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Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action

Jay Tidmarsh
Notre Dame Law School, jay.h.tidmarsh.1@nd.edu

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*By Jay Tidmarsh**

I. INTRODUCTION

Glenn Koppel's recent work has reminded procedural scholars of the importance of state rules of civil procedure.[1] His insight is invaluable. Although state courts handle the great bulk of civil litigation[2] and many state courts employ rules of procedure that vary significantly from the model of the federal courts,[3] procedural scholars tend to write and to teach almost exclusively about the federal approach to civil litigation. I plead as guilty as the next professor to this method.[4]

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* Professor of Law, Notre Dame Law School. I served as a consultant on behalf of Paul Lightner in *CitiFinancial, Inc. v. Lightner* and Charlene Shorts in *Palisades Collections LLC v. Shorts*, two of the cases referred to in this Article.

1. *See* Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167 (2005).

2. By one count, in 1991, state courts handled approximately ninety-eight percent of all civil litigation. *See* William W Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 681 n. 99 (1994) (*citing* Brian J. Ostrom et al., *State Court Case Load Statistics: Annual Report 1991* 40-44 (Natl. Ctr. for St, Cts. 1993)). A similar figure emerges from a comparison of recent civil filings. In 2004, the last year for which complete head-to-head data are available, 16,861,494 civil cases were filed in state courts, and 281,338 cases (including 34,443 removed from state court) were filed in federal court. *See* Shauna M. Strickland, *Court Statistics Project, State Court Caseload Statistics, 2005* tbl. 1, at 107 (2006) (available at http://www.ncsconline.org/D_Research/csp/2005_files/State%20Court%20Caseload%20Statistics%202005.pdf); Leonidas Ralph Mecham, *Judicial Business of the U.S. Courts: 2004 Annual Report of the Director* tbl. S-7 (Admin. Off. of the U.S. Cts. 2004) (available at http://www.uscourts.gov/judbus2004/tables/s7.pdf). Although the twelve-month reporting periods vary slightly in the two reports, these data indicate that in 2004 approximately 98.4 percent of all civil cases were filed in state court.

3. *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

4. In my co-authored casebook on complex litigation, which is 1,466 pages long, we include fewer than 50 pages focused on matters of practice in state courts (and even here, the focus is often on the relationship between state and federal courts), with only a smattering of citations to state-court decisions elsewhere in the text. *See* Jay Tidmarsh & Roger H. Trangsrud, *Complex Litigation and the Adversary System*, 423-426, 437-448, 698-701, 791-804, 833-844, 865-869 (Found. Press 1998). In my co-authored casebook on civil procedure, which is 693 pages long, we spend even less time specifically on state civil procedure; only one principal case, which in edited form is slightly less than five pages long, arose in state court. *See* Thomas D. Rowe, Jr., Suzanna Sherry & Jay Tidmarsh, *Civil Procedure* 312-316 (Found. Press 2004).

Therefore, when Professor Koppel asked that I participate in a panel discussing the role of state courts in complex litigation, I agreed with some trepidation. Many observers regard federal courts as the better home for complex litigation. One reason is that many common areas of complex litigation — for instance, most antitrust,[5] securities,[6] and patent[7] claims — lie exclusively within federal jurisdiction. In addition, federal courts possess certain natural advantages in complex cases, including their greater ability to avoid multiple and repetitive litigation through such devices as loosened rules of personal jurisdiction,[8] anti-suit injunctions and stays,[9] venue transfers,[10] and, above all, multidistrict transfers.[11] Some commentators claim that the federal courts' greater resources, limited dockets, and uniform but flexible system of procedural rules provide other advantages in resolving complex cases.[12] Moreover, the interstate nature of most complex litigation leads some commentators — even those who generally favor a restrained federal presence and a greater role for state courts in civil litigation — to argue that the federal courts should play the principal role in complex litigation.[13]

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5. *See Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co.*, 260 U.S. 261, 286-288 (1922).
6. 15 U.S.C. § 78aa (2000); *see* 15 U.S.C. § 77p(b) (2000) (preempting securities-fraud class actions asserting violations of state law).
7. 28 U.S.C. § 1338(a) (2000).
8. *See e.g.* 15 U.S.C. § 22 (2000) (authorizing nationwide service of process in antitrust cases); 15 U.S.C. §§ 77v, 78aa (2000) (authorizing nationwide service of process in securities-fraud cases); 18 U.S.C. § 1965(d) (2000) (authorizing nationwide service of process in RICO cases); 28 U.S.C. § 2361 (2000) (authorizing nationwide service of process in statutory interpleader cases); Fed. R. Civ. P. 4(k)(2) (authorizing nationwide service of process over certain federal-question claims).
9. State courts have no ability to stay proceedings in federal court, *see Atomic Co. v. Felter*, 434 U.S. 12 (1977), and limited ability to stay proceedings in other state courts, *see* Tidmarsh & Trangsrud, *supra* n. 4, at 470-472. Although the power of federal courts to stay proceedings in state courts or other federal courts is also limited, it exists in a range of circumstances. *See id.* at 393-423, 467-470.
10. 28 U.S.C. § 1404 (2000).
11. 28 U.S.C. § 1407 (2000).
12. *See* Sen. Rpt. 109-114 at 14 (Feb. 28, 2005) (reprinted in 2005 U.S.C.C.A.N. 3, 15); Jaren Casazza, *Valuation of Diversity Jurisdiction Claims in the Federal Courts*, 104 COLUM. L. REV. 1280, 1312 (2004); John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 HARV. J.L. & PUB. POLICY 143, 151-154 (2001); H. Comm. on the Jud., *Hearing on H.R. 1875*, 106th Cong., 107-108 (1999) (prepared testimony of former Attorney General Griffin B. Bell); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1714 (1992); Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 121-123. For a contrary view, *see* Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215 (1994).
13. *See* Sen. Rpt. 109-114 at 23-27 (Feb. 28, 2005) (reprinted in 2005 U.S.C.C.A.N. 3, 24-27); *Long Range Plan for the Federal Courts* (Jud. Conf. of the U.S. 1995) (available at http://www.uscourts.gov/lrp/CVRPGTOC.HTM) (recommending federal jurisdiction in cases requiring a "strong need for uniformity" or "affecting interstate and international commence," but otherwise recommending limitations on diversity jurisdiction); Fed. Cts. Study Comm., *Report of the Federal Courts Study Committee* 38-47 (1990) (reprinted in 22 CONN. L. REV. 733, 778-787 (1990)) (recommending an enhanced role for federal courts in complex litigation, but recommending abolition of diversity jurisdiction in most circumstances). *See also* Samuel Isaacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1415-1420 (2006) (arguing that the Class Action Fairness Act of 2005 is part of a more general shift toward federal substantive law and a federal forum to handle situations affecting national markets).

The role of state courts in complex litigation received an especially significant blow when Congress passed the Class Action Fairness Act of 2005 (CAFA).[14] The class action, which allows the aggregation of many related claims into a single case controlled by one or more class representatives,[15] is perhaps the quintessential complex-litigation device. Before CAFA, a determined class-action plaintiff who wanted a state forum could often keep the case in state court — at least for state-law claims such as commercial disputes, mass torts, and consumer cases.[16] But CAFA dramatically changed this dynamic. It created a minimal-diversity rule and a relatively modest amount-in-controversy rule.[17] Although CAFA was crafted to keep small[18] and predominantly local[19] state-law class actions in state court, few class actions can take advantage of these limitations.[20] The goal of CAFA was to move state-law class actions out of state courts and into federal courts,[21] and the recent data show that CAFA is having its desired effect. Compared to pre-CAFA levels, there has been a forty-six percent increase in class-action activity — amounting to an additional 26.4 class actions per month — filed in or removed to federal court.[22]

As the contributions in this Symposium from my colleagues Tom Rowe[23] and Rich Freer[24] show, the federal class-action rule, Rule 23, differs textually in some important ways from some state class-action rules; and if we also consider the different interpretations that states adopting the text of Federal Rule 23 sometimes give to their

14. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b) 119 Stat. 4 (2005) (codified at 28 U.S.C.A. §§ 1332(d), 1453, 1711-1715 (West 2006)).
15. For a detailed description of the history, purpose, requirements, and limitations of class actions, *see* Jay Tidmarsh & Roger H. Trangsrud, *Complex Litigation: Problems in Advanced Civil Procedure* 103-163 (Found. Press 2002).
16. On the devices that the plaintiff was able to employ to keep a case in state court, *see infra* n. 28 and accompanying text.
17. 28 U.S.C.A. §§ 1332(d)(2), (d)(6) (West 2006). The statute requires that at least one members of a plaintiff class be of diverse citizen from at least one defendant and that, in the aggregate, the claims of the class members must exceed $5,000,000.
18. CAFA does not apply to class actions that contain fewer than 100 class members, *see id.* at § 1332(d)(5)(B), or claims that, in the aggregate, amount to $5,000,000 or less, *see id.* at §§ 1332(d)(2), (d)(6).
19. In an intricate set of provisions, CAFA requires a federal district court to decline jurisdiction in some cases in which two-thirds or more of the class members are from one state, *see id.* at § 1332(d)(4), and permits a federal district court to decline jurisdiction in some cases in which more than one-third but less than two-thirds of the class members are from one state, *see id.* at § 1332(d)(3).
20. For a related pair of class actions arising from the aftermath of Hurricane Katrina, one of which was held to lie within federal jurisdiction and the other of which was held to fall within an exception to CAFA's subject-matter jurisdiction, *see Preston v. Tenet Healthsystem Meml. Med. Ctr. Inc.*, 485 F.3d 793 (5th Cir. 2007); *Preston v. Tenet Healthsystem Meml. Med. Ctr., Inc*, 485 F.3d 804 (5th Cir. 2007).
21. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5 (2005); Sen. Rpt 109-114 at 6 (Feb. 28, 2005) (reprinted in 2005 U.S.C.C.A.N. 3, 6).
22. Thomas E. Willging & Emery G. Lee III, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules* 2 (Fed. Jud. Ctr. 2007) (available at http://www.fjc.gov/library/fjc_catalog.nsf).
23. Thomas D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes: Differences from — and Lessons For? — Federal Rule 23*, 35 W. ST. U. L. REV. (Fall 2007).
24. Richard D. Freer, *Interlocutory Review of Class Action Decisions: An Introductory Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. (Fall 2007).

own class-action rules,[25] the gulf between state class-action practice and federal class-action practice grows wider. But with CAFA in place, the real issue is whether this divergence matters any more. If one of the most important devices in complex litigation is the class action, and if CAFA is shutting state courts out of the class-action business, then the contribution that state courts can make to procedural developments in the field of complex litigation has been hampered severely.

In this Article, I wish to suggest one place in which state courts can continue to have an impact on class-action practice: the adjudication of counterclaim class actions. A counterclaim class action arises when a non-class complaint is filed by a plaintiff against a defendant, who turns around and asserts against the plaintiff, on behalf of a class of similarly situated individuals, a counterclaim for relief. In Part II, I explain the factual, jurisdictional, and legal dynamics of such state-court counterclaim class actions. In Part III, I argue that counterclaim class actions, when filed in state court, are not removable to federal court under either the general provision for the removal of cases from state court or CAFA's specific removal provision. The analysis is essentially textual; the language of the removal statutes commands this result, despite policy arguments that might be mustered in favor of an expansive federal jurisdiction over cases containing class allegations. The analysis thus brings up the age-old tension between text and purpose; but in the area of removal, text has always had a controlling effect on the outcome. And so it should here. CAFA might have shifted the tide of class action practice toward the federal shore, but it has left some wading room for state courts to contribute to the development of the law of class actions.

II. CONSUMERS AND COUNTERCLAIM CLASS ACTIONS

This Part sets the table by addressing two preliminary matters. First, I describe the factual and jurisdictional dynamics that lead a defendant to plead a counterclaim class action in state court. Second, I examine whether the rules of joinder provide the defendant with the legal authority to do so.

A. The Dynamics of Counterclaim Class Actions

The principal context in which counterclaim class actions have thus far been employed is commercial litigation. In the typical scenario, one party to a contract —

25. *Compare e.g. Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982) (requiring a "rigorous analysis" of the requirements of Federal Rule 23) *and Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (refusing to allow immediate appeal of a decision denying class certification), *superceded by* Fed. R. Civ. P. 23(f) (permitting discretionary appeals of decisions granting or denying certification), *with The Money Place, L.L.C. v. Barnes*, 78 S.W.3d 730, 733-734 (Ark. 2002) (declining to adopt the federal courts' "rigorous analysis" for a class action certified under Rule 23 of the Arkansas Rules of Civil Procedure, which was identical in relevant language to Rule 23 of the Federal Rules of Civil Procedure), *and Butler v. Audio/Video Affiliates Inc.*, 611 So. 2d 330, 331 (Ala. 1992) (allowing immediate appeal from an order refusing to certify a class under Rule 23 of the Alabama Rules of Civil Procedure).

usually a consumer — fails to make a required payment under the contract to the other party — usually a financial institution that sells credit, mortgage, or insurance products. State law defines the parties' contractual rights. Although the financial institution might be of diverse citizenship from the consumer, the amount that the consumer owes on the contract is small, far less than the $75,000.01 jurisdictional amount necessary to invoke federal jurisdiction.[26] Hence, in order to recover on the contract, the financial institution sues the consumer in state court.

