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# Federal Court Jurisdiction

By Greg Bass and Aaron Cooper

**[Editor's note:** This article is adapted from Chapter 2 of the *FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS*, published in June 2004 by the Sargent Shriver National Center on Poverty Law. See the online version at [www.povertylaw.org](http://www.povertylaw.org).]

In this article we address the subject-matter jurisdiction of the federal courts and review the principal legislative provisions by which Congress has vested federal courts with jurisdiction. We also discuss the abstention doctrines, the principal limitations on the exercise of that jurisdiction, and the implications of those limitations. We review last the jurisdiction of state courts over federal claims.

## I. Courts of Limited Jurisdiction

Federal courts are courts of limited jurisdiction. Article III, Section 1, of the U.S. Constitution gives Congress the power to create inferior federal courts. The outer boundary of federal judicial power is defined in Article III, Section 2. These constitutional provisions are not self-executing. Beginning with the Judiciary Act of 1789, Congress created a system of federal courts and vested it with much, but not all, of the jurisdiction permitted by Section 2. The Constitution therefore establishes the potential scope of federal jurisdiction, and Congress defines the actual, more limited, range of it.

Statutes also limit the exercise of subject-matter jurisdiction by federal courts. Some of these limitations are explicit restrictions on federal jurisdiction in matters such as state taxation, public utility rate-making, and labor disputes. Other limitations are implicit in the jurisdictional provisions or other congressional enactments.

The U.S. Supreme Court also created restrictions on the exercise of statutorily conferred jurisdiction. Some of the restrictions are derived from Article III's case and controversy requirement, discussed in the following article in this issue of *CLEARINGHOUSE REVIEW*. Others fall within the ambit of the abstention doctrine and other exceptions to federal court jurisdiction.

**Greg Bass**  
*Litigation Director*

Greater Hartford Legal Aid  
999 Asylum Ave., 3d Floor  
Hartford, CT 06105  
860.541.5018  
[gbass@ghla.org](mailto:gbass@ghla.org)

**Aaron Cooper**  
*Attorney*

Covington & Burling  
1201 Pennsylvania Ave. NW  
Washington, DC 20004  
202.662.6000  
[acooper@cov.com](mailto:acooper@cov.com)

## II. Pleading Requirements

The burden of pleading and proving subject-matter jurisdiction rests on the party invoking federal jurisdiction. Thus a federal court plaintiff must make in the complaint “a short and plain statement of the grounds upon which the court’s jurisdiction depends.”<sup>1</sup> Likewise, a defendant who removes a case from state court must allege the basis of federal jurisdiction in the notice of removal. By contrast, most state courts of general jurisdiction are presumed to have jurisdiction over all civil actions unless such jurisdiction is specifically prohibited. As a result, plaintiffs typically do not need to plead or prove the existence of subject-matter jurisdiction in state court.<sup>2</sup>

Failure to plead properly the existence of jurisdiction may be cured by amendment. Indeed, 28 U.S.C. § 1653 provides that such amendment may occur in the trial or appellate courts. Because federal courts lack power to act without subject-matter jurisdiction, defendants may not waive objections to jurisdiction and may move to dismiss on jurisdictional grounds at any time.<sup>3</sup> Moreover, both trial and appellate courts may raise subject-matter jurisdiction issues *sua sponte*.

## III. Federal Question Jurisdiction

Section 1331 of Title 28 of the United States Code confers upon U.S. district courts jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” Section 1331, which grants what is commonly referred to as federal question jurisdiction, is

- an all-purpose jurisdictional statute,<sup>4</sup>
- available regardless of the defendants’ identity and, since 1980, not limited by any requirement that a minimum dollar amount be “in controversy.”<sup>5</sup>

Section 1331 also confers jurisdiction in actions authorized by 42 U.S.C. § 1983 against defendants acting under color of state law.<sup>6</sup> It is generally available in suits against the federal government and its agencies and in actions against federal officers and employees.<sup>7</sup>

Both Article III of the Constitution and 28 U.S.C. § 1331 use the same phrase, “arising under,” to define federal question jurisdiction, but the Supreme Court has not interpreted the constitutional and statutory language identically. In addressing the constitutional language, the Court has been expansive, broadly

<sup>1</sup>Fed. R. Civ. P. 8(a)(1). Plaintiffs may not need to plead specifically the existence of federal court jurisdiction as long as they plead sufficient facts to establish 28 U.S.C. § 1331 jurisdiction. See *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 608 n. 6 (1978); *Radici v. Associated Insurance Companies*, 217 F.3d 737, 740 (9th Cir. 2000) (Clearinghouse No. 53,260); *Jensen v. Schweiker*, 709 F.2d 1227, 1229 (8th Cir. 1983). But the better practice is to comply with the technical requirements of Federal Rule of Civil Procedure 8(a)(1) and explicitly state the basis of federal court jurisdiction.

<sup>2</sup>See Section IX for a discussion of state court jurisdiction over federal claims.

<sup>3</sup>See Fed. R. Civ. P. 12(h)(3).

<sup>4</sup>Congress has enacted—in addition to the general federal question jurisdiction conferred by Section 1331—a number of more specific statutes conferring jurisdiction on the district courts in cases arising under particular federal laws. One of these, once of considerable importance, grants jurisdiction of cases arising under any congressional act regulating commerce, 28 U.S.C. § 1337. It and provisions conferring jurisdiction in admiralty, bankruptcy, and patent, trademark, and copyright cases (28 U.S.C. §§ 1333, 1334, and 1338) are in the district court jurisdiction chapter of the Judicial Code (Chapter 85 of Title 28). Others, such as the provision for district court jurisdiction of actions to review adverse social security decisions, discussed in Section IV.F below, are in other titles of the Code, typically in agency organic statutes. Besides conferring jurisdiction in the federal courts, such organic statutes may waive sovereign immunity, create causes of action, or specify relief.

<sup>5</sup>Until 1980 Section 1331 was limited by a \$10,000 amount-in-controversy requirement. Before the repeal of the of the jurisdictional amount requirement, plaintiffs with federal statutory claims involving \$10,000 or less for each plaintiff had to rely on other jurisdictional provisions not so limited. Plaintiffs often invoked 28 U.S.C. § 1337 since much legislation that is litigated finds its constitutional authority in the commerce clause. Section 1337 is now superfluous. See *Erienet Inc. v. Velocity Net Inc.*, 156 F.3d 513, 519-20 (3d Cir. 1998). Similarly, before 1980, in Section 1983 litigation involving \$10,000 or less, plaintiffs relied on 28 U.S.C. § 1343(a)(3), the jurisdictional counterpart of Section 1983. While this jurisdictional provision is now superfluous, it is often still invoked along with Section 1331 in civil rights cases. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 685 n.1 (1997); *Dixon v. Burke County, Georgia*, 303 F.3d 1271, 1274 (11th Cir. 2002).

<sup>6</sup>See also 28 U.S.C. § 1343.

<sup>7</sup>E.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

interpreting “arising under” to include any case in which a federal question is an “ingredient of the original cause.”<sup>8</sup> Either the plaintiff or defendant may make the ingredient part of the case. The federal ingredient must be sufficiently central to the case such that its resolution one way or the other will change the outcome of the case.<sup>9</sup> In *Osborn v. Bank of the United States*, the “ingredient” was the law establishing the Bank of the United States. That ingredient made constitutional a statute enabling the bank to sue and be sued on its contracts (generally state-law claims) in federal courts. However, a statute which does nothing more than establish federal jurisdiction, the Court subsequently made clear, cannot serve as the federal law under which an action arises.<sup>10</sup>

On the other hand, since the general federal question jurisdiction was conferred in 1875, the statutory grant, the Court has consistently held, is not as broad as the Constitution would allow.<sup>11</sup> The primary test that has been developed for determining whether a civil action arises under the Constitution or laws of the United States for purposes of Section 1331 requires (1) a substantial federal element and (2) such element being part of the plaintiff’s “well-pleaded complaint.”

A case clearly arises under the Constitution for purposes of Section 1331 when the plaintiff claims that, for example, a government officer or employee acting in the officer’s or employee’s official capacity injures the plaintiff by an action that offends some provision of the Constitution or by action taken on the authority of an unconstitutional statute. The federal question jurisdiction of the district courts encompasses causes of action created by 42 U.S.C. § 1983, which explicitly authorizes a private remedy for acts that are under color of state law and violate rights secured by federal law. In such cases, federal law both creates the cause of action, supplying the underlying substantive rules that govern defendants’ conduct, and authorizes plaintiffs to enforce the rights created.<sup>12</sup> As Justice Stevens remarked for the Court in an opinion that canvassed Section 1331 jurisprudence, “[t]he ‘vast majority’ of cases that come within this grant of jurisdiction are covered by Justice Holmes’ statement (in *American Well Works v. Layne & Bowler Co.*) that a ‘suit arises under the law that creates the cause of action.’”<sup>13</sup> That a case in which the complaint is based on federal common law arises under the laws of the United States for the purpose of jurisdiction under Section 1331 is also now settled.<sup>14</sup>

<sup>8</sup>See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824); see also *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983) (Foreign Sovereign Immunities Act is constitutional as actions against foreign sovereigns or foreign plaintiffs in U.S. courts require the application of federal law).

<sup>9</sup>*Osborn*, 22 U.S. (Wheat) at 822–23. The U.S. Supreme Court has subsequently appeared to interpret *Osborn* more broadly.

<sup>10</sup>*Verlinden*, 461 U.S. at 496 (“Congress may confer on the federal court jurisdiction over any case or controversy that might call for the application of federal law.”).

<sup>11</sup>See generally CHARLES A. WRIGHT & M. KANE, *LAW OF FEDERAL COURTS* § 17 (6th ed. 2002), see also *Verlinden*, 461 U.S. at 495; *Louisville and Nashville Railroad v. Mottley*, 211 U.S. 149 (1908). The Article III catalogue of cases to which the federal judicial power extends does not by itself empower any federal court to hear such cases. The creation of courts inferior to the Supreme Court is left by Article III to Congress, and their jurisdiction similarly is for Congress to define, within the outer limits of the Article III judicial power. By employing in Section 1331 the identical “arising under” phrase and a virtually identical list of federal laws, Congress might have been thought to be conferring the broadest possible federal question jurisdiction. But the Court has interpreted the statute narrowly to keep the district courts’ caseload manageable and to minimize intrusion on state courts.

<sup>12</sup>If federal law creates a right to enforce rights established in federal court by state law, federal jurisdiction, the Court held, does not exist. *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900).

<sup>13</sup>*Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986), quoting *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8–9 (1983), which in turn quoted *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (suit for damages to business allegedly resulting from slanderous accusations that plaintiff had infringed defendant’s patent arises under state law even though federal patent law was an ingredient to the claim).

<sup>14</sup>*Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Also held to be within Section 1331 is such a complaint as the one at issue in *Smith v. Kansas City Title & Trust Co.*<sup>15</sup> In *Smith* a shareholder, alleging that the act authorizing the bonds was unconstitutional and that a bank, under state law, was allowed to invest only in bonds issued under a valid law, sought to prevent the state bank from buying bonds of a new federal agency. As Justice Holmes' dissent demonstrates, the case could rationally have been regarded as arising solely under the state law defining the bank's powers.<sup>16</sup> Yet the Court held that federal jurisdiction existed because the state-law claim involved an inquiry into the constitutionality of a federal statute.<sup>17</sup>

The apparent conflict between *Smith* and *American Well Works* makes it difficult to determine when federal jurisdiction exists in cases where state-created actions require an interpretation of federal law. Justice Brennan, for a unanimous Court, once stated the governing proposition as follows:

Even though state law creates . . . [a plaintiff's] causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.<sup>18</sup>

The *Merrell Dow* case, decided just three years later by a narrowly divided Court, involved a suit under state law based on an alleged violation of a federal statute. In *Merrell Dow* one count of what was otherwise a purely state-law tort action against a drug manufacturer for harm caused by one of its drugs alleged that the drug was misbranded in violation of the Federal Food, Drug, and Cosmetic Act and that the violation created a presumption of negligence. The Court joined the parties in assuming that the provision of the federal statute relied upon by the plaintiff did not imply a private cause of action.<sup>19</sup> On that assumption, the Court held that assertion of federal jurisdiction would "flout, or at least undermine, congressional intent."<sup>20</sup> The Court was referring to congressional intent not to create a federal remedy for violation of the federal law.<sup>21</sup>

Thus, when claims are made in state-created actions to enforce provisions of federal law, the availability of federal question jurisdiction, at least since *Merrell Dow*, turns on whether private actions are available under federal law to enforce the identical underlying provisions of federal law.<sup>22</sup> If a private right of action exists, the federal courts will have jurisdiction. This is different if the state action merely incorporates a standard set forth in

<sup>15</sup>*Smith v. Kansas City Title and Trust Co.*, 255 U.S. 180 (1921).

<sup>16</sup>*Id.* at 213–14 (Holmes, J., dissenting).

<sup>17</sup>See also *Sweeney v. Abramowitz*, 449 F. Supp. 213 (D. Conn. 1978) (federal court has jurisdiction over suit for malicious prosecution based on filing of a claim under Section 1983 because an essential element of plaintiffs' complaint is that the defendant had no probable cause to believe that he had a valid Section 1983 claim).

<sup>18</sup>*Franchise Tax Board*, 463 U.S. at 13.

<sup>19</sup>*Merrell Dow*, 478 U.S. at 804. In doing so, the Supreme Court applied the four-factor test established in *Cort v. Ash*, 422 U.S. 66, 78 (1975). The narrowing of the test employed to determine whether rights of action may be implied in *Alexander v. Sandoval*, 532 U.S. 275 (2001) (Clearinghouse No. 51,706), suggests that *Merrell Dow* would now be applied in a manner less likely to result in a finding of federal jurisdiction.

<sup>20</sup>*Merrell Dow*, 478 U.S. at 812. Like several of the other cases that have defined the contours of "arising under" jurisdiction, *Merrell Dow* involved not an original action in a federal district court but an attempt to remove a case brought in state court to the federal court. The Supreme Court said that "[s]ince a defendant may remove a case only if the claim could have been brought in federal court . . . the question for removal jurisdiction must . . . be determined by reference to the 'well-pleaded complaint'" under Section 1331. See also *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Franchise Tax Board*, 462 U.S. at 9–10. Removal is treated separately in Section VII.

<sup>21</sup>*Merrell Dow* appears to overrule *Smith* implicitly. See *Seinfeld v. Austen*, 39 F.3d 761 (7th Cir. 1994). Other appellate courts suggested, however, that Section 1331 jurisdiction would still be found if the state-law claims raised "substantial" federal interests. See *Barbara v. New York Stock Exchange*, 99 F.3d 49, 54 (2d Cir. 1996); *Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994); *Milan v. Western Surety Co.*, 886 F.2d 783, 787–88 (6th Cir. 1989).

<sup>22</sup>*Merrell Dow*, 478 U.S. 804. The Supreme Court in *Merrell Dow* stated that *Franchise Tax Board* did not "purport to disturb the long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Id.* at 813.

federal law but violation of the standard does not itself permit a private action under federal law.<sup>23</sup> In that event, the federal courts probably do not have jurisdiction.<sup>24</sup> Thus state-created actions, including state tort actions and state judicial review proceedings, that may be used to enforce federal law may or may not be within the jurisdiction of the district courts depending on the nature of the federal law sought to be enforced.<sup>25</sup>

Not only must the action “arise under” the Constitution or federal law, but also the federal question must appear on the face of a “well-pleaded complaint.”<sup>26</sup> In practice, this means that plaintiffs may not invoke federal jurisdiction by raising

- inessential federal issues in the complaint,<sup>27</sup> or
- anticipated federal defenses.<sup>28</sup>

In general, the Declaratory Judgment Act does not alter this principle.<sup>29</sup> Federal jurisdiction would lie only if there had

been federal jurisdiction over the suit that would have been filed in the absence of the Act.<sup>30</sup> At the same time, the Court has not been willing to allow a plaintiff to omit artfully a substantial federal question.<sup>31</sup>

#### IV. Other Jurisdictional Statutes

Section 2, Clause 1, of Article III of the Constitution provides that federal judicial power extends to cases between citizens of different states and between a citizen of a state and a citizen of a foreign country.

##### A. Diversity Jurisdiction

The present diversity statute, 28 U.S.C. § 1332, grants to U.S. district courts jurisdiction over cases between citizens of different states and between citizens of a state and citizens of a foreign country when the matter in controversy exceeds \$75,000.<sup>32</sup> The statutory jurisdiction based on diversity of citizenship requires “complete diversity,” that is, all plaintiffs

<sup>23</sup>Under *Moore v. Chesapeake and Ohio Railway Co.*, 291 U.S. 205 (1934), which was given new respectability by *Merrell Dow*, 478 U.S. at 814 n.12, a state tort action relying on the violation of a federal standard did not meet the requirements of Section 1331. Despite the similarity to state-created actions to enforce constitutional provisions actionable under Section 1983, the Supreme Court in *Merrell Dow* characterized the action in *Moore* as a “state tort.” State-created actions to enforce federal constitutional provisions, however, are really challenges to the constitutionality of the policies or practices of state or local defendants and thus more closely resemble Section 1983 actions for which federal question jurisdiction is available. See *Merrell Dow*, 478 U.S. at 814 n.12 (discussing *Smith*, 255 U.S. 180); see also *City of Chicago v. International. College of Surgeons*, 522 U.S. 156, 164 (1997) (federal jurisdiction over case raising federal constitutional claims in state administrative procedure act appeal).

<sup>24</sup>See *Merrell Dow*, 478 U.S. at 817; *Moore*, 291 U.S. at 216–17. But see *Smith*, 255 U.S. 180.

<sup>25</sup>Depending on the identity of the defendants and the relief sought, there may be Eleventh Amendment limitations on the power of federal courts to hear such state-created actions. See *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

<sup>26</sup>*Franchise Tax Board*, 463 U.S. at 9–10.

<sup>27</sup>Nor can federal jurisdiction be founded on insubstantial or frivolous federal claims. *Hagans v. Lavine*, 415 U.S. 528, 535, 542–43 (1974).

<sup>28</sup>The case most often cited for this proposition, though not the first, is *Mottley*, 211 U.S. 149. In *Mottley* the plaintiff alleged that a federal defense the plaintiff anticipated violated the Constitution. The Supreme Court denied jurisdiction because “a suit arises under the Constitution and laws of the United States only when the plaintiff’s statement of his own cause of action shows that it is based upon those laws or that Constitution.” *Id.* at 153. See also *Merrell Dow*, 478 U.S. at 808 (relying on *Mottley*, 211 U.S. 149).

<sup>29</sup>28 U.S.C. § 2201.

<sup>30</sup>See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673–74 (1950) (Declaratory Judgment Act does not alter federal court jurisdiction); see also *Franchise Tax Board*, 463 U.S. at 16.

<sup>31</sup>E.g., in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 66 (1987), the Court permitted removal to federal court where Congress “clearly manifested an intent” to preempt the field and all state causes of action; see also *Beneficial National Bank v. Anderson*, 123 S. Ct. 2058, 2063 (2003) (Clearinghouse No. 55,271); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 476 (1998).

