

2009

## Another Voice for the “Dialogue”: Federal Courts as a Litigation Course

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### Recommended Citation

Arthur D. Hellman, *Another Voice for the “Dialogue”: Federal Courts as a Litigation Course*, 53 St. Louis U. L.J. (2009).

Available at: <https://scholarship.law.slu.edu/lj/vol53/iss3/6>

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**ANOTHER VOICE FOR THE “DIALOGUE”:  
FEDERAL COURTS AS A LITIGATION COURSE**

ARTHUR D. HELLMAN\*

“Let it be remembered, also, for just now we may be in some danger of forgetting it, that questions of jurisdiction [are] questions of power as between the United States and the several states.”<sup>1</sup> So admonished former Supreme Court Justice Benjamin R. Curtis, speaking at proceedings in memory of Chief Justice Taney in 1864.<sup>2</sup> Today there is at least one group of people who are in no danger of forgetting the point that Justice Curtis made with such force. No, I’m not referring to members of the Federalist Society. I refer, rather, to law school students who take the course called “Federal Courts” or “Federal Jurisdiction.”

It is familiar history that the modern “Federal Courts” course traces its roots to the landmark casebook authored by Professors Henry Hart and Herbert Wechsler, first published in 1953.<sup>3</sup> In their preface to that book, Professors Hart and Wechsler wrote:

The jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and the federal government. . . . Questions of

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\* Sally Ann Semenko Endowed Chair and Professor of Law, University of Pittsburgh School of Law. Portions of this essay are adapted from the Preface to the first edition of ARTHUR D. HELLMAN & LAUREN K. ROBEL, *FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS* (2005). A second edition of the book is scheduled for publication in spring 2009. See ARTHUR D. HELLMAN, LAUREN K. ROBEL & DAVID R. STRAS, *FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS* (2d ed., forthcoming 2009). I am grateful to Aaron-Andrew Bruhl, Matthew Hellman, and David Stras for comments on earlier drafts.

1. Benjamin R. Curtis, Address to the U.S. Circuit Court in Memory of Chief Justice Roger Brooke Taney, (Oct. 15, 1864), 30 Fed. Cas. 1341, 1342–43 (1864).

2. Justice Louis D. Brandeis spoke in a similar vein in a conversation with Professor Felix Frankfurter in 1923. He said that few of his colleagues on the Supreme Court “realize that questions of jurisdiction are really questions of power between States and Nation.” Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism,”* 27 GA. L. REV. 697, 712–13 (1993). Justice Curtis’s remark became a kind of leitmotif in the works of Professor Frankfurter. See *id.* at 732 n. 224.

3. HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1st ed. 1953) [hereinafter HART & WECHSLER I]. For a tribute to the book that is worthy of its subject, see Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989).

jurisdiction, however, bear commonly a subordinate or derivative relation to the distinct problem of determining the respective spheres of operation of federal and state law. It is in the effort to identify and to delineate these areas of federal and state authority that the nature of federalism and its crucial problems are . . . most significantly revealed. . . .

. . . .

The book deals mainly with these problems of federal-state relationships but it also has two secondary themes. In varying contexts we pose the issue of what courts are good for—and are not good for—seeking thus to open up the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government. We also pose throughout problems of the organization and management of the federal courts . . . .<sup>4</sup>

The casebook thus took as its starting-point the issues of “distribution of power” between the states and the national government that Justice Curtis had called attention to almost a century earlier. But as this excerpt indicates, the focus of the book was not only on issues of federalism, but also on issues of separation of powers within the federal government and, more generally, on what might be called issues of institutional competence. That approach rapidly became the dominant one for the law school course in Federal Courts. It is reflected, to a greater or lesser degree, in most of the Federal Courts casebooks that are in use today.

The Hart and Wechsler approach provides a powerful intellectual model for organizing the materials that make up the field of study, and it is hard to imagine anyone teaching a Federal Courts course today without drawing heavily on that model. Certainly I would not do so. I suggest, however, that while the elements of the traditional model are necessary to the design of a Federal Courts course, they are not sufficient. The reason can be seen in the opening paragraph of the Hart and Wechsler preface. The preface begins:

One of the consequences of our federalism is a legal system that derives from both the Nation and the States as separate sources of authority and is administered by state and federal judiciaries, functioning in far more subtle combination than is readily perceived. The resulting legal problems are the subject of this book. *They are examined here mainly from the point of view of the federal courts and of Congress when it legislates respecting the judicial system.*<sup>5</sup>

Thus, from the very outset, the dominant perspective is made clear: The legal problems arising out of the system of judicial federalism will be examined from the point of view of the institutions of governance—the federal courts in

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4. HART & WECHSLER I, *supra* note 3, at xi–xii.

5. *Id.* at xi (emphasis added).

deciding cases and Congress in considering legislation. Conspicuously absent is the perspective of the practicing lawyer, and in particular the lawyer who confronts the legal problems of judicial federalism in the course of litigation.

