

# Duke Law Journal

---

VOLUME 65

APRIL 2016

NUMBER 7

---

## JOINT AND SEVERAL JURISDICTION

SCOTT DODSON<sup>†</sup> & PHILIP A. PUCILLO<sup>††</sup>

### ABSTRACT

*Is federal diversity jurisdiction case specific or claim specific? The complete-diversity rule makes clear that, when a diversity defect is noted in a putative diversity action, the court lacks subject-matter jurisdiction over that action as a whole. But does the court's jurisdiction nevertheless extend to claims between diverse parties, such that the case continues if the nondiverse spoiler is dismissed?*

*We engage this persistent and unsettled question by identifying and exploring two possible answers, each based on a distinct theory of subject-matter jurisdiction that boasts doctrinal support. The first we denote "joint jurisdiction"—an all-or-nothing theory—under which a diversity defect contaminates the whole case and deprives the court of jurisdiction over claims between diverse parties too. The second we denote "several jurisdiction"—a claim-by-claim theory—under which the court lacks jurisdiction over claims between nondiverse parties but always had, and continues to have, jurisdiction over claims between diverse parties.*

*We then offer a way to reconcile these seemingly incompatible theories and precedent: shifting the time of jurisdictional assessment from the time of filing in federal court to the time of dismissal of the jurisdictional spoiler. We also discuss how that solution potentially*

---

Copyright © 2016 Scott Dodson & Philip A. Pucillo.

<sup>†</sup> Harry & Lillian Hastings Research Chair and Professor of Law, University of California Hastings College of the Law.

<sup>††</sup> Professor of Law in Residence, Michigan State University College of Law. We received helpful comments on a very early draft from the civil procedure roundtable attendees at the 2014 SEALS annual conference and from the faculty of Michigan State University College of Law during a workshop in October 2014. We also are grateful to John Oakley, Joan Steinman, and Michael Collins for detailed and insightful comments on a fuller draft.

*creates new tensions, particularly regarding the notion that a court without subject-matter jurisdiction over an action may nonetheless render a binding adjudication of claims within that action. Finally, we explain how the application of other jurisdictional authorizations—including the jurisdiction-to-determine-jurisdiction doctrine and the jurisdictional-resequencing doctrine—might alleviate tensions created by our time-shifting proposal.*

#### TABLE OF CONTENTS

Introduction .....	1324
I. Competing Theories of Complete Diversity.....	1328
A. Joint Jurisdiction .....	1329
B. Several Jurisdiction .....	1338
II. Some Unappealing Proposals .....	1342
III. The Jurisdictional-Timing Solution .....	1345
A. The Usual Rule.....	1346
B. <i>Caterpillar</i> .....	1349
C. Time Shifting and Its Implications .....	1351
IV. New Tensions .....	1353
A. Defect Certainty .....	1354
B. Defect Error.....	1355
C. Defect Agnosticism.....	1356
D. Defect Ignorance.....	1357
E. Retroactive Jurisdiction for Final Judgments .....	1358
Conclusion.....	1359

#### INTRODUCTION

Diversity jurisdiction is an odd duck. It empowers federal courts to adjudicate certain state-law claims based on a risk, or the appearance of a risk, of state bias against out-of-state litigants.<sup>1</sup> That rationale is perplexing in a federalist system today that presumes the competence of state courts to adjudicate issues without such bias<sup>2</sup> and

---

1. See *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (explaining that the traditional rationale of diversity jurisdiction is to reduce “the possible fears and apprehensions” of out-of-state litigants that the state court will be biased against them). *But see* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495–99 (1928) (arguing that the real reason was to advance corporate interests opposed by antibusiness state legislatures and judges).

2. See *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 59–60 (1954) (Frankfurter, J., concurring). In *Elbert*, Justice Frankfurter asked,

that requires federal courts to apply the same substantive law as state courts would.<sup>3</sup> In addition, the state-bias rationale has morphed inconsistently over time, from an early probusiness rationale to protecting distant plaintiffs from the political power of local corporations to today protecting large corporations from being forced to defend against multistate class actions in certain plaintiff-friendly state courts.<sup>4</sup> Further, diversity jurisdiction can be invoked even when the bias rationale is turned on its head, such as when an in-state plaintiff invokes diversity jurisdiction.<sup>5</sup> Yet through these changes, and despite calls for limiting or even eliminating diversity jurisdiction,<sup>6</sup> the doctrine has been a mainstay of federal dockets for more than two hundred years.

In the ongoing policy debate about the scope and propriety of diversity jurisdiction, basic technical oddities of diversity jurisdiction have gone overlooked. Diversity jurisdiction, unlike its younger

---

Can it fairly be said that state tribunals are not now established on a sufficiently ‘good footing’ to adjudicate state litigation that arises between citizens of different States, including the artificial corporate citizens, when they are the only resort for the much larger volume of the same type of litigation between their own citizens? Can the state tribunals not yet be trusted to mete out justice to nonresident litigants; should resident litigants not be compelled to trust their own state tribunals?

*Id.*; see also *Deveaux*, 9 U.S. (5 Cranch) at 87 (assuming “that the tribunals of the states will administer justice as impartially as those of the nation”); Friendly, *supra* note 1, at 493 (arguing that there is no evidence of state-court bias); see generally Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016) (demonstrating that state courts tend to decide issues of state law by mimicking federal-court interpretations of analogous federal law).

3. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

4. Compare *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 329 (1853) (“The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence . . . wielded by corporations in almost any state.”), with Class Action Fairness Act of 2005, Pub. L. 109-2, § 2(a)(4)(B), 119 Stat. 4, 5 (2005) (“Abuses in class actions undermine the national judicial system . . . in that State and local courts are . . . sometimes acting in ways that demonstrate bias against out-of-State defendants . . .”). See also Friendly, *supra* note 1, at 496–97 (“[W]e may say that the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction.”). Some have suggested that the most persuasive rationale is not about bias at all, but rather is about preserving attorney choice of forum. See Charles Alan Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 207 (1969).

5. See, e.g., *Lumbermen’s Mut. Cas. Co.*, 348 U.S. at 54 (Frankfurter, J., concurring).

6. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 139–47 (1985); Rodney K. Miller, *Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity*, 64 OKLA. L. REV. 269, 312–13 (2012); Thomas D. Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 966 (1979).

sibling federal-question jurisdiction,<sup>7</sup> is grounded in the character of the parties rather than the character of the claim. This feature makes diversity jurisdiction both more complicated than federal-question jurisdiction and more susceptible to party gamesmanship. Compliance with the diversity requirements can be difficult to determine. That difficulty is particularly problematic in the context of subject-matter jurisdiction—if a federal court lacks jurisdiction, it has no power to proceed, even if the case had been litigated productively for years.<sup>8</sup>

The difficulty of assessing compliance with the strictures of diversity jurisdiction is exacerbated by the longstanding “complete diversity” interpretation of the general diversity-jurisdiction statute: all plaintiffs must be diverse in citizenship from all defendants.<sup>9</sup> The purported rationale of the complete-diversity rule is that the presence of same-state opponents neutralizes any state bias and thus obviates the need for federal jurisdiction.<sup>10</sup>

One nettlesome but unsettled complication of the requirement of complete diversity is simply illustrated. Consider a suit in federal court in which a single plaintiff from Texas asserts state-law claims

---

7. U.S. CONST. art. III, § 2 (extending the “judicial Power” to “all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority”); 28 U.S.C. § 1331 (2012) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

8. *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884). For arguments limiting this impact, see Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1442 (2011); Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 23–25 (2008).

9. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (“The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue . . . in the federal courts.”); 13E CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, *FEDERAL PRACTICE & PROCEDURE* § 3605 (3d ed. 2014) (stating that “the *Strawbridge* rule has been followed for more than two centuries”). The complete-diversity rule applies only to § 1332, not to Article III’s grant of diversity jurisdiction or to other statutory grants of diversity jurisdiction. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (holding Article III to authorize the exercise of diversity jurisdiction as long as there exists “minimal diversity,” meaning that at least one plaintiff in the action is diverse in citizenship from at least one defendant); cf. 28 U.S.C. § 1335 (2012) (authorizing minimal diversity jurisdiction for statutory interpleader); *id.* § 1332(d) (authorizing minimal diversity jurisdiction for certain class actions).

10. See WRIGHT ET AL., *supra* note 9, § 3605 (“The presumed theory behind the original grant of diversity jurisdiction . . . was to provide a neutral, national forum for cases in which there would be a danger of bias in a state court . . . This justification . . . does not apply to cases in which there are citizens from the same state on opposing sides . . .”); David Currie, *The Federal Courts and the American Law Institute Part I*, 36 U. CHI. L. REV. 1, 18 (1968); see also *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 564 (2005) (“A failure of complete diversity . . . contaminates every claim in the action.”).

against two defendants—one from California and the other from Texas—and alleges claims for \$500,000 against each defendant. It is beyond dispute that the federal court lacks diversity jurisdiction over the plaintiff's claim against the nondiverse Texas defendant, and thus lacks diversity jurisdiction over the action as a whole. But does the court nevertheless have jurisdiction over the plaintiff's claim against the diverse California defendant? If no, then the court must dismiss the entire case. If yes, then the court could dismiss the nondiverse claim and proceed with the diverse claim.

This is not an idle question. Diversity actions make up more than a third of the federal docket, and multiparty and multicclaim diversity suits are common.<sup>11</sup> Yet many of these cases in fact lack complete diversity.<sup>12</sup> Because a lack of subject-matter jurisdiction can be raised at any time and formally nullifies any progress that the parties have achieved, the economic downsides of diversity contamination for diverse litigants are considerable.<sup>13</sup>

We propose that the answer to this question requires consideration of two primary, and seemingly irreconcilable, conceptions of subject-matter jurisdiction. The first—what we refer to as “joint jurisdiction”—holds that the presence of the jurisdictional spoiler contaminates other claims in the action, such that the federal court lacks diversity jurisdiction over the diverse claim as well. In other words, the claims must stand or fall together as one action.

The second theory—what we refer to as “several jurisdiction”—holds that the court lacks jurisdiction over the nondiverse claim but has always had, and continues to have, jurisdiction over the diverse claim. In other words, the jurisdictional status of the claims is determined severally, on a claim-by-claim basis.

Which of these jurisdictional conceptions is correct? Supreme Court opinions dating as far back as 1824 seem to support joint jurisdiction in the context of the complete-diversity requirement.<sup>14</sup> Yet a separate and equally longstanding tradition considers that same requirement on a claim-by-claim basis, suggesting that spoiling claims

---

11. See *Federal Judicial Caseload Statistics 2014 Tables, U.S. District Courts—Civil, tbls. C to C-5*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014-tables> [http://perma.cc/6254-SNBN] (last updated Mar. 31, 2014).