<sup>32</sup>28 U.S.C. § 1332(a)(1)–(2). Diversity jurisdiction also exists when the parties include “citizens of different States and . . . citizens or subjects of a foreign state are additional parties,” *id.* § 1332(a)(3), and “a foreign state . . . as plaintiff and citizens of a State or different States,” *id.* § 1332(a)(4).

must be citizens of states different from the state of citizenship of any defendant.<sup>33</sup> If there is any overlap of state citizenship between any plaintiff and any defendant, diversity is defeated and the case cannot be brought in, or removed to, federal court.<sup>34</sup> That is, the case cannot be brought in or removed to federal court without an independent basis for federal jurisdiction.<sup>35</sup>

Federal courts have historically applied a domestic relations exception to limit their jurisdiction, refusing to entertain cases otherwise within their diversity jurisdiction. In *Ankenbrandt v. Richards* the Supreme Court traced to *Barber v. Barber* the origin of the doctrine.<sup>36</sup> *Barber v. Barber* held that federal courts had no jurisdiction over suits for divorce or alimony.<sup>37</sup> The *Ankenbrandt* Court dealt with a tort dispute brought in federal court by a mother, alleging physical and sexual abuse of the couple's children, against her former husband and his companion. The Court found federal court jurisdiction of the action since the domestic relations exception specifically served only to "divest . . . the federal courts of power to issue divorce, alimony, and child custody decrees."<sup>38</sup>

The policy of diversity jurisdiction, to protect out-of-state parties against possible home-state bias, is manifested in the provisions governing removal. A case may not be removed to federal court on

the basis of diversity if any defendant is a citizen of the forum state.<sup>39</sup>

Thus, if there is the requisite amount in controversy, the out-of-state defendant must decide whether to remove the in-state plaintiff's state court action to federal court.

Several other aspects of the diversity jurisdiction bear mention. The District of Columbia, the territories (e.g., U.S. Virgin Islands, Guam, American Samoa) and the Commonwealth of Puerto Rico are considered states for purposes of diversity.<sup>40</sup> U.S. citizens and aliens admitted for permanent residency are citizens of the state in which they are domiciled.<sup>41</sup> Domicile involves both presence and an intent to remain indefinitely. A person retains prior citizenship until the person forms the subjective intent to change citizenship. Thus a person temporarily living in one state may retain citizenship in another state. Citizenship for diversity purposes is determined as of the time a suit is filed and not when the cause of action arose. A corporation typically has dual state citizenship—the state in which the corporation is incorporated and the state in which it has its principal place of business.<sup>42</sup>

## B. Declaratory Judgment Act

The Declaratory Judgment Act is not, strictly speaking, a jurisdictional statute.<sup>43</sup> Under the Act, federal courts have the power in cases of "actual controversy" to

<sup>33</sup>See *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 266 (1806).

<sup>34</sup>Removal jurisdiction is discussed in Section VI.

<sup>35</sup>See *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

<sup>36</sup>*Id.* at 689.

<sup>37</sup>*Barber v. Barber*, 21 How. 582 (1859); see *Ankenbrandt*, 504 U.S. at 693.

<sup>38</sup>*Ankenbrandt*, 504 U.S. at 703–4; see, e.g., *Dunn v. Cometa*, 238 F.3d 38 (1st Cir. 2001) (tort claims regarding management of former spouse not barred by domestic relations exception); *Friedlander v. Friedlander*, 149 F.3d 739 (7th Cir. 1998) (tort claims not barred by exception). A similar exception excludes probate matters from federal jurisdiction. Federal courts may not probate a will or administer an estate but may entertain claims against administrators and executors as long as they do not interfere with probate proceedings. See generally 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3610 (2d ed. 1984).

<sup>39</sup>See 28 U.S.C. § 1441(b).

<sup>40</sup>*Id.* § 1332(d); see *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

<sup>41</sup>28 U.S.C. § 1332(a).

<sup>42</sup>*Id.* § 1332(c)(1).

<sup>43</sup>Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.



“declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”<sup>44</sup> In suits against federal agencies or officials for review of adverse agency action, plaintiffs often seek judgments declaring the action illegal as well as (occasionally in lieu of) injunctive relief. As indicated above, the Act does not confer or expand federal jurisdiction.<sup>45</sup> Therefore the Act cannot be used defensively to raise federal issues that would not appear on the face of a well-pleaded complaint.<sup>46</sup> Rather, the Act creates an additional remedy that is available to a district court in a case in which (1) the case or controversy requirement of Article III of the Constitution is met and (2) the court independently has subject-matter jurisdiction because of either the presence of a federal question or diversity of citizenship.<sup>47</sup>

## V. Litigation Against the Federal Government

Section 1331 is the principal basis of jurisdiction in litigation, otherwise not provided for, against the federal government and its agencies, officers, and employees.<sup>48</sup>

### A. General Considerations

Under *Bivens v. Six Unknown Named Agents*, individual employees of the federal govern-

ment are subject to actions for damages for acts in violation of plaintiffs’ federal constitutional rights.<sup>49</sup> Jurisdiction over such actions is provided by Section 1331.

Congress has enacted, in addition to Section 1331, a variety of specific jurisdictional grants for particular kinds of litigation against the government based on the nature of the judicial proceeding or the subject matter of the controversy. These jurisdictional grants often also contain specific remedial provisions that establish conditions to suit or create immunities.

### B. Mandamus Jurisdiction

Section 1361 of Title 28 confers on the district courts “jurisdiction of any action in the nature of mandamus to compel” a federal officer, employee, or agency “to perform a duty owed to the plaintiff.” The mandamus jurisdiction conferred by this provision is available only if

- the duty breached is “a clear nondiscretionary duty,”<sup>50</sup> and
- no other remedy is available.<sup>51</sup>

If a federal official, however, goes far beyond “any rational exercise of discretion,” mandamus may lie even when the action is within the statutory authority granted.<sup>52</sup>

The significance of this statute as a separate source of federal jurisdiction has

<sup>44</sup>*Id.* 2201(a).

<sup>45</sup>See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); cf. *Franchise Tax Board*, 463 U.S. 1 (state declaratory judgment acts do not expand removal jurisdiction); see also *Livestock Marketing Association v. U.S. Department of Agriculture*, 132 F. Supp. 2d 817, 824 (D.S.D. 2001).

<sup>46</sup>See *Franchise Tax Board*, 463 U.S. at 15; *Skelly Oil Co.*, 339 U.S. at 671–72.

<sup>47</sup>See *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937).

<sup>48</sup>See Sections V.D and V.E for discussion of contract and tort actions against the United States.

<sup>49</sup>*Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Suits against federal employees in their individual capacities are not suits against the United States for purposes of venue or service of process.

<sup>50</sup>*Pittston Coal Group v. McLaughlin*, 488 U.S. 105, 121 (1988) (quoting *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)); *Ingalls Shipbuilding Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 133 (5th Cir. 1994) (“Mandamus is only appropriate when the claim is clear and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt. Mandamus is thus not generally available to review discretionary acts of public officials.”) (internal quotations and citations omitted).

<sup>51</sup>See *Burnett v. Bowen*, 625 F. Supp. 831, 837–38 (C.D. Ill. 1986), rev’d on other grounds, 830 F.2d 731 (7th Cir. 1987); see also *Pittston Coal*, 488 U.S. at 121–22 (implying that mandamus will not lie if plaintiff failed to pursue other available administrative remedies). Mandamus also was invoked to challenge a court’s decision to transfer the venue of a case (see, e.g., *In re Chatman-Bey*, 718 F.2d 484, 487–88 (D.C. Cir. 1983)) or to compel performance of a prior court order (see, e.g., *Kahmann v. Reno*, 967 F. Supp. 731, 733–34 (N.D.N.Y. 1997)).

<sup>52</sup>See *United States ex rel. Schonbrun v. Commanding Officer, Armed Forces*, 403 F.2d 371, 374 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969).



faded with the abolition of the amount in controversy requirement for federal question jurisdiction and with the elimination of the sovereign immunity defense to suits against federal agencies, officers, and employees for injunctive relief.<sup>53</sup>

### C. Administrative Procedure Act

The Administrative Procedure Act creates a cause of action against agencies of the federal government acting under federal law. The Act authorizes judicial review, establishes the form and venue of judicial review proceedings, states what agency actions are reviewable, and describes the scope of review of such actions.<sup>54</sup> The Act eliminates the defense of sovereign immunity in cases seeking relief other than money damages and claiming that a federal agency, officer, or employee acted or failed to act in an official capacity or under color of legal authority.<sup>55</sup>

While these judicial review sections of the Act are important in providing for judicial review of agency action and describing its scope, they do not of their own force confer jurisdiction on the district courts.<sup>56</sup> A plaintiff bringing an action under the Act therefore must also have a jurisdictional foundation for the action. Federal question jurisdiction under Section 1331 is typically available for claims under the Act.<sup>57</sup>

### D. Tucker Act—Damage Claims Against the Federal Government

The Tucker Act gives the district courts jurisdiction<sup>58</sup>

to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.<sup>59</sup>

When it applies, the Tucker Act provides the exclusive method by which to file actions against the United States.<sup>60</sup>

For damage claims of \$10,000 or less, the U.S. Court of Federal Claims and federal district courts have concurrent jurisdiction.<sup>61</sup> If the claim is over \$10,000, the Court of Federal Claims has exclusive jurisdiction. If a plaintiff wishes to remain in district court instead of the Court of Federal Claims, the plaintiff may waive all damages over \$10,000.<sup>62</sup> If a plaintiff has multiple claims, none of which individually exceeds \$10,000, the claims are not aggregated for jurisdictional purposes.<sup>63</sup> The Court of Federal Claims is also authorized to grant very lim-

<sup>53</sup>See 5 U.S.C. § 702.

<sup>54</sup>Administrative Procedure Act, 5 U.S.C. §§ 701–706. Other chapters of the Administrative Procedure Act address agency procedure and the interaction of agencies and Congress. See 5 U.S.C. §§ 551 *et seq.* For a full discussion of the Act, see FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS ch. 5, sec. II (Jeffrey S. Gutman ed., 2004).

<sup>55</sup>*Id.* § 702.

<sup>56</sup>See *Califano v. Sanders*, 430 U.S. 99, 105–7 (1977).

<sup>57</sup>While jurisdiction is often found in 28 U.S.C. § 1331, practitioners should also look to the agency's organic statute or other provisions in the Judicial Code. For instance, some suits to review agency actions are committed to the exclusive jurisdiction of the court of appeals. See 28 U.S.C. §§ 2341–2351.

<sup>58</sup>Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491.

<sup>59</sup>*Id.* § 1346(a)(2)

<sup>60</sup>Congress has the power to remove the Tucker Act as a remedy, but Congress must manifest that intent unambiguously. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984); *California v. United States*, 271 F.3d 1377, 1382 (Fed. Cir. 2001). However, when provisions in other statutes specify comprehensive remedial schemes, the Supreme Court cautioned, the Tucker Act may give way. *United States v. Fausto*, 484 U.S. 439, 452–55 (1988) (Civil Service Reform Act implicitly withdraws certain actions by civil servants from the reach of the Tucker Act).

<sup>61</sup>The \$10,000 limit on district court jurisdiction is strictly construed. See *Chandler v. U.S. Air Force*, 272 F.3d 527, 529 (8th Cir. 2001).

<sup>62</sup>See *Roedler v. Department of Energy*, 255 F.3d 1347, 1351 (Fed. Cir. 2001); *Smith v. Orr*, 855 F.2d 1544, 1552–53 (Fed. Cir. 1988).

<sup>63</sup>See *Baker v. United States*, 722 F.2d 517, 518 (9th Cir. 1983); *Glaskin v. Klass*, 996 F. Supp. 67, 73 (D. Mass. 1998).

ited equitable relief and declaratory judgments, most notably in cases involving termination of government contracts and challenges to awards of such contracts.<sup>64</sup>

The language of the Tucker Act is deceptively broad; in fact, its jurisdictional provisions are stringently applied. The Act creates no substantive rights; it confers jurisdiction over claims based on statutes, contracts, or regulations that themselves create the right to damages against the United States.<sup>65</sup> The Tucker Act therefore can be used as the jurisdictional basis for claiming government benefits provided for by a substantive statute. For instance, a widow's claim to U.S. Department of Defense Survivor Benefit Plan payments was held to be substantially a claim for money damages and thus within the Court of Federal Claims' jurisdiction under 28 U.S.C. § 1491.<sup>66</sup>

In some cases, the exclusive jurisdiction of the Court of Federal Claims over damage claims exceeding \$10,000 is not a bar to a plaintiff's request for equitable relief from a district court if there is another basis for federal jurisdiction. In *Brown v. United States* plaintiff sought damages from her federal employer in excess of \$10,000 and declaratory and injunctive relief as well.<sup>67</sup> Under Section 1491, the Court of Federal Claims had exclusive jurisdiction over the action, but since that court had no authority to grant her equitable relief, the district court concluded that it could consider the plaintiff's

request for a declaratory judgment.<sup>68</sup> The district courts have jurisdiction, the Supreme Court held, over mixed claims involving both injunctive (or declaratory) relief and monetary relief that does amount technically to "damages" in excess of \$10,000.<sup>69</sup>

On the other hand, courts look behind the pleadings to determine whether the jurisdictional provisions of the Tucker Act apply. A plaintiff may not avoid jurisdiction in the Court of Federal Claims by "framing a complaint in the district court as one seeking injunctive, declaratory, or mandatory relief when, in reality, the thrust of the suit is one seeking money [damages] from the United States."<sup>70</sup>

All appeals from nontax claims under the Tucker Act, whether arising in the Court of Federal Claims or district courts, go to the U.S. Court of Appeals for the Federal Circuit.<sup>71</sup> The Federal Circuit also has exclusive jurisdiction, the Supreme Court held, in appeals from the district courts that contain a mixture of Tucker Act and Federal Tort Claims Act claims.<sup>72</sup> The legislative history of the Tucker Act shows a need, the Court found, for judicial uniformity as to Tucker Act claims; therefore centralized determination of these claims must predominate over regional adjudication.<sup>73</sup>

## E. Federal Torts Claims Act

Pursuant to the Federal Tort Claims Act,

<sup>64</sup>28 U.S.C. § 1491(a)(2), (b)(2).

<sup>65</sup>One exception is that the district court version of the Tucker Act does not provide jurisdiction for claims arising under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.* See 28 U.S.C. § 1346(a)(2).

<sup>66</sup>*Dean v. United States*, 10 Cl. Ct. 563 (1986).

<sup>67</sup>*Brown v. United States*, 631 F. Supp. 954 (D.D.C. 1986). See also *Favereau v. United States*, 44 F. Supp.2d 68, 71 (D. Me. 1999).

<sup>68</sup>*Brown*, 631 F. Supp. at 957.

<sup>69</sup>*Bowen v. Massachusetts*, 478 U.S. 879 (1988) (state seeking monetary and equitable relief under Medicaid program). Significantly in *Bowen* the Court held that not all actions that would result in the payment of money were necessarily actions for money damages: "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages'" *Id.* at 893.

<sup>70</sup>*Burkins v. United States*, 112 F.3d 444, 449 (10th Cir. 1997) (internal quotations omitted).

<sup>71</sup>28 U.S.C. § 1295(a)(2)–(3).

<sup>72</sup>*United States v. Hohri*, 482 U.S. 64 (1987).

<sup>73</sup>*Id.* at 72–75.

district courts . . . have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>74</sup>

Under this provision, federal district courts may entertain tort claims for damages against the United States based on the actions of government employees in cases in which the United States has not abrogated its sovereign immunity under the Tucker Act (i.e., tort actions). The Federal Tort Claims Act's consent to be sued and waiver of sovereign immunity apply only to cases in which "a private person" would be liable. However, the reverse is not true—there are situations in which government may escape liability in circumstances in which a private person would be liable. For instance, the Act does not authorize actions for strict tort

liability.<sup>75</sup> The Act contains an armed services exemption known as the *Feres* doctrine.<sup>76</sup> Further, under the statute, the United States is exempt from (i.e., it has not waived its sovereign immunity for) claims based on discretionary acts of government employees.<sup>77</sup>

The extent of the United States' liability under the Act is determined by state law, except that punitive damages are not allowed.<sup>78</sup> The Supreme Court, however, liberally permitted damages that were more than a plaintiff's actual loss, as long as the damages were not intended to punish the defendant for intentional actions.<sup>79</sup>

The Act also imposes certain procedural prerequisites to filing a claim in district court. For instance, a plaintiff must "first present[] the claim to the appropriate Federal agency" and his claim must "have been finally denied by the agency in writing," the writing "sent by certified or registered mail."<sup>80</sup> The administrative claim must specify the amount requested by way of compensation, and a plaintiff may not later in court seek an amount in excess of the administrative claim.<sup>81</sup> If the agency does not dispose of the administrative claim within six months, the claimant may consider the lack of decision a final denial and proceed to court.<sup>82</sup>

<sup>74</sup>Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1).

<sup>75</sup>*Dalehite v. United States*, 346 U.S. 15, 44–45 (1953). E.g., property owners may not sue for damages caused by sonic booms from military jets because strict liability is the only cause of action. *Laird v. Nelms*, 406 U.S. 797 (1972).

<sup>76</sup>The *Feres* doctrine takes its name from *Feres v. United States*, 340 U.S. 135, 146 (1950), in which the Supreme Court held that the United States could not be held liable for "injuries to servicemen where the injuries arise out of or are in the course of activity *incident to service*." (emphasis added). Determining what activities are "incident to service" has been a frequently litigated issue, although the Court generally takes a broad view of the term. See, e.g., *United States v. Johnson*, 481 U.S. 681, 692 (1987) (dismissing wrongful death action by widow of deceased coast guard helicopter pilot); *Costo v. United States*, 243 F.3d 863, 867–68 (9th Cir. 2001) (Navy sailors drowned during Navy-led recreational rafting trip). But see, e.g., *Fleming v. United States Postal Service*, 186 F.3d 697 (6th Cir. 1999) (Army sergeant major injured in automobile accident with U.S. Postal Service employee while off-base not barred by *Feres*).

<sup>77</sup>28 U.S.C. § 2680(a). The test for what is a "discretionary function" also has been much litigated, but the general formulation of the inquiry involves whether the action "involve[d] an element of judgment or choice" and whether the conduct was "based on considerations of public policy." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Federal employees are absolutely immune from tort liability if the attorney general certifies that the employee was acting within the scope of employment. 28 U.S.C. § 2675(d). If the certification is made, the United States is substituted as the defendant. *Id.*

<sup>78</sup>28 U.S.C. § 2674; *Molzof v. United States*, 502 U.S. 301, 305–6 (1992).

<sup>79</sup>*Molzof*, 502 U.S. at 306–7.

<sup>80</sup>28 U.S.C. § 2675(a). This is sometimes referred to by the courts as a jurisdictional requirement. See *Gonzales v. United States*, 284 F.3d 281, 288 (1st Cir. 2002); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986). Considering the requirement jurisdictional means that it may not be waived. See *id.*

<sup>81</sup>28 U.S.C. § 2675(b).

<sup>82</sup>*Id.* § 2675(a).