Herein lies a difficulty. Most of the students who take a Federal Courts course do not see themselves as future judges or future members of Congress, but as future lawyers. And the reason they take the course is that they think it will help them to practice law more effectively on behalf of their clients. I believe that a Federal Courts course falls short if it does not self-consciously and aggressively seek to serve that student interest. Fortunately, it can do so without sacrificing either the intellectual rigor or the intellectual rewards of the traditional model.

Lawyers are goal-oriented. From their perspective, the American system of judicial federalism is important because it sets up four possible goals: getting into federal court, staying out of federal court, gaining the benefit of federal law, or avoiding the detriment of federal law. A Federal Courts course should provide the doctrinal and practical education that will enable lawyers to identify and pursue these goals effectively in the service of their clients, while assuring that they understand the underlying tensions and issues that will shape the law in the future. In this essay I sketch the elements of an approach that builds upon the traditional model but adapts it to the goal-oriented perspective of lawyer-litigators. In brief:

- The course should be organized primarily on the basis of the tasks that lawyers perform.
- The course should emphasize the differences between federal and state courts that lead lawyers to prefer one forum over the other, not only in civil rights cases, but in the general run of civil litigation.
- The course should give heavy emphasis to the centrality of removal jurisdiction in civil practice today.
- Diversity jurisdiction should be given a full measure of attention and coverage.
- The course should make extensive use of problems that ask students to achieve particular results for a lawyer on one side of a dispute.

I do not suggest that these elements are either revolutionary or unique. They are not. But they do reflect an approach that is different in emphasis and to some degree in content from the traditional course.

The exposition in this essay is necessarily brief. Implementation of many of the ideas outlined here can be found in the Federal Courts casebook that I

co-authored with Dean Lauren K. Robel and Professor David R. Stras. The second edition of the book is scheduled for publication in the spring of 2009.<sup>6</sup>

### I. ORGANIZATION OF THE COURSE

In many law schools, Federal Courts has a reputation as a difficult course. Perhaps this is to be expected; to some degree, difficulty is inherent in the subject. But difficulty need not mean impenetrability, and I believe that the law of federal courts can be made understandable without sacrificing either depth or rigor. One of the most useful means to that end is to organize the various topics into larger, well-defined units of study. And if the overall approach is to be shaped by the goal-oriented perspective of the lawyer, the units in turn should be defined by the various tasks and contexts that set up the lawyer's goals.

For example, one task lawyers undertake is that of litigating in state court. In a state-court litigation, federal questions may take center stage, or they may lurk in the background, unseen by lawyers who have not been trained to know where to look. The doctrines that determine the role that federal law will play in a particular case will connect in various ways to other bodies of law that come into play in other settings. But the unit of study should be designed around the state-court context. It should encompass all of the doctrines that govern the litigation of federal issues in state courts. These include the *Testa-Howlett* line of cases,<sup>7</sup> the final-judgment rule embodied in 28 USC § 1257, and the adequate state ground doctrine, among others.

This approach enables the teacher to make and reinforce three important points. First, the litigation of federal issues in state courts is not something that happens occasionally; it is a routine part of our legal system. Second, most of the federal claims and defenses that will be familiar to students from their other courses have their counterparts in state law, and lawyers who want to represent clients effectively must consider both. Third, lawyers must take care, at each stage, not to inadvertently forgo either the state or the federal ground by omitting necessary language in a pleading or brief or failing to take the required procedural steps. I like to illustrate the point by comparing *Howell v. Mississippi*,<sup>8</sup> in which the defendant lost a possible *federal* claim by couching his brief in purely state-law terms, with *Commonwealth v. Kilgore*,<sup>9</sup> in which

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6. See ARTHUR D. HELLMAN, LAUREN K. ROBEL & DAVID R. STRAS, *FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS* (2d ed., forthcoming 2009).

7. *Testa v. Katt*, 330 U.S. 386 (1947); *Howlett v. Rose*, 496 U.S. 356 (1990).

8. 543 U.S. 440, 441 (2005) (per curiam).

9. 690 A.2d 229, 230 (Pa. 1997), *on remand from Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam).

the defendant forfeited a winning *state* claim because he did not raise it in the lower courts.

I am not suggesting that the entire course should be organized in this way. For example, most teachers will want to introduce students to the landmark precedents like *Osborn v. Bank of the United States*<sup>10</sup> and *Cohens v. Virginia*<sup>11</sup> that define the constitutional limits of the "arising under" jurisdiction. And most teachers will want to spend some time on doctrines of justiciability, including standing, ripeness, and mootness. These topics do not fit easily into a task-based approach, and it would be foolish to invent artificial categories in order to stay within that framework. But they are exceptions.

## II. WHY LAWYERS FIGHT OVER FEDERAL JURISDICTION

In explaining the approach of their new casebook, Professors Hart and Wechsler commented that federal jurisdiction "would surely be a sterile topic" if it were not explored as "an aspect of the distribution of power between the states and the federal government."<sup>12</sup> Most teachers will agree with this observation. But for most students, it is equally true that federal jurisdiction becomes "a sterile topic" if the course does not explain why lawyers fight so hard to get a case into federal court or keep it out. This in turn means that it is necessary to spend some time—preferably toward the beginning of the course—discussing the differences between federal and state courts.