At that point, the consumer realizes that a term in the contract arguably violates state consumer-protection, creditor-debtor, or insurance-regulation laws. The consumer's individual remedy for this alleged violation is modest. But because the offending provision in the contract is standard, the financial institution has also entered into the same agreement with many other consumers. In the aggregate, the institution faces a large potential liability.

In this circumstance, a consumer who wishes to vindicate the rights of similarly situated consumers has two options. One is to file a class action as an independent suit. The second is to assert a counterclaim against the financial institution in the state-court action.

After CAFA, the choice between these two options is likely to turn on whether the consumer wishes to litigate in federal or state court. If the consumer brings an independent action, then the case is probably destined for federal court. Assuming diverse citizenship between the creditor and at least one consumer, and further assuming that the total amount of the creditor's alleged wrongdoing exceeds $5,000,000, CAFA supplies the necessary jurisdiction for a consumer who wishes to file in federal court.[27] But the consumer might prefer state court. Before CAFA, a consumer who wished to avoid a federal forum avoided pleading any federal questions, and then either named a class representative who was not diverse from the financial institution or ensured that no class representative had a claim exceeding the jurisdictional amount in controversy.[28] After CAFA, however, holding onto the state forum becomes more difficult. As long as the parties are minimally diverse and more than $5,000,000 is at stake, the financial institution can remove a case filed in state court to federal court[29] — and it likely will do so.[30] Unless the consumer's stand-alone

26. *See* 28 U.S.C. § 1332(a) (2000) (providing federal jurisdiction over claims based on state law when the parties are of diverse citizenship and "the matter in controversy exceeds the sum or value of $75,000").
27. *See* 28 U.S.C.A. § 1332(d)(2) (West 2006).
28. Before the passage of CAFA, the traditional rule for diversity-based class actions was that each class representative, although not each class member, needed to be of diverse citizenship from each party opposing the class. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921). In addition, each class representative needed to have a claim exceeding the jurisdictional amount in controversy. *Snyder v. Harris*, 394 U.S. 332, 336 (1969). So did each class member. *Zahn v. Intl. Paper Co.*, 414 U.S. 291, 301 (1973). Although the text itself was ambiguous, the Supreme Court has recently held that 28 U.S.C. § 1367(b), enacted in 1990, superceded *Zahn*, so that as long as each class representative has a claim exceeding the jurisdictional amount, the class members need not have such claims. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005).
29. For the statutory sources authorizing the financial institution to remove, *see infra* Part III.A.

class suit falls into CAFA's discretionary[31] or mandatory[32] exceptions to jurisdiction, the case is likely to be adjudicated in federal court — regardless of the consumer's preference for state court.

Therefore, a consumer wishing to hold onto the state forum must turn to the second option — filing a counterclaim class action — and hope that CAFA does not authorize removal. Precisely this tactic has been used in a series of recent cases. For example, in *Progressive West Insurance Co. v. Preciano*,[33] an insurance company sued in state court seeking reimbursement for $5,000 in medical payments it made on behalf of the insured. The insured argued that the company's "policy of claiming such reimbursements was an unfair business practice under California's unfair competition law."[34] It filed a cross-complaint — the equivalent under California procedure of a counterclaim in federal court[35] — against the insurance company. The cross-complaint sought not only a remedy for the insured, but also "remedies 'on behalf of the general public,'"[36] thus converting the cross-complaint into a class action.[37]

Similarly, in *CitiFinancial, Inc. v. Lightner*,[38] a financial institution provided three loans, in the total amount of $15,892.22, to a consumer in West Virginia.[39] For two of the loans, the consumer also purchased credit insurance, which, in return for a premium rolled into the loan, guaranteed the loan payments in the event of the consumer's death or disability.[40] The consumer allegedly defaulted on the loans, and the financial institution sued in West Virginia state court to recover $6,645.10.[41] During the course of the litigation, the consumer alleged that the financial institution had overcharged for the credit insurance, thus violating West Virginia's consumer-protection laws.[42] As a result, the consumer filed a counterclaim in state

30. Indeed, the greatest growth in federal class-action practice after CAFA has been in the areas of contract disputes and fraud. *See* Willging & Lee, *supra* n. 22, at 2, 15.
31. *See* 28 U.S.C.A. § 1332(d)(3) (West 2006).
32. *See id.* at § 1332(d)(4).
33. 479 F.3d 1014 (9th Cir. 2007).
34. *Id.* at 1015.
35. *Id.* at 1015 n. 1; *compare* Cal. Civ. Proc. Code Ann. § 428.10 (West 2004) (permitting cross-complaints by "[a] party against whom a cause of action has been asserted") *with* Fed. R. Civ. Proc. 13(a) (permitting a compulsory counterclaim that "the pleader has against any opposing party") *and* Fed. R. Civ. P. 13(b) (permitting a permissive counterclaim by a pleader "against an opposing party").
36. *Progressive W.*, 479 F.3d at 1015.
37. California law specifically provides that class actions may be used to enforce the terms of its unfair-competition act, as long as the requirements of its class-action rule are met. Cal. Bus. & Prof. Code Ann. § 17203 (West Supp. 2007). On the general requirements for maintaining a class action (which California calls a "representative action"), *see* Cal. Civ. Proc. Code Ann. § 382 (West 2004).
38. 2007 WL 1655225 (N.D. W. Va. June 6, 2007).
39. *See* Pet. of CitiFinancial, Inc. to App. Order of Remand Pursuant to the Class Action Fairness Act, 28 U.S.C. § 1453, and Appendix to Pet. at 4-5, *CitiFinancial*, 2007 WL 1655225 (hereinafter "Pet. of CitiFinancial") (copy on file with author).
40. *Id.* at 5. The financial institution in the case, CitiFinancial, claimed that it was not itself an insurer, and that the insurance was underwritten by two Texas corporations. In selling credit insurance to consumers, CitiFinancial's employees were, according to CitiFinancial, acting as agents of the Texas companies. *Id.*
41. *CitiFinancial, Inc. v. Lightner*, 2007 WL 3088087 (N.D. W. Va. Oct. 22, 2007).
42. *CitiFinancial, Inc. v. Lightner*, 2007 WL 1655225 at *1 (N.D. W. Va. June 6, 2007).

court. Because the financial institution allegedly overcharged many other consumers, the consumer brought the counterclaim as a class action.[43] The aggregate potential liability faced by the financial institution in the counterclaim was, by its own admission, $40,000,000.[44]

Progressive West and *CitiFinancial* are illustrative cases, and reveal just the tip of an approaching iceberg.[45] If consumers can successfully avoid federal court with this tactic, and assuming that state law permits certification of the counterclaim as a class action, the state case suddenly transforms from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake. The entire litigation dynamic and its center of gravity switches in an instant. Faced with this reality, financial institutions will need to think carefully before they file collection actions in state courts in which they do not wish to defend their credit and lending policies.

Predictably, in both *Progressive West* and *CitiFinancial*, the financial institutions sought a way out of this dilemma: They invoked CAFA and removed the cases to federal court. Arguing that CAFA provided no authority to remove counterclaim class actions, the consumers moved to remand the cases to state court. Before evaluating the merits of their remand argument, however, it is necessary to consider one possible roadblock in the consumers' litigation strategy: Whether they can assert a class action claim by means of a counterclaim.

B. Asserting Class-Action Counterclaims Under State Procedural Codes

Because the consumer files the counterclaim class action in state court, the question of the legal authority to entertain such a counterclaim turns on state law. Although this issue is logically the first question to address, in the real world it is unlikely that the issue will be litigated until later in the case, if at all. When faced with

43. *CitiFinancial, Inc. v. Lightner*, 2007 WL 3088087 (N.D. W. Va. Oct. 22, 2007). West Virginia has largely adopted the language of the Federal Rules of Civil Procedure. Hence, at the time that the consumer filed his counterclaim, West Virginia's Rule 13, which governed counterclaims, was identical to the then-extant Federal Rule 13. *See* W. Va. R. Civ. P. 13(a), (b). Its Rule 23, dealing with class actions, was essentially the same as the then-extant Federal Rule 23, although West Virginia had not adopted the 1998 and 2003 amendments to Federal Rule 23 that revised Federal Rule 23(e) and added Federal Rule 23(f)-(h). *See* W. Va. R. Civ. P. 23. Unless West Virginia adopts the 2007 amendments that restyled the Federal Rules of Civil Procedure, its Rule 13 will vary slightly in language, although not in meaning, from Federal Rule 13; and its Rule 23 will vary somewhat more from Federal Rule 23.

44. Pet. of CitiFinancial, *supra* n. 39, at 1.

45. *See also Palisades Collections LLC v. Shorts*, 2008 WL 163677 (N.D. W. Va. Jan. 16, 2008) (ordering remand of case brought by creditor in which the consumer-defendant asserted a state-law counterclaim class action); *Ford Motor Credit Co. v. Jones*, 2007 WL 2236616 (N.D. Ohio July 31, 2007) (same); *Williamsburg Plantation, Inc. v. Bluegreen Corp.*, 478 F. Supp. 2d 861, 865 (E.D. Va. 2006) (ordering remand to state court of case involving a federal-question counterclaim class action); *Unifund CCR Partners v. Wallis*, 2006 WL 908755 at *1 (D.S.C. Apr. 7, 2006) (ordering remand of case brought by creditor against debtors in which one debtor asserted a state-law counterclaim class action). For a pre-CAFA case also involving a consumer's assertion of a state-court counterclaim class action, *see Gen. Elec. Capital Auto Lease, Inc. v. Mires*, 788 F. Supp. 948, 950 (E.D. Mich. 1992) (remanding case to state court).

a counterclaim class action in state court, the financial institution's likely first move, as *Progressive West* and *CitiFinancial* show, will be to remove the case to federal court.[46] Once the notice of removal is filed, proceedings in state court stop,[47] and the Federal Rules of Civil Procedure control the course of the action in federal court.[48] Only if the case remanded to state court will the authority to assert a counterclaim class action under state law again become a live question.

Nonetheless, because it is logically the first question, and because the issue will also arise under federal procedural law if the case is successfully removed to federal court, it is worth analyzing the issue now. Here is the problem. Classically, a counterclaim is a claim asserted by someone *already* a party (usually a defendant) against an opposing party (usually a plaintiff).[49] But a counterclaim class action does not exactly fit this mold. A counterclaim class action not only asserts one classic counterclaim (the defendant's claim against the plaintiff) but it also asserts the claims of persons who are not already parties. Unless a state's joinder rules allow the joinder of new parties (and in particular, new class members) on the counterclaim, then the defendant's effort to create a counterclaim class action fails *ab initio*.

In analyzing this question, let me step over briefly to the Federal Rules of Civil Procedure. Under the Federal Rules, the assertion of counterclaims is controlled by Rule 13(a) (dealing with compulsory counterclaims) and Rule 13(b) (dealing with permissive counterclaims). Both rules contemplate that a counterclaim will be asserted by an existing party against an existing and opposing party.[50] Neither rule makes provision for the joinder of additional parties to the counterclaim. Instead, to determine whether the joinder of additional parties is appropriate, we must look to Rule 13(h), which provides: "Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim."[51]

This language is not entirely helpful to a consumer pleading a counterclaim class action. The addition of class members is governed by Rule 23, not Rules 19 or

46. A civil action must be removed to federal court "within thirty days after receipt by the defendant" that shows the case is or has become removable. 28 U.S.C. § 1446(b) (2000). Failing to remove the case within thirty days waives the right to removal. *See Rosebud Holding, L.L.C. v. Burks*, 995 F. Supp. 465, 467 (D.N.J. 1998) ("While the thirty day time period in which to remove is not jurisdictional, it is a strictly applied rule of procedure that may not be extended by the court."); Charles Alan Wright et al., *Federal Practice and Procedure* vol. 14C, § 3732, 324 (3d ed., West 1998) (noting that the thirty-day rule is "mandatory in terms of . . . scope and character"); *id.* at 329-331 (describing limited exceptions to the thirty-day rule). Because it is unlikely that the plaintiff facing a counterclaim class action could get a ruling on the state procedural issue within thirty days, the plaintiff is unlikely to tarry in state court, and will instead file the notice of removal.

