FOURTH EDITION

THE GLANNON GUIDE TO CIVIL PROCEDURE

Learning Civil Procedure Through
Multiple-Choice Questions and Analysis

Joseph W. Glannon, *Suffolk University*

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Wolters Kluwer

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Professor of Law
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I dedicate this book to my children, Sam and Hallie

Contents

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The Glannon Guide to Civil Procedure

1

A Very Short Introduction

While studying the Glannon guide,
It's best to keep it at your side.
The procedure is civil,
Over details they quibble,
Professor—you've saved my hide.

S.K., Suffolk University Law School

This book provides a short, clear, efficient review of basic topics in Civil Procedure, organized around the theme of multiple-choice questions. In each chapter, the individual sections explain fundamental principles of a topic—such as stream-of-commerce jurisdiction, joinder under Rule 14, or the requirements for res judicata—and illustrate them with one or two multiple-choice questions. After each question, I explain which answer is right, and why the wrong answers are wrong. These short explanations allow me to discuss the black letter rules in the context of the questions. Hopefully, this format will engage you in the study process, so you'll develop a stronger understanding of the basics of procedure. That will pay dividends at the end of the course, whether your exam includes multiple-choice questions or not.

So, the book provides a topically organized review of basic Civil Procedure issues, and clear explanations tying that review to the questions in between. It will be useful either in conjunction with your class study of each topic, or for review toward the end of the course. Even if you just read it to get ready for the final, even if you don't *want* to learn the first year's most

mysterious course, working through this short book is going to make some lights go on about some complicated concepts.

Don't expect any magic formulas for Mastering the Multiple-Choice Question in the pages that follow. I don't have any. I don't think there are any. That's why multiple-choice questions are a legitimate testing format: You can't "psych out" a good multiple-choice question, you have to *analyze* it. My students routinely implore me to tell them the secret to improving their performance on multiple-choice exams. All I can tell them is that they need to understand the underlying legal rules, and articulate in their heads the problem with each answer until they find one that's unassailable. That may be good advice, but it never makes them feel much better. But *practice* on good questions, with clear accompanying explanations of the law, will help. I think you will find that this book provides an intelligent, slightly seductive vehicle for learning a complex subject.

Drafting multiple-choice questions can be dicey. There is a risk that the questions will be too complex, or too ambiguous. Fairness demands that a multiple-choice question have one clearly preferable answer. The questions in this book are fair—if you think any are not, please let me know for the next edition—and the explanations explain why. I've also included brief explanations of the law relevant to the questions right along with them, to assist in learning the doctrine and answering the questions. Glannon's Picks at the end of each chapter, recaps the answers to all questions for quick reference.

There are several ways to use this book. The first is to read each introduction, then work through the question, make a considered choice of the right answer, and then read my analysis. This is the best approach, because reading the introductions will provide you with the substantive background to address the question, and reinforce your understanding of it.

Another way to use the book is to read each question, choose the best answer, and then look at Glannon's Picks at the end of the chapter. If you got it wrong, go back and read my analysis of the various choices. This has the advantage that, if you really know the point, you don't have to read about it. But a quick recap of the law will usually be worth the extra time to read the introductions. The advantage over the first approach is meager.

The third way to use the book is to read the question, guess the answer, compare my answer at the end, and shrug your shoulders if you missed it. Not much value here; you might be better advised to save yourself the cost of the book.

Oh, one more thing. Just to lighten things up a little, I've started off each chapter with a limerick. Admittedly, some of them are pretty bad. If you can write a better one, e-mail it to me at jglannon@suffolk.edu and I'll consider it for the next edition. For some other students' offerings, see Closing Openers, the last chapter in the book.

2

Diversity Jurisdiction: The Basic Rules

It may seem like a lot of falarfel
To claim the state court stands impartial,
But though it's perverse,
Opponents must be diverse
'Cause that's the holding . . . from Chief Justice Marshall.

CHAPTER OVERVIEW

We have to start somewhere, so let's start with federal court jurisdiction over diversity cases, a fairly straightforward topic to get us going. As I promised in the first chapter, for each topic

my introductions will explain the basic doctrine, followed by a multiple-choice question and my analysis of the choices. Perhaps you already know the doctrine. If so, the introductions will provide a quick run-up to the questions. If you don't, it will supply an efficient infusion of black letter law.

A. State citizenship in diversity cases: The domicile test

Under federal diversity jurisdiction a citizen of one state may sue a citizen of another in federal court, even though her claim arises under state law, if she has a colorable claim for more than $75,000. The state citizenship of a person — as opposed to that of a corporation — is determined by her domicile, that is, the most recent state where she has (1) resided with (2) the intent to remain indefinitely. The "residence" requirement is easily satisfied. Staying overnight in a hotel or a tent will establish "residence" in a state. It is the intent-to-remain-indefinitely prong that gives students problems.

A person intends to remain indefinitely in a state if she is residing in the state on an open-ended basis, without the intent to leave at a definite time or on the occurrence of a definite event. You don't have to swear allegiance forever to a state to acquire domicile there; you only need to reside there "indefinitely," that is, on an open-ended basis. If a party is living in a state without definite plans to leave, the domicile test regards that state as her "home." She is there, not as a visitor, but as a citizen. She is, psychologically speaking, at home there, rather than passing through. She may choose to move on, as we all may, but at the moment she has no plans to do so.

Remember that, until the two prongs coincide in a new state, your old domicile continues, whether you plan to return to that state or not. If Acari, from Hawaii, leaves for a one-year job acting in a play in California, planning to go to New York afterwards, he remains domiciled in Hawaii, even if he swears that he will never return to Hawaii. He hasn't acquired a domicile in California, because he doesn't plan to stay there indefinitely. He hasn't acquired one in New York either, since he doesn't reside there yet. Domicile doctrine abhors a vacuum, so it holds that Acari keeps his Hawaii domicile until the two prerequisites come together in another state.

In analyzing the question below, assume that the court applies the reside-with-intent-to-remain-indefinitely test, and consider where Marla has established a residence with the requisite "indefinite" intent.

QUESTION 1. Moving Marla. Marla, who grew up in Montana, moved to Colorado after high school to enter a two-year program for hair stylists at the Denver Beauty School. She wasn't sure if she really wanted to be a stylist, but she was anxious to get away from home, and her parents agreed to foot the bill, so off she went. She figured she'd stay if she liked it, and get a job as a stylist afterwards, in Denver or elsewhere in the West (including Montana). Or she would leave the program if she didn't like it and look for work, hopefully in Denver. She took an apartment on a six-month lease. After moving to Denver, Marla

A. remains domiciled in Montana, because the program is only for two years.
B. remains domiciled in Montana, because she may return there to work as a stylist.
C. remains domiciled in Montana, because she was domiciled there before she left for Denver.
D. is domiciled in Colorado, because she resides there with the intent to remain indefinitely.

ANALYSIS. Don't be fooled by **A**. Although Marla's program is for two years, that doesn't mean that Marla will be there *only* for two years. The question indicates that she might stay in Denver after finishing the program, or she might leave for a job in some other Western state. Or, she might leave the program if she doesn't like it and stay in Denver. Thus, she may leave Colorado, or she may not. Since she is not definitely planning to leave Colorado at the end of the program, her stay is not clearly limited to the two years of her academic program.

How about **B**? It sounds seductively reasonable. But the test for domicile isn't whether you might someday go back to the state from which you came. The test is your attitude toward the state where you are. If you live in a state indefinitely, you acquire domicile there, even if you think you might go somewhere else, or back where you came from, at some point in the future. Here, Marla's state of mind is that, whether she finishes the program or not, she may stay in Colorado, or she may leave. That certainly does not show an intent to leave at a definite time. She is in the state with no definite plans to leave. The possibility that Marla might move on at some time in the future does not make her current stay a "definite" one. She might leave Colorado, or she might not. That's "indefinite" intent.

C would only be right if Marla has not established a new domicile in Colorado. If she went to Denver for a fixed period, she would retain her Montana domicile. However, if she's in Denver without definite plans to leave, she establishes a new domicile there. The facts suggest that her stay is open-ended, so she has established a Colorado domicile. **D** takes the prize.

B. The difference between intent and evidence: Proof of domicile

Cases analyzing domicile for purposes of diversity frequently cite evidence about the person's practical affairs, in order to establish a party's intent. The court may rely on facts such as where the party votes, has health insurance, has a driver's license, rents an apartment, has a bank account, registers her car, and so forth. Certainly, such facts are relevant evidence of a person's intent to remain in a state, or not to. But keep in mind that the *test itself* is the person's intent. Evidence about her practical affairs may help to demonstrate her subjective intent, but a person is not automatically domiciled where she has an apartment, or votes, or maintains her health insurance. If she were, *that would be the test,* rather than her subjective intent.

Parties introduce such practical evidence about a person's conduct to prove the ultimately relevant fact: her intent. But a person could be domiciled in Wisconsin, even though most of these practical factors point to Illinois. It's all a matter of trying to ascertain a subjective fact based on all the evidence. A court will certainly look at the party's testimony in assessing intent, but will also consider whether her practical conduct corroborates or refutes that testimony.

Consider this example.

QUESTION 2. **Wedding plans.** Rossi grew up in Erie, Pennsylvania. In August 2017, she departed for college in Idaho. After starting school in Idaho, she registered her car there and established a bank account there. She gets health coverage through the college. She has an apartment there, which she has taken on a one-year lease. She has a part-time job in Idaho, and has Idaho state taxes taken out of her check. On her application for the job she listed her Idaho address and telephone number. Her plan is to complete a two-year computer technician degree, and then return to Pennsylvania, where her fiancee has just taken over his family's construction business in Erie. (They have reserved a hall for their wedding in June 2019.) However, she may need a bit more than two years to finish the degree, if tuition goes up too much.