Today, most teachers do cover one aspect of the institutional differences between the two court systems—the debate over "parity" in the context of civil rights litigation.<sup>13</sup> The "parity" controversy is important, but it is only part of the topic, and a potentially misleading part at that. For one thing, it emphasizes one class of cases among the many in which the choice of forum may be of concern to lawyers.<sup>14</sup> More important, it de-emphasizes

10. 22 U.S. (9 Wheat.) 738 (1824).

11. 19 U.S. (6 Wheat.) 264 (1821).

12. HART & WECHSLER I, *supra* note 3, at xi.

13. The classic treatment is found in Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Professor Neuborne's basic point, as he later summarized it, was that "a series of institutional factors (including procedural differences) combined to give federal courts a comparative qualitative advantage for the individual in deciding close constitutional cases, at least at the trial level." Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 797 (1995) [hereinafter Neuborne, *Parity Revisited*].

14. Even in the context of civil rights litigation, it is doubtful whether the assumptions about state courts that underlie the challenge to "parity" remain accurate today. As long ago as the mid-1990s, Professor Neuborne acknowledged that "state/federal qualitative differences no longer play the role they played in the 60's and 70's in constitutional cases." Neuborne, *Parity Revisited*, *supra* note 13, at 798. But he "continue[d] to believe that a relative institutional advantage for the plaintiff exists in federal court; an advantage resulting from a mix of political insulation, tradition, better resources and superior professional competence." *Id.* at 799. I do not know whether Professor Neuborne holds this view today. In any event, I am not suggesting that

developments in the federal judicial system that cut across case types and often cancel out the considerations that are typically invoked in the “parity” context.

This point was brought home to me a few years ago when I gave a talk to the Federal Courts section of the Allegheny County Bar Association. I discussed a recent Third Circuit decision in which a local municipality, named as defendant in a section 1983 suit, had removed the case to federal district court. I took note of the conventional wisdom that in civil rights cases against local officials, it’s the plaintiff who prefers federal court. I said that if anyone in the room happened to be familiar with the circumstances of the case, I’d be interested to know the reasons for removal. Afterwards, a member of the audience introduced herself to me as a member of the law firm that represented the municipality. She said it was the firm’s standard practice to remove civil rights suits filed against the municipality in state court. The reason was simple: federal judges felt comfortable about granting summary judgment; state judges did not.

Over the years, I talked to lawyers in other parts of the country and learned that this perception is widely shared. Nor is the belief held only by lawyers. A representative expression of the view comes from District Judge Helen Gillmor of Hawaii. Judge Gillmor was asked in a published interview whether “there might be some difference in philosophy or case law concerning summary judgments in state court versus federal court.”<sup>15</sup> She responded:

That is true. The federal system has an expectation that many cases or portions of cases will be concluded by summary judgment. The appellate courts are very friendly and supportive of having matters decided by summary judgment. Because we have more staff than judges in the state court, we have an ability to deal more easily with summary judgment.<sup>16</sup>

Greater willingness of judges to grant summary judgment is one of the most important considerations that lead defendants to prefer the federal to the state forum, but it is only one of many. In 2008, Gregory Joseph, a prominent member of the litigation bar, published an important essay with the provocative title, “Federal Litigation—Where Did It Go Off Track?”<sup>17</sup> Mr. Joseph answered the question posed by his title by listing a host of developments over a 25-year period. Among them:

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teachers should not call attention to the distinctions emphasized by Professor Neuborne. The point, rather, is that students should also be made aware of the developments discussed in the text that have made the federal court a less attractive forum for plaintiffs across the board.

15. Ed Kemper, *An Interview with United States District Judge Helen Gillmor*, HAW. B.J., Jan. 2006, at 24, 26–27.

16. *Id.* Not everyone would agree that “more staff” in federal courts is an important part of the explanation.

17. Gregory P. Joseph, *Federal Litigation—Where Did It Go Off Track?*, LITIG., Summer 2008, at 5.

- Greater use of summary judgment motions, spurred by a trilogy of Supreme Court decisions in 1986, as well as “the emphasis on managerial judging and changes in the civil rules . . . .”
- The *Daubert*<sup>18</sup> decision and its codification in the Federal Rules of Evidence, reflecting a skeptical attitude toward expert testimony and a strong “gatekeeper” role for district judges.
- Rule 11 of the Federal Rules of Civil Procedure, which “created a momentum for parties to seek sanctions against one another (predominantly, defendants seeking sanctions against plaintiffs) that did not abate even after the mandatory features of the rule were excised in 1993.”
- The Supreme Court’s 2007 *Twombly*<sup>19</sup> decision, which “rewrote federal pleading requirements” by putting the burden on the plaintiff to make “a ‘showing,’ rather than a blanket assertion, of entitlement to relief.”<sup>20</sup>

As a consequence of these rule changes and court decisions (and some legislative enactments), “plaintiffs with non-federal causes of action flee federal court, and those with federal claims scour the books for state law analogues.”<sup>21</sup> Meanwhile, “defendants strain to achieve a federal forum.”<sup>22</sup>

Your students will be familiar with many of the developments on Mr. Joseph’s list from their courses in Civil Procedure, Evidence, and Trial Practice, but they may not realize that state courts can and often do adopt rules and practices that are more plaintiff-friendly. One approach would be to go through the stages of a typical products liability suit and identify the obstacles a plaintiff would face in federal court. You could then ask: would these obstacles necessarily confront a plaintiff in state court?