12. See, e.g., *United Republic Ins. v. Chase Manhattan Bank*, 315 F.3d 168, 170 (2d Cir. 2003) (“We have previously expressed a concern that cases brought in federal courts in which diversity of citizenship is not properly alleged and/or does not exist are far too common.”).

13. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006).

14. See *infra* Part I.A.

may be individually dismissed to preserve jurisdiction over claims between diverse parties.<sup>15</sup> The doctrine, it turns out, is conflicted.

We engage this conflict and offer four contributions. First, in Part I, we set out a descriptive account of joint and several diversity jurisdiction and demonstrate that both theories boast doctrinal support, making a binary choice between one or the other both tenuous and inherently disruptive. Second, we offer in Part II an analytical middle ground for resolving the competing traditions of joint and several jurisdiction, namely, shifting the time of jurisdictional assessment from the time of filing to a later point in the litigation. Third, in Part III, we consider new concerns that this middle approach generates, especially the problematic authority of a federal court to render binding decisions in an action over which it lacks subject-matter jurisdiction. Lastly, we explain in Part IV how those concerns can be mitigated by other jurisdictional authorizations, including the jurisdiction-to-determine-jurisdiction doctrine and the jurisdictional-resequencing doctrine. By unpacking the problems of this understudied feature of diversity jurisdiction, we hope to bring closer attention to the fundamental but oft-overlooked complexities of diversity jurisdiction as a whole.

## I. COMPETING THEORIES OF COMPLETE DIVERSITY

As an abstract principle, the complete-diversity rule is straightforward enough: every plaintiff in the action must be diverse in citizenship from every defendant. But determining the precise effect that a violation of the rule has upon a court's jurisdiction in a particular case can be a complicated exercise. The primary cause of this complexity is the existence of two competing notions of subject-matter jurisdiction, which we designate as "joint jurisdiction" and "several jurisdiction." Either of these might inform a court's assessment of its jurisdiction upon discovering a failure of complete diversity.

Joint jurisdiction insists that a federal court treat the various claims asserted in a diversity action as an indivisible action rather than a set of separate and distinct units. Joint jurisdiction is thus fittingly regarded as an all-or-nothing approach: either the court has jurisdiction over all claims in the action or none of them. When applying joint jurisdiction to address a violation of the complete-

---

15. *See infra* Part I.B.

diversity requirement, a court would not consider that its jurisdiction over claims between diverse parties would have attached at the outset of the action had the complaint simply omitted the nondiverse parties. The mere presence of a claim between nondiverse parties would oblige the court to dismiss the entire action, including any claims between diverse parties.

In contrast, several jurisdiction allows a federal court to engage in a claim-specific analysis in connection with a putative diversity action.<sup>16</sup> By regarding the claims asserted in such an action severally, that is, as separate and distinct units of a larger set, a court would have jurisdiction over claims between diverse parties even though the presence of a diversity spoiler would preclude complete diversity over the action as a whole. Consequently, although incomplete diversity would prevent the court from proceeding with the claims between nondiverse parties, the court's jurisdiction over claims between diverse parties would endure, and the court could proceed with them after dismissing the jurisdictional spoilers.<sup>17</sup>

In this Part, we offer detailed accounts of joint jurisdiction and several jurisdiction and document how each theory has enjoyed doctrinal support.

#### A. *Joint Jurisdiction*

The current statutory authorization for diversity jurisdiction—28 U.S.C. § 1332(a)—provides that district courts shall have original jurisdiction of specified “civil actions.”<sup>18</sup> Like its statutory forebear—the Judiciary Act of 1789<sup>19</sup>—§ 1332(a) contemplates that something more than an individual claim is the proper unit of measure for a

---

16. See John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 IND. L.J. 25, 45 (1998) (asserting that federal diversity jurisdiction “can be understood and honored—indeed, better understood and more coherently and consistently honored—when viewed through the lens of the claim-specific model of original jurisdiction”).

17. *Id.* at 52 (contending that the complete-diversity rule “does require the dismissal of the jurisdictional spoilers, even when the claims by or against the nondiverse parties are so related to the claims involving diverse parties that they could be adjudicated were the statute to call merely for minimal rather than complete diversity among all parties joined in the complaint”).

18. 28 U.S.C. § 1332(a) (2012) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 . . . and is between . . . citizens of different States . . .”).

19. Under the Judiciary Act of 1789, Congress vested the newly created circuit courts with original diversity jurisdiction over specified “suits of a civil nature.” Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (emphasis added).

federal court's jurisdiction.<sup>20</sup> As Professor Joan Steinman has written, “[w]hen persons knowledgeable of federal civil procedure think of a civil action, we normally conceive of the collection of claims and defenses” rather than individual claims.<sup>21</sup>

Almost from the beginning, the Supreme Court has interpreted Congress's grant of diversity jurisdiction as conferring joint jurisdiction. In *Strawbridge v. Curtiss*,<sup>22</sup> a pithy but momentous opinion construing the Judiciary Act of 1789, the Court confronted an action between multiple plaintiffs and multiple defendants, where both sides included citizens of Massachusetts.<sup>23</sup> Affirming the federal circuit court's dismissal for lack of diversity jurisdiction, the Court construed the Act as requiring that “each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts.”<sup>24</sup> “That is,” the Court expounded, “that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.”<sup>25</sup> With Massachusetts citizens on both sides of the litigation, a necessary condition for the exercise of diversity jurisdiction—that each of the plaintiffs has the capacity to sue each of the defendants in federal court—was absent.<sup>26</sup>

*Strawbridge* recognized a statutory requirement of complete diversity of citizenship, which Congress has not seen fit to supersede for more than two hundred years.<sup>27</sup> Notably, the Court chose dismissal

---

20. See Joan Steinman, *Claims, Civil Actions, Congress & the Court: Limiting the Reasoning of Cases Construing Poorly Drawn Statutes*, 65 WASH. & LEE L. REV. 1593, 1608–09 (2008) (arguing that existing doctrine allows multiple claims to comprise a single “civil action”).

21. *Id.* at 1603–04.

22. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

23. *Id.* at 267.

24. *Id.*

25. *Id.*

26. See *id.*

27. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1424 (7th ed. 2015) (questioning the interpretation of *Strawbridge* but acknowledging that “the decision has consistently been interpreted more broadly . . . as requiring ‘complete’ diversity”); WRIGHT ET AL., *supra* note 9, § 3605 (observing that, aside from three specific exceptions, “the *Strawbridge* rule has been followed for more than two centuries”). Indeed, in 1989, Congress passed the supplemental-jurisdiction statute, which reinforced the rule of complete diversity. See 28 U.S.C. § 1367(b) (2012). It has been reported that John Marshall came to regret his opinion in *Strawbridge*. See Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1881 (2007); see also *Louisville, Cincinnati, & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844) (“We remark too, that the cases of *Strawbridge* . . . and *Deveaux* have never



of the entire action as the appropriate remedy for noncompliance with that requirement, rather than insisting that the circuit court exercise jurisdiction over the claims between any plaintiffs and defendants who were diverse in citizenship. The parties were capable of suing or being sued in federal court only if the complaint omitted nondiverse parties. Although explicitly reserving judgment as to whether the complete-diversity rule would govern “where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued,”<sup>28</sup> the Court was clear that all claims in the case before it were to be dismissed. At least for joint claims, then, *Strawbridge* supports the theory of joint jurisdiction.

A more recent endorsement of joint jurisdiction emerged in *Owen Equipment & Erection Co. v. Kroger*.<sup>29</sup> *Owen* involved a wrongful-death action filed in federal court against Omaha Public Power District (OPPD) by Geraldine Kroger.<sup>30</sup> Because Kroger and OPPD were citizens of Iowa and Nebraska, respectively, the district court’s jurisdiction was based upon diversity of citizenship under § 1332(a) at the outset of the action.<sup>31</sup> However, after OPPD impleaded Owen Equipment & Erection Co. as a third-party defendant,<sup>32</sup> Kroger amended her complaint to join Owen as an additional direct defendant.<sup>33</sup> Importantly, in its answer to the amended complaint, Owen did not specifically deny Kroger’s allegation that Owen was a Nebraska corporation that had its principal place of business in Nebraska.<sup>34</sup>

After the district court entered summary judgment for OPPD,<sup>35</sup> which concluded OPPD’s involvement as a party, the action proceeded to trial solely as to Kroger’s claims against Owen.<sup>36</sup> It was only then that Owen revealed that its principal place of business was in Iowa, thereby establishing that it shared Iowan citizenship with

---

been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the [C]ourt that made them.”).

28. *Strawbridge*, 7 U.S. (3 Cranch) at 267–68.

29. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

30. *Id.* at 367.

31. *Id.*

32. *Id.* at 367–68.

33. *Id.* at 368.

34. *Id.* at 368–69.

35. *Id.* at 368.

36. *Id.*

Kroger.<sup>37</sup> The district court nonetheless refused to dismiss the case for lack of jurisdiction and proceeded to enter judgment for Kroger after the jury returned a verdict in her favor.<sup>38</sup> The Court of Appeals for the Eighth Circuit affirmed that judgment on appeal, reasoning that the district court's exercise of jurisdiction over Kroger's claims against Owen was proper under the doctrine of ancillary jurisdiction.<sup>39</sup>

Reversing the Eighth Circuit, the Supreme Court held that the district court lacked jurisdiction over Kroger's claims against Owen.<sup>40</sup> The Court emphasized that § 1332(a) "and its predecessors have consistently been held to require complete diversity of citizenship,"<sup>41</sup> meaning that "diversity jurisdiction does not exist unless each defendant is a citizen of a different State from each plaintiff."<sup>42</sup> Kroger could not, therefore, have joined Owen as an additional direct defendant in her original complaint against OPPD because Iowa citizens would have been on both sides of the litigation.<sup>43</sup> The Court then observed that this same arrangement is precisely what Kroger had deployed in her amended complaint.<sup>44</sup> Consequently, when she filed that pleading, "[c]omplete diversity was destroyed just as surely as if she had sued Owen initially" because "'the matter in controversy' could not be 'between . . . citizens of different states.'"<sup>45</sup>

---

37. *Id.* at 369; *see* 28 U.S.C. § 1332(c)(1) (2012) (providing that, for purposes of federal diversity jurisdiction, "a corporation shall be deemed to be a citizen of every State . . . by which it has been incorporated *and* of the State . . . where it has its principal place of business" (emphasis added)).

38. *Owen*, 437 U.S. at 369.