Three months after arriving in Idaho, Rossi brings suit against a Pennsylvania surgeon, for an injury suffered in an operation performed in Pennsylvania a year before. She sues in federal court on the basis of diversity. The court will probably conclude that Rossi is domiciled in

A. Pennsylvania, since she is only in Idaho as a student.
B. Pennsylvania, since she intends to return to Pennsylvania when she finishes her degree.

C. Idaho, since she has an apartment there, goes to school there, has a job there, has health coverage there and pays Idaho state taxes on her income.
D. Idaho, since she doesn't know when she will finish the college program.
E. Idaho, if she testifies in her deposition that she plans to remain there indefinitely.

ANALYSIS. Let's start with **C**, which suggests that the court will find Rossi domiciled in Idaho because she has an apartment there, an Idaho job, health insurance there, and so on. The example illustrates a situation in which most of these practical facts suggest that one state is the domicile, but it probably isn't. Here, there are good reasons for Rossi to arrange her practical affairs as she has, even if she plans to leave Idaho. If you went to school in a state, wouldn't you need a place to live? Wouldn't you get a job if you needed money? Wouldn't you give your local address so the employer could get in touch with you? Wouldn't you join the college health plan? Very likely, you would do all of these things, whether you intended to leave the state when you finished the degree or not. In this case, there's a perfectly good explanation for all these practical choices, even if Rossi has definite plans to leave the state. So, these facts do not themselves establish that Rossi has an open-ended commitment to living in Idaho. So **C** is wrong.

D suggests that Rossi is domiciled in Idaho, because she doesn't know exactly when she will finish her degree. However, while Rossi doesn't know when she will finish, she does have definite plans to leave Idaho when she does. Since she plans to leave upon the occurrence of a particular event, her stay is not open-ended. She's an Idaho visitor, not a domiciliary, under domicile analysis.

But **A** isn't right either. It implies that you can never establish a domicile by going to a state as a student. That isn't so. If you go to a state to attend school, without definite plans beyond your studies, you can establish a domicile there. Many students do satisfy the reside-with-intent-to-remain-indefinitely test by going to school. A case in point, on which this example is very loosely based, is *Gordon v. Steele,* 376 F. Supp. 575 (W.D. Pa. 1974).

How about **E**, which takes the position that the court will find Rossi domiciled in Idaho if she testifies that she plans to remain there indefinitely? Would this be dispositive? Surely not. People do sometimes lie. More often, some motive, such as access to federal court, may color their view of a subjective fact. In determining Rossi's domicile, the court would look at all the evidence, not just her testimony. Here, the facts pointing to Idaho are easily explained on another basis. And the fact that her fiancee has taken over the family business and they plan to marry at the time she will likely complete her studies very strongly suggests that she intends to return. Her testimony is important evidence about her intent, but not solely dispositive.

So **B** is the best answer. Rossi has not established a domicile in Idaho, because she went there with clear plans to leave when she finished her degree. The question *tells you* that she plans to leave, and her engagement clearly corroborates her intent to go back to Erie.

So the point is that the practical factors may be useful in evaluating a person's subjective intent. But the ultimate fact to be proved, under the domicile test, is the intent itself.

C. Chief Justice Marshall's *Strawbridge* Rule: The requirement of complete diversity

Very early on, the Supreme Court held that diversity jurisdiction is only proper if all plaintiffs are citizens of different states from all defendants. *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). You can have multiple defendants from the same state, and multiple plaintiffs from the same state, but no plaintiff can be from the same state as any defendant or her presence will "destroy diversity." (In the real world, of course, a plaintiff can cure the defect by dropping the nondiverse plaintiff, or a defendant from the plaintiff's state, to "perfect diversity.")

A twist in applying the *Strawbridge* rule arises in cases involving corporations. The Supreme Court has held that corporations are state "citizens," but courts cannot determine their citizenship by the domicile test, since a corporation can't have "intent" the way a person can. Consequently, Congress has defined the "state citizenship" of a corporation in the diversity statute itself. 28 U.S.C. §1332(c)(1) provides that a corporation is a citizen of the state in which it is incorporated, and also the state in which it has its principal place of business.

I find that my students resist looking at statutes and rules to the death. They will go to almost any lengths to avoid consulting the governing provisions of law! That's a shame, because the statutes and rules that establish procedural lore answer a lot of questions. I always let my students bring the federal rules pamphlet into the exam, since I want them to focus on applying the rules and statutes, rather than memorizing them. My questions in this book *assume that you have the relevant rule or statute in front of you* to help in analyzing the question. However, it's essential to find out your professor's policy on bringing the rules book into the exam. If she doesn't allow you to, you will obviously need to spend more time absorbing the details of the rules likely to be tested.

Here's a straightforward question — more straightforward than my usual fare — that probes the complete diversity requirement.

QUESTION 3. Foundering fathers. In which of the following cases would the federal court *lack* diversity jurisdiction? (Assume in each case that the suit is for more than $75,000.)

A. Madison, from Virginia, Jefferson, from Virginia, and Gerry, from Massachusetts, sue Hamilton, from New York and Franklin, from Pennsylvania.
B. Madison, from Virginia, sues Lafayette, from Maryland, and Washington Corporation, incorporated in Delaware with its principal place of business in Maryland, and a large office in Virginia.
C. Madison, from Virginia, sues Adams Corporation, incorporated in Delaware with its principal place of business in Virginia.
D. The court lacks jurisdiction in choices **B** and **C**.

ANALYSIS. Questions with double choices, like **D** here, can be excruciating. You review the answers and find one that is "right." You think you're all set, and then realize that you aren't, since two may be right. Back to the drawing board. One lesson, of course, is to read all the choices very carefully.

A is a proper diversity case (and therefore not the right answer) since no defendant is from the same state as any plaintiff. **C** is not a proper diversity case, since Adams Corporation is from the same state as Madison: Its principal place of business is in Virginia. Adams can't argue that there's diversity because it is from Delaware, where it is incorporated. The point of 28 U.S.C. §1332(c)(1) is that the corporation is considered a citizen of *both* states, and is not diverse from a citizen of either. So we have one right answer. The tougher question is whether there is diversity jurisdiction in **B**, in which Washington Corporation is not incorporated in Madison's state, and does not have its principal place of business there, but does have a substantial place of business there.

The statute provides that a corporation is a citizen of the state of "the" principal place of business, suggesting that only one will be chosen, even if the corporation has large establishments in several. That has been the holding of the courts. A corporation — say, McDonalds, of hamburger fame — may have many restaurants and a great deal of business in lots of states, but under §1332(c)(1) the court must choose one as its "principal" place of business. The question tells you that Washington Corporation's principal place of business is Maryland. It can't be diverse from a Marylander, but is diverse from Virginians. So **B** is a good diversity case; the right answer is **C**.

By the way, this question suggests two useful hints about taking multiple-choice questions.

- First, read the question with excruciating care. Here, it would be easy to read the question as "In which cases would the court *have*

jurisdiction?" If you do, of course, you will get it wrong. In a lecture by an expert on the multistate bar exam (which consists solely of multiple-choice questions) the speaker described the multistate exam as "an exercise in reading comprehension." I would be willing to wager that most students get more questions wrong by failing to read carefully than they do from lack of substantive knowledge.

- Second, when a question tells you something is true, take it on faith. Here, for example, don't go questioning whether Washington Corporation's large office in Virginia might be its principal place of business. Your professor is the boss in the artificial world of the exam. If she says its principal place of business is Maryland, answer the question based on that premise, whether you believe it or not.

Here's a question that applies the *Strawbridge* rule to a case involving both corporations and individuals. To answer it, remember that 28 U.S.C. §1332(c)(1) provides that a corporation is a citizen, for diversity purposes, of its state of incorporation and its principal place of business. The domicile test discussed above applies to the citizenship of human beings.

QUESTION 4. Onofrio's revenge. Onofrio lives in Oregon, with no plans to leave. He works in Idaho. He brings an action in federal court in California against Corcoran, an Idaho citizen, and Brainard Corporation, which is incorporated in California, with its principal place of business in Idaho. He seeks $200,000 in damages against each defendant. Brainard has a large sales office employing 125 people in Oregon. Rivera, the president of Brainard Corporation, lives in Oregon.

A. The court lacks jurisdiction over the action, because Brainard's president is domiciled in the same state as Onofrio.
B. The court lacks jurisdiction, because a substantial part of Brainard's daily activities take place in Oregon, where Onofrio is domiciled.
C. The court lacks jurisdiction, because Onofrio's place of business is in Idaho, and Corcoran is a citizen of Idaho.
D. Jurisdiction is proper.

ANALYSIS. Let's go through the answers in order. **A** is wrong, because the domicile of Brainard's president or other officers is irrelevant. Onofrio hasn't sued Rivera, he's sued the corporation. So we look at the corporation's state citizenship under 28 U.S.C. §1332(c)(1), not at Rivera's. **B** is also wrong. Under §1332(c)(1), a corporation is a citizen of the state in which it is incorporated and the state of its principal place of business. It is not a citizen of other states in which it does business, even a lot of business. Brainard can have huge amounts of daily activity in many states, but we still only look at

the state of incorporation and the state of its principal place of business in measuring diversity, because Congress has told us to in §1332(c)(1). So it is irrelevant that Brainard has a large facility in Oregon. The hypo *tells you* that Brainard's principal place of business is Idaho, not Oregon. Once again, when the question tells you something is true, answer the question on that basis.

C is wrong, because the place where Onofrio works is irrelevant in determining the citizenship of the parties. He's a person, and a person's citizenship is measured by his domicile, not his place of business. A court would choose the state in which he lives, the center of his domestic life, as his domicile, even if he works across the border. So he isn't a citizen of Idaho.

D, then, is the right answer. This is a case between Onofrio, a citizen of Oregon, and Corcoran, a citizen of Idaho, and Brainard Corporation, a citizen of California and Idaho. Since there are no Oregonians on the right side of the "v," it's a good diversity case, and federal jurisdiction is proper. The fact that the defendants are both from Idaho does not "destroy diversity."