But plaintiffs’ preference for the state forum is not simply a consequence of the different rules and practices that shape the course of litigation in federal

18. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

19. *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544 (2007).

20. Joseph, *supra* note 17, at 5. To be sure, there is substantial disagreement about how deeply *Twombly* cuts into existing law. But Mr. Joseph’s view is widely shared. For example, one academic commentator has described *Twombly* as “a remarkable departure from established doctrine” that “will frustrate the efforts of plaintiffs with valid claims to get into court.” A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 432–33 (2008). Professor Spencer continues by summarizing developments in federal litigation in terms that echo Mr. Joseph’s account:

In the wake of the tightening of summary judgment standards and a narrowing of the scope of discovery, as well as the advent of strong judicial case management, the *Twombly* decision has dealt what may be a death blow to the liberal, open-access model of the federal courts espoused by the early twentieth century law reformers.

*Id.* at 433.

21. Joseph, *supra* note 17, at 5.

22. *Id.*



court. Here we are in the realm of “lore” as much as law, but the realities (and perceptions) are no less important. A few years ago, an article in *Trial* magazine nicely summarized part of the picture from the perspective of a plaintiff’s lawyer:

In most states, local judges are elected by the very people whose disputes they will hear, motivating speedy and fair adjudication. Federal judges are appointed for life, and their courts are clogged with criminal cases. The so-called war on drugs has so overburdened the federal judiciary that getting a civil case tried at all in many federal courts is nearly impossible.<sup>23</sup>

The remainder of the article was devoted to strategies that would allow plaintiffs “to combat removal attempts.”<sup>24</sup>

Perhaps other teachers will have additional suggestions about how to present this information to students. But one way or another, it is essential to convey the message stated in the opening paragraphs of the *Trial* magazine article: “Plaintiff attorneys’ preference for state courts is undisputed . . . . Defense attorneys . . . upon receiving a state court complaint . . . frequently search for any conceivable basis to remove the lawsuit to federal court.”<sup>25</sup>

### III. THE CENTRALITY OF REMOVAL JURISDICTION

When Chief Justice Warren laid down the now-familiar “twin aims” test for “unguided *Erie* choices” in 1965, he said that one of the relevant questions was “whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a *plaintiff* to choose the federal court.”<sup>26</sup> This formulation reflected the widespread assumption in the middle decades of the twentieth century that forum-shopping between federal and state court was generally something that was done by plaintiffs.

Today, that assumption is an anachronism, and, from the perspective of teaching Federal Courts, a dangerous one. As has already been noted, it is defendants in civil litigation who have a strong tendency to prefer federal over state court. Defendants act upon this preference by removing cases that the plaintiff has filed in state court. The plaintiff, seeking to retain the state forum, files a motion to remand. Disputes initiated by remand motions are central to civil litigation practice today. And the law and strategy of removal should be a pervasive part of a Federal Courts course.

To some degree, this can be done interstitially, in the course of covering other subjects. For example, a leading case on the independent state ground as

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23. Erik B. Walker, *Keep Your Case in State Court*, TRIAL, Sept. 2004, at 22. Of course a defense lawyer might have a different view of what constitutes “fair” adjudication.

24. *Id.*

25. *Id.*

26. *Hanna v. Plumer*, 380 U.S. 460, 468 n.9 (1965) (emphasis added).

a bar to Supreme Court review of state-court decisions is *Fox Film Corp. v. Muller*.<sup>27</sup> Fox Film sued Muller in state court for breach of contract. Muller responded by "setting up the invalidity of the contracts under the Sherman Anti-trust Act."<sup>28</sup> The "federal question" was thus central to the litigation. Why didn't Muller remove the case to federal court? The answer, of course, is that the federal issue came in only as a defense; a federal defense is not a basis for original jurisdiction; and removal is possible only if the case could have been brought in federal court by the plaintiff. *Fox Film* can thus be used to introduce students to one of the most important rules that limit defendants' ability to remove.

Mention has already been made of the *Erie* line of cases and *Hanna*'s reference to forum-shopping by plaintiffs. In the Court's most recent application of "the federalism principle of *Erie R. Co. v. Tompkins*,"<sup>29</sup> the Court made clear that *Erie* principles are equally implicated if failure to follow the state rule would encourage out-of-state *defendants* to "systematically remove state-law suits brought against them to federal court."<sup>30</sup> But the teacher can point out that nothing in *Hanna* or its progeny prevents the defendant from enjoying the advantage of procedural decisions like *Daubert*, *Twombly*, and the summary judgment trilogy.