39. *Id.* at 369–70. The Eighth Circuit determined that ancillary jurisdiction was applicable because Kroger's claims against Owen arose from the same core of operative facts as her claims against OPPD. *Id.* at 369. It further determined that, because Owen had concealed its Iowan citizenship from Kroger until trial, the district court had properly exercised its discretion to invoke ancillary jurisdiction. *Id.*

40. *Id.* at 377 n.21 ("Our holding is that the District Court lacked power to entertain [Kroger's] lawsuit against [Owen].").

41. *Id.* at 373.

42. *Id.*; *see id.* at 373–74 ("Whatever may have been the original purposes of diversity-of-citizenship jurisdiction, this subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant.").

43. *Id.* at 374.

44. *Id.*

45. *Id.* (quoting 28 U.S.C. § 1332(a)(1) (2012)).

Steadfastly defending the requirement of complete diversity,<sup>46</sup> the Court reasoned that, if ancillary jurisdiction extended to the claims at issue, plaintiffs could circumvent the complete-diversity rule simply by “suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants.”<sup>47</sup> The Court was also concerned that, if ancillary jurisdiction were extended to a plaintiff’s claim against a nondiverse party who had been previously joined in the litigation as a third-party defendant, there would be no legitimate basis to refuse to extend the doctrine to the same plaintiff’s claim against that same nondiverse party if it were joined in the original complaint.<sup>48</sup> The Court insisted that such an outcome would allow the complete-diversity rule to be “evaded completely.”<sup>49</sup>

*Owen* can be viewed as supportive of the theory of joint jurisdiction. It is true that the *Owen* Court did not explicitly address whether the filing of Kroger’s amended complaint affected the district court’s jurisdiction over her claims against OPPD. Nor did the Court explicitly address whether the district court’s jurisdiction over Kroger’s claims against OPPD would have been established in the first instance had her original complaint named Owen as an additional direct defendant. However, throughout its discussion, the Court consistently framed the complete-diversity rule as an all-or-nothing requirement. Nothing in *Owen* endorses the power of a district court to exercise jurisdiction over claims between diverse parties in the absence of complete diversity.

Justice White’s dissenting opinion confirms this understanding of *Owen*. Reacting to the Court’s endorsement of joint jurisdiction, Justice White offered an alternative perspective of several jurisdiction: “The complete-diversity requirement, of course, could be viewed as meaning that in a diversity case, a federal district court may adjudicate only those claims that are between parties of different States.”<sup>50</sup>

Almost thirty years after *Owen*, the Supreme Court revisited the subject of joint jurisdiction in *Exxon Mobil Corp. v. Allapattah*

---

46. *Id.* at 377 (“Congress has established the basic rule that diversity jurisdiction exists under 28 U.S.C. § 1332 only when there is complete diversity of citizenship. The policy of the statute calls for its strict construction.”).

47. *Id.* at 374.

48. *Id.* at 374–75.

49. *Id.* at 375.

50. *Id.* at 380 (White, J., dissenting).

*Services, Inc.*<sup>51</sup> *Allapattah* arose from two separate actions that were filed in federal court and premised solely on diversity of citizenship.<sup>52</sup> Unlike in *Strawbridge* and *Owen*, however, neither action involved a lack of complete diversity. Instead, the jurisdictional concern in each action was that at least one plaintiff—but not all plaintiffs—satisfied the amount-in-controversy requirement of § 1332(a).<sup>53</sup> The claims of the plaintiffs who did not meet the amount-in-controversy requirement could not, therefore, fall within the district court’s original diversity jurisdiction under § 1332(a).<sup>54</sup> The question before the Supreme Court was whether the district court could nonetheless exercise supplemental jurisdiction over those claims.<sup>55</sup>

To resolve that question, the Court first had to determine the meaning of a key phrase in the supplemental-jurisdiction statute.<sup>56</sup> Section 1367(a) of that statute provides,

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.<sup>57</sup>

---

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

52. *Id.* at 550–51.

53. *Id.*; see 28 U.S.C. § 1332(a) (2012) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 . . .”).

54. Under § 1332, each plaintiff must independently satisfy the amount-in-controversy requirement. See *Clark v. Paul Grey, Inc.*, 306 U.S. 583, 589 (1939) (“[W]hen several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court, and . . . those amounts cannot be added together to satisfy jurisdictional requirements.”). This principle applies equally to a putative class action in which the named plaintiffs satisfy the amount-in-controversy requirement, but members of the class do not. See *Zahn v. Int’l Paper Co.*, 414 U.S. 219, 301 (1973) (“Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—one plaintiff may not ride on another’s coattails.”). Of course, as *Allapattah* holds, the supplemental-jurisdiction statute, enacted after *Clark* and *Zahn*, authorizes a district court to retain the jurisdictionally insufficient claims that those cases previously required to be dismissed. *Allapattah*, 545 U.S. at 566.

55. See *Allapattah*, 545 U.S. at 549 (stating the question as “whether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy”).

56. See 28 U.S.C. § 1367.

57. *Id.* § 1367(a).

Under this language, a threshold requirement for a district court's exercise of supplemental jurisdiction under § 1367(a) is the presence of a "civil action of which the district courts have original jurisdiction."<sup>58</sup> The availability of supplemental jurisdiction in the cases before the Court, therefore, rested upon the appropriate scope of a "civil action" within the meaning of the statute. Does a "civil action" necessarily encompass all of the claims asserted in the complaint? Or can a "civil action" encompass only the jurisdictionally sufficient claims, leaving the jurisdictionally insufficient claims eligible for supplemental jurisdiction?

The Court's resolution of this thorny statutory issue resulted in the application of different theories of subject-matter jurisdiction to the respective requirements of § 1332(a). For the amount-in-controversy requirement, the Court endorsed a claim-by-claim basis in accordance with a theory of several jurisdiction. The purpose of the amount-in-controversy requirement, the Court observed, is "to ensure that a dispute is sufficiently important to warrant federal-court attention."<sup>59</sup> Because the presence of one jurisdictionally sufficient claim establishes that importance despite the presence of additional jurisdictionally insufficient claims,<sup>60</sup> the Court rejected the joint-jurisdiction notion "that a district court lacks original jurisdiction over a civil action unless the court has original jurisdiction over every claim in the complaint."<sup>61</sup> A "civil action" within the meaning of § 1367(a) could thus encompass only the jurisdictionally sufficient claims,<sup>62</sup> allowing supplemental jurisdiction to attach to other claims failing the amount-in-controversy requirement.<sup>63</sup> The upshot is that,

---

58. *Id.*

59. *Allapattah*, 545 U.S. at 562.

60. *Id.*

61. *Id.* at 560.

62. *Id.* at 549 ("When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, [the court] has original jurisdiction over a 'civil action' within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint.").

63. *Id.* ("[W]here the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy . . ."). Of course, the restrictions set forth in 28 U.S.C. § 1367(b) might prohibit the exercise of supplemental jurisdiction over claims of certain plaintiffs who do not satisfy the amount-in-controversy requirement, even when such supplemental jurisdiction would be authorized under § 1367(a), but those kinds of plaintiffs were not at issue in *Allapattah*. *See id.* at 560 ("Nothing in the text of § 1367(b) . . . withholds supplemental jurisdiction over the claims

for the amount-in-controversy requirement of § 1332(a), the Court took a claim-by-claim, several-jurisdiction approach.

In contrast to the several-jurisdiction approach to the amount-in-controversy requirement, the Court made clear that joint jurisdiction was the proper mode of analysis for the complete-diversity requirement: “A failure of complete diversity, unlike the failure of some claims to meet the requisite amount in controversy, contaminates every claim in the action.”<sup>64</sup> The Court supported this approach by observing that the purpose of the complete-diversity requirement “is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants.”<sup>65</sup> Because “[t]he presence of parties from the same State on both sides of a case dispels this concern,”<sup>66</sup> a single nondiverse claim “deprives the district court of original diversity jurisdiction over the entire action.”<sup>67</sup> The Court thus concluded that an action involving a complete-diversity violation cannot constitute a “civil action” that would allow for the exercise of supplemental jurisdiction under § 1367(a). As the Court stated, “[i]ncomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere.”<sup>68</sup>

Even the dissenting justices in *Allapattah* appear to have agreed with the Court’s endorsement of joint jurisdiction as it relates to complete-diversity violations. The dissenters took as a starting point the Court’s joint-jurisdiction approach to complete diversity and would have applied it equally to the amount-in-controversy requirement.<sup>69</sup>

---

of plaintiffs permissively joined under Rule 20 . . . or certified as class-action members pursuant to Rule 23 . . .”).

64. *Id.* at 564; *see id.* at 566 (“[T]he special nature and purpose of the diversity requirement mean[s] that a single nondiverse party can contaminate every other claim in the lawsuit . . .”); *id.* at 556 (“[Since 1789], the diversity requirement in § 1332(a) required complete diversity; absent complete diversity, the district court lacked original jurisdiction over all of the claims in the action . . .”).

65. *Id.* at 553–54.

66. *Id.* at 554; *see id.* at 562 (stating that “the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum”); *see also* WRIGHT ET AL., *supra* note 9, § 3605 (stating that the “justification for granting federal diversity jurisdiction does not apply to cases in which there are citizens from the same state on opposing sides of the litigation”).

67. *Allapattah*, 545 U.S. at 553 (emphasis added).

68. *Id.* at 564 (emphasis added).

69. *Id.* at 584, 590 (Ginsburg, J., dissenting) (“[D]iversity must be ‘complete,’ *i.e.*, all parties on plaintiffs’ side must be diverse from all parties on defendants’ side. . . . In contrast to the

Notably, the established practice regarding removal of actions from state court to federal court tends to confirm the joint-jurisdiction approach of complete diversity. Although Congress could set a different standard for removal than for original jurisdiction, Congress has opted to make removal authorization generally derivative of original jurisdiction and thus incorporate the complete-diversity rule.<sup>70</sup> In light of that, the Supreme Court has consistently restricted diversity removal to cases in which all plaintiffs are citizens of states different from all defendants.<sup>71</sup> In addition, the Court has long interpreted the removal statute to prohibit partial removal.<sup>72</sup> Indeed, removal procedure throughout the nation's history, with one swiftly corrected exception, has been whole-case removal.<sup>73</sup> Removal therefore reflects the approach of joint jurisdiction for diversity cases.<sup>74</sup>

---

Court's construction of § 1367 . . . the interpretation presented here does not sever [diversity and the amount-in-controversy components.]; see also Steinman, *supra* note 20, at 1636 (interpreting the dissent to "believe that the fact patterns presented *no* civil actions within original federal jurisdiction because the monetarily-insufficient claims of some plaintiffs prevented there from being any action within the diversity jurisdiction of the federal courts").