D. Determining a corporation's principal place of business

Congress has provided that a corporation is a citizen of the state in which it is incorporated and the state of its principal place of business. 28 U.S.C. §1332(c)(1). So, to apply the *Strawbridge* complete diversity rule to corporate parties to a diversity case, courts have to determine where a corporation's principal place of business is. Corporations conduct their business in many different ways. Most corporations are small, and are incorporated in one state and do all their business in that state. These corporations are citizens of only one state. But large corporations might have extensive activities in many states — think Home Depot, or McDonalds. And some corporations will incorporate in one state, concentrate their manufacturing activities in another, and maintain their headquarters, where the corporation's high-level decisions are made, in a third.

Until 2010, federal courts took several approaches to determining a corporation's principal place of business under 28 U.S.C. §1332(c)(1). Some held that the state of a corporation's headquarters is the state of its principal place of business, even if the corporation's manufacturing or service activities took place elsewhere. Other courts, however, applied a "daily activities" test if a corporation's productive activities were primarily concentrated in a single state, reasoning that the corporation will be perceived as "local" in that state, since it will have the most contact with the public there. If the productive activities were widely spread among states,

these courts would look to the state where the corporation has its headquarters or "nerve center," since the diffused activities would all be coordinated from that state.

All of this is now interesting history, because in 2010 the Supreme Court held, in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), that the corporation's principal place of business for diversity purposes is the state of its headquarters in all cases. After *Hertz*, a corporation is citizen of the state in which its headquarters are located, even if all of its actual manufacturing or service activities take place elsewhere. The Court emphasized the importance of having a relatively clear rule that will avoid uncertainty and litigation about whether diversity jurisdiction is met in cases involving corporate parties.

QUESTION 5. Business principals. Angus and Phillips, from Texas, bring a breach of contract action against Apex Corporation in the federal district court for the Western District of Texas. Apex is a corporation that manufactures lawnmowers. It is incorporated in Delaware. It assembles the mowers at its plant in El Paso, Texas, which employs five hundred employees. It has another factory in Tennessee, which manufactures handles for the mowers and employs twenty-five employees. Its corporate headquarters occupy a small suite of offices on the twelfth floor of an office building in Tulsa, Oklahoma. Fifteen officers and employees work out of the headquarters office.

The court will find that there

A. is complete diversity and proceed with the case.
B. is not complete diversity because the case is brought in a Texas court, and the plaintiffs are both Texas citizens.
C. is not complete diversity because both plaintiffs are from Texas.
D. is not complete diversity between the plaintiffs and Apex. Under 28 U.S.C. §1332(c)(1) Texas is Apex's principal place of business, because Texas citizens in El Paso will think of Apex as "local," while hardly anyone in Oklahoma will know anything about Apex Corporation, which has very low visibility in Oklahoma.
E. is diversity between the plaintiffs and Apex, because Apex is a citizen of Delaware based on its incorporation there.

ANALYSIS. The wrong answers in a multiple choice question are called "distractors." Beguiling choices like **B** suggest the reason. There is something so *plausible* about it, isn't there? The suit is brought in the state where the plaintiffs live, so no diversity? Of course this doesn't make sense, but it threatens to distract you from the business at hand. To determine diversity, we compare the state citizenship of the plaintiffs and the defendants, not the

plaintiffs' citizenship and the place where the suit is brought. If the parties are from different states, it does not matter that one of the parties is a citizen of the state in which the suit is brought. The case is a proper diversity case, *no matter what state the suit is brought in.*

C should not fool any but the truly unprepared. Under *Strawbridge v. Curtiss*, you can have a hundred plaintiffs from the same state, as long as no defendant is from that state. So the fact that both plaintiffs are from Texas does not defeat diversity jurisdiction. And you should have rejected **E** quickly as well. A corporation is a citizen of *both* its state of incorporation and the state of its principal place of business, so we need to determine that here in order to apply the *Strawbridge* complete diversity rule.

D is beguiling, because it would make a lot of sense for a court to treat Apex as local in the state where its daily productive activity is centered. Many courts did apply this approach before the Supreme Court decided *Hertz Corp. v. Friend*. But that case is a Supreme Court case; its decisions are the supreme law of the land, and in *Hertz* the Court held that a corporation's principal place of business for diversity purposes is in the state where it has its central offices — its headquarters from which it directs corporate operations. Here, that state is Oklahoma, so Apex is a citizen of Oklahoma and of Delaware, and there is complete diversity between it and the Texas plaintiffs. **A** takes the prize.

E. Diversity in cases involving foreign citizens

Article III, §2 provides that federal courts may hear not only claims between citizens of different states, but also claims between citizens of a state and "foreign . . . Citizens or Subjects" (sometimes called "aliens"). So, a case between a citizen of Oregon and a citizen of Spain is within the constitutional grant of federal subject matter jurisdiction in Article III, §2. And, 28 U.S.C. §1332(a)(2) provides statutory authority for the federal district courts to hear such cases. By extrapolation, courts have held that a case between citizens of different states, with an alien added as an additional plaintiff or defendant, is also proper. See 28 U.S.C. §1332(a)(3). However, interpretive questions arise when an alien is domiciled in one of the American states. Suppose, for example, that Frankel, a New Yorker, sues Leduc, a citizen of France living in New York. The courts have held that there is federal jurisdiction over this case, since Leduc, though living in the plaintiff's state, is a foreign national (an alien). For diversity purposes, a person can't be a "citizen" of a state unless she is also a citizen of the United States. Since Leduc is a French citizen, he cannot be a citizen of New York, even if he is domiciled there. To be

a New York citizen, a person must both be domiciled in New York and a citizen of the *United States*.

The diversity statute has a special provision, however, that changes the result in Leduc's case if he has been "admitted for permanent residence in the United States." Section 1332(a)(2) now provides that an alien admitted for permanent residence and domiciled in a state cannot bring a diversity action against a citizen of the state in which she is domiciled. Leduc is thus treated as "local" in his state of domicile if he is here as a permanent resident. However, if Leduc has not been admitted for permanent residence (which apparently equates under immigration law to having a "green card"), Frankel could sue him in federal court under §1332(a)(2).

Conversely, a person may be a citizen of the United States without being a citizen of any state. If Frankel moves to Gambia and establishes a domicile there, he is still a United States citizen, but he is not a citizen of any American state, since he isn't domiciled in one. However, he isn't an alien either, as long as he remains an American citizen. So the diversity jurisdiction doesn't apply. This problem arose in *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F. Supp. 913 (D.C.N.Y. 1965). Twentieth Century Fox sued Elizabeth Taylor for her shenanigans during filming of the movie "Cleopatra." Although Taylor was an American citizen, she was living — indefinitely — in England. Consequently, she was not domiciled in any state and could not be sued in federal court based on diversity. She wasn't an alien, since she had not renounced her American citizenship. Nor was she a citizen of any American state, since she was domiciled in Great Britain.

QUESTION 6. At home and abroad. Crandall, a citizen of Missouri, and Rizzouti, a citizen of Iowa, sue Janssen, a citizen of Vermont; Gompers, an American citizen who lived all his life in Florida but recently moved to Great Britain and plans to remain indefinitely; and Toussaint, a Frenchwoman who has moved to Iowa to take a one-year visiting professorship at the University of Iowa, hoping to get tenure there and stay. The suit is brought in federal court based on diversity jurisdiction. (Assume that Toussaint has not been admitted to the United States for "permanent residence.")

A. There is no jurisdiction over the action because Toussaint is a citizen of Iowa.

B. There is no jurisdiction if Gompers remains in the case, but the action could proceed between the plaintiffs Crandall and Rizzouti and defendants Toussaint and Janssen.

C. There is no jurisdiction over the claims against Toussaint, because she is an alien domiciled in Iowa.

D. There is jurisdiction over the entire action.

ANALYSIS. This question should help to sort out the complexities of applying diversity to cases involving American citizens and aliens. The crux of the problem is the point made above: To be a "citizen" for diversity purposes, you must be *both* a citizen of the United States and domiciled in a state. Here, Toussaint, while domiciled in Iowa, is not a citizen of Iowa, because she isn't an American citizen. She's a French national, and therefore, under Article III, §2, she is an alien ("a citizen or subject of a foreign country"). (The exception in §1332(a)(2) does not apply, because Toussaint has not been admitted for permanent residence.) So **A** is wrong.

C is wrong, too. Article III authorizes suits between citizens of a state (or, as here, of several states) and aliens. It is irrelevant that Toussaint is domiciled in Iowa; she remains a Frenchwoman until she becomes an American citizen (or is admitted for permanent residence, under §1332(a)(2)).

And **D** is wrong, because Gompers is not a citizen of any state. Remember that, to be a citizen of a state you must be both an American citizen and domiciled in a state. Gompers is an American citizen, but he isn't domiciled in any state, since he is living in Great Britain with the intent to remain there indefinitely. The claim against him would have to be dropped for lack of subject matter jurisdiction. Consequently, go with **B**.

F. The relation between statutory diversity jurisdiction and the constitutional grant

Article III, §2 of the Constitution creates diversity jurisdiction in very general terms. It does not expressly state whether there must be "complete diversity," or whether diversity might be satisfied if *some* plaintiffs are diverse from *some* defendants. *Strawbridge v. Curtiss,* of course, held that all defendants must be diverse from all plaintiffs, but for many years it was unclear whether *Strawbridge* interpreted Article III or interpreted the statute by which Congress conveys diversity jurisdiction to the lower federal courts. If *Strawbridge* interpreted the language "citizens of different states" in Article III, the complete diversity rule would be constitutionally required, and could not be changed . . . unless the Court overruled *Strawbridge* or the Constitution were amended.