## F. Social Security Litigation Against the Federal Government

Under 42 U.S.C. § 405(g), federal courts have jurisdiction to hear social security cases, regardless of the amount in controversy.<sup>83</sup> They have such jurisdiction after “any final decision of the Commissioner of Social Security made after a hearing.”<sup>84</sup> In most social security cases a claimant dissatisfied with an initial determination, which is made by a state agency’s employee under authority delegated by the commissioner, must request a de novo reconsideration by the local Social Security Administration district office. If still dissatisfied, the claimant may request a hearing before an administrative law judge, followed by review by the Appeals Council of the agency. The council’s decision represents the commissioner’s “final decision” reviewable by a federal district court under Section 405(g).<sup>85</sup> If a claimant does not request review by the council, all procedural avenues are not yet exhausted “and, as a result, [there is] no judicial review in most cases.”<sup>86</sup>

The principal difficulty with this procedure is the series of time-consuming delays involved in exhausting the available administrative remedies. Because such delays are onerous for claimants, the courts allow var-

ious exceptions to the exhaustion requirement. Section 405(g) imposes, the Supreme Court held, a nonwaivable presentment requirement—that is, a requirement that a claimant present a claim to the Social Security Administration and obtain a decision.<sup>87</sup> Once this requirement is satisfied, the Commissioner can waive the exhaustion requirement if further administrative pursuit of the claim appears futile. Recent cases suggest that federal courts can also exercise jurisdiction once the presentment requirement is satisfied if the “contested issue is constitutional, collateral to the considerations of claimant’s claim, and its resolution therefore falls outside the agency’s authority.”<sup>88</sup>

Some agency decisions cannot be reviewed under Section 405(g) even after exhaustion of administrative remedies. For instance, if the Appeals Council dismisses an appeal for untimeliness, that is not a final decision of the commissioner; thus, the district court has no jurisdiction to review the claim.<sup>89</sup> Similarly the Supreme Court held that a refusal to reopen an earlier decision was not reviewable because it was not a final decision “made after a hearing.”<sup>90</sup>

The Supreme Court declined to decide whether mandamus jurisdiction was available to review claims arising under

<sup>83</sup>42 U.S.C. § 405(g), provides: “Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.”

<sup>84</sup>Judicial review of Supplemental Security Income cases under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 *et seq.*, is available under the same terms as review under Title II. See 42 U.S.C. § 1383(c)(3). In Medicare cases involving Part A (hospital and insurance) benefits under Title XVIII, however, judicial review is not available where the amount in controversy is less than \$1,000. See 42 U.S.C. § 1395ff(2).

<sup>85</sup>Under 42 U.S.C. § 405(h), federal question jurisdiction under 28 U.S.C. § 1331 is unavailable in any action “to recover on any claim” arising under the subchapter.

<sup>86</sup>*Sims v. Apfel*, 530 U.S. 103, 107 (2000) (Clearinghouse No. 53,049) (“In administrative-law parlance, such a claimant may not obtain judicial review because he has failed to exhaust administrative remedies.”).

<sup>87</sup>See generally *Heckler v. Ringer*, 466 U.S. 602, 617–18 (1984); *Mathews v. Eldridge*, 424 U.S. 319, 330–32 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 766–67 (1975); *Tataranowicz v. Sullivan*, 959 F.2d 268, 274–75 (D.C. Cir. 1992) (Medicare case).

<sup>88</sup>*Crayton v. Callahan*, 120 F.3d 1217, 1222 (11th Cir. 1997); see also *Bowen v. City of New York*, 476 U.S. 467 (1986) (permitting review when commission used a secret, illegal policy to deprive claimants of disability evaluation process).

<sup>89</sup>*Matlock v. Sullivan*, 908 F.2d 492, 493 (9th Cir. 1990); *Adams v. Heckler*, 799 F.2d 131, 133 (4th Cir. 1986).

<sup>90</sup>*Califano v. Sanders*, 430 U.S. 99, 107–8 (1977); *Stieburger v. Apfel*, 134 F.3d 37, 39 (2d Cir. 1997).

the Social Security Act and not reviewable under Section 405(g).<sup>91</sup> The federal courts of appeals, however, generally allowed mandamus to challenge procedures used by the Social Security Administration and collateral to any substantive issues of entitlement to benefits if no other remedy was available.<sup>92</sup> The courts relied on the failure of Congress to take any steps to preclude mandamus jurisdiction.<sup>93</sup>

## VI. Supplemental Jurisdiction

In 1990 Congress enacted the supplemental jurisdiction statute, 28 U.S.C. § 1367, which largely codified, with certain critical distinctions, the former case-law doctrines of pendent, ancillary, and pendent-party jurisdiction.

### A. Historical Basis of Pendent and Ancillary Jurisdiction

In order to understand the essentials of supplemental jurisdiction, the advocate should first be familiar with the basic precodification principles of pendent and ancillary jurisdiction established by the Supreme Court. In doing so, the advocate should reassess these decisions in light of Section 1367.

#### 1. Pendent Jurisdiction

The doctrine of pendent jurisdiction governs when federal courts exercise subject-matter jurisdiction over claims that lack an independent basis of juris-

dition. The Supreme Court's decision in *United Mine Workers v. Gibbs* created the modern test for determining when federal courts may exercise pendent jurisdiction over state-law claims.<sup>94</sup> By "establishing a new yardstick for deciding whether a federal court has jurisdiction over a state-law claim brought in a case that also involves a federal question," the *Gibbs* Court intended "not only to clarify, but also to broaden, the scope of federal pendent jurisdiction."<sup>95</sup>

The Court in *Gibbs* drew a distinction between power and discretion. Under the two-prong test adopted in *Gibbs*, federal courts must first determine whether they have the constitutional power to exercise pendent jurisdiction. This power exists when there is a substantial federal claim over which federal courts have subject-matter jurisdiction.<sup>96</sup> The power also exists when both the "state and federal claims derive from a common nucleus of operative facts" so that a plaintiff would "ordinarily be expected to try them all in one judicial proceeding."<sup>97</sup> When the entire action before the federal court therefore comprises a single constitutional "case," the court may, under Article III, exercise jurisdiction over the action, including state-law claims.

If the federal court has the power to exercise jurisdiction over the pendent claim, the federal court may nevertheless refuse, said the Court in *Gibbs*, to exercise

<sup>91</sup>See *Ringer*, 466 U.S. at 616; *Califano v. Yamasaki*, 442 U.S. 682, 698 (1979); *Norton v. Mathews*, 427 U.S. 524, 526–33 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 332 n.12 (1976).

<sup>92</sup>See *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003) (Clearinghouse No. 55,216); *Monmouth Medical Center v. Thompson*, 257 F.3d 807, 813 (D.C. Cir. 2001) (Clearinghouse No. 54,019) (Medicare case); *Burnett v. Bowen*, 830 F.2d 731, 737–38 (7th Cir. 1987); *Ganem v. Heckler*, 746 F.2d 844, 850–52 (D.C. Cir. 1984); *Lopez v. Heckler*, 725 F.2d 1489, 1507–8 (9th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984); *Belles v. Schweiker*, 720 F.2d 509, 511–13 (8th Cir. 1983); *Kuehner v. Schweiker*, 717 F.2d 813, 819 (3d Cir. 1983); *Starnes v. Schweiker*, 715 F.2d 134, 141–42 (4th Cir. 1983), *vacated on other grounds sub nom. Starnes v. Heckler*, 467 U.S. 1223 (1984); *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981); *Martinez v. Richardson*, 472 F.2d 1121, 1125–26 (10th Cir. 1973). But see *Bisson v. Secretary of Health and Human Services*, 787 F.2d 181 (6th Cir. 1986).

<sup>93</sup>See, e.g., *Burnett*, 830 F.2d at 738; *Ganem*, 746 F.2d at 852.

<sup>94</sup>*United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

<sup>95</sup>*Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349 (1988) (citing *Gibbs*, 383 U.S. at 725).

<sup>96</sup>In determining whether a federal claim is sufficiently substantial to confer pendent jurisdiction, the Supreme Court requires federal courts to determine whether the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court." *Hagans v. Levine*, 415 U.S. 528, 543 (1974).

<sup>97</sup>*Gibbs*, 383 U.S. at 725. Such an expectation would turn on considerations of claim preclusion. Consequently the "common nucleus of operative fact" test is commonly equated to the "transaction or occurrence" standard employed in several federal rules of civil procedure and in preclusion law.

pendent jurisdiction based on “considerations of judicial economy, convenience and fairness to litigants.”<sup>98</sup> Questions of economy arise when the federal claim is dismissed or resolved before the pendent claim. The *Gibbs* Court observed that “if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.”<sup>99</sup> The Court subsequently qualified this statement to permit trial courts to entertain pendent claims after the jurisdiction-conferring claims are dismissed as moot.<sup>100</sup> Ultimately the issue turned on whether sending the pendent claim to state court would result in the wasteful and duplicative expenditure of resources. The *Gibbs* Court also cautioned against making “[n]eedless decisions of state law.”<sup>101</sup> Indeed, “if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.”<sup>102</sup>

## 2. Pendent Party Jurisdiction

Some federal courts subsequently used the *Gibbs* approach to support the exercise of jurisdiction over new parties over whom there was no independent basis of federal jurisdiction. The Court first considered the question of pendent party jurisdiction in *Aldinger v. Howard*.<sup>103</sup> The plaintiff there sued county officials under Section 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), and asserted a pendent state-law claim against the county. Because the state-law claim against the county arose from the same

nucleus of facts as the Section 1983 claim against its officials, the *Gibbs* test appeared to support the assertion of jurisdiction.

Nevertheless, the Court rejected the attempted use of pendent party jurisdiction and held the asserted expansion of subject-matter jurisdiction to be inconsistent with congressional limitations on the exercise of jurisdiction. The Court observed that adding a transactionally related state-law claim against a defendant subject to a properly filed federal claim was quite different from adding a pendent claim to a new defendant. The Court further held that Congress impliedly negated the exercise of pendent party jurisdiction over counties pursuant to 28 U.S.C. § 1343 because counties were not “persons” subject to Section 1983. Although the specific basis for this conclusion was later overruled in *Monell v. New York City Department of Social Services*, *Aldinger* continued to stand for the proposition that, before exercising pendent party jurisdiction, the court must determine whether Congress had impliedly negated the authority for doing so.<sup>104</sup>

In *Owen Equipment and Erection Co. v. Kroger* the Court extended the reasoning of *Aldinger* to a case involving Rule 14(a).<sup>105</sup> There the plaintiff in a tort case over which the court had diversity jurisdiction amended her complaint to add claims arising from the same accident against a nondiverse third-party defendant. The Court, reasoning that the exercise of jurisdiction would be inconsistent with the statutory requirement of complete diversity, rejected jurisdiction over the claims.

<sup>98</sup>*Id.* at 726.

<sup>99</sup>*Id.*

<sup>100</sup>See *Rosado v. Wyman*, 397 U.S. 397, 404 (1970).

<sup>101</sup>*Gibbs*, 383 U.S. at 726.

<sup>102</sup>*Id.* at 726–27.

<sup>103</sup>*Aldinger v. Howard*, 427 U.S. 1 (1976).

<sup>104</sup>*Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

<sup>105</sup>*Owen Equipment and Erection Co.*, 437 U.S. 365 (1978). See also *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (Court refused to permit class representatives who satisfied the jurisdictional amount requirement to represent a class in which some members were unable to meet the jurisdictional amount requirements).

*Finley v. United States* nearly marked the death knell of pendent party jurisdiction.<sup>106</sup> In *Finley* the Supreme Court held that a plaintiff suing the United States under the Federal Tort Claims Act was not allowed to assert a pendent party claim against jointly liable, nondiverse defendants even though the claim against the United States was within the exclusive jurisdiction of the federal courts. Modifying the test established in *Aldinger*, the Court held that federal courts had no authority to assert subject-matter jurisdiction over pendent parties absent an affirmative grant of jurisdiction by Congress. In the absence of a legislative basis for the assertion of pendent party jurisdiction, the plaintiff had to establish an independent basis of subject-matter jurisdiction for each defendant sued. Since most jurisdictional statutes say nothing about pendent jurisdiction, the *Finley* Court called into question the statutory bases of both ancillary and pendent jurisdiction.<sup>107</sup>

### 3. Ancillary Jurisdiction

The related doctrine of ancillary jurisdiction developed to empower a federal court to hear some counterclaims and third-party claims over which it lacked an independent jurisdictional base.<sup>108</sup> Generally, when a claim bears a logical relationship to the main claim or arises out of the same transaction or occurrence, courts permit ancillary jurisdiction. Ancillary jurisdiction consequently extended to compulsory counterclaims, cross-claims, and additional parties to such claims.<sup>109</sup> It did not generally extend to permissive counterclaims, which, by definition, lacked the required factual nexus with the main claim.<sup>110</sup>

However, satisfying the *Gibbs* constitutional test is necessary but not sufficient, the Court in *Owen* cautioned, to confer ancillary jurisdiction. Jurisdiction may also be limited by statute. Thus, since the diversity statute has been interpreted to require complete diversity, the *Owen* Court held, a plaintiff may not advance even transactionally related state claims against a nondiverse third-party defendant. As noted above, the *Finley* Court's insistence on an express legislative grant of ancillary jurisdiction effectively precluded most exercises of it.

### B. Statutory Codification of Supplemental Jurisdiction

Congress responded to *Finley* in 1990 by enacting 28 U.S.C. § 1367. The supplemental jurisdiction statute retains the basic division described by the Supreme Court in *Gibbs* between the power of a court to entertain a pendent claim and the discretionary authority of a court to decline to exercise that power. However, Congress, in codifying supplemental jurisdiction, also chose to codify several of the discretionary factors that warranted declining jurisdiction.

The statute first delineates the power of the federal court to hear supplemental claims and claims against supplemental parties. Section 1367(a), providing that “the district courts *shall* have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution,” confers power to entertain supplemental jurisdiction in mandatory terms.<sup>111</sup> Rather than using “common

<sup>106</sup>*Finley v. United States*, 490 U.S. 545 (1989).

<sup>107</sup>*Id.* at 551.

<sup>108</sup>See *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926).

<sup>109</sup>The Supreme Court, however, has made clear that the context in which the ancillary claim is asserted is important. In *Owen*, a diversity case, plaintiff asserted a state-law claim against a nondiverse third-party defendant arising out of the same transaction or occurrence. Although the court assumed that federal jurisdiction over the claim would be constitutional, Section 1332(a) negated jurisdiction.

<sup>110</sup>See generally 6 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1422, at 170 (2d ed. 1990). But see *Ambromovage v. United Mine Workers of America*, 726 F.2d 972, 990 (3d Cir. 1984) (suggesting that some permissive counterclaims may be constitutionally joined).

<sup>111</sup>*McLaurin v. Prater*, 30 F.3d 982, 984 (8th Cir. 1994) (“The [supplemental jurisdiction] statute’s use of the word ‘shall’ . . . is a mandatory command.”).

nucleus of operative fact,” Section 1367(a) explicitly makes direct reference to the constitutional “case or controversy” requirement, signaling Congress’ intent to vest the federal courts with the full measure of supplemental jurisdiction permitted by the Constitution.<sup>112</sup> The statute also expressly retains the doctrine of pendent party jurisdiction by mandating the inclusion of claims involving “the joinder or intervention of additional parties.”<sup>113</sup>

Section 1367(c) sets forth the occasions on which a federal court may exercise its discretion not to hear a supplemental claim or admit a supplemental party, despite the power of the court to hear such a claim. A federal court may decline to assert supplemental jurisdiction over a pendent claim if any of the circumstances specifically enumerated in Section 1367(c) apply: if “the claim raises a novel or complex issue of State law,” if “the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,” if “the district court has dismissed all claims over which it has original jurisdiction,” or if “in exceptional circumstances, there are other compelling reasons for declining jurisdiction.”

The first three factors in Section 1367(c)(1)–(3) “are rephrased *Gibbs* factors.”<sup>114</sup> The statute also contains a fourth basis for declining to exercise supplemental jurisdiction in “exceptional circumstances” that present “other compelling reasons.”<sup>115</sup> The statute offers no guidance on what those exceptional circumstances are or when they are appropriately deemed to be compelling. The courts have accordingly used a wide-ranging set of factors to gauge this exception to supplemental jurisdiction.<sup>116</sup>

Nowhere in the statute is there a reference to the *Gibbs* discretionary prong language of fairness, economy, comity, or convenience.<sup>117</sup> Neither does the legislative history suggest a duty to consider “judicial economy, convenience, fairness, and comity” to determine if assertion of supplemental jurisdiction would be proper.<sup>118</sup>

The statute has a framework that alternately uses mandatory commands and discretionary criteria for the exercise of supplemental jurisdiction. Section 1367(a) uses the term “shall,” indicating that once a supplemental claim is determined to be related to the federal claim within the court’s original jurisdiction such that they form the same case or con-

<sup>112</sup>See *Lyon v. Whisman*, 45 F.3d 758, 759–60 (3d Cir. 1995); *Palmer v. Hospital Authority*, 22 F.3d 1559, 1568 (11th Cir. 1994); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1276 (5th Cir.), cert. denied, 512 U.S. 1207 (1994); see also 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567.1 (2d ed. 1998) (§ 1367(a) incorporates the constitutional analysis of the *Gibbs* case).

<sup>113</sup>28 U.S.C. § 1367(a); see *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181 (7th Cir. 1993). In subsection (b), the statute further places limitations on the use of supplemental jurisdiction in actions founded “solely” on 28 U.S.C. § 1332, thus retaining the requirement of complete diversity between the parties. See *Herrick Co. v. SCS Communications Inc.*, 251 F.3d 315, 325 n.7 (2d Cir. 2001). The statute therefore legislatively overturns *Finley* and adopts *Owen*.

<sup>114</sup>R. Hinkle, *The Revision of 28 U.S.C. § 1367(c) and the Debate Over the District Court’s Discretion to Decline Supplemental Jurisdiction*, 69 TENNESSEE LAW REVIEW 111, 120 (2001).

<sup>115</sup>28 U.S.C. § 1367(c)(4).

<sup>116</sup>See, e.g., *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992), cert. denied, 506 U.S. 1087 (1993) (“exceptional circumstances” and “compelling reasons” existed to decline supplemental jurisdiction under § 1367(c)(4) since deciding “state-law claims in federal court while identical claims are pending in state court would be a pointless waste of judicial resources”); *Southwestern Bell Telephone Co. v. City of El Paso*, 168 F. Supp. 2d 640, 648 (W.D. Tex. 2001) (court refused to apply Section 1367(c)(4) to decline supplemental jurisdiction over counterclaim for trespass; a party’s inability to clarify a claim does not present an exceptional circumstance or a compelling reason to decline jurisdiction); *Blue Dane Simmental Corp. v. American Simmental Association*, 952 F. Supp. 1399, 1413 (D. Neb. 1997) (applying Section 1367(c)(4) to decline supplemental jurisdiction over counterclaim where pending action in state court raised similar issues); *Polaris Pool Systems v. Letro Products Inc.*, 161 F.R.D. 422, 425 (C.D. Cal. 1995) (rejection of supplemental jurisdiction over state-law counterclaims under Section 1367(c)(4) in light of pending state court action may further “the values of economy, convenience, fairness, and comity”).

<sup>117</sup>See *Gibbs*, 383 U.S. at 726; *Carnegie-Mellon*, 484 U.S. at 350 (“[A] federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness and comity in order to decide whether to exercise jurisdiction over a case . . .”).