70. See 28 U.S.C. § 1441(a) (2012) ("Any civil action brought in a State court of which the district courts of the United States have original jurisdiction may be removed . . ."); *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997) ("The propriety of removal thus depends on whether the case originally could have been filed in federal court."); Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 61 (2008) (observing that § 1441(a) incorporates the complete-diversity rule). Exceptions do exist. See Dodson, *supra*, at 61–65.

71. See, e.g., *Barney v. Latham*, 103 U.S. 205, 209 (1880).

72. *Id.* ("If the whole suit could not be removed, no part of it could be taken from the State court."); see also Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779, 788 (2006) ("[A] diverse defendant joined with a diversity spoiler has no statutory vehicle to seek removal on the basis that he has a 'diversity suit' unfairly (and perhaps intentionally) trapped inside a larger non-removable action.").

73. In the Separable Controversy Act, ch. 288, 14 Stat. 306 (1866), Congress experimented with "allow[ing] a diverse defendant to remove his part of the case to federal court—despite the presence of joined, nondiverse co-defendants—if the case against him was 'separable' from the case against the other defendants," Hines & Gensler, *supra* note 72, at 785–86, but the experiment was such a failure of confusion and inefficiency, see Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1157 (1995), that Congress quickly restored whole-case removal, see Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. The removal statute does allow partial remand for "separate and independent claim[s]," but that provision has never played much of a role in diversity-jurisdiction removal, and, today, is expressly reserved for federal-question removal. See 28 U.S.C. § 1441(c).

74. Whole-case removal seems grounded in solid policy considerations. See Steinman, *supra* note 20, at 1645 ("The ability to remove individual claims would be a potent weapon in the arsenal of defendants who sought to burden plaintiffs with the substantial costs and other inconveniences of parallel litigation."); *id.* ("[T]he number of occasions when res judicata or

Thus, from *Strawbridge* to *Owen* to *Allapattah*, the Supreme Court has maintained a longstanding endorsement of joint jurisdiction with respect to the complete-diversity requirement.

### B. Several Jurisdiction

In a separate line of precedent, however, the Court has cultivated a tradition of applying the claim-specific approach of several jurisdiction to complete-diversity violations.

As early as 1825,<sup>75</sup> the Court recognized that diversity-destroying parties could be dismissed to salvage complete diversity. *Carneal v. Banks*<sup>76</sup> arose out of an alleged breach of contract between Carneal and Banks for an exchange of land.<sup>77</sup> Banks brought suit in federal circuit court, asserting that Carneal fraudulently misrepresented good title to the land and its value.<sup>78</sup> When Carneal subsequently died, Banks sued Carneal's heirs to have the contract rescinded and title to the land restored as before the contract. Banks also sued the heirs of Harvie, the previous owner of Banks's land, to ensure that title to the land remained with Banks. Carneal's heirs were not citizens of Virginia, but Banks and Harvie's heirs were all citizens of Virginia.<sup>79</sup> Nevertheless, the court entered a decree for Banks upon a jury verdict.<sup>80</sup>

On appeal from the decree, Carneal's heirs argued that the incomplete diversity among Banks and Harvie's heirs deprived the circuit court of jurisdiction over the entire action.<sup>81</sup> In rejecting that contention, the Supreme Court stated that jurisdiction over a claim

---

collateral estoppel could bite a litigant could greatly multiply."); *id.* at 1646 ("[T]hese consequences would undermine the goals of efficiency, convenience, cost-savings, and avoidance of both duplication and the creation of unnecessary and potentially complex issues."). Of course, whole-case removal has its share of downsides as well. *See Hines & Gensler, supra* note 72, at 781–82.

75. The idea perhaps originates with *Corporation of New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91 (1816), in which two plaintiffs sought ejectment as joint heirs in a diversity action, but one plaintiff was incapable of suing in diversity because he was a citizen of a U.S. territory rather than a state. *Id.* at 91–92. The Court held jurisdiction was lacking over the entire action, but only because the ejectment action was an indivisible joint claim. *Id.* at 95. In dicta, the Court surmised that, had the plaintiffs elected to sue severally, the spoiling plaintiff could have been dropped to preserve the remainder of the action. *Id.*

76. *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181 (1825).

77. *Id.* at 182.

78. *Id.* at 182–83.

79. *Id.*

80. *Id.* at 187.

81. *Id.* at 187–88.



against a diverse party would be disrupted by the presence of a nondiverse party only if the latter were indispensable to the suit.<sup>82</sup> Because Harvie's heirs were not even proper parties, much less indispensable parties,<sup>83</sup> they "[could not] affect the jurisdiction of the Court as between those parties who [were] properly before it."<sup>84</sup>

Four years later, the Court applied a similar claim-specific approach in *Conolly v. Taylor*.<sup>85</sup> There, foreign nationals and a Pennsylvania citizen sued Kentucky defendants and an Ohio defendant in a federal circuit court in Kentucky.<sup>86</sup> The Judiciary Act at that time extended alienage jurisdiction over a suit involving aliens,<sup>87</sup> and diversity jurisdiction over a "suit . . . between a citizen of the State where the suit [was] brought, and a citizen of another State."<sup>88</sup> Accordingly, the claims by the foreign nationals against the U.S. defendants met the statutory requirements of alienage jurisdiction, and the claim by the Pennsylvania plaintiff against the Kentucky defendant met the statutory requirements of diversity jurisdiction.<sup>89</sup> However, the statute did not authorize the circuit court to exercise diversity jurisdiction over the claim by the Pennsylvania plaintiff against the Ohio defendant because neither was a Kentucky citizen.<sup>90</sup> Accordingly, the circuit court dismissed the Pennsylvania plaintiff, proceeded with the rest of the case, and ultimately entered a decree.<sup>91</sup>

On appeal, the Supreme Court rejected the defendants' argument that the initial presence of the Pennsylvania plaintiff tainted the whole case such that dismissal of that party could not save

---

82. *Id.* at 188 ("If the validity of this [jurisdictional] objection, so far as respects Harvie's heirs, be unquestionable, it cannot affect the suit against Carneal's heirs, unless it be indispensable to bring Harvie's heirs before the Court, in order to enable it to decree against Carneal's heirs.").

83. *Id.* ("[Harvie's heirs] are made defendants by Banks, under the idea that the title to the land sold by him to Carneal was in them; but this is a mistake.").

84. *Id.*

85. *Conolly v. Taylor*, 27 U.S. (2 Pet.) 556 (1829).

86. *Id.* at 556–57.

87. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 ("[T]he circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where . . . an alien is a party . . .").

88. *Id.*

89. *See id.*; *Conolly*, 27 U.S. (2 Pet.) at 564.

90. *Conolly*, 27 U.S. (2 Pet.) at 564.

91. *Id.*

the remaining claims.<sup>92</sup> The Court acknowledged that the joinder of the Pennsylvania plaintiff prevented the exercise of alienage jurisdiction over the claims of the foreign plaintiffs.<sup>93</sup> However, the simple dismissal of the Pennsylvania plaintiff effectively removed the defect and enabled the circuit court to proceed on the basis of alienage jurisdiction: “Strike out [the Pennsylvania plaintiff’s] name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed, between the alien plaintiffs and all the citizen defendants.”<sup>94</sup>

In *Horn v. Lockhart*,<sup>95</sup> another nineteenth-century decision, Texas complainants sued both Texas and diverse defendants, resulting in incomplete diversity.<sup>96</sup> However, rather than dismiss the entire suit—a disposition that joint jurisdiction would have compelled—the federal circuit court considered the claims severally and dismissed only the Texas defendants.<sup>97</sup> The court then entered a final decree regarding the remaining claims among the completely diverse parties.<sup>98</sup>

On appeal, the Supreme Court rejected the contention that the failure of complete diversity at the time of filing deprived the circuit court of jurisdiction over the entire proceeding.<sup>99</sup> The Court emphasized that, because the Texas defendants were not indispensable parties, “their interests were not so interwoven and bound up with those of the complainants, or other parties, that no decree could be made without necessarily affecting them.”<sup>100</sup> Considering that the rights of the remaining parties were “adequately and fully determined without prejudice,”<sup>101</sup> the Court was satisfied that the jurisdictional defect “was met and obviated by the dismissal of the [nondiverse defendants].”<sup>102</sup>

---

92. *Id.* at 564–65.

93. *Id.* at 565 (“The substantial parties plaintiffs . . . are aliens; and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction, by uniting with themselves a person between whom and one of the defendants the court cannot take jurisdiction.”).

94. *Id.*

95. *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570 (1873).

96. *See id.* at 573–74, 579.

97. *Id.* at 574.

98. *Id.*

99. *Id.* at 579.

100. *Id.*

101. *Id.*

102. *Id.*

The preceding cases reveal the Supreme Court's willingness to apply several jurisdiction in order to allow for a defect in complete diversity to be cured through dismissal of nondiverse parties prior to judgment.<sup>103</sup> Somewhat more remarkable is the longstanding practice of courts exercising this same authority even after judgment, a practice the Court reaffirmed in the 1989 case *Newman-Green, Inc. v. Alfonzo-Larrain*.<sup>104</sup>

*Newman-Green* involved a suit brought by an American company against foreign citizens and a U.S. citizen domiciled abroad.<sup>105</sup> A U.S. party domiciled abroad is neither a foreign citizen nor a citizen of any state, but rather a "stateless" American who cannot be sued under § 1332.<sup>106</sup> Accordingly, the court lacked jurisdiction as long as the stateless defendant remained in the case. The defect, however, went unnoticed, and the district court proceeded to enter judgment against Newman-Green despite the absence of diversity jurisdiction.<sup>107</sup> Newman-Green appealed.

The Supreme Court held that a federal court of appeals may, under Rule 21 of the Federal Rules of Civil Procedure (which allows parties to be dropped "at any time" and "on just terms"<sup>108</sup>), dismiss a jurisdictional spoiler in order to preserve a judgment entered in the absence of complete diversity.<sup>109</sup> The Court first concluded that Rule 21 authorized district courts, even after entry of judgment, to dismiss parties who spoiled diversity.<sup>110</sup> The Court then extended this authority to federal appellate courts, which had exercised such

---

103. For hundreds of years, federal courts have followed this course and held that defects in complete diversity can be cured through the dismissal of diversity spoilers. WRIGHT ET AL., *supra* note 9, § 3608 ("Courts frequently employ Rule 21 to preserve diversity jurisdiction by dropping a nondiverse party if that party's presence in the action is not required under Rule 19.").

104. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

105. *Id.* at 828.

106. *Id.* at 828–29.

107. *Id.* at 828.

108. See FED. R. CIV. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.").

109. *Newman-Green*, 490 U.S. at 827 ("We decide today that a court of appeals may grant a motion to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction.").