In *State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523 (1967), the Supreme Court held that *Strawbridge* interpreted the diversity statute, not Article III. It further held that, for Article III purposes, a case is "between citizens of different states" so long as at least one plaintiff is diverse from one defendant. Consequently, it is now clear that diversity jurisdiction exists under Article III as long as there is "minimal diversity," that is, as long as some plaintiff is diverse from some defendant. However, *Strawbridge,* which

interprets the diversity statute, 28 U.S.C. §1332(a), to require complete diversity, has never been overruled.[1] Nor has Congress amended §1332(a) to allow diversity jurisdiction based on minimal diversity. But it *could be* changed by Congress. Recall that the jurisdiction allowed under the Constitution is not self-executing. The lower federal courts derive their jurisdiction from Congress. Congress may authorize jurisdiction over all cases described in Article III, or it may authorize the federal district courts to hear only some subset of those cases.

The following example illustrates the relationship between the scope of diversity jurisdiction permissible under Article III and the Congressional grant of diversity jurisdiction to the federal district courts.

QUESTION 7. Smith's amendment. Congressperson Smith introduces a bill that would provide for diversity jurisdiction "so long as at least one plaintiff in the case is a citizen of a different state from one defendant."

A. Smith's bill would be constitutional, since Congress may expand or restrict the jurisdiction of the federal district courts as it sees fit.
B. Smith's bill would be unconstitutional, since it allows jurisdiction over cases that do not satisfy the complete diversity rule of *Strawbridge v. Curtiss.*
C. Smith's bill would be constitutional, because the scope of diversity jurisdiction in Article III includes minimal diversity cases.
D. Smith's bill would be unconstitutional, since Article III, §2 alone determines which cases the federal district courts may hear.

ANALYSIS. It's crucial to understand why **D** is wrong. Article III of the Constitution doesn't create federal district courts, and doesn't directly bestow any jurisdiction on them. Section 1 of Article III authorizes *Congress* to create lower federal courts if it chooses to. This power to create lower federal courts (or not to) carries with it the implied authority to create them, but to authorize them to hear only some of the cases listed in Article III, §2. See *Kline v. Burke Constr. Inc.*, 260 U.S. 226, 233-234 (1922). In other words, Article III, §2 defines the universe of cases that federal courts may potentially hear, but Congress creates the lower federal courts and can give them as much or as little of the Article III jurisdiction as it chooses to. It need not — and never has — bestowed all of the constitutionally permissible jurisdiction on the lower federal courts.

So **D** is wrong because Article III does not directly grant jurisdiction to the federal district courts; Congress does. **A** is wrong too, because Congress

1. Congress has, however, enacted various statutes authorizing jurisdiction in some categories of cases based on minimal diversity. See, e.g., 28 U.S.C. §1332(d)(2) (certain class actions cases); §1369(a) (certain mass accident cases).

cannot give the lower federal courts any jurisdiction it wants. It may only grant jurisdiction over cases within the categories listed in Article III, §2, which defines the outer limits of the federal judicial power. And **B** is also wrong, because *Strawbridge,* we now know (from the *Tashire* decision), interpreted the federal diversity statute, not Article III, §2. Since it is the statute, §1332(a) (as interpreted by *Strawbridge*), that requires complete diversity, Congress could change it. Ironically, of course, it was really Chief Justice Marshall who established the complete diversity requirement, in *Strawbridge.* But he interpreted the diversity statute to require complete diversity, not the Constitution, and the statute may be changed by Congress. So don't blame Marshall alone for the rule; Congress hasn't changed it in two hundred years. Thus, **C** is right. Smith's bill would authorize jurisdiction based on "minimal diversity." *Tashire* holds that "minimal diversity" cases are proper diversity cases, within the meaning of Article III, §2, so Congress could authorize federal district courts to hear them.

G. The amount-in-controversy requirement

As the previous section explains, the scope of diversity jurisdiction in Article III and that conveyed to the federal district courts by Congress aren't the same. The *Strawbridge* rule illustrates one situation in which the statutory grant is narrower than the constitutional authority. Another example is the amount-in-controversy requirement. Article III, §2 contains no monetary restriction on diversity jurisdiction; it broadly authorizes jurisdiction over all cases between citizens of different states. Congress's grant of diversity jurisdiction to the federal district courts, however, includes an amount-in-controversy requirement, in order to keep small diversity cases out of federal court. See 28 U.S.C. §1332(a) (granting jurisdiction over diversity cases in which "the amount in controversy exceeds the sum or value of $75,000, exclusive of interest or costs").

Here's a mediocre question, included to make a point.

QUESTION 8. By the numbers. A diversity case cannot be heard in federal court unless the amount in controversy is at least

A. $75,000, counting interest and costs as well as the plaintiff's damages.
B. $75,000, not counting interest and costs.
C. $75,000.01, counting interest and costs.
D. $75,000.01, exclusive of interest and costs.

ANALYSIS. This is what I would call a "pure knowledge" multiple-choice question. It simply asks a factual question and gives you four choices, one of them right (**D**). To answer it, you simply need to remember a fact, not analyze a problem. This is easier, and less imaginative, than questions that require you to apply a concept to a subtle set of facts. Analytical questions call for a higher order of reasoning than this amount-in-controversy hypo.

Most professors will test your analytical skills, since they are trying to teach you to think, not memorize. So I think you will find the more analytical examples in this book more representative of law school exams — either multiple-choice or essay exams. Similarly, the multi-state bar exam also focuses on proper application of legal rules to facts, not memorization of black letter law.

One problem with requiring a minimum amount in controversy is that you have to know how much is "in controversy" in order to determine whether the court has jurisdiction. Courts generally determine their jurisdiction at the outset of a case, but how can they determine the amount in dispute between the parties without gathering evidence or trying the case?

The Supreme Court addressed this conundrum in *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283 (1938). Under the "*St. Paul Mercury* rule," the court will find the amount requirement met as long as it is possible that the plaintiff's claim would support a recovery of more than $75,000. If the judge, evaluating the plaintiff's injuries or damages, concludes that a jury would likely award more than $75,000, she will find the amount requirement met. If she concludes that a jury probably would award less than $75,000, but *might* rationally award more, she would still find the amount requirement met. If, on the other hand, she concludes that a verdict over $75,000 would be irrational, that the claim is "to a legal certainty" worth less than the amount required, she would dismiss for failure to meet the amount-in-controversy requirement.

This approach gives the plaintiff the benefit of the doubt. Where her damages might exceed the required number, the amount requirement is deemed satisfied, and the case may go forward in federal court. It is only where her injuries or losses could not rationally support a verdict for the jurisdictional amount that her claim will be dismissed.

Here's a question that probes the application of the *St. Paul Mercury* rule.

QUESTION 9. *St. Paul* misery. Wanda brings a diversity action against Peroski in federal court for injuries suffered in a construction accident. As a result of the accident, Wanda suffered a badly sprained ankle. She alleges that Peroski's negligence caused the accident. However, Peroski denies that her conduct was negligent. Wanda demands $100,000 in damages for her injuries.

A. To determine whether the amount-in-controversy requirement is met, the court will consider whether Wanda is likely to be able to prove that Peroski was negligent.
B. To determine whether the amount-in-controversy requirement is met, the court will have to determine whether a reasonable jury could award more than $75,000 for the injuries Wanda alleges.
C. The amount-in-controversy requirement is met if it is clear, to a legal certainty, that Wanda's damages exceed $75,000.
D. The amount-in-controversy requirement is met, because Wanda seeks $100,000 in damages.

ANALYSIS. If **D** were the right answer to this question, the amount-in-controversy requirement would be a dead letter. Plaintiffs would simply demand large damages in their complaints, and the federal court would have to hear their cases. Surely, federal judges are too savvy to leave it at that. The court won't simply accept the number Wanda's lawyer asks for in damages; it will look at *the actual injury Wanda has suffered,* and consider whether those injuries could rationally support a verdict over the required amount.

The rule suggested by **C** also misperceives the meaning of the *St. Paul Mercury* test. It suggests that the amount requirement is only satisfied where the plaintiff will definitely recover more than $75,000. Under this test, if the plaintiff might recover more, but also might recover less, there would be no diversity jurisdiction. Under *St. Paul Mercury,* the presumption is the opposite: if the damages are in the debatable range, where a reasonable jury might award more, or might award less, the amount requirement is met. Only where it is clear, as a matter of law, that the award will be *less* is the amount requirement not met.

A can't be right either: The amount-in-controversy question is not whether the plaintiff is likely to win her case on the merits, but whether, if *she does,* she might recover more than $75,000. After all, §1332(a) requires that more than $75,000 must be "in controversy," not actually recovered. If the court had to consider the strength of the plaintiff's proof of her claim in order to decide whether the amount-in-controversy requirement was met, it would not be able to decide this preliminary issue without developing the facts through discovery and litigating the merits of the case. That would be a poor rule indeed for a question of jurisdiction, which should be settled at the outset of the case.

So **B** is the best answer. The court will look at Wanda's damages, a sprained ankle, and consider whether a reasonable jury could award more than $75,000 for that injury. Seems like a good case for dismissal to me, but you don't have to decide that to answer the question.

H. Aggregation of damages in diversity cases

If a plaintiff brings more than one claim, can she add her damages on the claims together to meet the amount-in-controversy requirement? Suppose, for example, that Harris brings a federal diversity action against Tanfredi for $60,000 in damages suffered in an auto accident, and also, in the same suit, seeks $40,000 from him in damages for breach of a contract. This "aggregation" problem bedevils law students, and makes good fodder for testing. The basic rule is that a plaintiff can add up the amounts for all her claims against a single defendant, whether they are related or not. However, she cannot "aggregate" claims against *different* defendants, except in the unusual situation where they are sued on a "common, undivided interest." (Please disregard this exception for the moment.) Harris meets the amount requirement in the example just given. However, if she sued Tanfredi for $60,000, and Vincent, in the same action for $40,000, she would not meet the amount requirement against either, since she cannot add together the amounts sought against different defendants to meet the requirement.