<sup>118</sup>*Carnegie-Mellon*, 484 U.S. at 350.



troversy, the court must assert supplemental jurisdiction over the related claim. In contrast, the use of “may” in Section 1367(c) appears to confer on federal courts at least some discretion to decline to hear claims over which supplemental jurisdiction is potentially available in the context of the enumerated circumstances. The circuits are split over the question of whether “may” in Section 1367(c) incorporates the Gibbs factors or whether Section 1367(c) sets forth the only bases for declining supplemental jurisdiction.

The Seventh Circuit took the approach that Section 1367(c) merely incorporated the Gibbs discretionary factors.<sup>119</sup> The First, Third, and D.C. Circuits took a similar approach.<sup>120</sup> In *Executive Software North America Inc. v. U.S. District Court*, in contrast, the Ninth Circuit held that the statutory structure adopted by Congress demonstrated its intent for Section 1367(c) “to provide the exclusive means by which supplemental jurisdiction can be declined by a court . . . Accordingly, unless a court properly invokes a [S]ection 1367(c) category in exercising its discretion to decline to entertain pendent claims, supplemental jurisdiction must be asserted.”<sup>121</sup> Although subsections (c)(1)–(3) “appear to codify concrete applications of the underlying Gibbs values,” the Ninth Circuit reasoned, the statute “channels” their application and alters “the nature of

the Gibbs discretionary inquiry.”<sup>122</sup> Once a court identifies one of the “factual predicates” corresponding to one of the subsection 1367(c) categories, the exercise of discretion “is informed by whether remanding the pendent state claims comports with the underlying objective of most sensibly accommodat[ing] the values of ‘economy, convenience, fairness, and comity.’”<sup>123</sup>

Additionally the *Executive Software* court found that while the “other compelling reasons” referred to in the Section 1367(c)(4) “catchall” subsection referred back to the circumstances identified in subsections (c)(1)–(3), thus requiring the court to balance the Gibbs discretionary values of economy, convenience, fairness, and comity, the “exceptional circumstances” referred to in subsection (c)(4) meant that the court’s discretion should be employed only when the circumstances were “quite unusual.” This would require a district court to “articulate why the circumstances of the case are exceptional in addition to inquiring whether the balance of the Gibbs values provide compelling reasons for declining jurisdiction in such circumstances.”<sup>124</sup> The Ninth Circuit’s approach was either expressly adopted or effectively utilized by the Second, Eighth, and Eleventh Circuits.<sup>125</sup>

The Supreme Court did not directly acknowledge this controversy.<sup>126</sup> The Court in *City of Chicago v. International*

<sup>119</sup>See *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir.1993).

<sup>120</sup>See *O’Conner v. Commonwealth Gas*, 251, 262, 273 (1st Cir. 2001); *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995) (“the district court, in reaching its discretionary determination on the jurisdictional question, will have to assess the totality of the attendant circumstances”); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995) (“Section 1367(c) . . . was intended simply to codify the preexisting pendent jurisdiction law, enunciated in *Gibbs* and its progeny . . . .”); *Women Prisoners of District of Columbia v. District of Columbia*, 93 F.3d 910, 921 (D.C. Cir. 1996); *Diven v. Amalgamated Transit Union and Local* 689, 38 F.3d 598, 601 (D.C. Cir. 1994) (“Despite Congress’ use of ‘shall’ [in Section 1367(a)], the statute fairly exudes deference to judicial discretion—at least once the threshold determinations have been met and the court moves on to consider the exceptions.”).

<sup>121</sup>*Executive Software North America Inc. v. U.S. District Court*, 24 F.3d 1545, 1556 (9th Cir.1994) (citations omitted).

<sup>122</sup>*Id.*

<sup>123</sup>*Id.* at 1557 (citations and interior quotation marks omitted).

<sup>124</sup>*Id.* at 1558.

<sup>125</sup>See *Itar-Tass Russian News Agency v. Russian Kurier Inc.*, 140 F.3d 442, 447 (2d Cir. 1998); *McLaurin v. Prater*, 30 F.3d 982, 985 (8th Cir.1994); *Palmer v. Hospital Authority*, 22 F.3d 1559, 1569 (11th Cir.1994).

<sup>126</sup>For additional characterizations of the circuits’ treatment of the Gibbs factors in supplemental jurisdiction decisions, see J. Corey, *The Discretionary Exercise of Supplemental Jurisdiction Under the Supplemental Jurisdiction Statute*, 1995 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 1263, 1288–95 (1995), and Hinkle, *supra* note 114, at 120–35.

*College of Surgeons* observed that federal courts “can decline to exercise jurisdiction over pendent claims for a number of valid reasons.”<sup>127</sup> “Accordingly,” the Court added, “we have indicated that ‘district courts [should] deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine.’”<sup>128</sup> The Court flatly stated that “[t]he supplemental jurisdiction statute codifies these principles.”<sup>129</sup>

The Court also addressed the applicability, in light of the Eleventh Amendment, of Section 1367(a) and (d) in the context of claims against nonconsenting states. In *Raygor v. Regents of the University of Minnesota* the Court addressed a holding in *Pennhurst* before the enactment of Section 1367.<sup>130</sup> The Court noted that *Pennhurst* had barred the adjudication of pendent state-law claims against nonconsenting state defendants in federal court.<sup>131</sup> The Court held that neither did Section 1367(a) “authorize district courts to exercise jurisdiction over claims against nonconsenting States, even though nothing in the statute expressly excludes such claims.”<sup>132</sup> Section 1367(d), which tolls the period of limitations for supplemental claims while they are pending in federal court and for thirty days after they are dismissed, does not apply, the *Raygor* Court additionally held, to toll the period of limitations for state-law claims asserted against nonconsent-

ing state defendants and dismissed on Eleventh Amendment grounds.<sup>133</sup>

### C. Tactical Considerations—to Raise Supplemental Claims or Not

Although federal courts generally have discretion to adjudicate pendent state-law claims, plaintiffs who can raise pendent state-law claims are required as a practical matter to attempt to do so. In most states the alternative to raising pendent state-law claims in federal court litigation is forfeiting them. This is because the doctrine of *res judicata* or claim preclusion, applicable in most states, bars plaintiffs from litigating state-law claims that they could have raised as pendent claims in earlier federal court litigation. Therefore, even with only a slim chance that a federal court will exercise pendent jurisdiction, pendent state-law claims should be pleaded.

Most state courts confronted with state-law claims that were not joined (or attempted to be joined) in earlier federal court litigation were unwilling to assume that federal courts would have refused to exercise pendent jurisdiction and applied claim preclusion to bar litigation of the state-law claims in state courts.<sup>134</sup> Some state courts refused to preclude litigation of state claims when federal courts clearly would have declined to hear them as pendent claims for jurisdictional reasons.<sup>135</sup> or they also would have declined them for discretionary reasons.<sup>136</sup> However, those courts still applied

<sup>127</sup>*City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

<sup>128</sup>*Id.* at 172–73 (quoting *Carnegie-Mellon*, 484 U.S. at 357) (further citations omitted).

<sup>129</sup>*Id.* at 173.

<sup>130</sup>*Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002) (Clearinghouse No. 55,427).

<sup>131</sup>*Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

<sup>132</sup>*Raygor*, 534 U.S. at 541–42.

<sup>133</sup>*Id.* at 546–48. The Supreme Court further noted that “serious doubts about the constitutionality” would be raised if Section 1367(d) did in fact toll state claims against state defendants when those claims were dismissed on Eleventh Amendment grounds. *Id.* at 542. The Court’s ruling did not reach “the application or constitutionality of § 1367(d) when a State consents to suit or when a defendant is not a State.” *Id.* at 547.

<sup>134</sup>See, e.g., *Milone v. Nissan Motor Corp.*, 594 A.2d 642, 644 (N.J. Super. Ct. App. Div. 1991).

<sup>135</sup>E.g., *Mayronne v. Vaught*, 655 So. 2d 390, 392–93 (La. App. 4 Cir. 1995); *Craig v. County of Los Angeles*, 221 Cal. App. 3d 1294, 1300 (Cal. Ct. App. 1990).

<sup>136</sup>E.g., *Toomey v. Blum*, 54 N.Y.2d 669, 426 N.E.2d 181, 442 N.Y.S.2d 774 (1981).

claim preclusion to claims when they could not conclude that the federal court *clearly* would have declined jurisdiction.<sup>137</sup>

## VII. Removal Jurisdiction

Federal courts' exercise of removal jurisdiction is set forth in certain statutory provisions.

### A. General Removal—28 U.S.C. § 1441

The governing provision of the principal federal removal statute, 28 U.S.C. § 1441(a), authorizes a defendant to remove from state court to federal court “any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . . .”<sup>138</sup> Federal courts are granted “original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.”<sup>139</sup> Thus Section 1441(b) permits the removal of a case containing claims that “arise under” federal law, regardless of the citizenship or residence of the parties.<sup>140</sup> Otherwise, general removal jurisdiction must be founded upon diversity, with none of the defendants being citizens of the forum state.<sup>141</sup> Section 1441(a), in effect,

requires federal courts considering removal petitions to decide whether they could have initially exercised jurisdiction over the case.<sup>142</sup>

The implication of this linkage between removal and original jurisdiction for cases “arising under” federal law can be seen, for example, in the All Writs Act.<sup>143</sup> The Act, which allows federal courts to issue writs in aid of their jurisdiction but which does not itself provide an independent grant of federal jurisdiction, cannot provide the basis for removal.<sup>144</sup> Neither can principles of “ancillary jurisdiction” confer the original jurisdiction necessary for removal since the assertion of jurisdiction over ancillary claims must first be preceded by jurisdiction over a case or controversy.<sup>145</sup> By contrast, a state appeal under the Administrative Procedure Act of an administrative ruling to state court is removable to federal court as long as the complaint presents a well-pleaded claim of administrative action violating federal law even if coupled with state-law claims that require deferential, on-the-record review of the administrative findings.<sup>146</sup> Removal otherwise permitted by Section 1441(a) may be barred by Congress.

<sup>137</sup>E.g., *Penn. v. Iowa State Board of Regents*, 577 N.W.2d 393, 401–2 (Iowa 1998); *Anderson v. Phoenix Investment Counsel Inc.*, 440 N.E.2d 1164, 1168–69 (Mass. 1982); *Rennie v. Freeway Transportation*, 656 P.2d 919, 924 (Or. 1982).

<sup>138</sup>“Defendant” is defined narrowly. A state court plaintiff may not remove a counterclaim, which, had it been an independent action, would have been subject to original federal jurisdiction. *Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

<sup>139</sup>See 28 U.S.C. § 1331.

<sup>140</sup>Certain state court civil actions, such as those arising under state workmen’s compensation laws or the federal Violence Against Women Act of 1994, expressly may not be removed to federal court. 28 U.S.C. § 1445.

<sup>141</sup>28 U.S.C. § 1441(b). See also 28 U.S.C. § 1332(a) (federal diversity jurisdiction); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996) (the “complete diversity” requirement of Section 1332(a), which mandates that the citizenship of each plaintiff must be diverse from the citizenship of each defendant, applies to removal jurisdiction based on diversity).

<sup>142</sup>See *City of Chicago*, 522 U.S. at 163. The Supreme Court formerly treated the removal jurisdiction of the federal courts as derivative; the Court reasoned that federal courts could entertain cases removed from state courts only if the state court originally had subject-matter jurisdiction of the suit. See *Lambert Run Coal Co. v. Baltimore and Ohio Railroad*, 258 U.S. 377, 382 (1922). Congress ended this practice in 1986 by amending 28 U.S.C. § 1441(e) to provide that the federal court to which the action is removed “is not precluded from hearing and determining any claim” in the action because the state court “did not have jurisdiction over that claim.” Thus federal courts may now exercise removal jurisdiction in cases in which they have subject-matter jurisdiction but the state courts do not.

<sup>143</sup>28 U.S.C. § 1651(a).

<sup>144</sup>*Syngenta Crop Protection Inc. v. Henson*, 123 S. Ct. 366 (2002).

<sup>145</sup>*Id.* at 370–71.

<sup>146</sup>*City of Chicago*, 522 U.S. at 156.

However, such prohibitions on removal must be expressly stated.<sup>147</sup>

Under Section 1441(a) the removed “civil action” must also have been pending in a state “court.”<sup>148</sup> The federal courts are divided on whether removal can extend to proceedings before administrative agencies. Some applied a functional test, allowing removal in cases where a state agency functions like a court.<sup>149</sup> Other courts disavowed the use of such a test because they found the statutory term “state court” to be unambiguous.<sup>150</sup>

Under the “well-pleaded complaint” rule, federal jurisdiction must appear on the face of a complaint that meets traditional pleading rules, and “[t]he well-pleaded complaint rule applies to the original jurisdiction of the district courts as well as to their removal jurisdiction.”<sup>151</sup> The Supreme Court said: “The rule makes the plaintiff master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.”<sup>152</sup> Thus removal may not be based on federal defenses, whether they be anticipated in the complaint or actually raised in the answer.<sup>153</sup> However, when

plaintiff’s state-law claim is preempted by federal law, removal is permitted.<sup>154</sup>

The Court recently decided two important cases relating to removal and the Eleventh Amendment. In *Wisconsin Department of Corrections v. Schacht* the Court held that the presence of an Eleventh Amendment-barred claim against a State defendant in an otherwise removable case did not deprive the federal court of the removal jurisdiction that would otherwise exist.<sup>155</sup> The Court noted that the Eleventh Amendment “does not automatically destroy jurisdiction” but instead “grants the State a legal power to assert a sovereign immunity defense,” which can be waived.<sup>156</sup> Thus a State’s proper assertion of an Eleventh Amendment defense after removal prevents the federal court from hearing the barred claim, but it does not destroy removal jurisdiction over the remaining claims, which the court may proceed to hear.<sup>157</sup>

Noting its long-standing acknowledgment of the principle that a State’s voluntary appearance in federal court constitutes a waiver of immunity, the Supreme

<sup>147</sup>*Breuer v. Jim’s Concrete of Brevard*, 123 S. Ct. 1882 (2003) (Clearinghouse No. 55,253).

<sup>148</sup>*McDowell v. Wetterau Inc.*, 910 F. Supp. 236 (W.D. Pa. 1995) (removal allowed from state justice-of-the-peace court). But see *DeCoteau v. Sentry Insurance Co.*, 915 F. Supp. 155 (D.N.D. 1996) (removal not allowed from tribal court).

<sup>149</sup>See, e.g., *Volkswagon de Puerto Rico Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38, 44 (1st Cir. 1972). The Seventh Circuit’s use of a functional test in *Floeter v. C.W. Transport Inc.*, 597 F.2d 1100, 1102 (7th Cir. 1979), was recently questioned by the Circuit in *Wirtz Corp. v. United Distillers and Vintners North America Inc.*, 224 F.3d 708, 713 (7th Cir. 2000) (stressing need to examine *Floeter* decision in greater detail and limiting its holding to its facts).

<sup>150</sup>See, e.g., *Oregon Bureau of Labor and Industries ex rel. Richardson v. U.S. West Communications Inc.*, 288 F.3d 414, 419 (9th Cir. 2002).

<sup>151</sup>*Franchise Tax Board*, 463 U.S. at 10 n.9.

<sup>152</sup>*Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). An “independent corollary” to the well-pleaded-complaint rule is the “artful pleading” doctrine, which holds that “a plaintiff may not defeat removal by omitting to plead necessary federal questions.” *Rivet*, 522 U.S. at 475 (quoting *Franchise Tax Board*, 463 U.S. at 22). If the federal court determines that the plaintiff has “artfully pleaded” claims in this manner, it may allow removal even though no federal question appears on the face of the complaint. The artful-pleading doctrine generally allows removal in cases where federal law completely preempts state-law claims pleaded by the plaintiff. *Rivet*, 522 U.S. at 475.

<sup>153</sup>*Rivet*, 522 U.S. at 475 (affirmative preclusion defense resting on prior federal judgment is not a basis for removal).

<sup>154</sup>*Beneficial National Bank v. Anderson*, 123 S. Ct. 2058, 2063 (2003) (Clearinghouse No. 55,271).

<sup>155</sup>*Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998).

<sup>156</sup>*Id.* at 389 (citations omitted). The Supreme Court also rejected the argument that a remand was appropriate under 28 U.S.C. § 1447(c). If an Eleventh Amendment defense pertains to subject-matter jurisdiction, Section 1447(c) requires a remand only when the entire case is without subject-matter jurisdiction, not when jurisdiction is lacking over only one claim within the case. *Id.* at 391–92.

<sup>157</sup>*Id.* at 392–93.

Court in *Lapides v. Board of Regents* held that a State did waive its Eleventh Amendment immunity when it removed a case from state court to federal court.<sup>158</sup> The Court's holding, however, was limited to a situation in which a state statute waived sovereign immunity from state-law suits in state court and in which no valid federal claim lay against the State.<sup>159</sup> This is an exception to the well-pleaded-complaint rule of general removal. The Court did not reach the question whether removal of federal claims abrogated a State's Eleventh Amendment immunity.<sup>160</sup>

### B. Federal Officer Removal— 28 U.S.C. § 1442

Under 28 U.S.C. § 1442(a)(1) the United States, any federal agency, or any officer of the United States or agency (or person acting under that officer) sued in their individual or official capacity may remove to federal court any civil action arising from “any act under color of such office.” The statute thus authorizes removal to federal court of state court actions against federal agencies and individuals who are acting in the course of their employment by or on behalf of the federal government.

Federal agencies and officers may therefore remove cases under Section 1442

that other defendants could not under Section 1441: “The special right of removal conferred on federal officers by statute has been held to be absolute, and may be exercised even though the action might not have been brought initially in a federal court.”<sup>161</sup> Removal is proper when none of the other defendants in the action joins in the removal notice or when the federal officer is sued as a third-party defendant rather than as an original defendant.<sup>162</sup>

Most significant, federal officers may remove to federal court state cases in which they have a federal defense, such as absolute or qualified immunity.<sup>163</sup> Without such a federal defense, the Court declined to interpret Section 1442 to permit removal of cases arising solely under state law.<sup>164</sup> Moreover, federal officers must establish that the state suit is “for an act under color of office.”<sup>165</sup> To do so, the officer must show a “‘causal connection’ between the charged conduct and asserted official authority.”<sup>166</sup> Such a connection usually serves as the predicate for a colorable immunity defense.<sup>167</sup> Section 1442 therefore allows removal only when the federal defendant's act essentially was ordered or demanded by federal authority, thereby giving rise to the federal defense required by the statute.<sup>168</sup>

<sup>158</sup> *Lapides v. Board of Regents*, 535 U.S. 613 (2002) (Clearinghouse No. 53,836).

<sup>159</sup> *Id.* at 617. Plaintiff's Section 1983 damages claim against the State was barred since a State was not a “person” for purposes of such a claim. *Id.* (citing *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989)). The *Lapides* Court accordingly noted that the U.S. district court might remand the state-law tort claims against the State to state court under the supplemental jurisdiction standards referred to in 28 U.S.C. § 1367(c)(3). *Id.*

<sup>160</sup> See *Bank of Lake Tahoe v. Bank of America*, 318 F.3d 914, 916–19 (9th Cir. 2003) (Nevada waived Eleventh Amendment immunity from state-law claims by joining in removal to federal court).