110. *Id.* at 832.

authority in prior cases.<sup>111</sup> The Court stated it would not “disturb that deeply rooted understanding of appellate power.”<sup>112</sup>

*Newman-Green* makes sense from a standpoint of several jurisdiction.<sup>113</sup> Because the theory of several jurisdiction holds that a district court’s jurisdiction over a claim between diverse parties is unaffected by a complete-diversity violation, the district court would retain separate jurisdiction solely over that claim even though the jurisdictional spoiler was still a party to the action at the time of judgment.

By contrast, *Newman-Green* deviates from the theory of joint jurisdiction.<sup>114</sup> Under joint jurisdiction, the presence of a jurisdictional spoiler would contaminate the diverse claim, depriving the court of jurisdiction over all claims. Dismissal of the spoiler, therefore, could not “preserve” jurisdiction over the claims between diverse parties because no jurisdiction over those claims had ever existed.<sup>115</sup>

Thus, in contrast to the joint-jurisdiction line of cases from *Strawbridge* to *Owen* to *Allapattah*, the Supreme Court has maintained an equally longstanding commitment to several jurisdiction in cases like *Carneal*, *Horn*, and *Newman-Green*.

## II. SOME UNAPPEALING PROPOSALS

The dissonance resulting from the Supreme Court’s endorsement of both joint jurisdiction and several jurisdiction in conjunction with the complete-diversity rule invites resolution. But because each

---

111. *Id.* at 833–36.

112. *Id.* at 836; *cf.* *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181, 188 (1825) (upholding jurisdiction, postjudgment, over a completely diverse slice of a case that also involved dispensable nondiverse spoilers).

113. *See* Oakley, *supra* note 16, at 49 (“*Newman-Green* makes eminent sense if § 1332 is understood to vest the district court with original jurisdiction of all claims between diverse parties, with the joinder of claims between nondiverse parties raising the distinct issues of the scope of the district court’s supplemental jurisdiction over such claims and the necessity of their joinder.”).

114. *See* FALLON ET AL., *supra* note 27, at 1460 (“[If *Allapattah*] is right that the absence of complete diversity means that the entire action has been jurisdictionally contaminated from the start, how does one justify the decisions in cases like *Newman-Green* . . . ?”). Perhaps it is unsurprising that *Allapattah* (authored by Justice Kennedy, who dissented in *Newman-Green*) cites *Newman-Green* only for mundane principles of the policy rationale for complete diversity. *See* *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 554 (2005).

115. *See* Oakley, *supra* note 16, at 48–49 (“If indeed § 1332 confers no jurisdiction over any claim unless all claims in an action qualify independently for federal jurisdiction, the effect of the dismissal of the jurisdictional spoiler would be to confer retroactively and nonstatutorily the power to adjudicate the previously adjudicated claims between the diverse parties.”).

tradition boasts substantial doctrinal support, merely picking one over the other proves unsatisfying.

One proposal is to stick with joint jurisdiction for complete diversity and limit or reform conflicting traditions of several jurisdiction. Professor Steinman, for example, has favored a somewhat modified joint-jurisdiction approach to complete diversity, though her real focus is on the supplemental-jurisdiction statute.<sup>116</sup> Under her approach, a “civil action” under § 1367(a) is that group of all claims and defenses that the Rules and jurisdictional statutes allow to be asserted together.<sup>117</sup> In her view, joint jurisdiction is consistent with the linguistic term of a “civil action” and the pedigree of complete diversity.<sup>118</sup>

But joint jurisdiction has significant downsides. First, it is seemingly incompatible with the longstanding several-jurisdiction precedent.<sup>119</sup> This theory would limit Rule 21—which allows parties to be dropped “at any time” and “on just terms”—to situations not involving a lack of jurisdiction.<sup>120</sup> Perhaps that is a fair gloss on Rule 21; after all, Rule 18 does not allow joinder in excess of jurisdictional limits even though the rule itself is not so limited,<sup>121</sup> and Rule 82 disavows the rules’ effects on jurisdiction.<sup>122</sup> But if so, joint jurisdiction would undermine a long tradition in the lower courts of curing jurisdictional defects through Rule 21 and otherwise.<sup>123</sup> Professor

---

116. Steinman, *supra* note 20, at 1606–07.

117. *Id.* Professor James Pfander adopts a slightly different formulation that focuses on the distinction between claims in the complaint and claims by plaintiffs involving subsequently joined parties. See James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 146 (1999) (“[T]he general thrust of section 1367(b), . . . sympathetically read, operates not as a constraint on what the plaintiff does in the initial complaint but on what the plaintiff does later with respect to subsequently joined parties.”).

118. Steinman, *supra* note 20, at 1607.

119. See Oakley, *supra* note 16, at 48 (arguing that action-based contamination is incompatible with curative opinions like *Newman-Green*).

120. FED. R. CIV. P. 21. Joint jurisdiction would preclude Rule 21’s applicability to diversity spoilers.

121. See FED. R. CIV. P. 18(a) (“A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.”); 6A WRIGHT ET AL., *supra* note 9, § 1588 (“Clearly the terms of Rule 18 are not sufficient to extend the court’s subject-matter jurisdiction to state claims . . .”).

122. See FED. R. CIV. P. 82 (“These rules do not extend or limit the jurisdiction of the district courts . . .”).

123. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989) (“[I]t is apparent that the weight of authority favored the view that appellate courts possessed the authority to grant motions to dismiss dispensable nondiverse parties.”).

Steinman dismisses these cases as using “an economizing shortcut” that “need not be viewed as inconsistent” with theories of joint jurisdiction,<sup>124</sup> but it is hard to see how that can be, and she offers no further explanation for why they are not inconsistent.

Second, the use of joint jurisdiction for the complete-diversity requirement is in some tension with the widespread and undisputed use of several jurisdiction in connection with other jurisdictional doctrines, such as federal-question jurisdiction and the amount-in-controversy requirement. One could explain that distinction through resort to the bias rationale of protecting out-of-state litigants, as *Allapattah* does. As we noted at the outset of this article, however, that bias rationale has never been particularly compelling.<sup>125</sup> Even Professor Steinman recognizes the apparent incoherence of applying joint jurisdiction to the complete-diversity requirement but not to federal-question cases.<sup>126</sup>

Third, as a practical matter, joint jurisdiction imposes costs by undermining claims between diverse parties whose only flaw is their joinder with a claim between nondiverse parties. With no avenue for retaining jurisdiction over them, those claims will have to start anew, with all efforts toward resolving them wiped clean. As the Court in *Newman-Green* noted, such an approach of “requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.”<sup>127</sup>

A different proposal is to stick with several jurisdiction and reform or reinterpret the joint-jurisdiction tradition. Professor John Oakley has favored the several-jurisdiction approach to complete diversity.<sup>128</sup> Despite the “action-specific” phrasing of § 1332, he has argued that “the claim rather than the civil action is the fundamental unit of litigation for purposes of federal jurisdiction.”<sup>129</sup> Professor Oakley acknowledges that complete diversity is a “significant

---

124. Steinman, *supra* note 20, at 1617–18; *see also id.* at 1627 (“I nonetheless would permit district courts to ‘save’ the claims that are supported by an independent basis of subject-matter jurisdiction or that fall within supplemental jurisdiction by dismissing only the unqualified or ‘offending’ claims.”).

125. *See supra* notes 1–5 and accompanying text.

126. *See* Steinman, *supra* note 20, at 1602 (acknowledging that “this purported distinction may not hold-up”).

127. *Newman-Green Inc.*, 490 U.S. at 836.

128. Oakley, *supra* note 16, at 45–52.

129. *Id.* at 26.

impediment” to his claim-specific proposal,<sup>130</sup> but argues that the rule is “misunderstood.”<sup>131</sup> In his view, “the mandate of the rule of complete diversity restricts the scope of the supplemental jurisdiction of the district courts in diversity cases. Incomplete diversity does not divest the district court of original jurisdiction over claims for which supplemental jurisdiction is not required.”<sup>132</sup>

We sympathize with Professor Oakley’s position and think he may well be correct about the historical basis for claim-specific jurisdiction. But, as he resignedly accepts, endorsing his view would disrupt a venerable tradition (even if misunderstood) of joint jurisdiction dating back at least to *Strawbridge*. Further, Congress has consistently adhered to the complete-diversity tradition when amending the diversity statute, and its failure to amend the statute to mandate the application of several jurisdiction suggests that the statute now should be read as incorporating *Strawbridge* (even if misunderstood). Professor Oakley’s view, then, would also risk undermining what may now be the proper interpretation of the statute. We think the resulting disruption to *Strawbridge* is intolerable.

In short, because longstanding doctrine supports both joint jurisdiction and several jurisdiction, reconciliation merely by selecting one runs up against the wall of precedent of the other.

### III. THE JURISDICTIONAL-TIMING SOLUTION

Rather than pick one tradition at the expense of the other, we offer a middle road that, with slight tweaking, largely preserves both traditions. That middle road begins with a focus on when subject-matter jurisdiction attaches. The usual rule—the so-called “time-of-filing rule”—requires federal subject-matter jurisdiction to be assessed at the time of filing (or removal). In other words, if complete diversity exists at the time of filing, then the court has subject-matter jurisdiction even if subsequent events cause diversity to be lacking later in the case.

---

130. *Id.* at 26–27 (“If it were true that a district court has no jurisdiction over any claim in a diversity case unless every claim in that case is between parties of fully diverse citizenship, § 1332 would indeed be an ‘action-specific’ grant of jurisdiction . . .”).

131. *Id.* at 27. Professor Oakley also concedes that aggregation is inconsistent with a pure claim model, but would reinterpret aggregation rules as a form of supplemental jurisdiction. *Id.* at 47.

132. *Id.* at 49.

But the time-of-filing rule neither is itself jurisdictional nor must control every case. The time of jurisdictional assessment can be shifted to a later stage of the litigation, such as the moment after the dismissal of a nondiverse party. This approach allows for a shift from the time of filing to the time of cure of the jurisdictional defect, thereby transforming several jurisdiction into joint jurisdiction at a different time.

This Part explains how expanding the timeframe of jurisdictional assessment in this manner can alleviate the tensions between joint and several jurisdiction. This approach allows joint jurisdiction to be the prevailing theory of complete diversity, even in cases curing diversity defects by dismissing jurisdictional spoilers. Because jurisdiction is tested only after a jurisdictional spoiler leaves the suit, complete diversity would be present even under a theory of joint jurisdiction.