The situation is less clear where two plaintiffs join together to sue a defendant, and one sues for more than $75,000 but the other for less. Prior to enactment of 28 U.S.C. §1367, the supplemental jurisdiction statute, the answer was clear: each plaintiff had to meet the amount requirement on her own. If Couples and Jenks sued Barone, and Couples sought $50,000 in damages, and Jenks sought $60,000, neither met the amount requirement. If Couples sought $90,000 and Jenks joined with him, seeking $20,000, Couples met the requirement, but Jenks did not. Now, however, 28 U.S.C. §1367 has changed this result in the multiple-plaintiff situation. This problem is discussed in more detail at Chapter 14, pp. 279-283.

You can analyze this question without worrying about the supplemental jurisdiction statute, since it involves claims against multiple defendants, not by multiple plaintiffs. As to multiple defendants, the traditional rule, that the plaintiff must meet the amount requirement separately against each, still applies.

QUESTION 10. Aggravation of damages. Maurice sues O'Connell in federal court based on diversity jurisdiction, seeking recovery on a libel claim for $25,000 and an unrelated negligence claim, for $65,000. He also joins Parker as a codefendant on the negligence claim, seeking his $65,000 in negligence damages from Parker. Assume that Maurice's claims do not involve a "common undivided interest."

A. Maurice does not meet the amount-in-controversy requirement against Parker, but does against O'Connell.

B. Maurice meets the amount-in-controversy requirement against both defendants, since he seeks $90,000 in total recovery.

C. Maurice meets the amount-in-controversy requirement against both defendants, as long as the claim against Parker arises from the same events as that against O'Connell.

D. Maurice does not meet the amount-in-controversy requirement against either defendant.

ANALYSIS. Let's review the choices in reverse order. **D** is wrong, because Maurice does meet the amount requirement against O'Connell. One plaintiff can add up whatever claims he asserts against a particular defendant to meet the amount requirement, so Maurice can add his $25,000 and $65,000 claims against O'Connell to meet the requirement.

C doesn't cut the mustard either. The courts have generally taken the position that Maurice must seek more than $75,000 against Parker to meet the amount requirement.[2] He can't bootstrap a claim against Parker for less than the required amount onto his claim against O'Connell for more. And **B** is wrong, because the aggregation rules don't allow aggregation of amounts sought against different defendants.

A is correct. Maurice meets the amount requirement against O'Connell, by adding his two unrelated claims against him. But he cannot add Parker as a codefendant, since he seeks less than $75,000.01 in damages from him.

Frequently, a plaintiff sues two or more defendants on a tort claim for injuries arguably worth more than $75,000. Suppose, for example, that Epstein suffers nerve damage during surgery, and that the damages are $90,000. He sues Dr. Smith and Dr. Doe for his injury, claiming that the negligence of each during the operation contributed to the injury. Does he satisfy the amount-in-controversy requirement against the doctors?

Under the law of damages in tort cases, he does, because either of the doctors might be held liable for the entire injury. Suppose that the jury finds that the injury was Smith's fault alone. It would return a verdict against Smith for $90,000. So, Smith might be liable for more than the jurisdictional amount. Alternatively, if the jury found that the injury was Doe's fault alone, it would return a $90,000 verdict against Doe. So he also might be liable for the jurisdictional amount. Thus, the court cannot say to a legal certainty that Epstein could not recover the required amount from Smith, or from Doe. The amount requirement is met against either.

Suppose the jury found that they were both negligent and contributed to the harm? On this assumption, the result turns on the tort law of the state. In

2. The analysis here is more complex since the enactment of 28 U.S.C. §1367(a), the supplemental jurisdiction statute. See Chapter 14, pp. 280-281. However, this case would not be authorized under §1367 either, since §1367(b) bars supplemental jurisdiction over claims by plaintiffs against parties joined under Rule 20, if they are inconsistent with the requirements of §1332.

some states, they would find Smith and Doe "jointly and severally liable" for $90,000, which means that each would be held liable for the full amount, and Epstein could collect $90,000 from either.[3] In other states, they would each be held liable for parts of the loss, based on their percentages of negligence. But the amount requirement would be met in either type of jurisdiction. As long as either defendant might be held liable for the full $90,000, that amount is "in controversy" between her and the plaintiff. Since either Smith or Doe might be found solely at fault, either might be held liable for the full $90,000.

To illustrate:

QUESTION 11. Stooges do the math. In which of the following cases can all the claims properly be brought in federal court (assume that the traditional aggregation rules apply)?

A. Larry and Moe (both from New York) sue Curly (from Iowa) for negligence. Larry seeks $60,000 for his injuries in the accident and Moe seeks $25,000 for his.

B. Larry (from New York) sues Curly (from Iowa) for his injuries in an accident, seeking $60,000. Curly counterclaims for $100,000 for his injuries.

C. Larry (from New York) sues Curly and Moe, two Iowa citizens, for injuries he suffered when Curly and Moe's cars collided. He claims that one or the other, or both, were negligent, and seeks $100,000 in damages for his injuries.

D. Larry (from New York) sues Curly (from Iowa), and Dr. Moe, also from Iowa. He claims that Curly caused the accident, and that he suffered $60,000 in damages from a broken leg suffered in the accident. He further claims that Dr. Moe negligently set the leg after the accident, causing an additional $30,000 in damages.

ANALYSIS. Let's dispose of Larry, Moe, and Curly, and then we'll move on to other matters. The last choice, **D**, is the most interesting here, but it isn't the right answer. Under the law of causation in tort law, Curly would probably be liable for the $60,000 in initial injuries to Larry and the additional $30,000 due to Dr. Moe's malpractice. Larry would not have suffered the malpractice if he had not been injured in the accident, so most jurisdictions would hold Curly liable for this additional loss as well as the broken leg. So, the amount requirement is met as to him. But Dr. Moe is only liable for the $30,000 in damages that he caused, so the amount requirement is not met as to him. And Larry cannot aggregate his claim against Dr. Moe with his claim against Curly.

3. No, he couldn't get $90,000 from each, for a total of $180,000. Once the damage amount has been paid, his claim is "satisfied," and he cannot seek more from a second tortfeasor, even one who has been adjudged liable for it.

Under the traditional aggregation rules, the plaintiff must seek more than $75,000 from each defendant. And that rule has not been changed by 28 U.S.C. §1367, the supplemental jurisdiction statute. See 28 U.S.C. §1367(b) (barring supplemental jurisdiction over claims by plaintiffs against persons made parties under Fed. R. Civ. P. 20).

A isn't right because the amount requirement is not met by either plaintiff, and they can't be added together. **B** is no good either. The amount requirement must be assessed based only on the plaintiff's claim, without regard to the value of any counterclaim. If Curly had brought the initial suit (and the claim for $100,000 were colorable), the court would have had jurisdiction. But Larry brought it, and sues for less, so his claim does not support original jurisdiction. The claims in **C** do satisfy the amount requirement, however. Here, either defendant might be found to have negligently caused Larry's injuries, so either might be liable for his full $100,000 in damages. Go with **C**.

I. The Closer: Another shot at the domicile test

In each chapter I'll include a "Closer," a fairly challenging example to push the analysis and test your understanding. Because the concept of domicile is always confusing to students, especially that elusive "intent-to-remain-indefinitely" principle, let's try one more example on the domicile requirement. In analyzing it, assume that the court applies the reside-with-the-intent-to-remain-indefinitely test, and focus on the main point: Where is the last state in which the two prongs of the test — residence and intent to remain indefinitely — coincided at the same time?

QUESTION 12. Flaky Filbert. Filbert is flaky. He moved to Nebraska from Chicago, Illinois, to go to law school, planning to return to Chicago after law school to practice law. After his first year, he did a summer clerkship at a Denver, Colorado, law firm. They liked his work and indicated that they would hire him after graduation. Filbert decided he would go back to the firm after graduation. During his second year, he received a letter from the firm indicating that they would probably not have an opening for him after graduation. Consequently, he clerked in an Omaha, Nebraska, firm after his second year, and accepted an offer to join the firm after graduation.

In the middle of his third year, the Denver firm called him up and made him an offer. The offer was too good to resist, so he decided to renege

on the Omaha job and go to Denver when he finished school. Immediately after the events described,

A. Filbert is domiciled in Nebraska, because it is the last state in which he has met the two prerequisites for domicile.
B. Filbert is domiciled in Illinois, because when he moved to Nebraska he did not intend to remain there indefinitely.
C. Filbert is domiciled in Colorado, because while he was there he decided he would take the job with the Denver law firm after graduation and now intends to do so.
D. Filbert is domiciled in Nebraska, because he lives there now and has no plans to return to Illinois.

ANALYSIS. **C** seems like a reasonable answer to this question: Filbert did decide at one point to move to Colorado. He even decided that he would do so while he was in Colorado, But at the time he made that decision, he planned to leave to finish school in Nebraska. A court would likely hold that this intent was to *become domiciled* in Colorado two years later, so that Filbert did not establish a residence in Colorado at the same time that he had the intent to remain there indefinitely.

B is also wrong, although many of my students routinely choose it. Although Filbert did not plan to stay in Nebraska when he went there to go to school, he later decided to stay while he was residing there — when he accepted the job at the Omaha firm. At that moment, the two prerequisites coincided, and his domicile changed to Nebraska — remember, they don't have to coincide on the day you enter the state. Although Filbert moved to Nebraska planning to leave, he later formed the intent to remain indefinitely. When his intent changed, he acquired domicile in Nebraska. Even though he now plans to leave for Colorado, he hasn't acquired a residence there yet, so he keeps his Nebraska domicile until he physically relocates to the new state.

So the answer is **A**. **D** is right, in a sense, but the reason offered is insufficient. In evaluating the distractors, you should focus not only on the "bottom line," but also on the reasoning offered to support it. Here, **D** says "Nebraska," which is right, but the reason it gives is not. One does not necessarily acquire a domicile by living in a state with no plans to go back to a former state, as the Hawaii example at the beginning of this chapter (see p. 4) illustrates. One acquires a domicile by residing in that state with intent to remain *in that state* indefinitely.