47. 28 U.S.C. § 1446(d) (2000).

48. Fed. R. Civ. P. 81(c).

49. Other parties can also assert counterclaims. For instance, a third-party defendant can assert a counterclaim against a third-party plaintiff. *Cf.* Fed. R. Civ. P. 14(a)(2)(B) (authorizing such a counterclaim at the federal level).

50. For the relevant language of Rules 13(a) and (b), *see* Fed. R. Civ. P. 13(a) (permitting a compulsory counterclaim that "the pleader has against any opposing party") and Fed. R. Civ. P. 13(b) (permitting a permissive counterclaim by a pleader "against an opposing party").

51. Before the restyling of the Federal Rules of Civil Procedure in 2007, Rule 13(h) had read: "Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20."

20. Therefore, if a consumer were to file a counterclaim class action in federal court, the financial institution might well argue that, because the counterclaim class action seeks to add parties under Rule 23 rather than under Rules 19 or 20, Rule 13(h) renders the joinder fatally defective.

But the issue is not quite so simple; there are two arguments that Rule 13(h) has no application in the context of counterclaim class actions. First, some cases have held that a class member is not an "opposing party" within the meaning of Rules 13(a) and (b), so that counterclaims cannot be asserted against them.[52] Extending this argument, it is possible that class members in a class-action counterclaim are not "person[s]" added as part[ies]" within the meaning of Rule 13(h). Indeed, Rule 23 is more a rule of preclusion than a rule of joinder; class members are "parties" only in a fictional sense.[53] Second, the much neglected Rule 19(d) provides: "This rule [Rule 19] is subject to Rule 23."[54] Rule 19(d) is generally understood to exempt class actions from Rule 19's strictures —in particular, Rule 19(c)'s requirement to list all known parties subject to joinder under Rule 19(a) and Rule 19(b)'s draconian dismissal of a case for a party's failure to join indispensable parties.[55] In this context, Rule 19(d) arguably does other work; it opens the door a crack to permit counterclaim class actions. Rule 13(h) allows the joinder of additional parties on a counterclaim pursuant to either Rule 19 or Rule 20, and Rule 19(d) makes joinder under Rule 19 subject to Rule 23. Transitively, Rule 13(h) allows Rule 23 joinder on a counterclaim.

This argument that Rule 13(h) acts as no bar to counterclaim class actions is hardly airtight, but it enjoys some policy support. In general, the joinder provisions of the Federal Rules allow the assertion of new claims and the assertion of claims against new parties on a capacious basis. The basic theory of joinder under the Federal Rules is transactionalism: As long as joinder is consistent with efficiency and due process, parties should be able to join all related transactions and occurrences in a single case.[56]

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52. *See e.g. Donson Stores, Inc. v. Am. Bakeries Co.*, 58 F.R.D. 485, 488-489 (S.D.N.Y. 1973); *but see Natl. Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 75 F.R.D. 40, 45 (S.D.N.Y. 1977) (permitting counterclaims to be asserted against class members). *See generally In re Four Seasons Sec. Ls. Litig.*, 525 F.2d 500, 504 (10th Cir. 1975) (discussing the purposes for which a class member is and is not regarded as a party); Charles Alan Wright et al., *Federal Practice and Procedure* vol. 6, §1404, 25 & n. 19 (2d ed., West 1990) (collecting cases on both sides of the issue).
53. *See Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (describing class actions as "bind[ing] members of the class or those represented who were not made parties to it"); *Martin v. Wilks*, 490 U.S. 755, 762 n. 2 (1989) (describing class actions as a device by which "a person, although not a party, has his interests adequately represented by someone with the same interests who is a party").
54. Before the restyling of the Fed. R. Civ P. in 2007, Rule 19(d) had read: "This rule is subject to the provisions of Rule 23."
55. *See* Charles Alan Wright et al., *Federal Practice and Procedure* vol. 7, § 1626 (3d ed., West 2001). In brief, Rule 19 states a rule of mandatory joinder, under which nonparties whose absence creates certain types of unfairness must be joined if feasible. *See* Fed. R. Civ P. 19(a)(1)-(2) (listing three types of parties who must be joined). In the event that such nonparties cannot be joined, the court has the authority, in some situations, to dismiss the entire case. *See* Fed. R. Civ P. 19(b). For a more extended treatment of Rule 19, *see* Jay Tidmarsh & Roger H. Trangsrud, *Complex Litigation: Problems in Advanced Civil Procedure* 103-163 (Found. Press 2002).
56. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 (1976); Suzanna Sherry & Jay Tidmarsh, *Civil Procedure Essentials* 185-206 (Aspen Publishers 2007); *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974). In certain regards,

Despite this general orientation, the literal text of the Federal Rules on occasion fails to authorize the joinder of a particular claim or party, thus frustrating the Rules' liberal spirit. In such cases, federal courts have often chosen spirit over text, even when they had less of a hook than Rule 19(d) to hang the result on.[57] Indeed, in the context of Rule 13(h), one set of commentators has noted:

> Rule 13(h) should be applied to further the general objectives of Rule 13. Therefore, courts have construed subdivision (h) liberally in an effort to avoid a multiplicity of litigation, minimize the circuitry of actions, and foster judicial economy. Stated in general terms, the main purpose of Rule 13(h) is to dispose of an action in its entirety and to grant complete relief to all the concerned parties.[58]

Longstanding practice in federal court also appears hospitable to counterclaim class actions. In the course of making rulings on other issues, numerous federal decisions have mentioned in passing the presence of pending counterclaim class actions.[59] Among all of these decisions, I have not found a single case suggesting that counterclaim class actions are precluded by the language of Rule 13(h). If anything, the frequency with which such counterclaims are asserted in federal court and the tolerance of federal courts toward them indicate that they are an accepted part of federal joinder practice.

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joinder is even permitted beyond the scope of the transaction or occurrence. *See* Fed. R. Civ. P. 13(b), 18(a).

57. For instance, one court permitted the joinder of an additional claim under the former Rule 14(a), which contained an intricate series of rules authorizing joinder but which failed to authorize the joinder of a particular claim in the unique circumstances presented in the case. *See Thomas v. Barton Lodge II Ltd.*, 174 F.3d 636, 652 (5th Cir. 1999) (arguing that a literal reading of Rule 14(a) that prevented the joinder of an additional claim against an existing party was "strained" and "nonsensical"); *but see Asher v. Unarco Material Handling Co.*, 2008 WL 130858 (E.D. Ky. Jan. 10, 2008) (rejecting *Thomas*).

58. *See* Wright et al., *supra* n. 52, at § 1434, 268-270 (footnotes omitted).

59. For a representative sampling, *see Discover Bank v. Vaden*, 396 F.3d 366, 371 (4th Cir. 2007) (holding that state-law class-action counterclaims in pending state-court action were preempted); *McLaughlin v. Miss. Power Co.*, 376 F.3d 344, 354 (11th Cir. 2004) (dismissing counterclaim class action due to the lack of diversity of one of the class representatives); *Frank's Casing Crew & Rental Tools, Inc. v. PMR Techs. Ltd.*, 292 F.3d 1363, 1371-1372 (Fed. Cir. 2002) (holding that the filing of a counterclaim class action waived a defendant's ability to claim a lack of personal jurisdiction); *Channell v. Citicorp Natl. Serv. Inc.*, 89 F.3d 379, 387 (7th Cir. 1996) (remanding case to district court to consider whether to exercise jurisdiction over a counterclaim class action asserted in response to a plaintiff class action); *Pa. Dental Assn. v. Med. Serv. Assn. of Pa.*, 745 F.2d 248, 263 (3d Cir. 1984) (finding that the purported class representative for a counterclaim class action was inadequate); *U.S. v. 2,200 Paper Back Bks.*, 565 F.2d 566, 573 (9th Cir. 1977) (dismissing counterclaim class action for undue delay); *All Am. Airways v. Elderd*, 209 F.2d 247, 249 (2d Cir. 1954) (holding that the dismissal of a counterclaim class action was not immediately appealable); *Vodak v. City of Chi.*, 2006 WL 2524141 at *3 (N.D. Ill. Aug. 30, 2006) (asserting supplemental jurisdiction over a counterclaim class action; noting that "[a] counterclaim in a class action is the equivalent of a defendant class action"); *Sandwich Chef of Tex., Inc. v. Reliance Natl. Indem. Ins. Co.*, 202 F.R.D. 212, 216 (S.D. Tex. 2001) (ordering a counterclaim class action to be severed from the main case); *H & R Block, Ltd. v. Housden*, 186 F.R.D. 399, 401 (E.D. Tex. 1999) (denying the certification of a counterclaim class action that alleged a violation of the Federal Labor Standards Act); *Gen. Elec. Capital Auto Lease, Inc. v. Mires*, 788 F. Supp. 948, 951 (E.D. Mich. 1992) (remanding a case with a counterclaim class action to state court).

It is not necessary, however, to inquire further into federal practice. My detour into the Federal Rules of Civil Procedure was only for the purpose of defining the problem in the familiar language of federal procedure. In the situation that this Article addresses, the counterclaim class action has been filed in state, not federal, court; thus, state law, not federal law, determines the legitimacy of joining a class of new parties to a counterclaim.

Because state joinder rules are not monolithic, the propriety of asserting a counterclaim class action ultimately hinges on the language and interpretation of each state's joinder rules. Again, the facts of *Progressive West Insurance Co. v. Preciano*[60] and *CitiFinancial, Inc. v. Lightner*[61] present illustrative studies. *Progressive West* arose in California state court, which employs a set of detailed procedural codes and statutes very different from the loosely textured Federal Rules of Civil Procedure. In *Progressive West*, the consumer defendant had filed a cross-complaint (the equivalent of a counterclaim) under the authority of section 428.10 of the California Civil Procedure Code.[62] The very next provision in the Code, section 428.20, is the counterpart to Federal Rule 13(h):

> When a person files a cross-complaint as authorized by Section 428.10, he may join any person as a cross-complainant or cross-defendant, whether or not such person is already a party to the action, if, had the cross-complaint been filed as an independent action, the joinder of that party would have been permitted by the statutes governing joinder of parties.[63]

Thus, contrary to the ambiguous authority for counterclaim class actions in federal procedure, California authorizes counterclaim class actions, as long as the counterclaim meets the requirements for certification as a representative action under California law.[64]

CitiFinancial presents a trickier case. *CitiFinancial* arose in West Virginia state court. West Virginia has essentially adopted the language of the Federal Rules of Civil Procedure as its own. In particular, it has adopted Rule 13(h).[65] Therefore, the arguments that I have already sketched about the power of a federal court to entertain a counterclaim class action[66] essentially replicate themselves in the context of the power of West Virginia's courts to entertain a counterclaim class action of the type asserted

60. 479 F.3d 1014, 1018 (9th Cir. 2007).
61. 2007 WL 1655225 (N.D. W. Va. June 6, 2007).
62. 479 F.3d at 1015.
63. Cal. Civ. Proc. Code § 428.20 (2004).
64. *Progressive West*, which held only that the assertion of a counterclaim class action in state court did not make the case removable under CAFA, never raised the issue of a California court's power to hear a counterclaim class action). *See* 479 F.3d at 1018.
65. West Virginia's Rule 13(h) is identical to the version in the Federal Rules of Civil Procedure before the 2007 amendments restyled Federal Rule 13(h). For the difference in language between the former Federal Rule 13(h) (and the still-existing West Virginia Rule 13(h)) and the present Federal Rule 13(h), *see supra* n. 51 and accompanying text. Because the 2007 amendments were intended only to restyle Rules 13's language, but not to change its substance, *see* Fed. R. Civ P. 13 advisory committee note, Federal Rule 13(h) and West Virginia Rule 13(h) are functionally identical.
66. *See supra* nn. 50-59 and accompanying text.

in *CitiFinancial*. The principal difference is the lack of any West Virginia cases discussing the use of counterclaim class actions,[67] so that it is unclear whether counterclaim class actions are part of a longstanding practice in West Virginia state courts.[68]

Although I have not exhaustively determined the hospitability of each state to the counterclaim class action, my research suggests fairly broad acceptance.[69] New York courts have allowed them,[70] as have courts in Arizona,[71] Arkansas,[72] Florida,[73] Indiana,[74] and Michigan.[75] An appellate court in Ohio noted the question, and appeared willing to allow counterclaim class actions as long as they met Ohio's requirements for class certification;[76] in an earlier case, a trial court in Ohio had certified a counterclaim class action.[77] Although perhaps less numerous than at the federal level, counterclaim class actions are not uncommon among the state courts,