<sup>161</sup> 14C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3727, at 166–68 (3d ed. 1998).

<sup>162</sup> *Id.*

<sup>163</sup> In *Jefferson County v. Acker*, 527 U.S. 423 (1999), federal judges were permitted to remove to federal court collection actions filed by the county in state court and seeking payment of an occupational license fee. The judges asserted an ultimately unsuccessful federal defense on the grounds of intergovernmental tax immunity.

<sup>164</sup> *Mesa v. California*, 489 U.S. 121 (1989).

<sup>165</sup> 28 U.S.C. § 1442(a)(3).

<sup>166</sup> *Willingham v. Morgan*, 395 U.S. 402, 409 (1969) (citation omitted). Such a connection was established by the federal judges in *Jefferson County* whose legal theory was that the county's enforcement action was grounded upon their being engaged in the occupation of federal judges.

<sup>167</sup> See *Mesa*, 489 U.S. at 133 (federal employees prosecuted for crimes involving vehicles had no immunity defense and therefore did not “act under color of such office”).

<sup>168</sup> WRIGHT ET AL., *supra* note 161, at 146–57.

### C. Removal of Joined State-Law Claims

Advocates may file, in state court, claims that arise under both federal and state law, and removal is possible. “[T]he presence of even one claim ‘arising under’ federal law is sufficient,” the Supreme Court “suggested,” “to satisfy the requirement that the case be within the original jurisdiction of the district court for removal.”<sup>169</sup> The presence of related state-law claims does not alter the fact that pleaded federal claims constitute “civil actions” within the “original jurisdiction” of the federal courts for purposes of removal.<sup>170</sup>

Federal courts may exercise removal jurisdiction over state-law claims joined with removed federal claims under the doctrine of supplemental jurisdiction. The codification of supplemental jurisdiction principles in 28 U.S.C. § 1367, the Court held, “applies with equal force to cases removed to federal court as to cases initially filed there; a removed case is necessarily one ‘of which the district courts . . . have original jurisdiction.’”<sup>171</sup> Thus, when joined state-law claims meet the statutory standards of supplemental jurisdiction, federal courts may exercise removal jurisdiction over both the state and the federal claims.

Federal courts may also in appropriate circumstances exercise removal jurisdiction over unrelated state-law claims pursuant to 28 U.S.C. § 1441(c), which allows a federal court to remove an “entire case” and determine “all issues therein,” “whenever a separate and independent

claim or cause of action” within the federal question jurisdiction of Section 1331 is joined with “one or more otherwise non-removable claims or causes of action.” Alternatively the court may utilize its discretion to remand “all matters in which State law predominates.”<sup>172</sup> Thus Section 1441(c) specifies circumstances justifying both removal and remand in cases involving both federal and state claims. In contrast to the exercise of Section 1367 supplemental jurisdiction upon removal, however, Section 1441(c) “provides for removal or remand *only* where the federal question claims are ‘separate and independent’ from the state law claims with which they are joined in the complaint . . . Suits involving pendent (now ‘supplemental’) state claims that ‘derive from a common nucleus of operative fact’ . . . do not fall within the scope of § 1441(c), since pendent claims are not ‘separate and independent.’”<sup>173</sup> The federal court must retain the federal claims if they are separate and independent from the state-law claims and exercise its discretion to remand *only* those state-law claims that it can decline to hear under the supplemental jurisdiction principles of 28 U.S.C. § 1367(c).<sup>174</sup> Conversely the district court abuses its discretion if, under Section 1441(c), it remands state-law claims that are not separate and independent from the removed federal claims.<sup>175</sup> The statutory phrase allowing remand of “all matters in which State law predominates” should not allow the federal court to remand the entire case to state court.<sup>176</sup>

<sup>169</sup>*Schacht*, 524 U.S. at 386 (citing *City of Chicago*, 522 U.S. at 163–66).

<sup>170</sup>*Id.* (citing *City of Chicago*, 522 U.S. at 166).

<sup>171</sup>*City of Chicago*, 522 U.S. at 165 (citing 28 U.S.C. § 1367(a)) (further citation omitted).

<sup>172</sup>28 U.S.C. § 1441(c).

<sup>173</sup>*Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 786 (3d Cir. 1995) (citations omitted). The combination of supplemental jurisdiction and Section 1441(c) raises an interpretive question whether a claim may not be “separate and independent” enough to qualify for Section 1441(c) while also being too separate and independent to qualify for supplemental jurisdiction.

<sup>174</sup>*Id.* at 786–87; see discussion of § 1367(c).

<sup>175</sup>See *Eastus v. Blue Bell Creameries*, 97 F.3d 100, 106 (5th Cir. 1996).

<sup>176</sup>*Id.* at 106–7 (acknowledging contrary decisions); WRIGHT & KANE, *supra* note 11, § 39, at n.43 (criticizing the holdings of courts remanding entire cases under Section 1441(c) and stating, “The remand provision of § 1441(c) surely applies only to cases removed under that subsection”).

## D. Removal Procedure

The statutory procedures for removal are to be strictly construed.<sup>177</sup> A defendant removing a civil action must file in the U.S. district court for the district and division in which the state proceeding is pending a “notice of removal” which contains “a short and plain statement of the grounds for removal” and which attaches the process, pleadings, and orders served upon the defendant in the action.<sup>178</sup> Generally the notice of removal must be filed within thirty days after simultaneous service of the summons and complaint or formal service of the complaint, “through service or otherwise,” subsequent to and separate from the summons but only through formal service of process.<sup>179</sup>

In a case not originally removable, the defendant may remove to federal court within thirty days of receiving information in an “amended pleading, motion, order or other paper” which allows the defendant to “ascertain . . . that the case is one which is or has become removable . . . .”<sup>180</sup> In cases founded upon diversity jurisdiction, removal is not permitted more than one year after commencement of the action.<sup>181</sup>

Removal is effected when, promptly after filing the notice of removal with the federal court, the defendant files a copy with the clerk of the state court and gives written notice to all adverse parties.<sup>182</sup> A

motion to remand the case to state court “on the basis of any defect other than lack of subject matter jurisdiction” must be made within thirty days of the filing of the notice of removal.<sup>183</sup> If at any time before final judgment the federal court apparently lacks subject-matter jurisdiction, the case “shall be remanded.”<sup>184</sup>

## E. Remands—28 U.S.C. § 1447(c)

In addition to Section 1441(c), 28 U.S.C. § 1447(c) provides that, “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.”<sup>185</sup> Removed civil actions that could not originally have been filed in federal court must be remanded to state courts.

Federal courts have a general nonstatutory power to remand pendent state claims, the Supreme Court concluded, besides the power to remand cases under the removal statutes. Federal courts possessing discretion to hear pendent state-law claims may remand those claims to state court instead of dismissing them outright, the Court in *Carnegie-Mellon University v. Cohill* held.<sup>186</sup>

## VIII. Abstention—Discretion to Decline Jurisdiction

Federal courts have a “virtually unflagging obligation” to exercise the jurisdiction vested in them by Congress.<sup>187</sup> Nonetheless, the Supreme Court identi-

<sup>177</sup>*Syngenta Crop Protection*, 123 S. Ct. at 369–70.

<sup>178</sup>28 U.S.C. § 1446(a); see *Burns v. Minnesota*, 61 F.3d 908 (8th Cir. 1995) (insufficient notice of removal).

<sup>179</sup>28 U.S.C. § 1446(b); *Murphy Bros. v. Michetti Pipe Stringing Inc.*, 526 U.S. 344 (1999). The “initial pleading” in the statute refers not only to the complaint but also to any pleading “contain[ing] sufficient information to enable the defendant to intelligently ascertain the basis for removal.” *Whitaker v. American Telecasting Inc.*, 261 F.3d 196, 203 (2d Cir. 2001) (quoting *Brooklyn Hospital Center v. Diversified Information Technologies Inc.*, 133 F. Supp. 2d 197, 201 (E.D.N.Y. 2001)).

<sup>180</sup>28 U.S.C. § 1446(b). See, e.g., *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 779 (9th Cir. 1994), cert. denied, 513 U.S. 1102 (1995) (plaintiffs’ reply brief, filed two years after commencement of action in state court, set forth removable federal claim which triggered thirty-day removal period).

<sup>181</sup>*Eyak*, 25 F.3d at 779.

<sup>182</sup>28 U.S.C. § 1446(d).

<sup>183</sup>28 U.S.C. § 1447(c).

<sup>184</sup>*Id.*

<sup>185</sup>*Id.* (emphasis added).

<sup>186</sup>*Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988).

<sup>187</sup>*Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). See also *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

fied a number of extraordinary circumstances in which important countervailing interests justified the development of doctrines under which federal courts had discretion to decline to exercise jurisdiction.<sup>188</sup> These abstention doctrines allow federal courts to defer to state courts and state judicial proceedings as the basis for refusing to exercise jurisdiction. Although the abstention doctrines have different characteristics and will be discussed separately, the Court observed that the “various types of abstention are not rigid pigeon holes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.”<sup>189</sup>

#### A. The *Younger* Doctrine— Equitable Abstention

The Supreme Court limited the ability of federal courts to enjoin or otherwise to interfere with state judicial proceedings in *Younger v. Harris* and subsequent decisions.<sup>190</sup> In *Younger* plaintiffs sought a federal injunction against a state criminal prosecution on the ground that the state statute alleged to have been violated was unconstitutionally vague. The Court held that such an injunction could be

granted only in extraordinary circumstances to prevent immediate irreparable injury. Such a standard is not met when the federal plaintiff has a defense in the state proceeding. Such a defense is regarded as an adequate remedy at law even where the pendency of the criminal prosecution is alleged to chill First Amendment rights incidentally. The Court held that the result was also commanded by principles of federalism, comity, and equality.

Recognizing that, in some circumstances, state court defendants should not be subjected to trial, the *Younger* Court established some exceptions to its broad policy of nonintervention. When state court criminal prosecutions are brought in bad faith or for the purpose of harassment (such as repeated prosecutions without any hope of ultimately securing a conviction), federal equitable principles justify intervention.<sup>191</sup> The *Younger* Court explained that there might be “extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.”<sup>192</sup> The Court in *Younger* further noted the possibility “that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause,

<sup>188</sup> The Supreme Court did “often acknowledge[] that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.” *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996) (citations omitted) (Clearinghouse No. 51,212). Nevertheless, the Court went on to observe: “This duty is not, however, absolute . . . . Indeed, we have held that federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest, for example, where abstention is warranted by considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration. . . .” *Id.* (citations and internal quotation marks omitted). The Court recognized, however, that abstention from the exercise of federal jurisdiction was the exception, not the rule, and it should rarely be invoked. *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992).

<sup>189</sup> *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n. 9 (1987).

<sup>190</sup> *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>191</sup> *Perez v. Ledesma*, 401 U.S. 82, 85 (1971). This inquiry largely hinges, the lower federal courts have since emphasized, upon a showing of the subjective motivation of the state authority in bringing the proceeding. This has proven to be a difficult task for plaintiffs.

<sup>192</sup> *Younger*, 401 U.S. at 53. See also *Kugler v. Helfant*, 421 U.S. 117, 124–25 (1975). The *Kugler* Court observed that such circumstances would involve the state court or agency being “incapable of fairly and fully adjudicating the federal issues before it.” Bias might be one such circumstance, as in *Gibson v. Berryhill*, 411 U.S. 564 (1973), but plaintiffs otherwise faced uphill challenges in invoking this second exception to abstention. See *Diamond “D” Construction Corp. v. McGowen*, 282 F.3d 191, 201–2 (2d Cir. 2002) (“extraordinary circumstances” exception did not apply where plaintiff could pursue state mandamus relief for state agency’s alleged delay in conducting administrative proceedings); *Lawson v. City of Buffalo*, 2002 U.S. App. LEXIS 25876 (2d Cir. Dec. 16, 2002) (“irreparable harm” exception to *Younger* inapplicable in due process contest of state criminal court order of demolition of plaintiffs’ homes where no demolition order was currently in effect and any future order could be appealed in state court); *Employers Resource Management Co. v. Shannon*, 65 F.3d 1126 (4th Cir. 1995), cert. denied, 516 U.S. 1094 (1996) (refusing to find “extraordinary circumstances” to *Younger* abstention in federal action since there was no showing that state commission was incapable of reviewing ERISA (Employee Retirement Income Security Act) federal preemption claim in context of state administrative proceeding).



sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.”<sup>193</sup>

Although *Younger* arose as a suit to enjoin a pending state criminal proceeding, the *Younger* doctrine has expanded substantially. In a companion case, the Court held that declaratory judgment actions were also barred when injunctions against pending state criminal proceedings were unavailable.<sup>194</sup> The Court has expanded *Younger* beyond state court criminal proceedings. In *Huffman v. Pursue Ltd.* the Court applied *Younger* to an attempt to enjoin a state court nuisance proceeding based on alleged violations of state obscenity statutes.<sup>195</sup> Noting that the statutes were closely related to and in aid of criminal statutes, the Court held that abstention was required. The Court regarded as open the issue of whether *Younger* considerations applied to all civil proceedings,<sup>196</sup> However, the Court applied *Younger* to civil cases in which the state was a party in civil enforcement proceedings.<sup>197</sup> It also applied the *Younger* doctrine to civil proceedings involving important state interests in which the state was not a party where the state court’s ability to exercise a particular judicial function was at issue.<sup>198</sup>

In addition to expanding *Younger* from criminal to civil proceedings in which the state had an important interest, the Court applied *Younger* to pending state admin-

istrative proceedings. In *Middlesex County Ethics Commission v. Garden State Bar Association* the Court relied on the *Younger* doctrine to deny a federal injunction against state bar disciplinary proceedings.<sup>199</sup> The Court justified that decision, in part, on the close relationship between lawyer disciplinary proceedings and the supervisory role played by the state courts. In *Ohio Civil Rights Commission v. Dayton Christian Schools Inc.*, a sectarian school, the respondent in a state administrative proceeding involving alleged gender-based employment discrimination, sought a federal injunction against the pending state administrative proceeding.<sup>200</sup> In applying *Younger*, the Court emphasized the important state interest in rooting out employment discrimination, and the federal plaintiff’s opportunity to raise the First Amendment claim in the administrative proceeding, as justifying its refusal to permit the district court to entertain suits challenging the validity of administrative enforcement proceedings on First Amendment grounds.

By contrast, in its decision in *New Orleans Public Service Inc. v. Council of City of New Orleans*, a Section 1983 challenge to the operation of a city council utility rate order on the grounds of federal preemption, the Court balked at extending *Younger* abstention beyond nonjudicial state proceedings.<sup>201</sup> The Court noted that “it has never been suggested that *Younger* requires abstention in deference

<sup>193</sup>*Younger*, 401 U.S. at 53–54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). The Supreme Court in *Younger* used the “patently violative” exception as an illustration of “extraordinary circumstances” in which an exception might be justified. The Court, however, never further defined this exception or indicated what other “extraordinary circumstances,” if any, would fit into it. The “possible unconstitutionality of a statute ‘on its face’ does not in itself justify an injunction against good faith attempts to enforce it,” especially absent “any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief.” *Id.* at 53–54.

<sup>194</sup>See *Samuels v. Mackell*, 401 U.S. 66 (1971).

<sup>195</sup>*Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975).

<sup>196</sup>See, e.g., *Pennzoil*, 481 U.S. at 14 n.12; *Moore v. Sims*, 442 U.S. 415, 423 n.8 (1979).

<sup>197</sup>See *Trainor v. Hernandez*, 431 U.S. 434 (1977).

<sup>198</sup> See, e.g., *Pennzoil*, 481 U.S. at 11 (proceeding to enforce judgment on tortious inducement of breach of contract); *Moore*, 442 U.S. 415 (1979) (child neglect statutes); *Juidice v. Vail*, 430 U.S. 327 (1977) (contempt of court proceedings).

<sup>199</sup>*Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423 (1982).

<sup>200</sup>*Ohio Civil Rights Commission v. Dayton Christian Schools Inc.*, 477 U.S. 619 (1986).

<sup>201</sup>*New Orleans Public Service Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989).

to a state judicial proceeding reviewing legislative or executive action.”<sup>202</sup> To the contrary, “[s]uch a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court’s refusal to decide a case in deference to the States.”<sup>203</sup> Analyzing the city council’s rate-making proceeding and the subsequent state court challenge to it, the Court determined that the rate-making decision itself was a completed legislative action and that the state court review was not an extension of the legislative process. The sought-after federal court relief accordingly did not represent “the interference with ongoing judicial proceedings against which *Younger* was directed.”<sup>204</sup>

In sum, a number of federal courts have since adopted in slightly varying formulations a three-part threshold test derived from *Middlesex County Ethics Commission* for assessing the propriety of invoking *Younger*.<sup>205</sup> Under this analysis, absent extraordinary circumstances inherent in the exceptions stated in *Younger*, abstention is generally proper when (1) there are ongoing state adjudicative proceedings, which (2) implicate important state interests, and which (3)

provide an adequate opportunity to raise the plaintiff’s federal claims.

As for the last point, a key assumption of the *Younger* doctrine is that plaintiffs should be able to assert federal defenses to a state proceeding in the course of that single state court proceeding.<sup>206</sup> If the underlying state proceedings afford plaintiffs a timely opportunity to present their federal claims, then abstention is not appropriate.<sup>207</sup> Thus, in *Dayton Christian Schools*, a question was as to whether the federal court plaintiffs could have raised their First Amendment defense in the course of the proceeding.<sup>208</sup> The Court assumed that they could not, but the Court nonetheless observed that the school could have raised its federal claims in the state court appeal of any state administrative orders.<sup>209</sup> Many lower federal court decisions have since hinged their *Younger* abstention analyses upon finding the state forum to be an adequate outlet for the raising of federal claims. For example, in affirming abstention in a suit seeking an injunction against the prosecution of a state attorney discipline complaint in *Fieger v. Thomas*, the Sixth

<sup>202</sup>*Id.* at 368.

<sup>203</sup>*Id.* (citations omitted).

<sup>204</sup>*Id.* at 372.

<sup>205</sup>E.g., *Joseph A. v. Ingram*, 275 F.3d 1253, 1267 (10th Cir. 2002); *Diamond “D” Construction Corp. v. McGowan*, 282 F.3d 191 (2d Cir. 2002); *Green v. City of Tucson*, 255 F.3d 1086, 1095–96 (9th Cir.), cert. dismissed, 533 U.S. 966 (2001); *Wightman v. Texas Supreme Court*, 84 F.3d 188, 189 (5th Cir. 1996), cert. denied, 519 U.S. 1080 (1997); *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 638 (1st Cir. 1996); *Fieger v. Thomas*, 74 F.3d 740, 743–44 (6th Cir. 1996);

<sup>206</sup>“This doctrine of federal abstention rests foursquare on the notion that, in the ordinary course, ‘a state proceeding provides an adequate forum for the vindication of federal constitutional rights.’” *Diamond “D” Construction Corp.*, 282 F.3d at 198 (quoting *Cullen v. Fliegner*, 18 F.3d 96, 103 (2d Cir.), cert. denied sub nom. *Tuxedo Union Free School District v. Cullen*, 513 U.S. 985 (1994)) (citing *Kugler v. Helfant*, 421 U.S. 117, 124 (1975)).