Interstitial treatment is valuable, but it is not sufficient. Yet teaching the law of removal presents special challenges. Much of that law involves technical rules and narrow distinctions. Consider, for example, the often-litigated question of what constitutes an "other paper" which, when received by the defendant, triggers the 30-day deadline for removing a case that was not removable when filed initially.<sup>31</sup> This does not sound like the sort of subject that most teachers would want to spend class time on—though when you see a case that generates a lively debate between thoughtful judges, you might conjecture that it would also produce a lively discussion among students.<sup>32</sup>

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27. 296 U.S. 207 (1935).

28. *Id.*

29. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001).

30. *Id.* Justice Scalia, the author of the Court opinion in *Semtek*, had earlier made the same point in dissent. *See Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 39–40 (1988) (Scalia, J., dissenting).

31. *See* 28 U.S.C. § 1446(b) (2006) (procedure for removal).

32. *See, e.g., Addo v. Globe Life & Acc. Ins. Co.*, 230 F.3d 759 (5th Cir. 2000). In somewhat the same vein, there is an intercircuit conflict over the operation of the thirty-day removal deadline when the plaintiff sues multiple defendants in state court. *See, e.g., Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202 (11th Cir. 2008) (discussing the circuit split regarding the "first-served" and "last-served" defendant rule, and adopting the latter). A teacher could well spend some class time exploring the tactical choices that plaintiffs and defendants face under the competing rules.

In my view, it is not necessary to cover the law of removal with great thoroughness or even to cover any particular topics beyond the basics. What is important, rather, is to give students a sense of the kinds of issues that arise and the kinds of maneuvering that the rules engender. One area that lends itself very well to this kind of instruction is diversity jurisdiction. To that I now turn.

#### IV. TEACHING DIVERSITY JURISDICTION

When I started teaching Federal Courts, and for many years thereafter, I generally gave short shrift to diversity jurisdiction. Issues involving diversity jurisdiction seemed dreary and rule-bound compared with those raised by federal-question cases like *Mottley*,<sup>33</sup> *Merrell Dow*,<sup>34</sup> and *Franchise Tax Board*.<sup>35</sup> Today I see the matter very differently. In part, this reflects the importance of diversity jurisdiction in everyday litigation and the particular centrality of removal. But diversity jurisdiction also provides numerous opportunities to talk about issues of institutional competence and the respective roles of the courts and Congress in defining jurisdictional limits. Moreover, the issues of institutional responsibility dovetail nicely with the lessons about “gamesmanship” under the existing law.

The most interesting variety of gamesmanship involves one familiar rule—the complete diversity requirement under 28 USC § 1332(a)—and one that will not be so familiar—the one-year limit on diversity removal contained in 28 USC § 1446(b). I start with the complete diversity rule. The stage is set by one of the tactical suggestions in the *Trial* magazine article quoted earlier:

Plaintiff attorneys too often focus their attention on “target defendants,” even though others may also be liable for their clients’ injuries. Often, multiple entities’ wrongdoings combine to produce a single injury. These additional wrongdoers may be citizens of the same state as your client. Suing them as well as the “principal tortfeasors” can destroy diversity, eliminating federal jurisdiction.<sup>36</sup>

So the plaintiff, to keep the case in state court, sues a local employee, physician, or retailer as well as the out-of-state corporation. Is there anything the corporate defendant can do to counter this tactic? Yes: the defendant can remove and argue to the district court that the in-state defendant was fraudulently joined. But the standard for fraudulent joinder is a very demanding one. For example, in the Eighth Circuit, joinder is not fraudulent

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33. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

34. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986).

35. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983).

36. Walker, *supra* note 23, at 24.

as long as state law “*might* impose liability on the resident defendant under the facts alleged.”<sup>37</sup> And in the Fifth Circuit,

the test for fraudulent joinder is whether the defendant has demonstrated that there is *no possibility* of recovery by the plaintiff against an in-state defendant, which stated differently means that there is *no* reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.<sup>38</sup>

A practice-oriented commentary offers a grim prognosis for corporate defense lawyers who believe that an in-state defendant has been joined solely to defeat diversity:

[F]ighting fraudulent joinder requires reasonable preparation and, as a consequence, can substantially raise litigation costs. [The efforts] will probably fail under the “no possibility” standard. Apparently erroneous decisions by the district court, moreover, are final because remand orders are generally not reviewable by appeal or writ of mandamus. Even worse, there is a possibility that the corporate client will have to pay opposing counsel’s attorneys’ fees under 28 U.S.C. § 1447(c) in the event that the district court determines that the removal was improvident.<sup>39</sup>

But from the defendant’s viewpoint, that is not even the worst of it. Under a proviso added to 28 U.S.C. § 1446(b) in 1988, a diversity case “may not be removed . . . more than 1 year after the commencement of the action.”<sup>40</sup> The one-year limitation offers opportunities for “procedural gamesmanship” that plaintiffs’ lawyers exploit to the fullest. As one district judge wrote a few years ago:

As numerous courts have acknowledged, and both plaintiffs and defendants recognize, many plaintiffs’ attorneys include in diversity cases a non-diverse defendant only to non-suit that very defendant after one year has passed in order to avoid the federal forum. . . . The result is that diversity jurisdiction—a concept important enough to be included in Article III of the United States Constitution and given to courts by Congress—has become nothing more than a game: defendants are deprived of the opportunity to exercise their right to removal and litigate in federal court not by a genuine lack of diversity in the case but by means of clever pleading. No one can pretend otherwise.<sup>41</sup>

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37. *Filla v. Norfolk S. Ry. Co.*, 336 F.3d 806, 810 (8th Cir. 2003) (citing *Foslip Pharm., Inc. v. Metabolife Intern. Inc.*, 92 F. Supp. 2d 891, 903 (N.D. Iowa 2000)).