#### A. *The Usual Rule*

Defects in subject-matter jurisdiction can be raised by any party (or even by the court *sua sponte*) at any time (even for the first time on appeal).<sup>133</sup> Once a court finds that it lacks subject-matter jurisdiction, it cannot proceed, for subject-matter jurisdiction is the power of the court to act.<sup>134</sup>

But these principles present a timing question: At what point in time is subject-matter jurisdiction assessed? The traditional rule holds that the citizenship of the parties is established at the time of federal-court invocation, either at the time of filing in federal court or at the time of removal to federal court.<sup>135</sup> This time-of-filing rule has ancient roots; in the 1824 case *Mollan v. Torrance*,<sup>136</sup> the Court held that the

---

133. See Dodson, *supra* note 70, at 60.

134. *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 384 (1884).

135. *WRIGHT ET AL.*, *supra* note 9, § 3608 (“It has long been hornbook law . . . that whether federal diversity of citizenship jurisdiction exists is determined by examining the citizenship of the parties at the time the action is commenced by filing the complaint with the court as prescribed by Federal Rule of Civil Procedure 3.”); *id.* (“The majority of decisions typically require complete diversity to exist at the time the removal petition is filed.”). A substantial minority of courts require, for removal actions, that subject-matter jurisdiction exists both at the time of removal and at the time of filing to prevent a party-citizenship change in state court from creating diversity jurisdiction. *Id.* § 3723.

136. *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537 (1824).



existence of diversity jurisdiction “depends upon the state of things at the time of the action brought.”<sup>137</sup>

As it happens, the time-of-filing rule often operates to preserve diversity jurisdiction when it otherwise would appear lacking. A quintessential application can be found in *Freeport-McMoRan, Inc. v. K N Energy, Inc.*,<sup>138</sup> in which the Court held that the diversity jurisdiction acquired at the initiation of a suit cannot be divested on account of a subsequent destruction of complete diversity.<sup>139</sup> *Freeport* arose from an action for breach of contract that McMoRan Oil & Gas Co. and its parent company, Freeport-McMoRan Inc., filed in federal court against K N Energy, Inc.<sup>140</sup> At the time of filing, complete diversity was present because McMoRan and Freeport (citizens of Louisiana and Delaware) were diverse from K N (a citizen of Kansas and Colorado).<sup>141</sup> The district court’s jurisdiction was thus suitably premised upon diversity of citizenship under § 1332(a).<sup>142</sup>

McMoRan and Freeport later amended their complaint to add FMP Operating Company, a Texas limited partnership to which McMoRan had assigned its interest in the contract at issue, as a third plaintiff.<sup>143</sup> FMPO, however, was a citizen of Kansas and Colorado, making FMPO a nondiverse party.<sup>144</sup> The matter nonetheless proceeded to trial, after which the district court entered judgment for the plaintiffs.<sup>145</sup> On K N’s appeal from that judgment, the Court of Appeals for the Tenth Circuit reversed and directed that the action be dismissed for lack of jurisdiction.<sup>146</sup> The Tenth Circuit reasoned that the FMPO’s joinder destroyed complete diversity and thus deprived the district court of jurisdiction over the entire action.<sup>147</sup>

The Supreme Court rejected the Tenth Circuit’s analysis.<sup>148</sup> Emphasizing “the well-established rule that diversity of citizenship is

---

137. *Id.* at 539; *see also* *Morgan’s Heirs v. Morgan*, 15 U.S. (2 Wheat.) 290, 297 (1817) (“We are all of opinion that the jurisdiction having once vested, was not divested by the change of residence of either of the parties.”).

138. *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426 (1991) (per curiam).

139. *Id.* at 427–28.

140. *Id.* at 427.

141. *See* *McMoRan Oil & Gas Co. v. K N Energy, Inc.*, 907 F.2d 1022, 1023 (10th Cir. 1990).

142. *Id.*

143. *Id.* at 1023–25.

144. *Id.*

145. *Id.* at 1023.

146. *Id.* at 1025.

147. *Id.* at 1024–25.

148. *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam).

assessed at the time the action is filed,”<sup>149</sup> the Court stated that “if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events,”<sup>150</sup> including the joinder of a nondiverse dispensable party.<sup>151</sup> Concerned that “[a] contrary rule could well have the effect of deterring normal business transactions during the pendency of what might be lengthy litigation,”<sup>152</sup> the Court held that “[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action.”<sup>153</sup> The teaching of *Freeport* is that the time-of-filing rule allows a district court to ignore certain postfiling diversity-destroying events by fixing the time of jurisdictional assessment at the time of filing.<sup>154</sup>

The time-of-filing rule protects against gamesmanship (fiddling with parties postfiling to force dismissal) and waste (dismissal late in the litigation) while promoting uniformity, clarity, and ease of application.<sup>155</sup> Thus, the usual rule is that a court must assess diversity jurisdiction based on the lawsuit as filed, notwithstanding any postfiling changes.<sup>156</sup>

---

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 428–29.

153. *Id.* at 428.

154. The rule applies in other contexts as well, such as postfiling citizenship changes and, prior to 1998, the adding of nondiverse parties after removal. *See* Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567, 575 (2004) (declining to allow diversity jurisdiction when a nondiverse action became diverse through a postfiling change of citizenship of the nondiverse party); 14B WRIGHT ET AL., *supra* note 9, § 3723 (noting that judicial practice prior to 1998 was that the plaintiff should not oust federal jurisdiction in a removed case by adding a nondiverse defendant). Congress occasionally has deviated from the time-of-filing rule. *See* 28 U.S.C. § 1332(d)(7) (2012) (providing that CAFA class-member citizenship may be determined after filing if the pleading is not initially, but later becomes, subject to federal jurisdiction).

155. 13B WRIGHT ET AL., *supra* note 9, § 3608; *Grupo Dataflux*, 541 U.S. at 580 (“The time-of-filing rule is what it is precisely because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful.”); *Dery v. Wyer*, 265 F.2d 804, 808 (2d Cir. 1959) (articulating the policy “that the sufficiency of jurisdiction should be determined once and for all at the threshold and if found to be present then should continue until final disposition of the action”).

156. *See* *Grupo Dataflux*, 541 U.S. at 571 (stating that time-of-filing rule “measures all challenges to subject-matter jurisdiction premised upon diversity of citizenship against the state of facts that existed at the time of filing”). The time-of-filing rule also applies to the amount-in-controversy requirement. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 293 (1938) (“[E]vents occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff’s control or the result of his volition, do not oust the district court’s jurisdiction once it has attached.”).

## B. Caterpillar

This time-of-filing rule is neither constitutionally mandated nor itself jurisdictional but rather a manifestation of judicial policy.<sup>157</sup> In other words, unlike more rigid jurisdictional rules, the time-of-filing rule is amenable to modifications and exceptions.

In the removal context, the time-of-removal rule is a matter of statute.<sup>158</sup> The removal statute states that a defendant can remove a case of which the federal courts “have original jurisdiction” within thirty days of the state case “becom[ing] removable.”<sup>159</sup> Nevertheless, the Court has held the time-of-removal rule to be exorable. In *Caterpillar Inc. v. Lewis*,<sup>160</sup> Kentuckian James David Lewis sued diverse defendant Caterpillar and nondiverse defendant Wayne in state court.<sup>161</sup> Diverse party Liberty Mutual later intervened as a plaintiff in order to assert claims of its own against both defendants.<sup>162</sup> Because Lewis and Wayne were both Kentucky citizens,<sup>163</sup> there was a lack of complete diversity in the initial complaint, and thus there

---

157. *Grupo Dataflux*, 541 U.S. at 571; 13B WRIGHT ET AL., *supra* note 9, § 3608. In removed cases, the time-of-removal rule is statutory. See 28 U.S.C. § 1441(a).

158. In some circumstances, such as a change in a party’s citizenship, federal courts require, as a matter of federal common law, complete diversity to exist at the time of filing as well as at the time of removal. See WRIGHT ET AL., *supra* note 9, § 3723. This Article focuses on the statutory time-of-removal rule and its violations—for example, circumstances in which complete diversity is lacking at the time of removal.

159. See 28 U.S.C. §§ 1441(a), 1446(b)(3).

160. *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996). *Caterpillar* builds upon *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), which confronted a case improperly removed to federal court on the basis of the presence of the United States as a defendant even though the United States was a spurious party. *Grubbs*, 405 U.S. at 701–02. After the United States was dismissed, complete diversity remained in the case, and the district court entered judgment. *Id.* On appeal, the Supreme Court held that although U.S.-party removal was improper, the district court had jurisdiction to enter judgment: “We have concluded that, whether or not the case was properly removed, the District Court did have jurisdiction of the parties at the time it entered judgment. Under such circumstances the validity of the removal procedure followed may not be raised for the first time on appeal . . . .” *Id.* at 700. The primary difference between *Grubbs* and *Caterpillar* is that, in *Grubbs*, the plaintiff failed to timely move to remand, while, in *Caterpillar*, the plaintiff did timely move to remand. See *id.* at 701; *Caterpillar*, 519 U.S. at 64. Nevertheless, the Court in *Caterpillar* refused to vacate the judgment despite the plaintiff’s timely efforts. *Caterpillar*, 519 U.S. at 67. For more on *Caterpillar*, see Scott Dodson, *A Revolution in Jurisdiction*, in *THE LEGACY OF RUTH BADER GINSBURG* 137, 147–48 (Scott Dodson ed. 2015).

161. *Caterpillar*, 519 U.S. at 64–65.

162. *Id.* at 65.

163. *Id.*

would have been a lack of diversity jurisdiction had Lewis filed in federal court. The case as filed, therefore, was nonremovable.<sup>164</sup>

However, Lewis and Wayne settled their claims in the state court.<sup>165</sup> Caterpillar then filed a notice of removal in federal district court, asserting that Wayne's dismissal made the case removable on the basis of diversity of citizenship.<sup>166</sup> Lewis timely moved to remand the case back to state court, arguing that Liberty Mutual's claim against Wayne kept Wayne in the case and continued to prevent complete diversity.<sup>167</sup> Although Lewis was correct,<sup>168</sup> the district court erroneously denied his motion to remand,<sup>169</sup> and the case thereafter remained in federal court despite a lack of complete diversity.<sup>170</sup>

Several years into the litigation, a settlement agreement reached with Liberty Mutual resulted in Wayne's actual dismissal as a party to the action.<sup>171</sup> The matter then proceeded to trial solely as to Lewis's claims against the diverse defendant Caterpillar.<sup>172</sup> After the jury returned a verdict for Caterpillar, the district court entered judgment, and Lewis appealed.<sup>173</sup> The Sixth Circuit reasoned—consistent with the time-of-removal rule—that the absence of complete diversity at the time of removal required remand for lack of jurisdiction.<sup>174</sup>

Reversing the Sixth Circuit, the Supreme Court held that a failure of complete diversity at the time of removal “[was] not fatal to the ensuing adjudication if federal jurisdictional requirements are met

---

164. A state-court defendant's ability to remove an action usually hinges upon whether the plaintiff could have filed originally in federal court. *See* 28 U.S.C. § 1441(a) (2012) (allowing removal of “[a]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction”); *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997) (“The propriety of removal thus depends on whether the case originally could have been filed in federal court.”). Accordingly, a defendant may remove a diversity action only when it satisfies the requirements of 28 U.S.C. § 1332(a)—including the complete-diversity rule. *See* Dodson, *supra* note 70, at 61 (observing that § 1441(a) incorporates the complete-diversity rule).