<sup>207</sup>The Supreme Court in *Juidice v. Vail*, 430 U.S. 327, 337 (1977) emphasized: “Here it is abundantly clear that [plaintiffs] had an opportunity to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention . . . . [Plaintiffs] need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate.” (citations and footnotes omitted). *Younger* abstention “naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.” *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). See also *Pennzoil Co.*, 481 U.S. at 14 (quoting *Moore*, 442 U.S. at 432) (holding that “the burden on this point rests on the federal plaintiff to show ‘that state procedural law barred presentation of [its] claims.’”)

<sup>208</sup>*Dayton Christian Schools*, 477 U.S. at 619.

<sup>209</sup>*Id.* at 629 (“[I]t is sufficient under *Middlesex* . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding.”). Similarly, in *Huffman v. Pursue Ltd.*, 420 U.S. 592, 608 (1975), the Supreme Court concluded that, where the plaintiff had not exhausted state court appeals, abstention was appropriate. The *Dayton Christian Schools* and *Huffman* decisions should not be confused with either *Patsy v. Board of Regents*, 457 U.S. 496 (1982), or *Monroe v. Pape*, 365 U.S. 167 (1961). The Court in *Patsy* held that exhaustion of administrative remedies was not required under Section 1983. In *Monroe* the Court held that exhaustion of state judicial remedies was not a prerequisite to litigation under Section 1983. The *Dayton* and *Huffman* holdings do not undermine either rule; rather they prohibit injunctive relief against ongoing administrative or judicial proceedings.

Circuit held that the state proceedings gave adequate opportunities for plaintiff to raise his constitutional challenges to the grievance procedures.<sup>210</sup> The Sixth Circuit noted that, even if the attorney disciplinary board could not declare a rule of professional conduct unconstitutional, the board could still refuse to enforce the rule or otherwise narrowly construe it.<sup>211</sup> Similarly, in *Hirsh v. Justices of the Supreme Court*, another decision upholding abstention in a challenge to lawyer disciplinary proceedings, the Ninth Circuit found *Younger* to be satisfied.<sup>212</sup> The Ninth Circuit's finding is notwithstanding that the state constitution precluded the bar court from considering federal constitutional claims since discretionary state judicial review was available.<sup>213</sup>

The adequate state forum factor also frequently arises in the specific context of

institutional reform litigation raising systemic constitutional challenges to the administration of state agency or court proceedings. These cases generally present the issue of whether broad-ranging federal court challenges to procedural deficiencies in child welfare, public benefits, and other adjudicatory systems should be dismissed due to asserted opportunities for plaintiffs to raise these same systemic claims in the very state court and administrative hearings that form the bases for the litigation. The decisions produced somewhat mixed outcomes.<sup>214</sup>

The *Younger* doctrine further presupposes an ongoing state proceeding. If no state court proceeding is actually pending at the commencement of the federal litigation, both declaratory and injunctive relief may be available to the federal plaintiff.<sup>215</sup> In *Ankenbrandt v. Richards*, a

<sup>210</sup>*Fieger v. Thomas*, 74 F.3d 740 (6th Cir. 1996).

<sup>211</sup>*Id.* at 747–48; see also *Dayton Christian Schools*, 477 U.S. at 629 (noting that a holding that the state agency could not interpret its own statutory mandate in light of federal constitutional principles would be an “unusual doctrine”).

<sup>212</sup>*Hirsh v. Justices of the Supreme Court*, 67 F.3d 708 (9th Cir. 1995).

<sup>213</sup>*Id.* at 713. See also *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633 (1st Cir. 1996) (abstention upheld in challenge to enforcement of confidentiality of attorney disciplinary proceedings rule, where state court appeal, despite its being closed to the public, still presented adequate opportunity to litigate federal claims); *Doe v. Connecticut*, 75 F.3d 81 (2d Cir. 1996) (abstention invoked in doctor's Americans with Disabilities Act federal court challenge to state's administrative disciplinary action seeking revocation of his license since state proceedings implicated important state interests and plaintiff could assert federal statutory claims in context of eventual court appeal); *Wightman v. Texas Supreme Court*, 84 F.3d 188 (5th Cir. 1996), cert. denied, 519 U.S. 1080 (1997) (constitutional objections could be raised at multiple stages of attorney discipline administrative proceedings and on appeal, thus satisfying *Younger* abstention). But cf. *Meredith v. Oregon*, 2003 WL 549362 (9th Cir. 2003) (Clearinghouse No. 55,168) (affirming denial of abstention where plaintiff did not have adequate or timely opportunity to raise constitutional challenge to administrative enforcement action for erecting a sign on vacant property without a permit).

<sup>214</sup>See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 107 n.9 (1975) (*Younger* distinguished by Supreme Court in challenge to state court procedures of pretrial detention of persons without judicial finding of probable cause since issue raised by plaintiffs “could not be raised in defense of the criminal prosecution,” the federal injunctive order to hold preliminary hearings was not directed at the state prosecutions, and the order “could not prejudice the conduct of the trial on the merits”); *LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), cert. denied sub nom. *Kelly v. LaShawn A. by Moore*, 510 U.S. 1044 (1994) (abstention rejected in child welfare system challenge brought by foster care children, where state Family Division case law precedent indicated that those proceedings were a “questionable vehicle” for raising plaintiffs’ “multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law”). But see *Hansel v. Town Court*, 56 F.3d 391 (2d Cir.), cert. denied, 516 U.S. 1012 (1995) (abstention applied in challenge to constitutionality of use of nonlawyer judges in town criminal court system, where, even though state's highest court had already declared this type of system constitutional, federal court still determined that plaintiff could raise federal claims in state court); *Joseph A. v. Ingram*, 275 F.3d 1253 (10th Cir. 2002) (Clearinghouse No. 54,011) (abstention affirmed in consent decree enforcement action brought by state wards who experienced abuse or neglect and alleged lack of meaningful access to adoption services, where, although individual children's court proceedings may not be authorized to hear class actions, they possessed the power to consider federal claims, including plaintiffs’ claimed due process violations); *J.B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999) (Clearinghouse No. 52,608) (abstention warranted in challenge to lack of therapeutic services for disabled children in child welfare system, where plaintiffs failed to show that state children's court could not adjudicate federal claims during periodic review proceedings); *Pompey v. Broward County*, 95 F.3d 1543 (11th Cir. 1996) (procedural bar to raising constitutional claims in state courts, not whether claims will be successful on the merits, is pertinent inquiry in ordering that abstention precluded federal court from issuing injunctive relief on behalf of individuals alleging incarceration for failure to make child support payments following contempt hearings devoid of due process protections).

<sup>215</sup>See *Steffel v. Thompson*, 415 U.S. 452 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Wooley* the Supreme Court found abstention to be improper where the federal plaintiff had been subjected to repeated state prosecutions for his practice of covering the “live free or die” motto on the New Hampshire license plates that he was required to purchase to drive his automobile.

diversity action brought by a mother on behalf of her children and alleging torts of physical and sexual abuse committed by her former husband and his companion, the Court held the application of *Younger* abstention to be erroneous since the state proceedings had concluded prior to the filing of the federal lawsuit.<sup>216</sup> The Court reasoned that *Younger* had never been applied “when no state proceeding was pending nor any assertion of important state interests made.”<sup>217</sup> A determination of whether state proceedings are actually “pending” at the time of the federal action being brought can be confusing, especially in institutional reform cases.<sup>218</sup> Nevertheless the determination may prove to be pivotal to the court’s decision to abstain.<sup>219</sup> Although the *Younger* doctrine severely limits the federal court’s ability to enjoin

pending state court proceedings, the mere existence of a state court proceeding with some relationship to the litigants or issues involved in a federal court case does not, standing alone, justify the invocation of *Younger*. The *Middlesex* three-part test is triggered, the Ninth Circuit in *Green v. City of Tucson* held, “only when the threshold condition for *Younger* abstention is present—that is, when the relief sought in federal court would in some manner directly ‘interfere’ with ongoing state proceedings.”<sup>220</sup> The *Green* court concluded that abstention was not called for in a federal action contesting the constitutionality of a state statute making incorporation of a territory contingent upon the consent of the neighboring city or town despite parallel state court proceedings involving similar issues.<sup>221</sup> Other courts adhered

<sup>216</sup>*Ankenbrandt*, 504 U.S. at 689.

<sup>217</sup>*Id.* at 705.

<sup>218</sup>In institutional reform cases, federal courts may invoke abstention even where the relief sought does not target a specific state court proceeding. In *Joseph A. v. Ingram*, 275 F.3d 1253 (10th Cir. 2002) (Clearinghouse No. 54,011), the court abstained from enforcing a consent decree mandating access to child adoption services even though plaintiffs did not seek to enjoin any specific state proceeding. The court ruled that *Younger* applied because enforcement of at least some of the consent decree provisions would require “interference with the operations of the Children’s Court in an insidious way in that the [decree] . . . expressly prevents the Department’s employees from recommending a range of planning options for children who are in the Department’s custody.” The court viewed this as having the parallel effect of an injunction or declaratory judgment, which essentially precluded the state court from considering those options. *Id.* at 1268–69; see also *Anthony v. Council*, 316 F.3d 412, 419–21 (3d Cir. 2003) (Clearinghouse No. 55,083) (abstention upheld in litigation brought by persons who had been seeking right to counsel and had been held in civil contempt for failure to comply with child support orders; retroactive relief would implicate past contempt proceedings and prospective relief regarding plaintiffs’ open cases would implicate a “comprehensive and fluid system,” which must be “viewed as a whole” for abstention purposes); *J.B.*, 186 F.3d at 1291 (abstention applied to child welfare litigation continuing jurisdiction of state court to modify child’s disposition, coupled with mandatory periodic review hearings, constituted ongoing state judicial proceedings); *Luckey v. Miller*, 976 F.2d 673, 677–78 (11th Cir. 1992) (abstention affirmed in constitutional challenge to adequacy of state indigent criminal defense system, where, although plaintiffs did not seek to restrain any single criminal prosecution or contest any conviction, this “only functions to set up an empty syllogism by which plaintiffs may argue that their intent is not to interfere with pending prosecutions”). Cf. *Meachem v. Wing*, 77 F. Supp. 2d 431, 442–43 (S.D.N.Y. 1999) (Clearinghouse No. 52,561) (court declined to abstain in challenge to public assistance fair hearing procedures where “Article 78” state court proceedings could be filed to contest the administrative decisions terminating benefits; these did not constitute ongoing state appellate proceedings); *Marisol A. v. Giuliani*, 929 F. Supp. 662, 688–89 (S.D.N.Y. 1996), *aff’d* on other grounds, 126 F.3d 372 (2d Cir. 1997) (abstention inappropriate in child welfare systemic litigation where state defendants could not point to any state court proceeding being improperly challenged).

<sup>219</sup>See, e.g., *Canatella v. California*, 304 F.3d 843, 850–52 (9th Cir. 2002) (analysis of when state bar disciplinary action commences leads court to find abstention unwarranted, as no state proceeding was ongoing); *Zaharia v. Cross*, 216 F.3d 1089 (10th Cir. 2000) (state criminal proceeding was ongoing and abstention was appropriate where plaintiff could apply to state court to modify or dismiss contested restraining order or could otherwise appeal it to state district court and raise federal claims).

<sup>220</sup>*Green v. City of Tucson*, 255 F.3d 1086 (9th Cir.), cert. dismissed, 533 U.S. 966 (2001) (Clearinghouse No. 53,917). *Id.* at 1091. “Absent ‘extraordinary circumstances,’ *Younger* abstention is appropriate only when (1) there are ongoing state judicial proceedings; (2) the proceedings implicate important state interests; and (3) the state proceedings provide the plaintiff with an adequate opportunity to raise the federal claims.” *Id.* at 1097.

<sup>221</sup>The individual federal plaintiffs in *Green* were not parties to the state court proceedings, and, while they did not seek intervention in the state forum, the court held that neither *Younger* nor corollary “day in court” or exhaustion doctrines imposed upon them an “obligation to intervene in state court litigation raising issues similar to those that the plaintiff wishes to raise in federal court.” *Green*, 255 F.3d at 1103.

to this principle of “interference” being a key component of the *Younger* analysis.<sup>222</sup>

## B. *Pullman* Abstention

When federal constitutional claims arise from unsettled issues of state law, federal courts have discretion to abstain from exercising jurisdiction. When they do so, the federal courts avoid predicting what state courts would decide and permit the state courts the first opportunity to interpret state law. Doing so may also dispose of the need of the federal court to decide the federal constitutional issue later.

### 1. The *Pullman* Doctrine

This aspect of abstention, known as *Pullman* abstention, was announced in *Railroad Commission v. Pullman Co.*<sup>223</sup> In *Pullman* the railroad sued a state regulatory agency; the railroad challenged on Fourteenth Amendment grounds the requirement that all trains in Texas have a conductor in each sleeping car. Employment in the railroad industry was racially segregated; whites were employed as conductors, while blacks performing similar work were employed as porters. Thus the regulation had a discriminatory impact on blacks.

The Supreme Court held that the authority of the regulatory agency to issue the challenged requirement was unclear under state law. Reasoning that resolution of the question could obviate the

need to decide the constitutional issue, the Court ruled that the unclear issue of state law should be resolved in state court before a federal court adjudicated the constitutional challenge. Thus the Court required the district court to abstain to enable the parties to litigate the unclear question of state regulatory authority in state court.

*Pullman* abstention is therefore appropriate when (1) the federal court is presented with an ambiguous or uncertain provision of state law and (2) state court interpretation of the state-law issue may avoid the federal constitutional question.<sup>224</sup> Mere ambiguity in state law is insufficient - *Pullman* abstention also involves a “discretionary exercise of the court’s equity powers.”<sup>225</sup> The Court acknowledged that, “in the abstract,” the possibility of limiting constructions always existed. Nonetheless, the Court stated that “the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary.”<sup>226</sup> Rather, the Court noted that it had “frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction.”<sup>227</sup> Thus the ambiguity in state law must be such that a clarifying construction would eliminate the need to reach the constitutional issue or at least alter it substantially.

<sup>222</sup>See *Green*, 255 F.3d at 1098 n. 15 (collecting decisions from other circuits); see also *Columbia Basin Apartment Association v. City of Pasco*, 268 F.3d 791, 800-801 (9th Cir. 2001) (Clearinghouse No. 54,213) (following *Green* in upholding *Younger* abstention to challenge by landlords to city’s efforts in state court to enforce ordinance regulating rental dwelling units); *Joseph A.*, 275 F.3d at 1272 (“*Younger* governs whenever the requested relief would interfere with the state court’s ability to conduct proceedings, regardless of whether the relief targets the conduct of a proceeding directly.”); *J.B.*, 186 F.3d at 1291-92 (placing federal court “in the role of making dispositional decisions such as whether to return the child to his parents” would prevent state court from carrying out its functions, thus requiring abstention in child welfare action).

<sup>223</sup>*Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). Justice Scalia underscored the distinctive nature of this brand of “abstention” by noting: “To bring out more clearly . . . the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits, it would be preferable to speak of *Pullman* ‘deferral.’ *Pullman* deferral recognizes that federal courts should not prematurely resolve the constitutionality of a state statute . . . .” *Grove v. Emison*, 507 U.S. 25, 32 n.1 (1993).

<sup>224</sup>Circuit courts articulated the *Pullman* factors in slightly different ways. See *Fireman’s Fund Insurance Co. v. City of Lodi*, 302 F.3d 928, 939-40 (9th Cir. 2002), cert. denied, 123 S. Ct. 1754 (2003) (Clearinghouse No. 54,489); *Ford Motor Co. v. Meredith Motor Co.*, 257 F.3d 67, 71 (1st Cir. 2001); *Planned Parenthood v. Farmer*, 220 F.3d 127, 149-50 (3d Cir. 2000); *Williams v. Lambert*, 46 F.3d 1275, 1281 (2d Cir. 1995).

<sup>225</sup>*Baggett v. Bullitt*, 377 U.S. 360, 375 (1964).

<sup>226</sup>*Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 (1984).

<sup>227</sup>*Id.* (quoting *Zwickler v. Koota*, 389 U.S. 241, 251 n.14 (1967)).

Because the purpose of *Pullman* abstention is to avoid the unnecessary decision of unsettled questions of constitutional law, its use is improper when “the unconstitutionality of the particular state action under challenge is clear.”<sup>228</sup> For the same reason, many federal courts refuse to apply the doctrine in cases raising claims that state law is inconsistent with federal statutory law.<sup>229</sup> Although such claims are constitutional in the sense that they implicate the supremacy clause, they raise no substantive constitutional rights.<sup>230</sup> Since *Pullman* abstention necessarily results in delayed piecemeal adjudication, the Court is somewhat less inclined to sanction abstention in cases involving federal First Amendment challenges.<sup>231</sup>

State constitutions frequently contain provisions similar to the substantive provisions of the United States Constitution. Those provisions could be an alternative basis under state law for enjoining challenged state conduct.<sup>232</sup> However, the Court held that federal courts need not abstain to permit state courts to address first state constitutional provisions that

are counterparts of federal provisions; the Court observed that a contrary rule “would convert abstention from the exception into the general rule.”<sup>233</sup> When states had unique constitutional provisions with no federal counterpart, the Court required abstention.<sup>234</sup>

Advocates should be aware that the inclusion of supplemental state claims in a federal constitutional lawsuit increases the risk of *Pullman* abstention. If the supplemental claim offers an alternative basis for resolving the litigation and for obviating the need to construe the Constitution, its inclusion invites abstention. Therefore the increased risk of abstention should be taken into account before including a supplemental state-law claim as an alternative basis for relief in constitutional litigation.<sup>235</sup> Although the inclusion of supplemental claims can increase the risk of abstention, their omission does not eliminate the risk. If the state law that purportedly authorizes the challenged conduct is unclear, *Pullman* abstention remains a threat.<sup>236</sup> While a parallel state proceed-

<sup>228</sup>*Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 756 (1986).

<sup>229</sup>See 17A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4242, at 51 (2d ed. 1998); *Skipper v. Hambelton Meadows Architectural Review Commission*, 996 F. Supp. 478, 482–85 (D. Md. 1998); *United Services Automobile Association v. Muir*, 792 F.2d 356 (3d Cir. 1986), cert. denied sub nom. *Grode v. United Services Automobile Association*, 479 U.S. 1031 (1987); *Federal Home Loan Bank Board v. Empie*, 778 F.2d 1447 (10th Cir. 1985).

<sup>230</sup>See *Fireman's Fund Insurance Co.*, 302 F.3d at 939 n.12 (noting prior holdings, with one decision to the contrary, that preemption is not a “constitutional issue” justifying *Pullman* abstention).

<sup>231</sup>See *City of Houston v. Hill*, 482 U.S. 451, 467–68 (1987); see also *Harman v. Forsennius*, 380 U.S. 528, 535 (1965); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 63–64 (1st Cir. 2003) (court refused to abstain in challenge to unambiguous criminal libel statute and noted that delay involved in abstention was problematic where First Amendment rights were implicated).