38. *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc) (emphasis added).

39. Jay S. Blumenkopf et al., *Fighting Fraudulent Joinder: Proving the Impossible and Preserving Your Corporate Client’s Right to a Federal Forum*, 24 AM. J. TRIAL ADVOCACY 297, 310 (2000).

40. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b)(2)(B), 102 Stat. 4642, 4669 (1988).

41. *Linnin v. Michielsens*, 372 F. Supp. 2d 811, 824–25 (E.D. Va. 2005) (citations omitted).

The first Vioxx litigation in Texas provides an excellent (and well-documented) example of this phenomenon.<sup>42</sup> The “target defendant” was Merck, a New Jersey corporation. The Texas plaintiff brought suit in state court, naming not only Merck but also several other defendants, all of whom were citizens of Texas. These included the doctor who prescribed Vioxx and a doctor and research lab who took part in some of the Vioxx studies. The plaintiff waited for more than a year, then dropped the Texas defendants. Merck never removed the case, and the plaintiff won a large jury verdict in state court (later reversed on appeal).<sup>43</sup>

The one-year rule also furnishes a good vehicle for discussing the interplay between courts and Congress in framing jurisdictional rules. In 2003 the Fifth Circuit recognized an equitable exception to the seemingly absolute language of the statute.<sup>44</sup> Other courts have rejected this approach and insisted that it is the responsibility of Congress “to curb [the] abuses.”<sup>45</sup> In 2005 the Judicial Conference of the United States, the administrative policy-making body of the federal judiciary, proposed legislation to codify the equitable exception. There was a hearing on the proposal; witnesses endorsed the idea but disagreed about how best to word the amendment.<sup>46</sup> But the plaintiffs’ bar was not represented at the hearing, and (although not solely because of that) the bill died.

This sequence raises numerous questions. Among them: Was the Fifth Circuit justified in developing an equitable exception in the face of statutory language that appears to impose an absolute prohibition? Should Congress have clarified the law rather than allowing the conflict to continue in the lower courts? If so, which of the various proposed approaches best addresses the competing interests?

A class or two devoted to diversity removal, fraudulent joinder, and the one-year rule can give the students a good sense of the tactical maneuvers that lawyers engage in today to secure the forum they prefer.<sup>47</sup> It also allows the teacher to raise issues about institutional competence and responsibility that are central to the traditional Federal Courts course.

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42. See *Federal Jurisdiction Clarification Act: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the U.S. House of Representatives Committee on the Judiciary*, 109th Cong. 29–32 (2005) (statement of Arthur D. Hellman) [hereinafter *Jurisdiction Clarification Hearing*], available at <http://bulk.resource.org/gpo.gov/hearings/109h/24607.pdf>.

43. *Merck & Co., Inc. v. Ernst*, \_\_\_ S.W. 3d \_\_\_, No. 14-06-00835-CV, 2008 WL 2201769, at \*7 (Tex. App. May 29, 2008).

44. See *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 427–29 (5th Cir. 2003).

45. *Caudill v. Ford Motor Co.*, 271 F. Supp. 2d 1324, 1327 (N.D. Okla. 2003) (quoting *Martine v. Nat’l Tea Co.*, 841 F. Supp. 1421, 1422 (M.D. La. 1993)).

46. See *Jurisdiction Clarification Hearing*, *supra* note 42.

47. The one-year rule also offers opportunity for gamesmanship involving the amount in controversy requirement.

Here's another example. Consider this scenario: Anthony Argan, a citizen of Texas, brings a state-law tort suit in the state court of New Jersey against a single defendant, Pharmacium, Inc. The defendant is a multinational pharmaceutical manufacturer; its state of incorporation is New Jersey. The complaint asserts that the plaintiff was seriously injured as a direct result of taking certain drugs made by Pharmacium. There is no doubt that the amount in controversy is in excess of \$75,000. May the defendant remove the case to federal district court on the basis of diversity?

Your answer is likely to be, "Of course not. The requirements for diversity jurisdiction are satisfied, but removal is barred by the forum defendant rule, 28 U.S.C. § 1441(b)."

Not so fast! There's something I haven't told you: Pharmacium's legal department routinely monitors the electronic docketing systems of state courts. Pharmacium thus learned of Argan's suit before being served with process or receiving any other official notification. Ten days after the filing of the lawsuit, Pharmacium removed the action to federal district court. Argan promptly filed a motion to remand, asserting that removal was barred by § 1441(b). Pharmacium has asked the court to deny the motion. It relies on the language of § 1441(b): removal of a diversity action is barred when any party "properly joined *and served*" as a defendant is a citizen of the forum state. If the in-state defendant removes before it is served, Pharmacium insists, § 1441(b) does not stand in the way.