67. I conducted a search on Westlaw using the database of West Virginia cases ("WV-CS") and the command "(counterclaim or crossclaim) /100 'class action.'" The search netted two cases, neither of which involved a counterclaim class action.
68. Like *Progressive West*, *CitiFinancial* held only that the assertion of counterclaim class actions did not make the case removable under CAFA; it did not address the ability to assert a counterclaim class action under either West Virginia or federal law. *CitiFinancial*, 2007 WL 1655225 at *3.
69. I conducted a search on Westlaw using the database of all state cases ("ALLSTATES") and the command "counterclaim /10 'class action.'" The search netted 129 cases, many of which involved other issues, such as the assertion of counterclaims in a standard plaintiff class action.
70. *See Compact Electra Corp. v. Paul*, 93 Misc. 2d 807, 810 (N.Y. App. Div. 1977) (permitting the assertion of a counterclaim class action regarding certain violations of state law, but not other violations of state and federal law); *cf. Am. Express Travel Related Servs., Inc. v. Caplan*, 266 A.D.2d 325, 326 (N.Y. App. Div. 1999) (summarily holding that certification of a counterclaim class action was inappropriate "[u]nder the facts and circumstances of this case"); *Cornell U. v. Dickerson*, 100 Misc. 2d 198, 206 (N.Y. Sup. Ct. 1979) (refusing to certify a counterclaim class action on the merits); *Natl. Bank of Westchester v. Pisani*, 58 A.D.2d 597, 598 (N.Y. App. Div. 1977) (also refusing to certify a counterclaim class action on the merits).
71. *Lennon v. First Natl. Bank of Ariz.*, 518 P.2d 1230, 1234-1235 (Ariz. Ct. App. 1974).
72. *Carquest of Hot Springs, Inc. v. Gen. Parts Inc.*, 204 S.W.3d 53, 58 (2005). In earlier cases, the Arkansas Supreme Court had held the contrary, stating that a consumer counterclaim class action "seems to be entirely beyond the scope of the counterclaim statute." *Tucker v. Pulaski Fed. Sav. & Loan Assn.*, 481 S.W.2d 725, 731 (1972); *Reynolds v. Bakem Credit Union*, 500 S.W.2d 355, 356 (1973) (reaffirming *Tucker*). *Carquest* neither overruled the earlier cases nor explained its reversal in course. The likeliest explanation is that *Tucker* and *Reynolds* involved the interpretation of former § 27-1121 of the Arkansas Code, which used to govern the pleading of counterclaims. Ark. Stat. Ann. § 27-1121 (Repl. 1962). Section 27-1121 was subsequently superseded by Rule 13 of the Arkansas Rules of Civil Procedure. *See* Ark. R. Civ. P. 13 reporter's note (noting that § 27-1121 had been superceded). At the time of *Carquest*, Arkansas Rule 13 was in all material respects the same as the then-extant Federal Rule 13; in particular, Arkansas Rule 13(g) was identical to the then-extant Federal Rule 13(h). *See* Ark. R. Civ. P. 13; *supra* n. 51 and accompanying text (providing text of former and restyled Federal Rule 13(h)). *Carquest*'s result provides further support for the view that the "Rules 19 or 20" language of Federal Rule 13(h), *see supra* nn. 51, 54-55 and accompanying text, imposes no absolute bar to the assertion of counterclaim class actions.
73. *Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach Ltd.*, 541 So. 2d 1121, 1124-1125 (Fla. 1988).
74. *Lake County Trust Co. v. Wine*, 704 N.E.2d 1035, 1044 (Ind. Ct. App. 1998).
75. *Adair v. City of Det.*, 198 Mich. App. 506, 511 (1993) (defendant in a class action could itself file a counterclaim class action against the plaintiff class).
76. *See Tammac Corp. v. Norch*, 2003 WL 21224229 at *3 (Ohio Ct. App. May 27, 2003) (noting "a certain paucity in case law analysis of counterclaimants seeking class certification").
77. *Car Now Acceptance Co. v. Block*, 2002 WL 32001272 at *8 (Ohio Ct. Com. Pleas Nov. 25, 2002). *But see Terminal Supply Co. v. Farley*, 1991 WL 1577 at *7 (Ohio Ct. App. Jan. 11, 1991) (affirming a trial court's refusal to certify a counterclaim class action); *Cardinal Fed. Sav. & Loan*

which have often noted, without negative comment, the presence of a pending counterclaim class action.[78] Also of interest is the Model Class Actions Act, whose section 11 provides detailed rules for handling counterclaims in class actions, including a rule permitting a defendant class or its members to counterclaim against a plaintiff class or its members; the Model Act, however, makes no general reference to the power of a trial court to entertain a counterclaim class action.[79] With the exception of two Arkansas cases that are no longer good law,[80] none of the cases or authorities suggest that a state's joinder rules bar the pleading of counterclaim class actions. For present purposes, I need go no further. Assuming that a counterclaim class action is certifiable under a state's class-action requirements, at least some states allow them to be asserted. Therefore, I can turn to the principal issue in this Article: Whether a state-court counterclaim class action is removable to federal court under CAFA.[81]

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v. Michaels Bldg. Co., 1987 WL 31932 at *3 (Ohio Ct. App. Dec. 23, 1987) (also affirming a trial court's refusal to certify a counterclaim class action).

78. For instance, in *Health Costs Controls v. Sevilla*, 718 N.E.2d 558 (Ill. App. 1999), the court held that a trial court had subject-matter jurisdiction over a counterclaim class action even after the main claim was terminated; although the court implicitly assumed that such counterclaims were appropriate, it never so held. *See also Ex Parte Green Tree Fin. Corp.*, 723 So. 2d 6 (Ala. 1998) (denying certification of a counterclaim class action on the merits); *First Life Assurance Co. v. Mountain*, 848 P.2d 1177 (Okla. App. 1993) (same); *Prime Meats, Inc. v. Yochim*, 619 A.2d 769 (Pa. Super. Ct. 1993) (same); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 603 N.E.2d 767 (Ill. App. 1992) (affirming the settlement of a counterclaim class action); *Parker Co. v. Spindletop Oil & Gas Co.*, 628 S.W.2d 765 (Tex. 1982) (indicating a willingness, in appropriate circumstances, to consider certification of a counterclaim class action brought against members of a plaintiff class action); *First Am. Natl. Bank of Nashville v. Hunter*, 581 S.W.2d 655 (Tenn. App. 1978) (denying certification of a counterclaim class action on the merits). *Cf.* Miss. Code Ann. § 75-24-15(4) (West 1999) (by statute precluding counterclaim class actions in disputes arising under certain consumer contracts).

79. Model Class Actions [Act] [Rule], § 11, 12 U.L.A. 114 (1996). In particular, § 11(d) provides in relevant part and § 11(e) provides in full:

> (d)A defendant class may plead as a counterclaim any claim on behalf of the class that the court certifies as a class action against the plaintiff. The court may certify as a class action a counterclaim against the plaintiff on behalf of a subclass or permit a counterclaim by a member of the class. . . .
>
> (e)A member of a class or subclass asserting a counterclaim shall be treated as a member of a plaintiff class for purposes of exclusion under Section 8.

In any event, the ambiguities of this language have little effect on the general question of the power of state courts to entertain counterclaim class actions. Only Iowa and North Dakota have adopted the Model Act. Model Class Actions [Act] [Rule], 12 U.L.A. 43 tbl. 1 (Supp. 2006).

80. *See supra* n. 72.

81. As an aside, however, this brief investigation into state procedure loops back to Professor Koppel's concern, as well as to the theme of this Symposium: the need to understand better the workings of state-court procedure and the desirability of using state-court procedure as a resource for the improvement of procedure at all levels. Although I do not suggest that the ambiguity over the power of federal and some state courts to entertain counterclaim class actions should be the catalyst driving us onto the ramparts of procedural reform, this one scenario, tucked away into a corner of joinder practice, provides an example of the ways in which federal and state courts can learn from the ways in which other state courts have handled comparable issues within their own jurisdictions.

III. THE NON-REMOVABILITY OF STATE-COURT COUNTERCLAIM CLASS ACTIONS

It is hornbook law that federal courts are courts of limited jurisdiction; the federal district courts possess only the subject-matter jurisdiction that the Constitution and Congress give them.[82] Congress has enacted numerous statutes granting the district courts original jurisdiction over various subject matters.[83] Since the Judiciary Act of 1789, Congress has also provided for removal jurisdiction, allowing certain cases that are originally filed in state court to be removed to federal court.[84] A case is removable only if its subject matter lies within federal jurisdiction and Congress has enacted a statute permitting removal.[85]

Removal provisions are scattered throughout the United States Code,[86] and on appropriate and unique facts, any of these statutes might serve as the basis for removal of a case containing a counterclaim class action. But only two provisions have arguable applicability in the context of most counterclaim class actions: the catch-all removal provision, 28 U.S.C. section 1441, and the removal provision created by CAFA, 28 U.S.C. section 1453(b).

In this Part, I demonstrate that neither of these provisions allows the removal of a case simply because it contains a counterclaim class action. More than sixty years ago, the Supreme Court held that the predecessor to section 1441 does not authorize removal by plaintiffs, even when they become counterclaim defendants.[87] Nothing in the language or structure of section 1453(b) changes that result in the specific context of counterclaim class actions.

Faced with this reality, a financial institution facing a consumer's state-court counterclaim class action can employ one other tactic to achieve the federal forum: ask the federal court to realign the parties, thus converting the financial institution from the plaintiff into the defendant and allowing it to remove the case. This Part concludes by showing that the realignment doctrine was never intended to allow a counterclaim defendant to manipulate federal jurisdiction in this way. Therefore, this tactic also fails to obtain a federal forum to hear a state-court counterclaim class action.

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82. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

83. The principal grants are found in 28 U.S.C. §§ 1330-1369, but miscellaneous grants of subject-matter jurisdiction are sprinkled across myriad federal statutes. *See e.g.* Pub. L. No. 58-54, § 2, 33 Stat. 599, 600 (1905) (granting the Red Cross the right to "sue and be sued" in federal court).

84. Jud. Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1845). Although the Constitution does not specifically provide for or even mention removal jurisdiction, the constitutionality of removal jurisdiction is today beyond cavil. *See Tenn. v. Davis*, 100 U.S. 257 (1879).

85. Charles Alan Wright et al., *Federal Practice and Procedure* vol. 14B, § 3721 (3d ed., West 1998).

86. *See e.g.* Fin. Instns. Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1441a(a)(11) (2000) (providing the Thrift Depositor Oversight Board with a right of removal); *id.* at § 1441a(*l*)(3) (providing the Resolution Trust Corporation with a right of removal).

87. *See infra* nn. 95-124 and accompanying text.

A. The Removal Statutes and Counterclaim Class Actions

This Section first examines a counterclaim defendant's ability to remove a case under section 1441, and then explores the counterclaim defendant's ability to remove a counterclaim class action under section 1453(b). This order might appear backward: It seems more direct to go straight to section 1453(b), which specifically concerns the removal of class actions. Because the baseline rule of section 1441 helps to inform the meaning of section 1453(b), however, I begin with section 1441 before turning to the murkier section 1453(b).

1. Removal Under 28 U.S.C. §1441(a)

Section 1441(a) provides in relevant part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

This sentence places three limits on removal. First, Congress must not otherwise preclude removal.[88] Second, if the case had originally been filed in federal, rather than state, court, a federal court must have had subject-matter jurisdiction over the case. Third, the removal must be made by "the defendant or defendants." Other provisions in sections 1441(b) and 1446(b) — which will become significant when we examine section 1453(b)[89] — also place important restrictions on the right of removal. Notably, a defendant in a diversity case cannot remove a case from a court in the defendant's home state;[90] removal must occur within thirty days of the date on which the case first becomes removable;[91] and a diversity-based case is not removable once it has been pending in state court for more than one year, regardless of when the case first became removable.[92] Additionally, when a plaintiff sues more than one defendant, the Supreme Court has required that the defendants unanimously consent to removal.[93]

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88. On rare occasion, Congress has made certain actions non-removable. *See* 28 U.S.C. § 1445 (2000) (making Jones Act, workers' compensation, and other actions non-removable); 15 U.S.C. § 77v(a) (2000) (making state-law fraud claims not asserted as a class action non-removable); Wright et al., *supra* n. 46, at § 3729 (discussing other statutes that have been interpreted to preclude removal).
89. *See infra* nn. 147-149, 171-172 and accompanying text.
90. 28 U.S.C. § 1441(b) (2000).
91. *Id.* at § 1446(b).
92. *Id.*
93. *Gableman v. Peoria, Decatur & Evansville Ry.*, 179 U.S. 335, 337 (1900); *Chi., Rock Is. & P. Ry. v. Martin*, 178 U.S. 245, 248 (1900). The Supreme Court has not expressly affirmed this rule in many years, but, with some necessary exceptions, lower federal courts adhere to it faithfully. *See Loftis v. United Parcel Serv. Inc.*, 342 F.3d 509 (6th Cir. 2003); Wright et al., *supra* n. 46, at § 3731 (describing exceptions). *But see* Charles Alan Wright et al., *Federal Practice and Procedure* vol.