<sup>232</sup>See *Louisiana Debating and Literary Association v. City of New Orleans*, 42 F.3d 1483, 1493 (5th Cir. 1995) (if state or local statute or ordinance is subject of challenge, any asserted state constitutional claims should be “so interrelated” as to render state law ambiguous for *Pullman* abstention purposes).

<sup>233</sup>*Examining Board of Engineers, Architects and Surveyors v. Otero*, 426 U.S. 572, 598 (1976). See also *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

<sup>234</sup>*Reetz v. Bozanich*, 397 U.S. 82 (1970) (requiring *Pullman* abstention to enable Alaska courts to construe unique and previously unconstrued provision of Alaska Constitution regarding the privilege of fishing). See also *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 85 n.8 (1975) (requiring abstention to enable Texas courts to construe state constitution because challenged statute was part of “an integrated scheme of related constitutional provisions, statutes, and regulations”); *Columbia Basin Apartment Association v. City of Pasco*, 268 F.3d 791, 806 (9th Cir. 2001) (Clearinghouse No. 54,213) (abstention justified where detailed analysis of state constitutional counterpart of Fourth Amendment revealed significant differences).

<sup>235</sup>In *Bad Frog Brewery Inc. v. New York State Liquor Authority*, 134 F.3d 87 (2d Cir. 1998), the Second Circuit declined to apply *Pullman* abstention due to the presence of a First Amendment challenge based on specific prohibition of speech even though the interpretations of related state regulations were unclear. The court dismissed plaintiff's state damage claims and declined to exercise supplemental jurisdiction due to their raising novel or complex issues of state law.

<sup>236</sup>In *Pustell v. Lynn Public Schools*, 18 F.3d 50, 53 n.5 (1st Cir. 1994), the First Circuit observed that the plaintiffs could not “avoid [*Pullman*] abstention by excluding crucial state law issues from their pleadings.” The unsettled nature of state home schooling statutes and regulations, coupled with the particularly local nature of educational policy, led the court to uphold abstention.

ing is not required for *Pullman* abstention, a pending state court action may in fact make it more likely that the federal court will abstain. In *Ford Motor Co. v. Meredith Motor Co.* the First Circuit found the federal court plaintiff's concurrently pending state court appeal of the underlying state agency decision to constitute an additional factor justifying *Pullman* abstention.<sup>237</sup> The court was persuaded by the state court appeal's potential to moot the federal issues and consequently stayed the federal action pending final review of the agency decision in the state court system.<sup>238</sup>

## 2. *England* Reservations and Practice

Once a court invokes *Pullman* abstention, it generally will retain jurisdiction and stay proceedings regarding the federal constitutional issues while the plaintiff litigates the unclear question of state law through the state's highest court.<sup>239</sup> In the state court action the plaintiff must not only present the state-law question but also ask the state court to construe it in light of the federal issue, which must be expressly reserved (an "*England* reservation").<sup>240</sup> Failure to reserve the federal issue has consequences.<sup>241</sup> It precludes a later return to federal court for its resolution.<sup>242</sup> Failure to inform

the state court of the federal issue also precludes a later return to federal court.<sup>243</sup> Thus, following an order of abstention, the state court action must describe the nature of the constitutional issue in some detail but must expressly reserve its determination for the federal court.<sup>244</sup>

An express *England* reservation has three elements: (1) explicit expression to the state tribunal of an intent to return to federal court in the wake of an adverse state determination, if any; (2) explicit notification to the state tribunal of the federal questions that would be reserved; and (3) an absence of voluntary litigation by the reserving party of the federal questions that would be preserved for federal trial.<sup>245</sup>

## 3. State Certification as a *Pullman* Alternative

If the forum state has a procedure by which its highest court answers state-law questions certified to it, a federal court can potentially obtain an authoritative ruling on ambiguous issues of applicable state law. Although certification procedures vary widely among the states, most states accept certified questions from the U.S. Supreme Court, any federal court of appeals, or any U.S. district court. Other states accept certified questions from

<sup>237</sup>*Ford Motor Co. v. Meredith Motor Co.*, 257 F.3d 67 (1st Cir. 2001).

<sup>238</sup>*Id.* at 72–73; see also *Fetish and Fantasy Halloween Ball Inc. v. Ahern Rentals Inc.*, No. 01-16151, 2002 U.S. App. LEXIS 16767, at \*5–9 (9th Cir. Aug. 15, 2002) (*Pullman* abstention upheld where pending state court action could provide construction of state attachment statute that would avert due process challenge). Cf. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997) (Clearinghouse No. 52,194) (noting that pending state supreme court appeal concerning interpretation of state constitutional amendment may greatly simplify adjudication of federal constitutional issues).

<sup>239</sup>See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 12.2.1, at 737 (3d ed. 1999).

<sup>240</sup>*England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

<sup>241</sup>A claim of federal preemption of a clearly applicable state statute can be the subject of an *England* reservation, allowing the plaintiff to return to federal court to litigate the preemption issue. See *Fleet Bank v. Burke*, 160 F.3d 883, 893 (2d Cir. 1998), cert. denied, 527 U.S. 1004 (1999).

<sup>242</sup>*England*, 375 U.S. 421–22.

<sup>243</sup>*Id.*; *Government Employees v. Windsor*, 353 U.S. 364 (1957).

<sup>244</sup>The Supreme Court reaffirmed the *England* reservation rule in *Allen v. McCurry*, 449 U.S. 90, 101 n.17 (1980), and in *Migra v. Warren City School District*, 465 U.S. 75, 85 n.7 (1984).

<sup>245</sup>*England* reservation must be used carefully. See, e.g., *Bernardsville Quarry v. Borough of Bernardsville*, 929 F.2d 927, 929 n.1 (3d Cir.), cert. denied, 502 U.S. 861 (1991) (federal litigants must be careful to make the reservation to the state court, not the federal court); *Temple of the Lost Sheep Inc. v. Abrams*, 930 F.2d 178 (2d Cir.), cert. denied, 502 U.S. 866 (1991) (court disallowed attempted *England* reservation and dismissed plaintiffs' Section 1983 claims on basis of collateral estoppel, where concurrent federal action had been dismissed on *Younger* abstention grounds); See also *Hickerson v. City of New York*, 146 F.3d 99, 110–11 (2d Cir. 1998), cert. denied, 525 U.S. 1067 (1999) (*England* reservation available only to those litigants who initially choose to proceed in the federal forum, not in state court).

specified federal courts. Several states have no apparent procedure for the certification of questions of state law from the federal courts.<sup>246</sup> State procedures to certify the question of state law to the state's highest court can significantly shorten the delay associated with *Pullman* abstention. In *Arizonans for Official English v. Arizona* the Court discussed and endorsed the concept of state court certification of novel or unsettled questions of state law as a more suitable "cautious approach" which now covers territory once dominated by *Pullman* abstention and which often proves in practice to avoid the protracted, expensive litigation frequently associated with the doctrine.<sup>247</sup>

In a state with no available or adequate certification procedure, the delay associated with *Pullman* abstention requires a careful evaluation of whether the prospect of eventual return to district court is worth the wait; the alternative is to abandon the federal action and present both the state and federal issues to a state court for resolution in a single action. Although *Pullman* abstention can cause long delay, minimizing the impact of delay is possible in appropriate cases by seeking preliminary injunctive relief pending abstention. Federal courts retain full equitable power to issue preliminary relief to preserve the status quo while the parties seek clarification of state law in state court.<sup>248</sup>

### C. *Burford* Abstention

In *Burford v. Sun Oil Co.* the Supreme Court ordered the dismissal of a federal suit challenging the reasonableness under Texas law of a state commission's decision to grant a permit to drill oil wells.<sup>249</sup> The Court created what has

become known as *Burford* abstention to avoid the potentially disruptive impact that federal court intervention would have had on the state's efforts to maintain a unique and complex administrative structure to regulate a vital state activity.

Defendants often attempt to rely on language in *Burford* to assert a broader doctrine of abstention based simply on the existence of a complex state administrative or regulatory pattern. Such a reading of the *Burford* decision, however, ignores the many unique factors involved in Texas regulation of oil and gas. The reasonableness of the particular permit to drill oil wells at issue in *Burford* was not itself of "transcendent importance."<sup>250</sup> However, federal court review of reasonableness, under state law, "where the state had established its own elaborate review system for dealing with the geological complexities of oil and gas fields," would have had "an impermissibly disruptive effect on state policy for the management of those fields."<sup>251</sup> Because the "exercise of equitable jurisdiction by comparatively unsophisticated Federal District Courts alongside state-court review had repeatedly led to '[d]elay, misunderstanding of local law, and needless federal conflict with the state policy,'" the Court in *Burford* held that abstention was warranted.<sup>252</sup>

The Court in *New Orleans Public Service* summarized the *Burford* abstention doctrine as follows:

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult

<sup>246</sup>See 19 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507, at 177–78 (2d ed. 1996).

<sup>247</sup>*Arizonans for Official English v. Arizona*, 520 U.S. 43, 76–80 (1997).

<sup>248</sup>See *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 309 n.18 (1979). See generally WRIGHT ET AL., *supra* note 229, § 4243, at n.14.

<sup>249</sup>*Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

<sup>250</sup>*Colorado River*, 424 U.S. at 815.

<sup>251</sup>*Id.*

<sup>252</sup>*New Orleans Public Service*, 491 U.S. at 360 (quoting *Burford*, 319 U.S. at 327).



questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”<sup>253</sup>

*Burford* does not require abstention, the Court in *New Orleans Public Service* emphasized, simply because a complex state administrative process exists. Nor does it mandate abstention in all situations where a federal ruling may potentially conflict with state regulatory law or policy.<sup>254</sup> The Court in *New Orleans Public Service* then concluded that *Burford* abstention was unwarranted in the case before it since federal adjudication of the plaintiff’s federal preemption claim relating to a city council rate decision and a related “pretext claim” would not result in undue interference with local regulatory policy concerns.<sup>255</sup> Even if injunctive relief was ordered against enforcement of the rate order, the Court noted, “there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy.”<sup>256</sup>

The Court in *Quackenbush v. Allstate Insurance Co.*, narrowly construed *Burford* abstention and described it as balancing the interest in retaining federal jurisdiction against the competing concern for the “independence of state action,”

which, it noted, “only rarely favors abstention.”<sup>257</sup> The Court acknowledged that it had “revisited the [*Burford*] decision only infrequently in the intervening 50 years.”<sup>258</sup> The Court noted several factors “unique to that case”—the difficulty of the state regulatory issues, the need for uniform regulation in the oil and gas area and the important state interests served by this system, and, “most important[,]” the “detrimental impact of ongoing federal court review of the [state agency’s] . . . orders, which review had already led to contradictory adjudications by the state and federal courts.”<sup>259</sup>

The *Quackenbush* Court considered whether *Burford* abstention supplied a proper basis for dismissal, as opposed to a stay, of federal actions presenting damages claims. Noting that prior abstention holdings did not supply a “formulaic test for determining when dismissal under *Burford* is appropriate,” the Court observed that the power to dismiss was based on discretionary doctrines of equity, comity, and federalism.<sup>260</sup> This had led the Court previously to allow “federal courts applying abstention principles in damages actions to enter a stay, but [the Court had] . . . not permitted them to dismiss the action altogether[.]”<sup>261</sup> The Court held that, while “*Burford* might support a federal court’s decision to postpone adjudication of a damages action pending the resolution by the state courts of a disputed question of state law,” federal courts “have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discre-

<sup>253</sup>*Id.* at 361 (quoting *Colorado River*, 424 U.S. at 814). See also *Hachamovitch v. DeBuono*, 159 F.3d 687, 697 (2d Cir. 1998); *Tucker v. First Maryland Savings and Loan Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991).

<sup>254</sup>*New Orleans Public Service*, 491 U.S. at 362.

<sup>255</sup>*Id.* at 362–63.

<sup>256</sup>*Id.* at 363 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978)).

<sup>257</sup>*Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 728 (1996) (Clearinghouse No. 51,212) (quoting *Burford*, 319 U.S. at 334).

<sup>258</sup>*Id.* at 726 (citation omitted).

<sup>259</sup>*Id.* at 725 (citing *Burford*, 319 U.S. at 327–28) (further citations omitted).

<sup>260</sup>*Id.* at 727–28.

<sup>261</sup>*Id.* at 730 (citation omitted).

tionary.”<sup>262</sup> *Burford* abstention has been used in

- federal claims involving insurance, zoning, related land use issues,<sup>263</sup> and
- a Medicaid contract funding challenge.<sup>264</sup>

Defendants, however, periodically attempt to rely on *Burford* in cases involving constitutional rights of individuals, but the courts are often reluctant to permit such an expanded use of *Burford* abstention.<sup>265</sup> The Second Circuit said: “*Burford* abstention is not required even in cases where the state has a substantial interest if the state’s regulations violate the federal constitution.”<sup>266</sup>

The Supreme Court indicated a potential application of *Burford* in the area of state domestic relations law. In *Ankenbrandt v. Richards* the Court addressed a tort action brought by a mother on behalf of her daughters against their father.<sup>267</sup> The Court stated that, even though the action

did not fall within the “domestic relations” exception to federal jurisdiction, *Burford* abstention “might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody.”<sup>268</sup> Difficult state-law questions bearing on substantial public policy problems could be implicated “if a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree and the suit depended on a determination of the status of the parties.”<sup>269</sup> Some federal courts followed the suggestion of the *Ankenbrandt* Court by applying *Burford* abstention in the domestic relations area.<sup>270</sup>

#### D. Colorado River Abstention

In *Colorado River Water Conservation District v. United States* the Supreme Court established a fourth type of abstention applicable to situations when parallel state and federal litigation were pending.<sup>271</sup> *Colorado River* was a water rights

<sup>262</sup>*Id.* at 730–31. Federal courts are applying the *Quackenbush* language regarding abstention-based stays in damage actions in differing contexts. See, e.g., *Coles v. Street*, No. 01-3637, 2002 U.S. App. LEXIS 14557, \*6 (3d Cir. July 18, 2002) (*Quackenbush* holding limited to common-law damage actions in federal court under diversity jurisdiction and therefore inapplicable to statutory damage actions under federal question jurisdiction); *Meyers v. Franklin County Court of Common Pleas*, No. 99-4411, 2001 U.S. App. LEXIS 18116, \*11 (6th Cir. Aug. 7, 2001) (Section 1983 claims for damages stayed under *Younger* abstention). See generally K. Lesch, *Aggressive Application of Federal Jurisdiction Under the Younger Abstention Doctrine to Section 1983 Damage Claims*, 65 GEORGE WASHINGTON LAW REVIEW 645 (1997). Cf. *Diamond “D” Construction Corp.*, 282 F.3d at 196 n.2 (“*Younger* abstention is inappropriate on a claim for money damages”).

<sup>263</sup>See, e.g., *MacDonald v. Village of Northport*, 164 F.3d 964 (6th Cir. 1999) (land use); *Palumbo v. Waste Technologies Industries*, 989 F.2d 156, 159–60 (4th Cir. 1993) (hazardous waste permitting); *Law Enforcement Insurance Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986), cert. denied, 481 U.S. 1017 (1987) (insurance); *Browning Ferris Inc. v. Baltimore County*, 774 F.2d 77 (4th Cir. 1985) (permits for sanitary landfills). See also *Johnson v. Collins Entertainment Co.*, 199 F.3d 710 (4th Cir. 1999) (gaming industry). But see *Izzo v. Borough of River Edge*, 843 F.2d 765 (3d Cir. 1988) (mere existence of land-use regulation does not justify *Burford* abstention).

<sup>264</sup>*Bethpage Lutheran Service Inc. v. Weicker*, 965 F.2d 1239 (2d Cir. 1992).

<sup>265</sup>See, e.g., *Neufeld v. Baltimore*, 964 F.2d 347 (4th Cir. 1992) (reversing the trial court’s decision to abstain from deciding plaintiff’s claim that a zoning ordinance violated his constitutional rights); *Moe v. Brookings County, South Dakota*, 659 F.2d 880 (8th Cir. 1981) (administration of county poor relief program); *Hanna v. Toner*, 630 F.2d 442 (6th Cir. 1980) (challenge to the conditions of confinement of the county juvenile detention home), cert. denied, 450 U.S. 919 (1981); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980) (prison conditions suit), cert. denied, 450 U.S. 1041 (1981); *Association for Retarded Citizens of North Dakota v. Olson*, 713 F.2d 1384 (8th Cir. 1983) (conditions in facility for mentally retarded citizens and their treatment).

<sup>266</sup>*Hachamovitch*, 159 F.3d at 698 (due process challenge to suspension of physician license) (citations omitted). But see *Coles*, 2002 U.S. App. LEXIS 14557 (*Burford* abstention applied to due process challenge to allegedly improper use of eminent domain).

<sup>267</sup>*Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

<sup>268</sup>*Id.* at 705.

<sup>269</sup>*Id.* at 705–6. The Supreme Court held *Burford* to be inapplicable in the case before it since the status of the domestic relationship had been determined in state court and it had no bearing on the torts alleged. *Id.* at 706.

<sup>270</sup>See, e.g., *Dunn v. Cometa*, 238 F.3d 38 (1st Cir. 2001) (tort claims regarding former wife’s management of former husband’s care); *Minot v. Eckardt-Minot*, 13 F.3d 590 (2d Cir. 1994) (custodial interference tort action).

<sup>271</sup>*Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

case involving simultaneous state and federal court proceedings against the United States. Although the federal litigation did not fall within *Younger*, *Pullman*, or *Burford*, the Court held that, in a limited number of cases, federal courts must abstain because of the pendency of state court litigation. The Court emphasized “the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.”<sup>272</sup> But the Court also recognized that when there was concurrent state court litigation, “exceptional” circumstances might permit a federal court to refrain from exercising jurisdiction “for reasons of wise judicial administration.”<sup>273</sup>

*Colorado River* abstention is inapplicable unless there is parallel litigation.<sup>274</sup> The mere fact that the two lawsuits may involve different parties, however, may not be enough to preclude abstention. For example, the Seventh Circuit noted that “the requirement is of parallel suits, not identical suits” and treated a suit as parallel when “substantially the same parties are contemporaneously litigating substantially the same issue in another forum.”<sup>275</sup> The Second Circuit, on the other hand, refused to apply *Colorado River* when the parties were not identical because the stay of the federal action would not necessarily avoid piecemeal litigation.<sup>276</sup>

*Colorado River* identified four factors relevant to whether a federal court should

abstain in favor of parallel state proceedings. These are (1) which court first assumes jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which jurisdiction was obtained by the concurrent forums.<sup>277</sup> In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* the Court identified the following other factors that courts must also consider in applying *Colorado River*: (1) the source of the governing law; (2) the adequacy of the state court action to protect federal rights; (3) the relative progress of the state and federal proceedings; (4) the presence or absence of concurrent jurisdiction; (5) the availability of removal; and (6) the vexatious or contrived nature of the federal claims.<sup>278</sup> The Court noted that these constituted merely “some of the factors.”<sup>279</sup> In *Moses H. Cone* the Court cautioned that

the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case.<sup>280</sup>

<sup>272</sup>*Id.* at 817.

<sup>273</sup>*Id.* at 818.