This argument has in fact been made by defendants in numerous cases throughout the country.<sup>48</sup> Some courts have accepted the argument, typically saying that "the unambiguous text" of § 1441(b) permits removal in this situation.<sup>49</sup> Other courts have emphatically rebuffed defendants. In their view, "a literal interpretation of the provision creates an opportunity for gamesmanship by defendants, which could not have been the intent of the legislature in drafting the 'properly joined and served' language."<sup>50</sup>

This question is, admittedly, a byway of removal law. But I think it has pedagogical value beyond its narrow context.<sup>51</sup> First, of course, it requires students—and indeed the teacher—to read the statute with great care. Probably all of us have, at one time or another, told students that § 1441 bans

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48. The defendant who makes the argument is not necessarily the in-state defendant. For example, in *Valerio ex rel. Valerio v. SmithKline Beecham Corp.*, No. 08-60522-CIV, 2008 WL 3286976 (S.D. Fla. 2008), the non-forum defendant removed a case also involving a forum defendant.

49. See, e.g., *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263 (M.D. Fla. 2009).

50. *Ethington v. General Elec. Co.* 575 F. Supp. 2d 855, 862 (N.D. Ohio 2008) (citation omitted).

51. The scenario discussed here is drawn from a Problem in HELLMAN, ROBEL & STRAS, *supra* note 6, at 720.

removal in diversity cases when any defendant is a citizen of the forum state.<sup>52</sup> But that is not what the statute says. Second, this maneuver provides an example of “gamesmanship” by defendants that pairs nicely with the tactical use of the complete diversity requirement and the one-year rule by plaintiffs. Third, the issue enables the teacher to revisit (or take up) the competing approaches to statutory interpretation represented by the majority and the dissents (particularly Justice Stevens’ dissent) in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*<sup>53</sup> Finally, the question calls attention to the pressure sometimes put on legal rules by technological developments. Students are likely to be intrigued by the ability of defendants to monitor dockets “and quickly remove a case prior to being served.”<sup>54</sup> Plainly, that is not something that Congress anticipated. But is that enough to justify relying on “the logic and policy behind diversity jurisdiction”<sup>55</sup> rather than the words of the statute?

#### V. CASE-BASED PROBLEMS

Upon reflection, it is somewhat surprising that Federal Courts should have a reputation as a particularly difficult course. Why Federal Courts? Why not Bankruptcy? Or Corporate Tax? ERISA? Secured Transactions? Part of the explanation, I think, is that too often the law of Federal Courts appears to students as a series of abstractions far removed from any real-life activity. One way to combat this tendency is to devote class time to problems based on actual cases.

The “problem method” has a long pedigree in law teaching, and there is considerable elasticity in conceptualizing what counts as a “problem.” I need not enter into that debate here. The key is the purpose, and the purpose is twofold: to send the student back to the governing law (typically the Judicial Code and Supreme Court decisions) and to require the student to identify and apply the relevant precepts from the perspective of a lawyer seeking to

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52. The Supreme Court, too, has similarly paraphrased the statute. *See, e.g.*, *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 (2005) (“Defendants may remove an action on the basis of diversity of citizenship if there is complete diversity . . . , and no defendant is a citizen of the forum State.”).

53. 545 U.S. 546 (2005). In *Allapattah*, the Court held that the 1990 supplemental jurisdiction statute, 28 U.S.C. § 1367, overruled long-established law under which a party with a claim that did not satisfy § 1332’s amount-in-controversy requirement could not sue in federal court by joining forces with a plaintiff who did meet that requirement. The Court relied on the “plain text” of the statute. *Id.* at 566. Justice Stevens, in dissent, attacked the majority “for ignoring [a] virtual billboard of congressional intent.” *Id.* at 575 (Stevens, J., dissenting). The district court in the *North* case found “the Supreme Court’s approach to Section 1367 instructive in its analysis of Section 1441(b).” *North*, 600 F. Supp. 2d at 1269.

54. *North*, 600 F. Supp. 2d at 1269.

55. *Allen v. GlaxoSmithKline PLC*, Civil Action No. 07-5045, 2008 WL 2247067, at \*4 (E.D. Pa. May 30, 2008).

accomplish a particular goal in a particular setting—removing a case to federal court, avoiding unfavorable state law, etc.