Section 1441(a) is the default rule for removal; it governs removal in the absence of another, more specific removal provision. Its direct lineage traces back to 1887.[94] Not surprisingly, therefore, the issue of a plaintiff's ability to remove a case based on the defendant's assertion of a counterclaim that lies within federal jurisdiction was settled long ago. In *Shamrock Oil & Gas Corp. v. Sheets*,[95] two Texas defendants owed a Delaware corporation $5,390.42 on an account.[96] Although the Delaware corporation could have filed the case in federal court,[97] it chose to file in state court.[98] The defendants then asserted a $7,200 counterclaim, arising out of the breach of a "separate and distinct" contract, against the corporation.[99] Because the counterclaim met the diversity and amount-in-controversy requirements, a federal court would have had jurisdiction had the defendants chosen to file the counterclaim there.

Faced with the counterclaim, and for reasons that are not clear from the record,[100] the Delaware corporation removed the entire case to federal court. It invoked 28 U.S.C. section 71, the predecessor to section 1441.[101] Section 71 authorized removal by "the defendant or defendants therein."[102]

Rejecting the Texas defendants' argument that a counterclaim defendant was not a "defendant" within the meaning of section 71, the district court denied their motion to remand.[103] After a trial on the merits, the Delaware corporation prevailed on its original claim and defeated the counterclaim.[104] The Texas citizens appealed the

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14C, § 3731, 192-193 (West Supp. 2007) (suggesting that a possible interpretation of a recent Supreme Court case might threaten the rule of unanimity).

94. Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 (1887). In 1911, with some alterations in language, this statute became § 28 of the Judicial Code, *see* Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1094-1095 (1911) (codified at 28 U.S.C. § 71 (1940)), and in 1948, with additional alterations, it migrated to § 1441, *see* Act of June 25, 1948, ch. 646, Pub. L. No. 80-773, 62 Stat. 869, 937-938 (1949).
95. 313 U.S. 100 (1941).
96. *Sheets v. Shamrock Oil & Gas Corp.*, 115 F.2d 880, 881 (5th Cir. 1940), *aff'd*, 313 U.S. 100 (1940). The defendants were two individuals doing business as an oil company, and the dispute involved their failure to pay for petroleum products that the plaintiff had sold them. *See* Br. of Petr. at 3, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).
97. Diversity of citizenship existed, and the amount in controversy at that time was $3,000. *See* 28 U.S.C. § 41 (1940).
98. *Shamrock Oil*, 313 U.S. at 103.
99. *Id.*; Br. of Petr., *supra* n. 96, at 4. To be precise, the Texas defendants filed a set-off and cross-action. Under Texas law, a cross-action was the equivalent of a counterclaim. *Sheets*, 115 F.2d at 881; Br. of Petr., *supra* n. 96, at 8.
100. The petitioner's brief in the Supreme Court makes no mention of the tactical reason it now preferred a federal court to hear the case, given its prior tactical decision to sue in state court. The brief mentions that, on the application of the respondents, the case had been transferred to a state court in a different county than the county in which it had been filed, and the respondents filed their counterclaim after the transfer. Br. of Petr., *supra* n. 96, at 3. A fair inference is that the Delaware corporation preferred the original state forum to the federal forum, but preferred the federal forum to the transferee state forum. It used the counterclaim as the excuse to try to avoid its least desirable forum.
101. *Shamrock Oil*, 313 U.S. at 103.
102. For the text of 28 U.S.C. § 71 (1940), *see Shamrock Oil*, 313 U.S. at 104 n. 1.
103. *Shamrock Oil*, 313 U.S. at 103.
104. Br. of Petr., *supra* n. 96, at 4; *Shamrock Oil*, 313 U.S. at 103.

denial of the remand order.[105] The Fifth Circuit held that the corporation had no right to remove a case simply because a jurisdictionally sufficient counterclaim had been filed against it.[106] The court of appeals' holding relied on three arguments: the jurisdictional canon that a party cannot remove itself from a forum that it has voluntarily chosen;[107] prior cases that had denied a counterclaim defendant the right to remove;[108] and the "defendant or defendants therein" language of section 71.[109]

The Supreme Court affirmed.[110] After observing that the determination of the corporation's status as a "plaintiff" or "defendant" was to be determined under federal, not state, law,[111] the Court skipped over the first two arguments raised in the court of appeals, and "confine[d]" its decision to "the question of statutory construction":[112] Whether plaintiffs who become counterclaim defendants were "the defendant or defendants therein" entitled to remove under section 71.[113]

The Court's answer was unequivocal: The phrase "the defendants or defendants therein" means what it says, and provides only the *original* defendant(s) in the case with the right to remove.[114] Of vital importance in the Court's reasoning was the history and language of the various iterations of the removal statute.[115] The first removal statute, contained in section 12 of the Judiciary Act of 1789, allowed only "the defendant" to remove a case;[116] in *West v. Aurora City*, the Supreme Court interpreted this language not to permit a plaintiff to remove upon becoming a counterclaim defendant.[117] In 1867, Congress expanded removal jurisdiction to permit either a plaintiff or a defendant to remove a case if the removing party could show prejudice or local influence, but in other circumstances left intact the Judiciary Act's requirement that only a defendant could remove.[118] Then, in 1875, Congress "greatly

105. *Shamrock Oil*, 313 U.S. at 103.
106. *Sheets*, 115 F.2d at 884.
107. *Id.* at 882.
108. *Id.* at 882-884. The Fifth Circuit thought that "the weight of authority" was against allowing removal by a counterclaim defendant, *id.* at 882, although in the Supreme Court the corporation claimed that twenty-one of twenty-five cases had allowed removal, *see Shamrock Oil*, 313 U.S. at 101; Br. of Petr., *supra* n. 96, at 11-14.
109. *See Sheets*, 115 F.2d at 881, 884.
110. *Shamrock Oil*, 313 U.S. at 104.
111. *Id.* ("[A]t the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions.").
112. *Id.*
113. *Id.* at 104-105.
114. *Id.* at 105-109.
115. *Id.* at 105-108.
116. Jud. Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1845); *see Shamrock Oil*, 313 U.S. at 105-106.
117. 73 U.S. 139 (1867). *West* also denied removal on an alternate holding dealing with a defect in the removal process, *id.* at 142, but its principal focus was on the language of the removal statute. In reaching this interpretation of the statute, the Court's principal argument was that a plaintiff that voluntarily invoked the jurisdiction of a court should not be allowed to remove — precisely the argument that the court of appeals had raised in *Shamrock Oil*. *See supra* n. 107 and accompanying text.
118. Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, 559 (1868) (in a case otherwise meeting the diversity requirements, permitting removal by a non-citizen of the forum state, "whether he be plaintiff or defendant," if the non-citizen alleges by affidavit that "he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court"); *see Shamrock Oil*, 313 U.S. at 105.

liberalized"[119] removal practice by allowing "either party" to remove a case otherwise within federal jurisdiction.[120] Within twelve years, however, Congress had relented, replacing the "either party" language of the 1875 Act with "the defendant or defendants therein" language that eventually migrated into section 71.[121]

The Supreme Court thought that the return in the 1887 statute to the word "defendant" was critical:

> We think these alterations in the statute are of controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction on removal by reviving in substance the provisions of [section] 12 of the Judiciary Act of 1789 as construed in *West v. Aurora City* . . . If, in reenacting in substance the pertinent provisions of [section] 12 of the Judiciary Act, Congress intended to restrict the operation of those provisions or to reject the construction which this Court had placed upon them, by saving the right of a plaintiff, in any case or to any extent, to remove the cause upon the filing of a counterclaim praying an affirmative judgment against him, we can hardly suppose that it would have failed to use some appropriate language to express that intention.[122]

In its final paragraph, *Shamrock Oil* bolstered its interpretation of section 71 with a policy argument: the desirability of "strict construction" of "acts of Congress regulating the jurisdiction of the federal courts."[123] "Due regard for the rightful independence of state governments," the Court noted, requires the federal courts to "scrupulously confine their own jurisdiction to the precise limits which the statute has defined."[124]

The language of section 71 changed somewhat when it was re-codified as section 1441 in 1948; in particular, the phrase "the defendant or defendants therein" became "the defendant or the defendants."[125] No one has thought that this slight alteration should change the default rule announced in *West v. City of Aurora* and re-affirmed in *Shamrock Oil*: Only original defendants, and not counterclaim defendants, can remove a case to federal court.[126] Therefore, when Congress has

119. *Shamrock Oil*, 313 U.S. at 106.
120. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 471 (1875); *see id.* (also permitting removal, in a case "wholly between citizens of different States, and which can be fully determined as between them," by "either one or more of the plaintiffs or defendants actually interested in such controversy"); *id.* (stating the removal procedures by which "either party, or any one or more of the plaintiffs or defendants entitled to remove" could do so). This jurisdictionally generous statute is best known for also granting, for the first time in more seventy years, federal-question jurisdiction to the federal district courts, thus forming the basis for the present 28 U.S.C. § 1331. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (1875).
121. Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 (1887). On the subsequent history of the 1887 Act, *see supra* n. 94.
122. *Shamrock Oil*, 313 U.S. at 107.
123. *Id.* at 108.
124. *Id.* at 109 (*quoting Healy v. Ratta*, 292 U.S. 263, 270 (1934) (internal quotation marks omitted)).
125. Act of June 25, 1948, ch. 646, Pub. L. No. 80-773, 62 Stat. 869, 937-938 (1949).
126. *See* Wright et al., *supra* n. 46, at § 3731, 251-253 & nn. 2-3 (collecting cases); *id.*, at 255 & nn. 5-7 (describing a few possible exceptions, not involving counterclaims, in which a person other than an original defendant might be able to remove).

wished to provide parties other than defendants with a right of removal, it has used tailored language to accomplish that result.[127]

Shamrock Oil did not involve a counterclaim class action, so it is possible to argue that this procedural context requires a different conclusion. In *Shamrock Oil*, the plaintiff asserted claims against the defendants, and only those defendants asserted a counterclaim against the plaintiff. Nothing in the party structure changed. With a counterclaim class action, however, new parties are added to the case. These new parties — the class members — face no claims from the original plaintiff. They are only plaintiffs; with respect to their claims, the defendant is only a defendant. Perhaps a financial institution facing such new claims should be seen as a "defendant" entitled to remove the case to federal court under section 1441(a).

For a number of reasons, however, this argument is unlikely to succeed. The first, and sufficient, difficulty is one of the other limitations in section 1441(a): the requirement that a case can be removed only when "the district courts of the United States have original jurisdiction" over the action. One of the bedrock principles of federal jurisdiction is the "well-pleaded-complaint rule": Federal jurisdiction is determined by looking only at the well-pleaded complaint, not at subsequent pleadings.[128] Counterclaims are not part of the well-pleaded complaint, and cannot be considered in determining jurisdiction.[129]

The "well-pleaded complaint" rule is typically invoked in the context of federal-question jurisdiction, although the Supreme Court has recently recited it in the

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127. *See e.g.* 28 U.S.C. § 1452 (2000) (allowing "[a] party" to remove certain cases within the federal courts' bankruptcy jurisdiction); 25 U.S.C. § 487(d) (2000) (requiring joinder of the United States as an indispensable party and giving it a right of removal in cases involving certain tribal lands); 12 U.S.C. § 1789 (2000) (providing National Credit Union Administration Board with a right of removal without regard to whether the Board was an original defendant); 12 U.S.C. § 1819(b)(2)(B) (2000) (granting Federal Deposit Insurance Corporation the same broad right of removal when a case "is filed against the Corporation or the Corporation is substituted as a party"). *Cf. FDIC v. Otero*, 598 F.2d 627 (1st Cir. 1978) (allowing removal based on counterclaim asserted against the FDIC).

    A statute of particular interest is § 337(c) of the Tariff Act of 1930. 19 U.S.C. § 1337(c) (2000). Under § 337, the United States International Trade Commission is authorized to investigate certain unfair importing practices. Section 337(c) allows the target of such an investigation to file a counterclaim against the Commission, and then provides: "Immediately after a counterclaim is received by the Commission, the respondent raising such counterclaim shall file a notice of removal with a United States district court" having venue over the proceeding. Although arising in the administrative-law context, § 337(c) shows that Congress is capable of using language to effect the removal of counterclaims when it so desires. *Cf.* 28 U.S.C. § 1446(f) (2000) (describing post-removal procedures in a claim removed under § 337(c)).