Glannon's Picks

1. Moving Marla	**D**
2. Wedding plans	**B**
3. Foundering fathers	**C**
4. Onofrio's revenge	**D**
5. Business principals	**A**
6. At home and abroad	**B**
7. Smith's amendment	**C**
8. By the numbers	**D**
9. *St. Paul* misery	**B**
10. Aggravation of damages	**A**
11. Stooges do the math	**C**
12. Flaky Filbert	**A**

3

Federal Claims and Federal Cases

When an accident left the Mottleys in pain,
They settled for passes on the train.
The railroad wouldn't renew
So they decided to sue,
Which gave rise to a rule most arcane.

CHAPTER OVERVIEW

Always keep in mind that federal courts are courts of limited subject matter jurisdiction. Actually, I suppose that is true of *all* courts, short of the Pearly Gates. I can't think of any court, state or federal, that can hear every type of case.

But the federal courts are courts of *really* limited subject matter jurisdiction. They only have authority, under the federal constitution, to hear about ten categories of cases, all listed in Article III, §2 of the Constitution. Some of those categories are pretty arcane, such as cases involving ambassadors and consuls, or cases involving land grants, and consequently of little concern to first-year law students. Two categories of Article III cases — diversity cases and cases arising under federal law — account for the lion's share of federal court litigation, and therefore get a lot of attention in Civil Procedure. This chapter addresses the second of these, federal jurisdiction over cases "arising under" the Constitution and laws of the United States.

A. The toughest nut: The *Mottley* rule

The most fundamental point about arising-under jurisdiction is that many cases that involve federal issues do not "arise under" federal law. This is the essential message of that civil procedure chestnut, *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908). In *Mottley*, the plaintiffs sued the railroad for breach of contract, and alleged in their complaint that the railroad had breached the contract because it believed that a federal statute prohibited it from renewing their passes for free travel. In fact, when it answered the complaint, the railroad did rely on the federal statute as their justification for denying the passes. The parties then litigated that federal question and the federal trial court held that the federal statute did not bar renewing the passes.

The United States Supreme Court reversed and ordered the case dismissed for lack of subject matter jurisdiction. The Court held that a case only "arises under" federal law, within the meaning of the federal statute granting arising-under jurisdiction, if the *plaintiff relies* on federal law as the source of her right to relief. That wasn't true in *Mottley*: the plaintiffs had sued for breach of contract, a state law claim. Although a federal issue was litigated, because the railroad raised a defense based on federal law, the plaintiffs did not base their claim on federal law.

The fundamental premise of the *Mottley* rule is that we must assess the federal court's subject matter jurisdiction based on the plaintiff's complaint. There is no inherent reason why this must be so. Presumably, the court could wait to see whether the defendant's answer raises defenses based in federal law, or asserts a counterclaim under federal law, and allow the court to hear the case if she does. Such later pleadings may inject important federal issues into the case, as they did in *Mottley*. There's a good argument that this would be a sensible interpretation of the arising-under statute. Indeed, the American Law Institute recommended some years ago that removal be

authorized where the plaintiff sues in state court and the defendant asserts a federal law defense. See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, §1312(a)(2) (1969). But *Mottley* is still good law in the federal courts.

Here's a fairly straightforward question that illustrates the point.

QUESTION 1. Making a federal case. Consolidated Corporation sues Garces, a former employee, for business libel, a tort claim. The suit is brought in federal court, and alleges that Garces falsely reported to a federal agency that Consolidated was using watered-down concrete on a federal construction project. Garces answers, admitting that he had made a report to the agency, but alleging that his report was protected by the First Amendment to the United States Constitution, which guarantees the right of free speech. He also files a counterclaim against Consolidated, based on the Federal Whistleblower Act, which authorizes damages for anyone who is dismissed or disciplined for reporting fraud on the federal government. After answering the complaint, Garces moves to dismiss for lack of subject matter jurisdiction. (Assume that there is no jurisdiction based on diversity.) The motion should be

A. granted, because the court lacks subject matter jurisdiction over the case.
B. denied, because the complaint alleges that Garces reported the violations to a federal agency.
C. denied, because the case involves a question arising under the Constitution of the United States.
D. denied, because Garces's counterclaim arises under federal law.
E. denied, because Garces waived his objection to jurisdiction by answering the complaint and asserting a counterclaim against Consolidated.

ANALYSIS. While it might make sense to allow federal jurisdiction whenever an issue of federal law is raised in a suit, this has not been the Supreme Court's interpretation of the arising-under statute. Under *Mottley*, we don't consider federal questions injected into the case by the defendant. Consequently, **C** is wrong; the fact that the case *involves* a federal question isn't enough to satisfy *Mottley*. We need to look at the plaintiff's claim only. Here, the law that creates Consolidated's right to sue is libel law, which is state tort law; the federal law issue only enters the case as a defense.

D is wrong for the same reason. Just as we don't consider federal defenses raised in the answer, we don't consider counterclaims (that is, claims for relief asserted by the defendant against the plaintiff) in assessing arising-under jurisdiction. One irony here is that Garces could just as well

have been the plaintiff in this dispute. Both parties had claims against the other. If Garces had filed suit first, his claim under the Federal Whistleblower Act would have supported federal arising-under jurisdiction. But he didn't file first, and under *Mottley* the court will only consider Consolidated's claim in assessing its jurisdiction. Consequently, Garces will end up litigating his federal law defense and counterclaim in state court. **A** is the correct answer.

When I test this issue, I always like to have one choice in which there's a vague federal presence that is not directly the source of the claims in the action. Here, **B** is wrong because the fact that the report was made to a federal agency doesn't mean that Consolidated's claim arises under federal law. There's a vague federal flavor here, but if we ask what Consolidated is suing Garces for, the answer is, for libel, a claim arising under state law. Under *Mottley,* such peripheral involvement of federal law will not suffice to support jurisdiction. See, however, Section C below, which illustrates a situation in which a federal issue embedded in a state claim may support jurisdiction.

E is emphatically wrong, because an objection to subject matter jurisdiction may be raised at any time during the case. If the court lacks subject matter jurisdiction over a case, it must dismiss, even if the defendant wants the court to hear it, asserts her defenses and counterclaims, and proceeds to litigate there. *Mottley*, in which the parties litigated to judgment in the trial court and appealed, illustrates the point. Although the parties wanted the Court to reach the merits, it dismissed because the federal trial court lacked subject matter jurisdiction over the case.

B. What is a "well-pleaded complaint?"

Remember that *Mottley* is frequently referred to as the "well-pleaded complaint" rule, because it requires the court to consider not what the plaintiff has pleaded, but what she *needed to plead* to state her cause of action. Just because the plaintiff makes allegations involving federal law in her complaint (as the Mottleys did to rebut the railroad's anticipated defense) doesn't mean that her case arises under federal law. The court will ask what she would plead if she were just stating her own claim and not gilding the lily to get into federal court.

This is puzzling for first year law students. You are just learning the elements of different legal claims, so it's hard to know what allegations are essential to a claim and which are not. But it's fairly clear on the facts of *Mottley* that the plaintiffs did not have to breathe a word about the federal statute in order to assert a valid complaint against the railroad. They certainly didn't claim that they could get relief *because* of the federal statute, but rather in spite of it. The basic syllogism that supports their claim is "We

made a contract with the railroad, it didn't perform its obligations, we want an order to it to do so." That is the substance of the Mottleys' position, and it states a basic claim for breach of contract without any reference to a federal issue.

Of course, the Mottleys *did* refer to federal law in their complaint: they alleged that the federal statute was the railroad's reason for refusing to perform the contract. But they didn't *have to* allege that to state their contract claim, so the Supreme Court held that this superfluous allegation should be ignored in determining whether the case arises under federal law.

The Court didn't make this distinction just to wallow in technicalities. It did so to prevent manipulation by plaintiffs. If plaintiffs could "make a federal case" out of a state law claim by including unnecessary references to federal law in their complaints, arising-under jurisdiction could be created by simply including peripheral or even irrelevant references to federal issues in the complaint. By asking not what is in the complaint, but what has to be, the court can limit the opportunity to manipulate the federal courts' jurisdiction.

Let's try another problem that illustrates the well-pleaded complaint limit under *Mottley*.

QUESTION 2. Olefsky's plea for relief. Olefsky, from Florida, is diagnosed with leukemia. Testing of his well determines that it is polluted with toxic chemicals, which may have caused his disease. Officials investigate and determine that the chemicals had migrated through the ground-water from a nearby landfill run by Acme Disposal Corporation, a New York corporation with its principal place of business in Florida. The landfill is completely lined, to prevent leaching into the groundwater, but several years ago one of Acme's drivers had dumped a load outside the lined area. The investigation also revealed other problems with Acme's waste management practices. For example, Acme had violated the Federal Toxics Transportation Act, by failing to file manifests with the Environmental Protection Agency detailing the contents of shipments of hazardous wastes, as required by the Act.

Olefsky sues Acme in federal court, claiming that the dumping created a nuisance (a state law tort) that led to his injuries. The complaint also alleges that Acme violated the Federal Toxics Transportation Act, by failing to file manifests (though it does not allege damages arising from those violations). Acme moves to dismiss for lack of subject matter jurisdiction.

A. The motion will be denied if Acme violated the Federal Toxics Transportation Act.

B. The motion will be denied, because Olefsky has alleged a violation of federal law in his complaint.

C. The motion will be granted, even if the case arises under federal law, because Acme's principal place of business is in Florida, so that the parties are not diverse.

D. The motion will be granted, since Olefsky's case does not "arise under" federal law, as that phrase is interpreted in 28 U.S.C. §1331.

ANALYSIS. Sometimes the most basic points about a subject are the most confusing. It's very important to recognize what is wrong with the third choice here. **C** suggests that there must be both diversity *and* a federal question in order to sue in federal court. Not so; a plaintiff may sue in federal court as long as her case satisfies *one category* of federal jurisdiction . . . it doesn't have to fit into two, or ten! Thus, if this case arises under federal law, it can be brought in federal court, even though the parties are both from Florida. Conversely, if they were diverse, the case could be brought in federal court even if it arose under state law.