<sup>274</sup>See *Harris v. Pemsely*, 755 F.2d 338, 346 (3d Cir.), rehearing denied, 758 F.2d 83 (3d Cir.), cert. denied, 474 U.S. 965 (1985); *Crawley v. Hamilton County Commissioners*, 744 F.2d 28, 31 (6th Cir. 1984).

<sup>275</sup>*Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988). The Fourth Circuit ruled in similar fashion. See, e.g., *Gannett Co. v. Clark Construction Group Inc.*, 286 F.3d 737, 742 (4th Cir. 2002) (suits are considered parallel “if substantially the same parties litigate substantially the same issues in different forums”; however, differing remedies and methods of proof dictate that two of three pending suits are not parallel). But see *McLaughlin v. United Virginia Bank*, 955 F.2d 930, 935 (4th Cir. 1992) (although the two actions involved similar claims and certain common facts, they were not parallel because neither the parties nor the legal theories were the same). The Tenth Circuit also cited with approval the “substantial similarity” test of parallel actions. See *Fox v. Maulding*, 16 F.3d 1079, 1081–82 (10th Cir. 1994).

<sup>276</sup>See *Zemsky v. City of New York*, 821 F.2d 148 (2d Cir.), cert. denied, 484 U.S. 965 (1987).

<sup>277</sup>*Colorado River*, 424 U.S. at 818.

<sup>278</sup>*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

<sup>279</sup>*Id.* at 15; see *KPS and Associates v. Designs by FMC Inc.*, 318 F.3d 1, 10 (1st Cir. 2003) (*Colorado River* list “is by no means exhaustive”) (citation omitted).

<sup>280</sup>*Moses H. Cone*, 460 U.S. at 16. The Second Circuit held that, although *Colorado River* abstention did not employ a “mechanical checklist,” the district court must actually balance the relevant factors in reaching its determination. *Village of Westfield v. Welch’s*, 170 F.3d 116, 121 (2d Cir. 1999).

Despite the potential for construing *Colorado River* abstention broadly, the Supreme Court emphasized the narrowness of the doctrine. Federal courts long permitted parallel litigation, using preclusion doctrines to limit relitigation.<sup>281</sup> Moreover, in *Moses H. Cone*, the Court emphasized the limiting language in *Colorado River* and noted that pendency of a parallel state proceeding should not generally bar federal court proceedings.<sup>282</sup>

However, the Supreme Court held in *Wilton v. Seven Falls Co.*, a diversity action, that a standard of substantial discretion, rather than the *Colorado River* “exceptional circumstances” standard, governed a district court’s decision to stay a declaratory judgment action on grounds of a parallel state court proceeding.<sup>283</sup> This discretion is conferred upon the federal courts by the permissive language of the Declaratory Judgment Act.<sup>284</sup> The Court reaffirmed *Brillhart v. Excess Insurance Co.*, which held that district courts were “under no compulsion” to grant declaratory relief.<sup>285</sup> But they have discretion to do so.<sup>286</sup> Thus, in contrast to *Colorado River* abstention, which allows a federal

court to decline to exercise jurisdiction only under exceptional circumstances, the *Brillhart* doctrine, applicable to declaratory judgment actions, gives the district court broader discretion to determine “whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites.”<sup>287</sup> The *Wilton* Court cautioned, however, that its decision did not address the *Brillhart* doctrine’s “outer boundaries,” such as actions raising issues of federal law or cases without parallel state proceedings.<sup>288</sup> Lower courts are split over the application of *Colorado River* to Section 1983 litigation. Some federal courts relied on *Colorado River* to stay or dismiss Section 1983 actions.<sup>289</sup> By contrast, the Eleventh Circuit rejected *Colorado River* abstention in Section 1983 cases.<sup>290</sup> Other circuits found the “unflagging obligation” to exercise jurisdiction particularly compelling in Section 1983 claims.<sup>291</sup>

Simultaneously filing identical Section 1983 suits in state and federal courts potentially invites *Colorado River* absten-

<sup>281</sup>See *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922); *McClellan v. Carland*, 217 U.S. 268, 281–82 (1910).

<sup>282</sup>*Moses H. Cone*, 460 U.S. 1, 14; see also *Gregory v. Daly*, 243 F.3d 687, 701–2 (2d Cir. 2001) (disallowing, without showing of exceptional circumstances, defendant’s claim that federal court should abstain under *Colorado River* in Title VII employment discrimination action “on the bare fact that allowing this case to proceed will result in the maintenance of duplicative proceedings”).

<sup>283</sup>*Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

<sup>284</sup>28 U.S.C. § 2201(a); see *Wilton*, 515 U.S. at 286–87.

<sup>285</sup>*Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942).

<sup>286</sup>See *id.* at 494–95.

<sup>287</sup>*Wilton*, 515 U.S. at 282.

<sup>288</sup>*Id.* at 290; see *United States v. City of Las Cruces*, 289 F.3d 1170, 1179–84 (10th Cir. 2002) (citing applications of *Brillhart* in cases founded on jurisdictional grounds other than diversity).

<sup>289</sup>The Second, Third, Fifth, and Seventh Circuits applied *Colorado River* to Section 1983 claims. See, e.g., *Marcus v. Township of Abington*, 38 F.3d 1367, 1371–72 (3d Cir. 1994); *American Disposal Services v. O’Brien*, 839 F.2d 84 (2d Cir. 1988); *Allen v. Board of Dentistry*, 835 F.2d 100 (5th Cir. 1988); *Eitel v. Holland*, 798 F.2d 815 (5th Cir. 1986); *Oliver v. Fort Wayne Education Association*, 820 F.2d 913 (7th Cir. 1987); *Lumen Construction Inc. v. Brant Construction*, 780 F.2d 691 (7th Cir. 1985). See also *Sisler v. West*, 570 F. Supp. 1 (S.D. Ohio 1983), *aff’d mem.*, 718 F.2d 1107 (8th Cir. 1983) (table); *Glover v. City of Portland*, 675 F. Supp. 398 (M.D. Tenn. 1987).

<sup>290</sup>*Alacare Inc.—North v. Baggiano*, 785 F.2d 963, 969 (11th Cir.), cert. denied, 479 U.S. 829 (1986).

<sup>291</sup>*For Your Eyes Only Inc. v. City of Columbus*, 281 F.3d 1209, 1217 (11th Cir. 2002); *Village of Westfield v. Welch’s*, 170 F.3d 116, 124 n.4 (2d Cir. 1999); *Polykoff v. Collins*, 816 F.2d 1326 (9th Cir. 1987); *Signad Inc. v. City of Sugar Land*, 753 F.2d 1338, 1340 (5th Cir.), cert. denied, 474 U.S. 822 (1985); *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1980); *Epps v. Lauderdale County*, 139 F. Supp. 2d 859, 864 (W.D. Tenn. 2000); *Saacks v. City of New Orleans*, No. 95-1234, 1995 U.S. Dist. LEXIS 11489, \*1-4 (E.D. La. Aug. 10, 1995); *Tucker v. Callahan*, 663 F. Supp. 375 (M.D. Tenn. 1987).

tion. More complicated issues arise when plaintiffs split their claims, seeking some relief in state court and other relief in federal court. The prohibition of such piecemeal litigation is one of the *Colorado River* factors, but, in an increasing number of cases, plaintiffs have no choice but to split claims if they wish to preserve access to federal court without abandoning meritorious state claims.<sup>292</sup>

When plaintiffs must split their claims to avoid the Eleventh Amendment bar, they may lessen the likelihood of *Colorado River* abstention by delaying the filing of the state claim until substantial progress is made on the federal lawsuit. Delay in filing the state claim also minimizes the risk that the state case will be decided first and thereby acquire preclusive effect.<sup>293</sup> However, a plaintiff following this strategy must take care not to delay filing a state claim beyond the statute of limitations. For claims against the state, statutes of limitations are often short, but state tolling policies may extend these periods.

A less risky strategy may be to file both state and federal claims in federal court whenever there is an arguable basis for reading *Pennhurst* narrowly. Even if the federal court dismisses the state claim, the risk of a later, refiled state claim acquiring preclusive effect is minimized. Some federal courts suggest a third solution to this dilemma. *Pennhurst* having created a new category of abstention, plaintiffs, in such cases, may make an *England* reservation in federal court and then submit their state claims to state court.<sup>294</sup>

## E. The *Rooker-Feldman* Doctrine

Because lower federal courts do not have appellate jurisdiction over state courts, the Supreme Court refuses to permit losing state court litigants to invoke federal jurisdiction to attack state court judgments on the ground that the state court acted unconstitutionally.<sup>295</sup> This doctrine, often referred to as the *Rooker-Feldman* doctrine, originated in *Rooker v. Fidelity Trust Co.*<sup>296</sup> The Supreme Court reaffirmed the doctrine in *District of Columbia Court of Appeals v. Feldman.*<sup>297</sup>

The *Rooker-Feldman* doctrine derives from 28 U.S.C. § 1257, which sets forth the exclusive means by which state court judgments are reviewable in federal court. The *Rooker-Feldman* doctrine is also supported by the structure of the federal judicial system, in which only the Supreme Court of the United States has appellate jurisdiction over state court judgments. As a result, the doctrine bars “a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party’s claim that the state judgment itself violates the loser’s federal rights.”<sup>298</sup> District courts may not review state court decisions “even if those challenges allege that the state court’s action was unconstitutional.”<sup>299</sup>

Although the *Rooker* doctrine prohibits federal courts from exercising jurisdiction to review state court judgments, there are cases in which the relief sought in federal court has an impact on state court

<sup>292</sup>*Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), applied the Eleventh Amendment to bar supplemental claims seeking injunctive relief to compel state officials to comply with state law.

<sup>293</sup>See generally the discussion of claim and issue preclusion in FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS, *supra* note 54, ch. 3, sec. IV.

<sup>294</sup>See *Cuesongle v. Ramos*, 835 F.2d 1486 (1st Cir. 1987); *Butler v. State of Maine Supreme Judicial Court*, 758 F. Supp. 37 (D. Me. 1991); *Society for Good Will to Retarded Children v. Cuomo*, 652 F. Supp. 515, 525–27 (E.D.N.Y. 1987). See also *Migra v. Warren City School District*, 465 U.S. 75, 85 n.7 (1984); Cf. *United Parcel Service Inc. v. California Public Utilities Commission*, 77 F.3d 1178 (9th Cir. 1996) (*England* reservation available to litigants who do not file first in federal court but are compelled to file instead in state court); *Wicker v. Board of Education*, 826 F.2d 442, 446 (6th Cir. 1987) (dictum) (*England* reservation possible even when plaintiff does not oppose abstention).

<sup>295</sup>The only exception is for habeas corpus petitions.

<sup>296</sup>*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

<sup>297</sup>*District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

<sup>298</sup>*Johnson v. DeGrandy*, 512 U.S. 997, 1005–6 (1994) (citation omitted).

<sup>299</sup>*Feldman*, 460 U.S. at 486.

judgments without directly involving an effort to reverse the state court judgment or enjoin its enforcement. Nonetheless, courts applied the *Rooker* doctrine where the assertion of district court jurisdiction was inextricably intertwined with the state court action. Thus, in *Feldman*, the Court held that a federal court lacked jurisdiction to grant injunctive relief to enable plaintiff to sit for a bar examination after the District of Columbia's highest court denied in a judicial proceeding his petition for a waiver to take the examination.<sup>300</sup> A federal claim is inextricably intertwined with a state court judgment when the claim can succeed only upon a showing that the state court was wrong.<sup>301</sup> If, however, the federal claim alleges a prior "injury that a state court failed to remedy," the doctrine does not apply.<sup>302</sup> Nor does it apply if the plaintiff lacked a reasonable opportunity to raise her federal claim in a state court.<sup>303</sup>

### IX. State Court Jurisdiction over Federal Claims

In determining whether state courts were allowed to entertain jurisdiction over federally created causes of action, the Supreme Court applied a presumption of

concurrency.<sup>304</sup> Under this presumption, state courts may exercise jurisdiction over federally created causes of action as long as Congress does not explicitly or implicitly make federal court jurisdiction exclusive. An implied exclusivity can result from an "unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interest."<sup>305</sup> In considering whether a federal claim is incompatible with state court jurisdiction, the Court looks to "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims."<sup>306</sup>

Under this framework, federal courts have exclusive jurisdiction over admiralty, bankruptcy, patent, trademark, and copyright claims because the relevant jurisdictional statutes expressly provide so.<sup>307</sup> In other areas, such as antitrust, the federal statutes do not make federal court jurisdiction exclusive, but courts found an implied exclusivity.<sup>308</sup> State courts may exercise jurisdiction over claims brought under 42 U.S.C. § 1983.<sup>309</sup> Although the Court has not expressly addressed state court jurisdiction over the other Reconstruction-era civil rights actions, it

<sup>300</sup>*Id.* at 482. See *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987); see also *Ballinger v. Culotta*, 322 F.3d 546 (8th Cir. 2003) (Clearinghouse No. 55,150) (Section 1983 federal action alleging constitutional violations stemming from state court child custody action barred by *Rooker-Feldman* because federal claim could succeed only to the extent that the state court holding was wrongly decided); *Lawson v. City of Buffalo*, No. 02-7204, 2002 U.S. App. LEXIS 25876 (2d Cir. Dec. 16, 2002) (plaintiff's federal due process damage claims barred by *Rooker-Feldman* since they could have been raised in state court); *Hachamovitch*, 159 F.3d at 695 (claims are inextricably intertwined for *Rooker-Feldman* purposes if barred by principles of preclusion). But see *Rivers v. McLeod*, 252 F.3d 99 (2d Cir. 2001) (federal due process claim not barred since it was not litigated in state family court proceeding, it arose from differing facts, and claim did not question validity of state court orders regarding custody and visitation).

<sup>301</sup>*Lemons v. St. Louis Co.*, 222 F.3d 488, 493 (8th Cir. 2000); *Marks v. Stinson*, 19 F.3d 873, 886 n.11 (1994).

<sup>302</sup>*Centres Inc. v. Town of Brookfield*, 148 F.3d 699, 702 (7th Cir. 1998). See *Long v. Shorebank Development Corp.*, 182 F.3d 548, 555 (7th Cir. 1999).

<sup>303</sup>*Long*, 182 F.3d at 558; *Sheehan v. Marr*, 207 F.3d 35, 39–41 (1st Cir. 2000).

<sup>304</sup>See, e.g., *Robb v. Connolly*, 111 U.S. 624 (1884); *Claffin v. Houseman*, 93 U.S. 130, 136 (1876). See generally Martin H. Redish & John Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICHIGAN LAW REVIEW 311 (1976).

<sup>305</sup>*Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477–78 (1981).

<sup>306</sup>*Id.* at 483–84. See also *Hathorn v. Lovron*, 457 U.S. 255, 271 (1982) (Rehnquist, J., dissenting) (discussing considerations of uniformity, federal expertise, and federal hospitality to federal claims).

<sup>307</sup>See 28 U.S.C. §§ 1333–1334, 1338.

<sup>308</sup>See, e.g., *Miller v. Grandos*, 529 F.2d 393, 395 (5th Cir. 1976); *Allied Machinery Services Inc. v. Caterpillar Inc.*, 841 F. Supp. 406, 409 (S.D. Fla. 1993).

<sup>309</sup>See *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Martinez v. California*, 444 U.S. 277 (1980).

reviewed a 42 U.S.C. § 1982 action arising in the state courts without any apparent doubt about the permissibility of state courts to entertain such actions.<sup>310</sup> Moreover, state courts addressing issues involving 42 U.S.C. §§ 1981 and 1982, both having their origins in Section 1 of the Civil Rights Act of 1866 and its 1870 reenactment, concluded that they were allowed to entertain such actions.<sup>311</sup>

State courts, the Supreme Court held, *may* exercise jurisdiction over Section 1983 claims.<sup>312</sup> However, the Court explicitly left open the question of whether they were required to exercise such jurisdiction. In *Howlett v. Rose* the Court was asked to decide whether common-law sovereign immunity was available to a state school board to preclude a claim under 42 U.S.C. § 1983 even though such a defense would be unavailable in federal court.<sup>313</sup> The state court had dismissed the lawsuit on grounds that the school board, as an arm of the state, had not waived its sovereign immunity in Section 1983 cases. The *Howlett* Court stated that state common-law immunity was eliminated by acts of Congress in which Congress expressly made the states

liable.<sup>314</sup> The Court held that the state court's refusal to entertain a Section 1983 claim against the school district, when state courts entertained similar state-law actions against state defendants, violated the supremacy clause.<sup>315</sup>

Virtually every state addressing the issue holds that state courts may exercise jurisdiction over Section 1983 actions, and Section 1983 actions are now routinely heard in state courts. Moreover, Section 1983 cases are now reported from virtually every state in which the appellate courts of that state expressly or impliedly agree to hear them.

By statute, state courts are authorized to hear claims arising under

- the Fair Labor Standards Act,
- the Equal Pay Act,<sup>316</sup> and
- the Age Discrimination in Employment Act.<sup>317</sup>

They also have jurisdiction over Title VIII actions involving housing discrimination.<sup>318</sup> State courts have concurrent jurisdiction over Title VII claims.<sup>319</sup>

<sup>310</sup>*Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).

<sup>311</sup>See, e.g., *Miles v. FERM Enterprises Inc.*, 29 Wash. App. 61, 627 P.2d 564 (1981); see also *DeHorney v. Bank of America National Trust and Savings Association*, 879 F.2d 459, 463 (9th Cir.1989) (state courts have concurrent jurisdiction over Section 1981 suits). Cf. *Filipino Accountants Association Inc. v. State Board of Accountancy*, 155 Cal. App. 3d 1023, 1028 n.4, 204 Cal. Rptr. 913, 915 n.4 (1984) (assuming state court jurisdiction over Section 1981 actions). State courts also consistently exercised jurisdiction over actions brought under 42 U.S.C. § 1985(3) and alleging conspiracies to deprive individuals of equal protection of the laws, a result which is not surprising considering the common origin of Section 1985 and Section 1983 in the Civil Rights Act of 1871. See, e.g., *Rajneesh Foundation International v. McGreer*, 303 Or. 139, 734 F.2d 871 (1987) (allowing Section 1985(3) counterclaim). State courts also assumed the availability of state court jurisdiction over Section 1985(2) claims involving the administration of justice in state courts. See *Rutledge v. Arizona Board of Regents*, 147 Ariz. 534, 711 F.2d 1207 (1985).

<sup>312</sup>The Supreme Court held that state courts possessed concurrent jurisdiction over Section 1983 actions. *Felder v. Casey*, 487 U.S. 131, 139 (1988); see also *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

<sup>313</sup>*Howlett v. Rose*, 496 U.S. 356 (1990).

<sup>314</sup>*Id.* at 376.

<sup>315</sup>But see *National Private Truck Council Inc.*, 515 U.S. 582, 587 n.4 (1995) ("We have never held that state courts must entertain § 1983 suits") (citations omitted).

<sup>316</sup>29 U.S.C. § 216(b).

<sup>317</sup>*Id.* § 626(c)(1) ("any court of competent jurisdiction").

<sup>318</sup>42 U.S.C. § 3612(A). See *Marine Park Association v. Johnson*, 1 Ill. App. 3d 464, 274 N.E.2d 645 (1971).

<sup>319</sup>See *Yellow Freight System Inc. v. Donnelly*, 494 U.S. 820 (1990).