128. The seminal case is *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877). With the exception of state-law claims completely preempted by federal law, the Supreme Court has adhered to the rule ever since. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983) ("For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff*'s complaint establishes that the case 'arises under' federal law."); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).

129. *Holmes Group, Inc. v. Vornado Air Circulation Sys. Inc.*, 535 U.S. 826, 831-832 (2002) ("[A] counterclaim — which appears as part of the defendant's answer, not as part of the plaintiff's complaint — cannot serve as the basis for 'arising under' jurisdiction . . . [W]e decline to transform the longstanding well-pleaded-complaint rule into the 'well-pleaded-complaint-*or-counterclaim* rule.'").

diversity context as well.[130] In a diversity case, the rule operates somewhat differently: Whether the case is filed in federal court or removed there, what must appear on the face of the plaintiff's well-pleaded complaint is complete diversity between opposing sides and the requisite amount in controversy.[131] One difference between a case filed originally in federal court and one removed there is the date on which the requisite diversity and amount in controversy must appear in the complaint. For a case filed in federal court, the date is the date on which the complaint is filed. When the original claims in the complaint do not establish complete diversity and the amount in controversy, subsequent events cannot invest the court with jurisdiction. As the Supreme Court has recently noted, "[i]t has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.' This 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-whether the challenge be brought shortly after filing, after the trial, or even for the first time on appeal."[132] Indeed, in the specific context of ancillary jurisdiction, which includes federal jurisdiction over compulsory counterclaims, the Court has recently stated that " '[a]ncillary jurisdiction may extend to claims having a factual and logical dependence on 'the primary lawsuit,' . . . but that primary lawsuit must contain an independent basis for federal jurisdiction."[133] Were it otherwise, a plaintiff, such as

130. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005) ("When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question, has original jurisdiction over that claim.").

131. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) ("[I]f, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed."); *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 appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' "). In determining whether a complaint is well-pleaded, a federal court retains a limited power to realign the parties. *See infra* Part III.B. It can also look beyond parties that are fraudulently joined, *see* 28 U.S.C. § 1359 (2000); *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529 (5th Cir. 2006), and must consider indispensable parties that were not joined, *see* Fed. R. Civ. P. 19(b); *Carnero v. Bos. Sci. Corp.*, 433 F.3d 1 (1st Cir. 2006).

See Freeport-McMoRan, Inc. v. K N Energy Inc., 498 U.S. 426, 428 (1991) (describing the "the well established rule that diversity of citizenship is assessed at the time the action is filed"). For a removed case, the requirements of diversity must exist both on the date on which the case is filed in state court and the date on which the case is removed — although an exception to the former requirement exists when a party's departure from the case creates the diversity that the initial complaint filed in state court lacked. *See* Wright et al., *supra* n. 85, at § 3723, 573-575. *See also Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996) (holding that federal jurisdiction existed when the district court erroneously ruled that complete diversity existed at time of removal, and defect in jurisdiction had been cured by the dismissal of the non-diverse party before the court entered judgment); *Grupo Dataflux v. Atlas Global Group, Inc.*, 541 U.S. 567 (2004) (refusing to extend *Caterpillar* to a situation in which the post-filing withdrawal of partner from the partnership cured the lack of complete diversity).

132. *Grupo Dataflux*, 541 U.S. at 570-571 (*quoting Mollan v. Torrance*, 22 U.S. 537, 539 (1824)).

133. *Peacock v. Thomas*, 516 U.S. 349, 355 (1996) (*quoting Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978)); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (requiring that one original claim must meet the amount-in-controversy requirement before a court can assert supplemental jurisdiction over the claims of other plaintiffs that do not meet the

a financial institution, could obtain federal jurisdiction over a claim lacking the requisite amount in controversy simply by alleging that the consumer will file a counterclaim class action against it.

Even before the Court's recent reassertions of traditional jurisdiction principles made the contrary argument untenable, most courts held that a counterclaim with a jurisdictionally sufficient amount in controversy cannot be added onto a jurisdictionally insufficient original claim to meet the amount-in-controversy requirement and thereby justify removal.[134] This rule is absolutely clear when the counterclaim is merely a permissive one.[135] When the counterclaim is compulsory, the cases are mixed, but a strong majority refuses to count the value of the counterclaim when determining the amount in controversy in a removed case.[136] Because the

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requirement). Compulsory counterclaims are quintessential claims over which federal courts have asserted ancillary jurisdiction. *See Owen Equip.*, 437 U.S. at 377 n. 18; *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593 (1926). Permissive counterclaims lie outside of federal subject-matter jurisdiction unless they possess an independent basis of jurisdiction over them. *See* Wright et al., *supra* n. 52, at § 1422.

134. The issue has rarely arisen. Because of *Shamrock Oil*, *see supra* nn. 95-124 and accompanying text, only original defendant(s) can seek removal. The one situation in which the argument has been raised has been when a diverse defendant who is sued in state court on a jurisdictionally insufficient claim wishes to litigate the case in federal court, and removes the case after filing a counterclaim that meets the amount-in-controversy requirement. *See* Wright et al., *supra* n. 85, at § 3706, 214-215.

135. Wright et al., *supra* n. 85, at § 3706, 215 & n. 42.

136. *Id.* at § 3706, 215-217 & n. 43 (collecting cases and critiquing the rule); *compare Spectacor Mgmt. Group v. Brown*, 131 F.3d 120, 125-126 (3rd Cir. 1997) (holding that the value of a compulsory counterclaim can be added to the value of the original claim when the case is originally filed in federal court and the defendant chooses to assert the counterclaim rather than move to dismiss for lack of subject-matter jurisdiction, but distinguishing contrary holding rendered in removed cases because *Shamrock Oil*'s strict construction of the removal statutes required that "inclusion of counterclaims should not be permitted in the removal context"), *and Swallow & Assoc. v. Henry Molded Prods. Inc.*, 794 F. Supp. 660 (E.D. Mich.1992) (counting amount requested in a compulsory counterclaim toward the statutory amount in controversy), *with Kaplan v. Computer Sci. Corp.*, 148 F. Supp. 2d 318, 321 (S.D.N.Y. 2001) (noting *Shamrock Oil*'s policy of strict construction and holding that "it is inappropriate in a removed case to consider the amount of Defendant's counterclaim in assessing the amount in controversy for jurisdictional purposes"), *and FLEXcon Co. v. Ramirez Com. Arts, Inc.*, 190 F. Supp. 2d 185, 187 (D. Mass. 2002) (also noting *Shamrock Oil*'s policy of strict construction and "[t]he growing weight of authority . . . that the amount in controversy requirement cannot be satisfied by considering a defendant's counterclaim").

The one fly in this ointment is the Supreme Court's decision in *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961). *Horton* involved a workers' compensation proceeding in which an employee sought $14,035 from his employer and its workers' compensation carrier for a workplace injury. The Texas Industrial Accident Board, an administrative agency, awarded the worker $1,050. At the time, the requisite amount in controversy for federal jurisdiction was $10,000. The insurer nonetheless filed suit in federal court to set aside the $1,050 award, and the employee filed a counterclaim for the full $14,035; the employee also filed suit in state court for that amount. After reciting the usual mantra that the amount in controversy is determined by looking at the plaintiff's complaint, *see id.* at 353, *Horton* held that the amount-in-controversy requirement was nonetheless satisfied. *Horton*'s reasoning was opaque; the Court argued that, because the trial of the Accident Board's award was *de novo* to the court, and because the employee insisted throughout that he was due $14,035, "[i]t would contradict the whole record as well as the allegations of the complaint to say that this dispute involves only $1,050. The claim before the Board was $14,035; the state court suit of petitioner asked that much; the conditional counterclaim in the federal court claims the same amount." *Id.* at 353-354. As one set of commentators has observed, *Horton* is a "surprising decision"; "it is difficult to the point of impossibility to state the principle for which the Horton decision stands." Wright et al., *supra* n. 85, at § 3706, 218, 220. One construction of the decision is that the value of a compulsory counterclaim should be considered in figuring the amount in

financial institution's original claim does not meet the amount-in-controversy requirement,[137] the case is not one "of which the district courts of the United States have original jurisdiction" under section 1441(a). Thus, even without the rule in *Shamrock Oil*, a plaintiff financial institution could not remove a case whose original claim contained a jurisdictionally insufficient amount in controversy.

Second, any argument seeking to avoid the rule in *Shamrock Oil* for counterclaim class actions runs afoul of a central rationale underlying the "defendant only" interpretation of what is now section 1441(a). In *West v. Aurora City*, the first case to uphold "defendant only" removal, the Supreme Court found that a right of removal should not be "given" to "an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action."[138] As Chief Justice Chase noted, the plaintiffs in *West* had "voluntarily resorted, as plaintiffs," to state court. As a result, "[t]hey were bound to know of what rights the defendants to their suit might avail themselves under the code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants to a suit."[139] So too here. Assuming that state law authorizes counterclaim class actions,[140] a financial institution must understand that being subjected to such a counterclaim is one of the risks of proceeding in state court; and the logic of *West v. Aurora City* does not allow it to escape state court when that risk materializes.

Third, allowing removal of a counterclaim class action because the financial institution is only a defendant with respect to most of the class's claims ignores the fact that, at least with respect to the counterclaims asserted by the original consumer, the financial institution is in the "plaintiff-counterclaim defendant" posture that *West* and *Shamrock Oil* regarded as insufficient to justify removal.[141] Removal would

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controversy. *Id.* at 220. It is also possible to see the case as a *sui generis* part of the "skirmish in the continuing battle" between Texas employees and insurance carriers involving the peculiar Texas workers' compensation scheme. *Id.* at 224. In my judgment, however, the case is best explained by principles of res judicata; if the carrier succeeded in setting aside the Board's $1,050 award, it might also (depending on the grounds the federal court used to decide the case) be able to use the necessary factual findings in the judgment as direct estoppel against the employee in the $14,035 case in state court. Thus, *Horton* is a rare case in which the legal value of the judgment to the plaintiff ($14,035) was greater than the face value of the complaint ($1,050) — and that fact was true regardless of whether the employee filed a federal counterclaim. In any event, *Horton* is distinguishable because it involved a case filed originally in federal court; courts in removed cases are more hostile to the inclusion of the value of a compulsory counterclaim in calculating the amount in controversy.

137. *See supra* n. 26 and accompanying text.

138. 73 U.S. 139, 142 (1868).

139. *Id.* Although *Shamrock Oil* did not rely on the voluntariness argument, it did rely on *West*, which relied principally on this rationale. *See supra* n. 122 and accompanying text; *see also supra* n. 107 and accompanying text (noting the reliance of the court of appeals in *Shamrock Oil* on this rationale).

140. On this issue, *see supra* nn. 60-80 and accompanying text.

141. One of the arguments asserted by the financial institution in *CitiFinancial* was the "separate and distinct" nature of the original claim against the consumer and the counterclaim class action against it. *CitiFinancial*, 2007 WL 1655225 at *2. But that argument echoes the argument rejected in *Shamrock Oil*, 313 U.S. 100, in which the Delaware corporation also argued that the counterclaim against it was, under Texas law, "separate and distinct." *See supra* n. 99 and accompanying text.

therefore bring into federal court at least one claim that is not ordinarily removable. But this approach flies in the face of *West* and *Shamrock Oil*. Alternatively, the financial institution might seek to chop up the case and remove only the claims of class members other than the claim of the original consumer-defendant. The latter approach runs afoul of section 1441(a)'s requirement that the entire case, and not just claims within the case, be removed; nor is it evident where the authority to remove only some claims might come from.[142] Regardless of whether it is facing one counterclaim or one thousand, the financial institution is in the same procedural posture — the plaintiff on an original claim and the defendant on a counterclaim — as other counterclaim defendants who cannot remove.

Finally, the "strict constructionist" argument from *Shamrock Oil* argues against too much jurisdictional creativity in the context of counterclaim class actions.[143] Indeed, recent Supreme Court cases have demonstrated the importance of paying close attention to the text of the relevant removal provision rather than to policy arguments for desirable outcomes.[144] A reading of the phrase "the defendant or the defendants" that is broad enough to sweep a state-law counterclaim class action into federal court would limit state-court authority to determine state-law claims, in contravention of desire articulated in *Shamrock Oil* to allow state courts to exercise independent authority over such claims to the fullest extent consistent with the language of removal statutes.