With rare exceptions, I construct problems based on reported cases. Often I make a few changes in the facts to eliminate peripheral issues, create a somewhat closer balance in the arguments on each side, or highlight a particular ambiguity in the controlling precedents. Much of the time, I don't have to look very hard to find good cases; they pop up in *United States Law Week*, *Federal Litigator*, or other periodicals. For example, just the other day, one article featured a ruling by the Eleventh Circuit<sup>56</sup> that applied the Supreme Court's *Grable* decision<sup>57</sup> to a lawsuit growing out of the national debate over the regulation of firearms.<sup>58</sup> The district court had allowed removal of state-law negligence and defamation claims on the theory that adjudicating the claims would require the court to determine whether plaintiff violated federal firearms laws.<sup>59</sup> The Eleventh Circuit reversed. I expect to create a problem based on this case; it will require students to closely analyze not only *Grable* but also the predecessor decision in *Merrell Dow*. It will also raise the question whether Justice Thomas was on the right track in suggesting, in his concurring opinion in *Grable*, that preserving "Smith jurisdiction" is not worth the difficulty and litigation costs of cases like this one.<sup>60</sup>

#### VI. LAWYERS, JUDGES, AND THE "SENSE OF JUSTICE"

In this essay, I have discussed Federal Courts from a perspective that is down-to-earth (perhaps even earthbound) and instrumental. But it would be a mistake to stop there. The Federal Courts course has an aura—a mystique, even—that is unique in the law school curriculum. (If you are in any doubt, read the remarkable review by Akhil Reed Amar of the third edition of Hart and Wechsler.<sup>61</sup> Can you imagine a love letter to any other casebook?) This special quality comes about in large part because of history—in particular, the succession of legendary figures whose writings have defined the field and illuminated the issues. These include Felix Frankfurter, Henry Friendly, Henry Hart, Herbert Wechsler, and Paul Bator—to name only some of those no longer with us.

What stands out about these men is that their work combined rigorous analysis with passion and often eloquence. A Federal Courts course should

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56. *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290 (11th Cir. 2008).

57. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

58. See Alyson M. Palmer, *11th Circuit: Federal Courts Lack Jurisdiction over Gun Dealers' Case Against N.Y. Mayor*, FULTON COUNTY DAILY REPORT, Jan 2, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202427143081>.

59. *Adventure Outdoors*, 552 F.3d at 1296.

60. See *Grable*, 545 U.S. at 321 (Thomas, J., concurring).

61. Amar, *supra* note 3.



give the student a sense of that passion—and of the ideals that underlie it. There is probably no better example than the climactic moment in Hart’s great “dialogue” on the power of Congress to limit the jurisdiction of the federal courts.<sup>62</sup> Hart launches on a searing and powerful condemnation of a line of Supreme Court decisions on the rights of aliens:

Under the benign influence of [ideas developed in Supreme Court opinions], the law grew and flourished, like Egypt under the rule of Joseph . . . [But there] arose up new justices in Washington which knew not Joseph. Citing only the harsh precepts of the very earliest decisions, they began to decide cases accordingly, as if nothing had happened in the years between.

. . . .

. . . [T]ake the facts of *Mezei*, in comparison with its *dicta*. The *dicta* say, in effect, that a Mexican wetback who sneaks successfully across the Rio Grande is entitled to the full panoply of due process in his deportation. But the holding says that a duly admitted immigrant of twenty-five years’ standing who has married an American wife and sired American children, who goes abroad as the law allows to visit a dying parent, and who then returns with passport and visa duly issued by an American consul, is entitled to nothing—and, indeed, may be detained on an island in New York harbor for the rest of his life if no other country can be found to take him.

I cannot believe that judges adequately aware of the foundations of principle in this field would permit themselves to trivialize the great guarantees of due process and the freedom writ by such distinctions. And I cannot believe that judges taking responsibility for an affirmative declaration that due process has been accorded would permit themselves to arrive at such brutal conclusions.<sup>63</sup>

The interlocutor responds, “But that is what the Court has held. And so I guess that’s that.”<sup>64</sup> But for Hart it is not:

The deepest assumptions of the legal order require that the decisions of the highest court in the land be accepted as settling the rights and wrongs of the particular matter immediately in controversy. But the judges who sit for the time being on the court have no authority to remake by fiat alone the fabric of principle by which future cases are to be decided. They are only the custodians of the law and not the owners of it. The law belongs to the people of the country, and to the hundreds of thousands of lawyers and judges who

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62. Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), reprinted in HART & WECHSLER I, *supra* note 3, at 312. Although the title uses the word “dialectic,” the work is universally referred to as the “Dialogue.” See, e.g., Amar, *supra* note 3, at 696, 704, 714, 715.

63. Hart, *supra* note 62, at 1391, 1395.

64. *Id.* at 1395.

through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people's sense of justice.<sup>65</sup>

Here is the soul of Federal Courts. And here the lawyers receive equal billing with the judges—in fact, top billing. But this should not be surprising. Hart, like Wechsler, Friendly, Bator, and most of the other great figures who shaped the domain of Federal Courts, was as much a lawyer as a scholar. And a pedagogical approach that asks students to consider the law from the perspective of a lawyer seeking to serve his client's interests should fit well with the focus on allocation of power and institutional competence that is at the heart of a Federal Courts course in the Hart and Wechsler tradition.

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65. *Id.* Today, of course, few law review writers would allude to the reign of Joseph, and none would refer to "a Mexican wetback." An additional reason for calling attention to this passage is to demonstrate that unconventional and even politically incorrect modes of expression are not inconsistent with a commitment to "the people's sense of justice."