165. *Caterpillar*, 519 U.S. at 65.

166. *Id.*

167. *Id.*

168. *Id.* at 70 (noting that “the Sixth Circuit correctly determined that the complete diversity requirement was not satisfied at the time of removal”).

169. *Id.* at 65–66.

170. *Id.* at 66–67.

171. *Id.* at 66.

172. *Id.*

173. *Id.*

174. *Id.* at 64, 67.

at the time judgment [was] entered.”<sup>175</sup> In the underlying action, complete diversity was restored once the jurisdictional spoiler, Wayne, had been dismissed as a party prior to trial.<sup>176</sup> With the jurisdictional defect cured, the district court had diversity jurisdiction over Lewis’s claims at the time that it entered judgment for Caterpillar.<sup>177</sup>

However, although the jurisdictional defect was cured by the dismissal of the nondiverse party, the case was still improperly removed in violation of the time-of-removal rule.<sup>178</sup> Nevertheless, the Court stated, “[o]nce a diversity case has been tried in federal court, . . . considerations of finality, efficiency, and economy become overwhelming.”<sup>179</sup> In other words, the statutory time-of-removal requirement, even when properly invoked, can be overridden by countervailing practical considerations.

### C. *Time Shifting and Its Implications*

*Caterpillar* was a removal case under the removal statute’s time-of-removal provision. The time-of-filing rule for cases filed in federal court is a judicial creation, and, as such, ought to be modifiable by courts even more easily than the statutory time-of-removal rule at issue in *Caterpillar*.<sup>180</sup> Although the several-jurisdiction cases of *Carneal*, *Horn*, and *Newman-Green* discussed above do not rely upon manipulation of the time-of-filing rule to account for their holdings, we think they should be understood in the same light as *Caterpillar*—as cases allowing manipulation of the time-of-filing rule.

A subsequent case characterized *Caterpillar*’s “method of curing a jurisdictional defect” to be “an exception to the time-of-filing

---

175. *Id.* at 64. The Court was explicit that “if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated.” *Id.* at 76–77.

176. *Id.* at 73.

177. *Id.*

178. *Id.* (stating that although “[t]he *jurisdictional* defect was cured, . . . a statutory flaw—*Caterpillar*’s failure to meet the [removal] requirement that the case be fit for federal adjudication at the time the removal petition is filed—remained in the unerasable history of the case”).

179. *Id.* at 75.

180. See *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 567 (2004) (acknowledging that the time-of-filing rule is a judicial creation); *id.* at 594 n.9 (Ginsburg, J., dissenting). *Grupo Dataflux*, it should be noted, refused to adopt a new exception to the rule for postfiling changes in citizenship of a party. *Id.* at 582 (majority opinion) (“We decline to endorse a new exception to a time-of-filing rule that has a pedigree of almost two centuries.”).

rule.”<sup>181</sup> We view *Caterpillar*, *Carneal*, *Horn*, and *Newman-Green* not as “exceptions” to the rule but rather as judicial “shifts” of the time for jurisdictional assessment (from the time the case first reaches federal court to a time after dismissal of a jurisdictional spoiler). The semantic difference is important. An exception offers no explanation for resolving the tension between joint and several jurisdiction. A time shift, however, allows joint jurisdiction to apply with consistent force to a case “cured” of incomplete diversity by dismissal of the jurisdictional spoiler.

The idea is to shift the time of jurisdictional assessment to after dismissal of the nondiverse party. Evaluating complete diversity as of that later time is consistent with joint jurisdiction. If, at that later time, any nondiverse party has been dropped, then the case as a whole—that is, joint jurisdiction—fulfills the complete-diversity requirement as of that time. No jurisdictional spoiler remains to contaminate the case. Shifting the timing rule, therefore, obviates reliance on several jurisdiction, at least for the complete-diversity requirement.

The upshot to all this is that *Allapattah*’s contamination theory of diversity<sup>182</sup> can be consistent with the cure cases of *Carneal*, *Horn*, and *Newman-Green*. The key is determining when the court assesses whether a contaminant exists. Shifting that determination away from the time of filing means that a court, under the right circumstances, can assess complete diversity as of the moment after the spoiler is dismissed.

This view of the timing of jurisdictional assessment does require some linguistic changes to precedent. Characterizing dismissal of a nondiverse party as “preserving” diversity jurisdiction, as some justices have written,<sup>183</sup> resonates most strongly with notions of several jurisdiction, as if the court always had jurisdiction of the claims between diverse parties despite the presence of nondiverse

---

181. *Id.* at 572.

182. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 564 (2005) (“A failure of complete diversity, unlike the failure of some claims to meet the requisite amount in controversy, contaminates every claim in the action.”).

183. *See, e.g., id.* at 585 n.5 (Ginsburg, J., dissenting) (“The cure for improper joinder of a nondiverse party is the same as the cure for improper joinder of a plaintiff who does not satisfy the jurisdictional amount. In both cases, original jurisdiction can be preserved by dismissing the nonqualifying party.”).

parties.<sup>184</sup> Joint jurisdiction, by contrast, maintains that there was never any diversity jurisdiction to preserve in the case until the moment the nondiverse party was dismissed. The term “cure” is therefore more accurate, for it suggests diversity jurisdiction was created by remedying a defect that, until then, prevented diversity jurisdiction over any of the claims in the action.

We make no suggestions on how easy it should be for a court to shift the time of jurisdictional assessment from the presumptive time of filing to the time of a jurisdictional cure. In *Grupo Dataflux v. Atlas Global Group, L.P.*,<sup>185</sup> the Justices were unanimous in deferring to the rule’s good policy.<sup>186</sup> And, in *Caterpillar*, the Court confronted an unusual removed case that had been tried all the way to a verdict, when “considerations of finality, efficiency, and economy become overwhelming.”<sup>187</sup> Rule 21, if it applies to jurisdictional cures, sets the arguably less restrictive standard of “just terms.”<sup>188</sup> We do not resolve this uncertainty here; instead, we merely make the claim that the time of jurisdictional assessment can be shifted in a way that allows the “cure” cases to be consistent with a joint-jurisdiction theory of complete diversity.

#### IV. NEW TENSIONS

That the timing shift renders joint jurisdiction consistent with the “cure” cases does not mean all is well and good. The idea that a court in fact lacked subject-matter jurisdiction until a particular postfiling time raises new concerns.

The primary concern is that the court presided over the case—at least for a time—without diversity jurisdiction over any of the claims in the action. During that time, the court may have issued interim orders binding the parties or even a final judgment on the merits with respect to one or more parties. Yet under joint jurisdiction, the court never in fact had diversity jurisdiction to do those things. Rather, the court obtained diversity jurisdiction for the first time only upon

---

184. Cf. Oakley, *supra* note 16, at 48 (“*Newman-Green* and its antecedents cannot be squared with any action-specific conception of § 1332. The dismissal of a jurisdictional spoiler ‘preserves’ diversity jurisdiction over an already-litigated action to which a non-diverse party had been joined.”).

185. *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567 (2004).

186. *See id.* at 594 n.9 (Ginsburg, J., dissenting).

187. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996).

188. FED. R. CIV. P. 21.

dismissal of the diversity spoiler. As Justice Kennedy wrote in his *Newman-Green* dissent, the “awesome power of curing actual defects in jurisdiction” effectively “confers jurisdiction retroactively on the district court.”<sup>189</sup>

We question Justice Kennedy’s statement to the extent that his use of the term “jurisdiction” encompasses all forms of jurisdiction. Even when a court in fact lacks diversity jurisdiction during a failure of complete diversity in a putative diversity action, other forms of interim jurisdiction can supplement the lack of diversity jurisdiction until incomplete diversity is cured.

Part of the problem in the discourse is that jurisdiction is framed as a binary question: a court either has it or it doesn’t. But, in truth, jurisdiction is more complicated. We delineate a few examples why here. We do not mean to undertake a comprehensive dissertation—we leave that for another paper. Rather, we identify these forms of interim jurisdiction as vehicles for authorizing court adjudicatory power during the pendency of incomplete diversity.

#### A. *Defect Certainty*

Once a court is aware of a true jurisdictional defect, then the court cannot proceed<sup>190</sup> until the jurisdictional defect has been cured. Thus, it would be inappropriate for a court to recognize incomplete diversity and yet continue to adjudicate the case on the expectation that, later, a cure will occur. But there will still be case pendency and court action (even if to issue an order dismissing for lack of jurisdiction) during the time of incomplete diversity. Meanwhile, the court has jurisdiction to issue interim orders under the jurisdiction-to-determine-jurisdiction doctrine.<sup>191</sup>

This doctrine recognizes a court’s power to issue rulings in order to decide whether it has jurisdiction or not.<sup>192</sup> The seminal case is

---

189. *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 839–40 (1989) (Kennedy, J., dissenting).

190. *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884) (“The first and fundamental question [in all matters] is that of jurisdiction.”).

191. For a seminal article on the topic, see Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491 (1967). For an authoritative modern treatment, see KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* §§ 4.4, 5.1 (2d ed. 2009).

192. See RICHARD H. FALLON ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1580 (4th ed. 1996) (“A federal court always has jurisdiction to decide whether it has jurisdiction.”); *Tex. & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry. Co.*, 270



*United States v. United Mine Workers*,<sup>193</sup> in which a district court issued preliminary injunctions and, when those injunctions were violated, sanctions for the violations. On appeal, the Supreme Court found that the district court lacked subject-matter jurisdiction over the case. Nevertheless, the Court affirmed the sanctions, explaining that “[u]ntil its judgment declining jurisdiction should be announced, [the district court] had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition.”<sup>194</sup> This authority was confirmed despite the lack of statutory subject-matter jurisdiction.

Thus, the jurisdiction-to-determine-jurisdiction doctrine can support the authority of a court to issue certain orders during a pendency of incomplete diversity in a state-law case. In the context of incomplete but minimal diversity, the court can diligently and expeditiously take steps to adjudicate the jurisdictional defect by dismissing the spoiling claims, while simultaneously issuing orders to maintain the status quo with respect to other parties. If a cure occurs, then those interim orders will have been authorized under the jurisdiction-to-determine-jurisdiction doctrine. Orders issued after the cure would then be authorized by traditional diversity jurisdiction.