Unsurprisingly, therefore, the few federal courts to consider the issue have not bent the rule of *Shamrock Oil* to the emergence of counterclaim class actions.[145] Indeed, the conclusion that section 1441 does not authorize the removal of counterclaim class actions results from an uncomplicated, almost mundane, exercise in legal reasoning. The combination of a clear text ("the defendant or the defendants"), an on-point Supreme Court decision (*Shamrock Oil*), a bedrock jurisdictional canon (the rule that the court's jurisdiction must appear on the face of the complaint), and a sensible interpretive policy (strict construction in order to allow state courts the

142. *Cf.* 28 U.S.C. § 1441(c) (2000) (allowing removal, in federal-question but not diversity cases, of "a separate and independent claim or cause of action").

143. For a recent case reiterating the need to construe removal statutes strictly, *see Syngenta Crop Protec., Inc. v. Henson*, 537 U.S. 28 (2002).

144. *See e.g. Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2420 (2007) (interpreting 28 U.S.C. § 1447(c); noting that "[w]e will not ignore a clear jurisdictional statute in reliance upon supposition of what Congress *really* wanted"); *Osborn v. Haley*,127 S. Ct. 881 (2007) (interpreting 28 U.S.C. § 2679(d) according to its plain terms); *Syngenta*, 537 U.S. 28 (refusing to permit removal under the All Writs Act despite threat posed by state-court action to a federal judgment).

145. *Palisades Collections LLC v. Shorts*, 2008 WL 163677 (N.D. W. Va. Jan. 16, 2008);); *Ford Motor Credit Co. v. Jones*, 2007 WL 2236616 (N.D. Ohio July 31, 2007); *CitiFinancial, Inc. v. Lightner*, 2007 WL 1655225 (N.D. W. Va. June 6, 2007); *see Unifund CCR Partners v. Wallis*, 2006 WL 908755 (D.S.C. Apr. 7, 2006) (holding that *Shamrock Oil* barred removal of a counterclaim class action, but not clarifying whether its holding was an interpretation of 28 U.S.C. § 1441(a) (2000) or 28 U.S.C.§ 1453(b) (2000)); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686 (9th Cir. 2005) (as support for an argument on a different issue, citing *Shamrock Oil* for the proposition that "[t]he removal statute, 28 U.S.C. § 1441, is quite clear that only a 'defendant' may remove the action to federal court"). *Cf. Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1018 (9th Cir. 2007) (holding *Shamrock Oil* applicable to removal under 28 U.S.C. § 1453(b)).

greatest authority to decide cases brought under state law) is too much to overcome. But the conclusion is nonetheless important, for the non-removability of counterclaim class actions under section 1441 serves as the baseline for the more complicated removal problems posed by section 1453(b), the removal provision created by CAFA.

2. *Removal Under 28 U.S.C. §1453(b)*

In addition to granting original federal jurisdiction over minimally diverse class actions with more than $5,000,000 at stake,[146] CAFA also created section 1453(b), which concerns the removal of state-court class actions. Section 1453(b) provides:

> A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

In one sense, the meaning of this language is evident: Congress wished to make state-court class actions widely removable. To accomplish this end, section 1453(b) overrides several of the ordinary barriers to removal: the limit in section 1441(b) that, in a diversity case, a defendant cannot remove a case from its home forum;[147] the limit in section 1446(b) that a defendant cannot remove a diversity case once it has been pending in state court for more than one year;[148] and the gloss placed on section 1446(b) that all defendants must consent to removal.[149]

In another sense, however, section 1453(b) is a very perplexing statute. Counterclaim class actions expose three of its fundamental ambiguities. First, if section 1453(b) is understood to provide a removal power to federal court,[150] the statute appears to be unconstitutional.[151] The reason is simple: To the extent that it provides a removal power, section 1453(b) allows *all* class actions to be removed from state court. Unlike section 1441(a), which limits the right to remove only to those cases "of which the district courts of the United States have jurisdiction," section 1453(b) says that any "class action may be removed." Section 1453(a) incorporates the definition of "class action" from section 1332(d)(1),[152] which in turn defines a

146. 28 U.S.C.A. § 1332(d)(2) (West 2006). The statute contains limitations on this jurisdiction. *Id.* at §§ 1332(d)(3)-(5) and (d)(9).
147. 28 U.S.C. § 1441(b) (2000); *see supra* n. 90 and accompanying text.
148. 28 U.S.C. § 1446(b) (2000); *see supra* n. 92 and accompanying text.
149. *See supra* n. 93 and accompanying text.
150. The reason for this caveat will become clear *infra* nn. 170-181 and accompanying text.
151. Adam Steinman has previously raised the issue of § 1453(b)'s facial unconstitutionality. Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah, and its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 331 (2006). I am indebted to Professor Steinman for discussions about this issue.
152. 28 U.S.C.A. § 1453(a) (West 2006) ("In this section, the term[ ] . . . 'class action' . . . shall have the meaning[ ] given such term[ ] under section 1332(d)(1).").

"class action" to be "any civil action filed under . . . [a] State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action."[153] Thus, if section 1453(b) provides a removal authority, every case in state court that seeks class-action status is removable to federal court — regardless of whether the case lies within the jurisdiction of the federal courts.[154] Since *Marbury v. Madison*,[155] however, it has been understood that federal courts are courts of limited jurisdiction, and Congressional efforts to supply federal courts with more jurisdiction than the Constitution permits are unconstitutional.

The second perplexity of section 1453(b) is its failure to assign the removal power to any particular parties. Section 1453(b) uses the passive voice ("A class action may be removed"), never stating which parties can remove a state-court class action. The use of the word "defendant" twice and "defendants" once, as well as the final clause ("that such action may be removed by any defendant") prove that defendants are parties who can remove under section 1453(b), but the text does not expressly state that they are the only parties able to do so.

Still assuming that section 1453(b) provides a removal power, the third curious feature of the statute is its failure to provide a venue provision indicating the court to which a class action should be removed. Such a venue provision is *de rigeur* in statutes providing a removal power.[156] It is passing strange for Congress not to have included such a provision in section 1453(b).

Because the issue of section 1453(b)'s constitutionality determines, or at least frames, the question about whether parties are entitled to remove a class action from state court, I begin with that issue. As I demonstrate, however, it is not ultimately necessary to resolve the issue of section 1453(b)'s constitutionality.[157] Whether section 1453(b) is or is not constitutional, the conclusion is the same: A counterclaim defendant cannot remove a counterclaim class action.

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153. 28 U.S.C.A. § 1332(d)(1)(B) (West 2006) ("[T]he term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.").

154. In particular, § 1453(b) appears to allows removal of a state-court class action in which no federal question is alleged, and no minimal diversity exists between the class and the people opposing the class.

155. 5 U.S. 137 (1803).

156. For instance, § 1441 lays venue over an action removed under its terms in "the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a) (2000); *see also id.* at § 1442 (same); *id.* at § 1443 (same). Section 1453(b) allows a state-court class action case to be removed "in accordance with section 1446." 28 U.S.C.A. § 1453(b) (West 2006). Section 1446(a) in turn provides that "a defendant or defendants desiring to remove" a case must file a notice of removal "in the district court of the United States for the district and division within which such action is pending." 28 U.S.C. § 1446(a) (2000). But § 1446(a) states a rule for filing a petition, not a rule of venue. Thus, § 1453(b)'s reference to § 1446 would not seem to establish a rule of venue.

157. *See infra* nn. 170-181 and accompanying text (suggesting that the best reading of § 1453(b) renders it constitutional).

a. The Constitutionality of §1453(b)

The argument for the unconstitutionality of section 1453(b) is a facial one:[158] On its face, the statute gives the federal courts subject-matter jurisdiction that they do not, under Article III, possess. If section 1453(b) in fact does so, then it cannot serve as a legitimate basis for the removal of a class action, including a counterclaim class action. Therefore, if a counterclaim defendant wishes to remove counterclaim class action, it must find a source of power other than section 1453(b) to justify removal. The only other generally applicable removal power is 28 U.S.C. section 1441(a), but as we have seen, section 1441(a) does not permit the removal of counterclaim class actions.[159] Therefore, unless a counterclaim defendant can point to a specific removal power other that section 1441(a) under which the removal of a counterclaim is permitted, the unconstitutionality of section 1453(b) means that counterclaim class actions are not removable to federal court.

A number of interpretive strategies, however, might save section 1453(b) in some or all of its applications. Loosely, the strategies can be grouped into two categories: an approach that imports into section 1453(b) the requirement that the federal court have subject-matter jurisdiction over a removed class action, and an approach that reads section 1453(b) as a procedural statute defining the terms of removal rather than as a statute granting a power of removal.[160] Both interpretations lead to the same conclusion — that a counterclaim defendant cannot remove a counterclaim class action.

i. As-Applied Constitutionality

Start with the first strategy: saving section 1453(b) from a claim of facial unconstitutionality by arguing that the statute is constitutional as applied to those class actions (likely the vast majority) over which federal courts have subject-matter jurisdiction. This approach thus imports the basic requirement of section 1441(a) — that a civil action is removable only when the district courts have subject-matter jurisdiction over the removed action —into section 1453(b); in effect, section 1453(b)

158. For a useful analysis of facial as opposed to as-applied challenges to the constitutionality of legislation, *see* Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

159. *See supra* Part III.A.1.

160. Professor Steinman also suggests a third approach for finding § 1453(b) constitutional: that CAFA's new rules concerning coupon settlements, *see* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 3, 119 Stat. 4, 5-9 (2005) (codified at 28 U.S.C.A. §§ 1711-1715 (West 2006)), provides a sufficient substantive hook to justify jurisdiction over all class actions. *See* Steinman, *supra* n. 151, at 331 n. 273; *cf. Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480 (1983) (holding Foreign Sovereign Immunities Act constitutional because the Act's creation of substantive federal law justifies the assertion of federal jurisdiction over all claims arising under the Act). Because counterclaim class actions remain non-removable under any theory of § 1453(b)'s constitutionality, *see infra* Part III.A.2.b, I do not need to pursue this alternate argument any further.

reads (with the glossed language in italics): "A class action *of which the district courts of the United States have jurisdiction* may be removed."[161]

A number of arguments support the addition of this gloss. The first is the legislative history of CAFA. Although this history is very limited and needs to be treated with more than the ordinary caution,[162] scattered passages can be read to suggest that section 1453(b) creates a removal authority only over those class actions that fall within the terms of section 1332(d), which is CAFA's grant of original class-action jurisdiction to the federal courts.[163] Second, a standard canon of statutory construction is to construe a statute in a way that avoids a constitutional question; interpreting section 1453(b) narrowly to allow removal only of jurisdictionally sound

161. There are a couple of variants of this idea. One is that removal of a state-court class action is authorized whenever a federal court has subject-matter jurisdiction over the class action; the other is that removal is appropriate only if the federal court has subject-matter jurisdiction pursuant to CAFA's jurisdictional grant, 28 U.S.C.A. § 1332(d) (West 2006). *See* Steinman, *supra* n. 151, at 321-322. Because there are limited circumstances in which the traditional rules of subject-matter jurisdiction over class actions grant the federal courts jurisdiction to hear cases that CAFA does not, *see id.* at 322 (describing the "small, completely diverse class action"), the first variant is slightly more expansive than the second. The argument for the second variant is that, because § 1453(b) was passed as a part of CAFA, the scope of the removal jurisdiction should be tied to the scope of the original jurisdiction CAFA created. Because the additional subject-matter jurisdiction granted by the first variant is slight, and because the issue of the removability of counterclaim class actions ends up in the same place under either interpretation, *see infra* n. 188 and accompanying text, it is not necessary to choose between the two variants for present purposes.

162. CAFA, which was the second public law enacted in the 109th Congress, was passed on Feb. 17, 2005. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). The only significant legislative history accompanying the bill was a Senate Report, which was not completed until Feb. 28, 2005 — eleven days after CAFA's passage and ten days after President Bush had signed CAFA into law. Sen. Rpt. 109-14 (Feb. 28, 2005) (reprinted in 2005 U.S.C.C.A.N. 3); Statement by President George W. Bush upon Signing S.5, 2005 U.S.C.C.A.N. S3). There was also a brief House Report that accompanied the House Resolution introducing CAFA and setting the terms of the floor debate, but this Report contained no substantive comments on the legislation. *See* H.R. Rpt. 109-7 (Feb. 15, 2005); H.R. Res. 96, 109th Cong. (2005) (enacted). Although legislators often noted the existence of the removal provision in CAFA or remarked that more class actions would be removable to federal court under CAFA, *see e.g.* 151 Cong. Rec. S1003 (daily ed. Feb. 7, 2005) (statement of Sen. Leahy); 151 Cong. Rec. S1087 (daily ed. Feb. 8, 2005) (statement of Sen. Kennedy); 151 Cong. Rec. S1150 (daily ed. Feb. 9, 2005) (statement of Sen. Reid); 151 Cong. Rec. H727 (daily ed. Feb. 17, 2005) (statement of Rep. Boucher); *id.* at H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner), the floor debates in the Senate and House contain no particularly enlightening references to § 1453.