Does Olefsky's case arise under federal law? **A** suggests that it does if Acme violated the Federal Toxics Transportation Act. However, even if Acme violated the Act, that doesn't mean that Olefsky's case arises under it. His claim for damages does not arise from the failure to file EPA reports; it arises from dumping by Acme's driver in an unlined area. So what if they violated the federal reporting statute? How does that strengthen Olefsky's case? He's suing for nuisance, a state tort theory based on different acts by the defendant. It's irrelevant to Olefsky's case that they violated other federal pollution requirements.

Suppose Acme had violated a federal accounting statute, and Olefsky found that out. Could he sue for his pollution claim and argue that it arises under federal law because they violated a federal law irrelevant to his claim? Certainly not. Olefsky may have alleged a federal violation in his complaint, but it doesn't *have to be in there* to state his claim against Acme. His "well-pleaded complaint" — one that contains the allegations that entitle him to sue Acme for damages, but *only* those allegations — would contain nuisance allegations, but nothing about the Federal Toxics Transportation Act. Indeed, Olefsky's right to recover would be exactly the same if there were no Federal Toxics Transportation Act. If that is true, the statute is obviously irrelevant to his claim, and throwing promiscuous references to it into the complaint will not make the case "arise under" federal law.

Thus, **A** is wrong, and that means that **B** is too. If it's irrelevant that Acme violated the statute, it's also irrelevant that Olefsky alleged that they did. **D** takes the prize. This case asserts a state tort claim and therefore does not arise under federal law within the meaning of 28 U.S.C. §1331.

C. The *Grable* problem: State law claims that require proof of federal law

Under *Mottley*, the court must look to see whether the plaintiff asserts a right to relief under federal law. If she does, the case "arises under" federal law, so the court has jurisdiction under 28 U.S.C. §1331. In *American Well Works v. Layne*, 241 U.S. 257, 260 (1916), Justice Holmes suggested a commonly cited test for arising-under jurisdiction, that a suit arises "under the law that creates the cause of action." The Mottleys' claim flunked the Holmes test, since state contract law created their right to sue for their passes.

It would be nice if the Holmes test decided all cases, but the law in this area just isn't that tidy. The Supreme Court has occasionally held that a case in which state law creates the plaintiff's cause of action still "arises under" federal law, where the plaintiff, in order to establish her state law claim, must prove a substantial issue of federal law. See, in particular, *Smith v. Kansas City Title and Trust Co.*, 255 U.S. 180 (1920). In *Smith,* the plaintiffs sued to enjoin a corporation from investing in certain bonds, claiming that doing so would exceed the corporation's powers under state corporation law. The claim the plaintiffs asserted was a state law claim, but to establish that it was illegal for the corporation to invest in the bonds, they had to establish that the federal statute authorizing issuance of the bonds was invalid. Thus, they did not have to *plead* federal law to allege a valid cause of action, but they had to *prove* a proposition of federal law to establish their state law claim. The Supreme Court held that this claim arose under federal law, even though the case clearly would not satisfy the Holmes test.

In *Grable & Sons Metal Products Inc. v. Darue Engineering and Manufacturing Co.*, 545 U.S. 308 (2005), the Supreme Court reaffirmed the principle relied on in *Smith* to support arising-under jurisdiction. In *Grable*, the plaintiff brought an action to quiet title — a state law property claim — to recover property sold by the Internal Revenue Service to Darue after the IRS took the property from Grable for non-payment of taxes. Although Grable sued under state law, it claimed that the tax taking was invalid because the IRS had not complied with the notice required by the federal internal revenue code. Thus, it would have to establish a proposition of federal law — the type of notice required by the federal statute — in order to prove its state law quiet title action. The Supreme Court held that the federal district court had subject matter jurisdiction over the claim under 28 U.S.C. §1331.

However, *Grable* did not hold that arising-under jurisdiction would attach every time the plaintiff had to prove some federal issue to establish a state law claim. The federal issue must be "substantial," 545 U.S. at 312, and the court would have to consider various other policies — such as avoiding interference with state court jurisdiction, the need for uniform interpretation of a federal issue and the risk of bringing too many claims into federal court.

After *Grable*, federal courts must make sensitive judgments about the importance of the embedded federal issue, and such issues will sometimes, but not always, support arising-under jurisdiction. If this standard appears murky, it is, but perhaps has to be to accommodate the various interests at stake in such cases.

Here are two questions to test your understanding of this problematic exception to the well-pleaded complaint rule.

QUESTION 3. A *Mottley* matter. In 2017, the Mottleys are denied renewal of their free passes on the Louisville and Nashville Railroad. They sue the Railroad for breach of contract, claiming that it had agreed to renew their passes for life, in return for a release of liability for injuries in an accident on the Railroad. They allege that the Railroad refused to renew their passes because of a new federal statute barring free passes, but also allege that the statute only applies to passes granted after its enactment. Both parties are from Kentucky. The Railroad moves to dismiss the case for lack of subject matter jurisdiction.

After the Supreme Court's decision in *Grable & Sons Metal Products Inc. v. Darue Engineering and Manufacturing Co.*, the court will

A. grant the motion, applying the well-pleaded complaint rule.
B. deny the motion if it determines that there is a substantial question as to whether the federal statute applies to the Mottleys' passes, issued prior to its passage.
C. deny the motion, because the Mottleys, in order to prove their state law claim, must establish a proposition of federal law.
D. grant the motion only if it concludes that the federal statute does not bar renewal of the Mottleys' passes.

ANALYSIS. The correct answer is **A**; the case should be dismissed for lack of subject matter jurisdiction. This case is not like *Grable*, because the Mottleys do not have to prove any proposition of federal law to establish their claim. All they need to prove is that they had a contract and that the railroad has failed to perform it. (So **C** is wrong.) There is no federal issue embedded in their claim. The federal statute will be raised as a defense by the railroad. After *Grable*, as before, courts still *look only to the plaintiff's case* to determine whether the case arises under federal law. The plaintiffs' case here does not require any allegation or proof of a proposition of federal law.

B is also wrong, because even if the applicability of the new federal statute is a substantial question of federal law, it is not one that the Mottleys must establish to prove their claim — the railroad must prove it to establish a defense. **D** is wrong too. The federal court need not decide whether the

statute bars renewal . . . in fact, it can't decide that, because it doesn't have subject matter jurisdiction over the case. After *Grable*, as before, this case does not qualify for arising under jurisdiction.

Here's another question on this embedded-federal-issue problem.

QUESTION 4. Making a federal case, part 2. Marston, a lawyer, represented Green in a suit Green brought against Tedder for patent infringement. (Patent cases arise under federal law and must be brought in federal court under 28 U.S.C. §1338(a).) The court held that Green's patent was invalid because he had not filed for patent protection within one year of commencing sale of the product for which he sought a patent.

After he lost his infringement suit, Green sued Marston for legal malpractice, a state tort claim, in state court. Green asserted that Marston had failed to raise an obvious argument in the earlier case that, if presented, would have led the court to find his patent valid. Marston moved to dismiss the state law malpractice action, arguing that it had to be brought in federal court because it arose under the federal patent statute.

A. It is unclear, under *Grable*, whether this case would arise under the patent statute or not.
B. The case arises under federal law because Green seeks relief under the federal patent laws.
C. The case arises under federal law, under *Grable*, because there is a federal patent issue embedded in the plaintiff's state law malpractice claim.
D. The case belongs in state court because it does not involve any federal issue.

ANALYSIS. This example is taken from *Gunn v. Minton*, 133 S. Ct. 1059 (2013). *Gunn* presents a nice set of facts for assessing the meaning of *Grable*'s approach to embedded federal issues. First, **D** is wrong, because there is a federal issue "involved" in Green's case. Green argues that Minton was negligent for failing to assert an argument for patent validity under the federal patent laws. Surely that is an issue of federal law, and one that Green will have to establish to win his legal malpractice case. Yet **B** is not right either. Green does not seek relief under the federal patent statutes; he seeks relief on a cause of action for legal malpractice, which is a state law negligence claim. Under the frequently cited "Holmes test," this claim does not arise under federal law, because it is state negligence law that "creates the cause of action."

While Green's suit against Marston is not brought under the federal patent statute, there is a patent issue embedded in his legal malpractice claim. In order to prove that negligence claim, he must prove that Minton

failed to make an argument about federal patent law that would have led to grant of a patent to Green. So this is the same configuration as cases like *Grable* and *Kansas City Title & Trust*. But **C** is still not right. It says that Green's case arises under federal law because there is a federal patent issue embedded in the plaintiff's state law malpractice claim. Yet *Grable* did not say that every case in which the plaintiff must establish a federal issue in order to prove a state law claim arises under federal law. It said such cases will *sometimes* "arise under," depending on whether the federal issue is substantial, possible interference with state court jurisdiction, the need for uniform interpretation of a federal issue, and the risk of bringing too many claims into federal court.

So sometimes when a plaintiff must prove a federal issue in order to establish her state law cause of action, the case will "arise under," but in other cases it will not, depending on some fairly broad standards. That makes **A** the best answer here. In fact, in *Gunn* the Supreme Court applied those factors and concluded that the legal malpractice case did not arise under the patent laws, even though Gunn would have to prove a proposition of federal patent law to recover for legal malpractice. The court relied primarily on the fact that this would bring many legal malpractice cases, which are typically handled in state courts, into federal court, and would turn on issues that (even if they were federal issues) were of importance merely to the parties to the case, not "substantial" federal issues of broader application.