### *B. Defect Error*

If the court adjudicates a question of subject-matter jurisdiction—such as on a Rule 12(b)(1) motion,<sup>195</sup> a remand motion,<sup>196</sup> or anytime through appeal—and erroneously determines that jurisdiction exists, then the court effectively has de jure jurisdiction until the jurisdictional ruling is reconsidered or overturned.

At the point of challenge, a different jurisdictional doctrine kicks in (see scenarios in Sections A and C) to cover the case until the court

---

U.S. 266, 274 (1926) (“Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist.”).

193. *United States v. United Mine Workers*, 330 U.S. 258 (1947).

194. *Id.* at 291 (quoting *United States v. Shipp*, 203 U.S. 563, 573 (1906)); cf. Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intra-suit Preclusion*, 63 FLA. L. REV. 301 (2011) (discussing the doctrine of judicial primacy, which requires federal courts to address jurisdiction before merits).

195. See FED. R. CIV. P. 12(b)(1) (providing that a party may assert a defense of lack of subject-matter jurisdiction by motion).

196. See 28 U.S.C. § 1447(c) (2012) (“A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal . . .”).

adjudicates or avoids the challenge. But a number of doctrines can prevent correction, thereby effectively leaving interim orders and final judgments—even on the merits—in the absence of complete diversity.

For example, the parties may forgo an appeal or a motion for reconsideration, essentially preserving the court's jurisdictional error. Although party waiver, consent, and forfeiture cannot confer subject-matter jurisdiction,<sup>197</sup> the practical effect is that—barring sua sponte reconsideration—the court's orders will stand even in the absence of jurisdiction.

Further, preclusion principles can prevent collateral attack of a judgment—even a merits judgment—entered without jurisdiction. The Supreme Court has allowed judgments on the merits entered without subject-matter jurisdiction to stand, even when jurisdiction was never challenged.<sup>198</sup> This rule of jurisdictional finality accepts the fact that jurisdiction was lacking but renders that fact impotent to undo what already has been done, even on the merits.

### C. Defect Agnosticism

Rather than resolve a potential defect in subject-matter jurisdiction (thereby also avoiding the scenarios in Subparts A and B), the court can choose to remove the spoiling claims on nonjurisdictional, nonmerits grounds. This is the doctrine of jurisdictional resequencing.<sup>199</sup> In *Sinochem International Co. v. Malaysia International Shipping Corp.*,<sup>200</sup> for example, the Court allowed the dismissal of a case under the nonjurisdictional procedural

---

197. 13B WRIGHT ET AL., *supra* note 9, § 3522:

[T]he parties cannot confer on a federal court jurisdiction that has not been vested in that court by the Constitution and Congress. This means that the parties cannot waive lack of subject matter jurisdiction by express consent, or by conduct, or even by estoppel; the subject matter jurisdiction of the federal courts is too fundamental a concern to be left to the whims and tactical concerns of the litigants.

(footnotes omitted).

198. See *Durfee v. Duke*, 375 U.S. 106, 115 (1963); *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *McCormick v. Sullivant*, 23 U.S. (10 Wheat.) 192, 199 (1825); see also *Clermont*, *supra* note 194, at 317 (“Because the essential issue of jurisdiction or notice was actually litigated and determined, even if erroneously, the defendant cannot relitigate the same issue in subsequent litigation.”).

199. See *Clermont*, *supra* note 194, at 326; Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725, 727 (2009); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 5 (2001); Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 5 (2010).

200. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007).

doctrine of forum non conveniens without first establishing—despite openly questioning—the existence of subject-matter jurisdiction.<sup>201</sup> As long as the potentially spoiling claim is dismissed on nonmerits grounds,<sup>202</sup> the court can continue with a case that then has complete diversity.

Under this scenario, a court confronting an arguable defect in complete diversity can, in an appropriate case, resequence the issue to instead resolve the potentially spoiling claims on nonmerits grounds. All orders rendered during that time will be authorized, for the absence of diversity jurisdiction was never confirmed. Upon dismissal of the potentially spoiling claims, the case attains complete diversity, and the court can continue the case assured of diversity jurisdiction.

#### D. Defect Ignorance

If the court is ignorant of a defect in subject-matter jurisdiction, and proceeds as if it possesses jurisdiction, then the court has jurisdiction until jurisdiction is challenged. For example, perhaps the parties' pleadings allege and admit complete diversity even though complete diversity in fact is actually lacking. For much of diversity jurisdiction's history, jurisdiction-in-fact determinations were irrelevant because jurisdiction depended instead upon the pleadings.<sup>203</sup> Indeed, it was not uncommon for courts to enter judgment on the merits even with the knowledge that jurisdiction in fact was lacking.<sup>204</sup> Even today, the pleadings play a large role in jurisdictional determinations. The amount in controversy is established by the good-faith allegations in the plaintiff's complaint;<sup>205</sup>

---

201. See *id.* at 432 (allowing dismissal under the forum non conveniens doctrine without first establishing subject-matter jurisdiction); *cf.* *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583–88 (1999) (allowing dismissal for lack of personal jurisdiction without first establishing subject-matter jurisdiction).

202. See *Sinochem*, 549 U.S. at 431 (“Jurisdiction is vital only if the court proposes to issue a judgment on the merits.” (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1041, 1041 (7th Cir. 2006))); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88–89 (1998); see also RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1412 (6th ed. 2009) (“If the record fails to disclose a basis for federal jurisdiction, the court must suspend determination of the merits of the controversy unless the failure can be cured.” (emphasis added)).

203. See *Wood v. Mann*, 30 F. Cas. 447, 449 (C.C.D. Mass. 1834) (Story, J.) (“[T]he question was, whether the citizenship of the parties, as described in the record, gave the court jurisdiction; not whether that citizenship as alleged was true in fact.”).

204. See *Collins*, *supra* note 27, at 1831–32.

205. *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961) (“The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it

the actual amount in controversy is irrelevant unless the defendant challenges the plaintiff's allegation.<sup>206</sup> The upshot is that the court is deemed to have jurisdiction if the pleadings establish it until jurisdiction is challenged. If jurisdiction goes unchallenged, then the court proceeds with the case, and any order or judgment issued will stand until overruled or reconsidered.

Of course, a defect in subject-matter jurisdiction may be raised at any time during the litigation, including for the first time on appeal, and, if so, then a district or appellate court affirming the defect can take appropriate measures under the scenarios in Sections A, B, or C.

### *E. Retroactive Jurisdiction for Final Judgments*

The most troubling scenario is that in *Newman-Green*, in which an appellate court simply dropped the jurisdictional spoiler to preserve a judgment on the merits as to the diverse parties. Justice Kennedy's objection to retroactive jurisdiction seems strongest here, as commentators suggest.<sup>207</sup> The idea that a court can enter a final judgment without complete diversity, and then confer diversity jurisdiction retroactively, seems wholly at odds with the notion of limited judicial power.

It may be that a combination of defect ignorance and the jurisdiction-to-determine-jurisdiction doctrine justifies the result in *Newman-Green*.<sup>208</sup> But even if not, the time-of-filing rule calls Kennedy's concern about incomplete-diversity final judgments into question. *Freeport* is a prime example. There, complete diversity

appears or is in some way shown that the amount stated in the complaint is not claimed in good faith." (quotation marks omitted)).

206. See Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1008–09 (2006); cf. *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 552 (2014) (describing a similar paradigm for establishing the amount in controversy in removed cases).

207. See Taylor Simpson-Wood, *Has the Seductive Siren of Judicial Frugality Ceased to Sing?: Dataflux and Its Family Tree*, 53 DRAKE L. REV. 281, 285, 305 (2005):

[R]etroactive jurisdiction contravenes the jurisdictional precept that where a court lacks the jurisdictional authority to entertain a case, any judgment entered by that court is void.

....

... If a district court is without jurisdiction initially, there is no action in existence to be considered. It follows, as night does day, that if there is no action, then there is no binding judgment for the court to revive by retroactively conferring jurisdiction upon itself.

(footnotes omitted); see also *supra* note 115.

208. Cf. Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1217–45 (2001) (questioning the Court's jurisdiction-first rhetoric and exploring expanded hypothetical jurisdiction).

existed at the time of filing, but a later-added nondiverse defendant destroyed complete diversity.<sup>209</sup> Nevertheless, the court proceeded to trial and final judgment despite incomplete diversity.<sup>210</sup> The Supreme Court held that to be proper, stating that “[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action.”<sup>211</sup> *Freeport* thus allows a court to enter a final judgment even in a case that in fact lacks complete diversity merely because the time-of-filing rule fixes the assessment of diversity at an earlier time. This strikes us as substantially undermining Kennedy’s concern about a court entering a final judgment without complete diversity.

In the end, perhaps the outer boundary for when a court can assess jurisdictional compliance belongs at final judgment, and *Newman-Green* was wrongly decided. We mean not to resolve but to observe. Suffice it to say that the applicability of joint jurisdiction and time shifting does create new concerns regarding assumed jurisdiction. But these new concerns do not mean that joint jurisdiction is a failure; rather, they mean only that additional thought is needed in these areas.

#### CONCLUSION

The Supreme Court has created a conundrum for lower federal courts confronted with violations of the requirement of complete diversity in putative diversity actions. On one hand, the Court has endorsed the application of joint jurisdiction, which would require dismissal of an entire action—including those claims over which diversity jurisdiction would have existed if only the nondiverse parties had not been joined. On the other hand, the Court has endorsed the application of several jurisdiction, under which dismissal would be limited to claims between nondiverse parties; diversity jurisdiction over claims between diverse parties would endure. In the end, whether a claim survives a failure of complete diversity will come down to a lower federal court’s fortuitous preference for one of these traditions over the other.

Although each tradition boasts substantial doctrinal support, neither the case-specific approach of joint jurisdiction nor the claim-specific approach of several jurisdiction offers an optimal method of

---

209. *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 427 (1991) (per curiam).

210. *Id.* at 428.

211. *Id.*

responding to a complete-diversity violation. The key to reconciling these competing traditions, as we argue here, rests somewhere in the middle. By shifting the time of jurisdictional assessment from the time of filing to the time of cure of the jurisdictional defect, and invoking other jurisdictional authorizations—such as the jurisdiction-to-determine-jurisdiction doctrine and the jurisdictional-resequencing doctrine—a federal court can remain faithful to the established tradition of joint jurisdiction while securing the finality, efficiency, and other good outcomes that would be available under several jurisdiction.