D. The relation between constitutional and statutory limits on "arising under" jurisdiction

Article III, §2 of the Constitution provides that federal courts may hear cases "arising under" federal law. And 28 U.S.C. §1331, the statute conveying arising-under jurisdiction to the federal district courts, uses the same language. A student, or a lawyer, might reasonably conclude that this language means the same thing in the statute and in the Constitution. Since the Supreme Court has interpreted the phrase "arising under federal law" in the statute to focus solely on the plaintiff's complaint, shouldn't that phrase mean the same thing in Article III, §2?

Article III defines the constitutional limits of the jurisdiction of all federal courts, including the Supreme Court. If the *Mottley* rule were an interpretation of Article III, it would drastically restrict the power of all federal courts, including the Supreme Court, to consider cases that involve federal defenses and counterclaims. For example, the Court would have no power to hear an appeal in a case like Consolidated's in Question 1, which raises a federal issue, but does not satisfy the *Mottley* test. The state courts

would then have the final authority to decide the federal law questions raised by the case.

Not surprisingly, the Supreme Court has interpreted the scope of the Article III arising-under jurisdiction much more broadly than *Mottley*'s construction of the arising-under statute. In *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), Chief Justice Marshall concluded that the Article III grant of jurisdiction over cases arising under federal law applies as long as a question of federal statutory or constitutional law "forms an ingredient" of the case. Certainly, federal law "forms an ingredient" of a case if a federal issue is raised as a defense or as a counterclaim. Thus, because the Article III grant extends to such cases, Congress could do away with the *Mottley* rule (what law student would miss it?) by amending 28 U.S.C. §1331. Although this has been clear since *Osborn*, Congress has never repudiated *Mottley*, because it provides a clear rule that allows federal courts to determine their jurisdiction at the outset of the case, and limits the potential for parties to manipulate federal jurisdiction.

To illustrate the distinction between the reach of arising-under jurisdiction in Article III and under §1331, consider the following question.

QUESTION 5. Mix and match. Eleanor sues Franklin for breach of contract, claiming that he agreed to sell her certain high-risk securities on January 1, 2011, but failed to deliver them on the appointed date. Franklin defends on the ground that after he agreed to the sale, but before the delivery date, a federal statute was passed making such sales illegal.

A. This case "arises under" federal law as that phrase is construed in 28 U.S.C. §1331, but not as it is construed in Article III, §2 of the United States Constitution.

B. This case "arises under" federal law as that phrase is construed in both 28 U.S.C. §1331 and in Article III, §2 of the United States Constitution.

C. This case "arises under" federal law as that phrase is construed in Article III, §2 of the United States Constitution, but not as construed in 28 U.S.C. §1331.

D. This case "arises under" federal law as that phrase is construed in both 28 U.S.C. §1331 and in Article III, §2 of the United States Constitution, if the case is removed to federal court after the defendant has answered the complaint in state court, asserting his federal defense.

ANALYSIS. The point of this example is to illustrate the distinction between *Mottley*'s narrow interpretation of arising-under jurisdiction in 28 U.S.C. §1331 and *Osborn*'s much more expansive interpretation of the same language in Article III, §2. The facts here are essentially a clone of *Mottley*. The plaintiff sues under state contract law, and the defendant asserts a federal defense to the claim. This is clearly not an arising-under case under the

Mottley interpretation of §1331, because the plaintiff's well-pleaded complaint asserts only a state law claim. So **A** and **B** are both wrong: In order to satisfy the arising-under statute, §1331, the plaintiff herself must assert a right to relief under federal law, and Eleanor's claim is based on state contract law.[1] And since, under *Mottley*, the court will only look at the plaintiff's complaint, not at the answer, in determining whether it has jurisdiction under §1331, **D** is wrong as well. The defendant's federal defense in his answer will be disregarded in evaluating the court's jurisdiction, even if the answer is already before the court when it determines the jurisdiction question.

So **C** is the right answer. The case is within the constitutional grant of arising-under jurisdiction in Article III: Franklin's federal law defense makes federal law an "ingredient" of the case, even though that ingredient is injected by the defendant, not the plaintiff. But the case is not proper under §1331, because *Mottley*'s well-pleaded complaint rule (still the governing interpretation of §1332(a)) requires that the plaintiff rely on federal law to make her claim.

Thus, with arising-under cases as with diversity cases, it is always necessary to analyze the constitutional scope of jurisdiction and Congress's grant of that jurisdiction separately. In arising-under cases, as in diversity cases, Congress has never chosen to authorize the federal district courts to exercise all of the Article III jurisdiction. Here's another example to drive home the point.

QUESTION 6. Limiting the limits. Congressperson Smith introduces a bill to add a $75,000.01 amount-in-controversy requirement to 28 U.S.C. §1331.

A. Smith's bill would be constitutional, since Congress may expand or restrict the jurisdiction of the federal district courts as it sees fit.
B. Smith's bill would be unconstitutional, since it would restrict the right of plaintiffs to take some cases that arise under federal law to federal court.
C. Smith's bill would be constitutional, because Congress may grant less than the full Article III jurisdiction to the federal courts.
D. Smith's bill would be unconstitutional, since Article III, §2 authorizes the federal district courts to hear all cases arising under federal law.

ANALYSIS. Smith's bill would impose an additional limit on the jurisdiction of the federal district courts in arising-under cases. Not only

1. This case assumes there is no argument for jurisdiction under the *Grable* case, of course.

would the *Mottley* rule apply, but even cases that satisfy *Mottley* could not be heard if less than $75,000.01 was in controversy. Clearly, this would prevent the district courts from hearing cases that are within the constitutional grant of arising-under jurisdiction. If Isaacs sued Eagleton under the federal Age Discrimination in Employment Act (ADEA) but only sought $25,000 in damages, his case certainly involves a "federal ingredient," his claim under a federal statute. His case even satisfies the *Mottley* rule, since he seeks relief under the federal statute. But Smith's bill, if enacted, would prevent him from bringing this federal law claim in federal court.

Not a problem. Article III establishes the outer limits on federal court jurisdiction, but the cases make it clear that, within those limits, Congress decides which cases they want the federal district courts to hear. Congress could grant arising-under jurisdiction very broadly, by authorizing the federal district courts to hear any case that "involves" federal law. This would convey virtually all of the jurisdiction permissible under *Osborn*'s "federal ingredient" test. Or it could grant arising-under jurisdiction very selectively. For example, Congress could authorize jurisdiction over cases arising under the federal tax laws, but no others. Or it could grant none of the arising-under jurisdiction, if it chose to do so.

Under this principle, **D** is incorrect. It implies that the federal district courts automatically have all the arising-under jurisdiction in Article III, so that Congress could not limit it. That is not the accepted interpretation. Article III describes the outer limits of the federal judicial power, but within those limits Congress regulates the federal district courts' jurisdiction. It must authorize them to hear cases by statute. It can, and always has conveyed jurisdiction selectively. It isn't enough that a case is within the outer bounds of Article III; it must also be authorized in a jurisdictional statute. **B** is off the mark for the same reason; there is nothing unconstitutional about Congress's limiting the arising-under jurisdiction of the federal district courts.

Perhaps the most plausible "distractor" is **A**, which takes the position that the bill is constitutional because Congress may "expand or restrict the jurisdiction of the federal district courts as it sees fit." This isn't quite true. It may *restrict* their jurisdiction as it sees fit, but it may not *expand* their jurisdiction as it sees fit. Article III sets the outer limit. If Congress passed a statute authorizing federal district court jurisdiction over divorces, that statute would be unconstitutional, because nothing in Article III (leaving diversity aside, anyway) authorizes federal courts to hear divorce cases.

That leaves **C**, which is the right answer. If Congress wants to limit the district courts to "big" federal question cases through an amount-in-controversy requirement, it may do so. While this would indeed "restrict the right of plaintiffs to take some cases arising under federal law to federal court" (**B**), Congress may do that. It always has in diversity cases, and at one

time, did in arising-under cases as well. See Pub. L. No. 96-486 (1981) (repealing $10,000.01 amount-in-controversy requirement formerly required under §1331).

E. Federal law in state courts

Our analysis of arising-under jurisdiction demonstrates that a great many cases that raise federal issues cannot be brought in federal court. Cases like *Mottley,* in which federal law is raised as a defense, or cases in which a federal law counterclaim is asserted, are not within federal court arising-under jurisdiction. So what becomes of them? They are brought in state court, of course. State courts are competent to decide issues of federal law, and in cases like these they must do so.

Suppose, however, that the plaintiff has a case that is within federal arising-under jurisdiction, even as narrowly construed under 28 U.S.C. §1331, but wants to bring it in state court. Can she do that? Put another way, *must* a case be brought in federal court if it satisfies the *Mottley* standard for arising-under jurisdiction?

Generally, the answer is "no." Most cases that arise under federal law may be brought in state court if the plaintiff prefers to do so. For example, if Isaacs has a claim under the federal Age Discrimination in Employment Act, it clearly arises under federal law and may be filed in federal court. But Isaacs would have the right to sue in state court instead, if she prefers. If she sues under 42 U.S.C. §1983, for violation of her federal civil rights, she could certainly do so in federal court under *Mottley,* but again, she doesn't have to. The jurisdiction of the federal and state courts over most types of federal law cases is said to be "concurrent," that is, the courts of both systems can entertain these cases.

Like so many legal principles, this one has an exception. It has long been held that Congress may, if it chooses, provide by statute that the federal courts' jurisdiction over a particular type of federal claim is exclusive, that is, that those federal claims *must* be brought in federal court. See, e.g., *Bowles v. Willingham,* 321 U.S. 503, 511-512 (1944). Congress has mandated suit in federal court in some categories of cases. For example, 28 U.S.C. §1338(a) provides in part that "[n]o State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents. . . ." Occasionally, too, the Supreme Court has concluded that Congress intended federal court jurisdiction to be exclusive, even though the statute isn't clear on the point. But this is quite rare. In most cases, jurisdiction is concurrent with the courts of the states, unless the federal statute conferring jurisdiction confines jurisdiction to the federal courts. See generally C. Wright & M.K. Kane, *The Law of Federal Courts* §45 (8th ed. 2017).