On the use of legislative history to interpret a statute, *compare e.g. Zedner v. United States*, 126 S. Ct. 1976, 1985-1986 (2006) (using legislative purpose and history to interpret a statute), *and Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (interpreting a statute in light of its "text, structure, purpose, and history"), *with Zedner*, 126 S. Ct. 1976, 1991 (Scalia, J., concurring) (stating that "the use of legislative history is illegitimate and ill advised in the interpretation of any statute — and especially a statute that is clear on its face"), *and Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568-571 (2005) (critiquing use of legislative history).

163. *See* Sen. Rpt. 109-14 at 5 (Feb. 28, 2005) (noting that CAFA "modifies the federal removal statutes to ensure that *qualifying interstate class actions* initially brought in state courts may be heard by federal courts") (emphasis added); *id.* at 29 ("In order to enable *more* class actions to be removed to federal court, [CAFA] would also create three new rules regarding the removal of class actions filed in state court.") (emphasis added); *id.* at 48 ("[CAFA] establishes the procedures for removal of *interstate class actions over which the federal court is granted original jurisdiction in new section 1332(d).*") (emphasis added).

class actions meets this rule of construction.[164] Third, the only time when a party opposing a class action is likely to remove a case to federal court is when the federal court has arguable subject-matter jurisdiction; as applied in such cases, section 1453(b) is constitutional, and it is not clear that a class representative seeking remand has the ability in such a case to challenge the unconstitutionality of the statute as applied to others.[165] Finally, 28 U.S.C. section 1447(c) provides a federal court with the authority to remand any removed class action over which it lacks subject-matter jurisdiction.[166] Because a federal court always has jurisdiction to determine its own jurisdiction,[167] and because section 1447(c) allows the federal court to immediately throw back those class actions not fitting within federal jurisdiction, section 1453(b) is saved from a verdict of unconstitutionality.[168]

Although strong arguments can be leveled against this gloss,[169] I am willing to assume for now that this reading is a viable way to save the statute. On this reading, section 1453(b) allows the removal of state-court class actions that otherwise meet the requirements for federal jurisdiction. The next issue is whether section 1453(b) allows the removal of counterclaim class actions that, had they been filed as separate actions, would have met these requirements. Before I come to that issue, however, let me examine the second interpretation by which section 1453(b) might be saved — an interpretation that directly demonstrates the non-removability of counterclaim class actions.

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164. *Office of Sen. Mark Dayton v. Hanson*, 127 S. Ct. 2018, 2021 (2007) (*noting* "our established practice of interpreting statutes to avoid constitutional difficulties"); *Clark v. Martinez*, 543 U.S. 371, 380-382 (2005); *see Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). *Cf.* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001) (critiquing the canon of avoidance).

165. *See* Fallon, *supra* n. 158; *Clark v. Martinez*, 543 U.S. 371, 395-396 (2005) (Thomas, J., dissenting).

166. *See* 28 U.S.C. § 1447(c) (2000) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

167. *U.S. v. Ruiz*, 536 U.S. 622, 628 (2002); *U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947).

168. Professor Steinman favors this argument as the means for rendering § 1453(b) constitutional. *See* Steinman, *supra* n. 151, at 331.

169. One argument is that a statute should be read plainly according to its language. *See e.g. Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) ("We should prefer the plain meaning since that approach respects the words of Congress."). Another is the text of § 1332(d)(10), whose reference to § 1453 is superfluous if § 1453(b) grants jurisdiction only over class actions of which the federal courts already had jurisdiction. 28 U.S.C.A. § 1332(d)(10) (West 2006) ("For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized."). Perhaps the most devastating argument, however, is the text of § 1332(d)(11), which states a rule of removal specifically for state-court mass actions and which limits removal only to those mass actions that meet the terms of CAFA's original jurisdiction. 28 U.S.C.A. § 1332(d)(11)(A) (West 2006) ("For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs."). In § 1332(d)(11)(A), Congress showed that it knew how to use language that limited removal just to those class actions meeting the jurisdictional requirements of § 1332(d), but it included no comparable language in § 1453(b).

ii. Section 1453(b) as a Non-Jurisdictional Provision

The second tack is to treat section 1453(b) not as a rule granting a power of removal, but rather as a procedural statute whose only purpose is to alter some of the usual limitations on removal specified in sections 1441(b) and 1446(b). A number of arguments point to this interpretation as the correct one. First, the text of sections 1332(d) and 1453(b) lend themselves to this interpretation. Section 1332(d)(11)(A) states that "[f]or purposes of this subsection and section 1453, a mass action [meeting certain requirements] shall be deemed to be a class action *removable under paragraphs (2) through (10)*" of section 1332(d) — a clear indication that Congress thought that section 1332, not section 1453(b), provides the jurisdictional grant for class actions.[170] Section 1453(b) then says that, with certain specified exceptions, "[a] class action may be removed to a district court of the United States in accordance with section 1446."[171] Section 1446 is entitled "Procedure for removal." It provides no power of removal; rather, it lays out the method by which a case removable under another statute is accomplished. The reference in section 1453(b) to section 1446 thus suggests that the only purpose of section 1453(b) is to incorporate some of the removal procedures of section 1446 and to make specific changes to other procedures. Thus, section 1453(b) provides no right of removal; the right to remove a state-court class action must be found elsewhere.[172]

Another argument favoring this reading of section 1453(b) is that it solves a number of interpretive problems that the as-applied interpretation creates. First, it avoids making section 1453(b) redundant of section 1441(a), which it would be if the gloss "of which the district courts of the United States have jurisdiction" is read into section 1453(b). Second, it explains the curious use of the passive voice in section 1453(b), and the statute's silence concerning who might invoke section 1453(b)'s power of removal;[173] because the statute itself grants no removal power, there is a reason to avoid language that might be interpreted as providing a particular party with a right to remove. Third, it explains the failure of section 1453(b) to include a venue provision that specifies the federal court to which a class action should be removed.[174] Because section 1453(b) provides no removal power, but only a set of rules modifying standard removal procedures, the lack of a venue provision makes sense: The venue

170. 28 U.S.C.A. § 1332(d)(11)(A) (West 2006) (emphasis added).

171. For these exceptions, *see supra* nn. 147-149 and accompanying text.

172. Seeing § 1453(b) as a procedural statute, not a removal-power statute, is also consistent with the structure of the remainder of § 1453. The other principal provision in § 1453 is § 1453(c), which modifies another of the usual removal procedures: the rule in § 1447(c) that remand orders are not ordinarily appealable. *See* 28 U.S.C. § 1447(c)-(d) (2000); *cf. Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (allowing a writ of mandamus to lie against a remand order not based on jurisdictional grounds). In contrast, § 1453(c) makes orders granting or denying remand appealable within the discretion of the court of appeals. It also states other procedural rules that govern the appeal. Because § 1453(c) deals with procedural matters, it makes sense to see § 1453(b) as similarly dealing with procedural matters.

173. *See supra* text following n. 155.

174. *See supra* n. 156 and accompanying text.

rule is supplied by the statute — section 1441(a) in most cases — that provides the authority to remove the class action.

Moreover, to the extent that the legislative history is relevant, much of the history discussing section 1453(b) becomes coherent on a procedure-only reading of section 1453(b). At one point, the Senate Report states that section 1453 "establishes the *procedures* for removal of interstate class actions over which the federal court is granted original jurisdiction in new section 1332(d)."[175] In the same vein, in explaining the effect of section 1453(b), the Report states that "[t]he general removal provisions currently contained in Chapter 89 of Title 28[176] would continue to apply to class actions, except where they are inconsistent with the provisions of the Act."[177] In particular, noting the venue issue, the Report cites the venue provision of section 1441(a) and states its belief that this venue provision should apply to removed class actions.[178]

Finally, interpreting section 1453(b) as a procedural rather than a removal-power statute renders the statute constitutional, thus satisfying the canon of construction that a statute should be construed to avoid constitutional difficulties without violating the canon that a statute should be read plainly according to its text.

In the end, the best reading of section 1453(b) is the procedural one: Section 1453(b) grants federal courts no removal power, but only specifies the procedures by which removal of an otherwise removable state-court class action is accomplished.[179] On that reading, we must look beyond section 1453(b) to find a statute that provides a removal power over state-court class actions, and then determine under that statute which parties are entitled to remove the case from state court. In the absence of a special removal power that might apply in unique circumstances, the only general removal power applicable to state-court class actions is section 1441(a). As I have

175. Sen. Rpt. 109-14 at 48 (Feb. 28, 2005) (reprinted in 2005 U.S.C.C.A.N. 3, 45) (emphasis added); *see also* 151 Cong. Rec. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("The removal provisions in Section 5 are self-explanatory and attempt to put an end to the type of gaming engaged in by plaintiffs' lawyers to keep cases in State court. They should be interpreted with this intent in mind."); *id.* at H730 (noting that removal might occur under § 1332(d)(6), but not mentioning removal under § 1453(b) as a possibility). *But see infra* n. 206 (analyzing a prior version of CAFA that suggests § 1453(b) provides a removal power).

176. Chapter 89 of Title 28 is entitled "District Courts, Removal of Cases from State Courts." Before the addition § 1453, it consisted of §§ 1441-1452, which both contained the most common removal authorities and specified the procedures to be used in removing a case from state court. *See* 28 U.S.C. ch. 89 (2000).

177. *See* Sen. Rpt. 109-14 at 48 (Feb. 28, 2005); *see also id.* at 29 ("In order to enable more class actions to be removed to federal court, [§ 1453(b)] would also create three new rules regarding the removal of class actions filed in state court.").

178. *See id.* at 48.

179. Admittedly, some federal courts that have mentioned the issue have talked about § 1453(b) as if it granted a removal power. *See e.g. Preston v. Tenet Healthsystem Meml. Med. Ctr.*, 485 F.3d 793, 796 (5th Cir. 2007) (noting that removal occurred "pursuant to . . . 28 U.S.C. §§ 1332(d)(2) & 1453(b)"); *Prime Care of N.E. Kan., L.L.C. v. Humana Ins. Co.*, 447 F.3d 1284, 1285 (10th Cir. 2006); *but see Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1015 (9th Cir. 2007) (describing § 1332(d) as the source of federal jurisdiction and noting that § 1453(b) only "makes it easier for litigants to remove class actions to federal district courts"). But none of the cases has considered the issue in a serious way.

already shown, section 1441(a) provides no power to remove counterclaim class actions.[180] Therefore, the consequence of interpreting section 1453(b) as a removal-procedure, rather than a removal-power, statute is to make counterclaim class actions non-removable from state court.[181]

To recap, if section 1453(b) is either seen as a statute unconstitutionally granting a removal power *or* seen as a procedural statute not granting any removal power, a state-court counterclaim class action can be removed only under an authority other than section 1453(b). In most cases, the only arguably applicable power will be section 1441(a). But section 1441(a) does not allow the removal of counterclaim class actions. On the other hand, if section 1453(b) is seen as constitutional *and* granting a removal power, the ability of a counterclaim defendant to remove a state-court counterclaim class action hinges on whether section 1453(b) can be interpreted to grant such a power to parties other than the original defendants. As the following section shows, the text of section 1453(b) does not support this view.

b. The Language of § 1453(b)

On the assumption that section 1453(b) provides a removal power that passes constitutional muster, a number of reasons suggest that the statute is best construed not to provide counterclaim defendants with a right to remove counterclaim class actions. The first reason is the language of the statute itself. Section 1453(b) allows a "class action" to be removed. A "class action" is defined to be "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action."[182] The phrase "civil action" implies that the class action must be the original case filed in court, not just a counterclaim in that case; thus, the only class actions removable are those filed as original claims in state court.[183] Adding weight to this conclusion is section 1453(b)'s use of the word "defendant" twice and "defendants" once. Granting that the statute's use of these words does not logically exclude the possibility of removal by plaintiffs,[184] its silence on the matter suggests

180. *See supra* Part III.A.1.

181. The exception to this statement arises in the context of a case in which a unique removal power allows someone other that the original defendant to remove the case. For examples of such statutes, *see supra* n. 126.

182. 28 U.S.C.A. § 1332(d)(1)(B) (West 2006); *see supra* n. 152-153 and accompanying text (detailing how this definition is incorporated into § 1453(b)).

183. *Cf.* Fed. R. Civ. P. 2 ("There is one form of action — the civil action.").

184. A statute with a comparable ambiguity in terms of which parties might remove, as well as a comparable purpose to expand federal jurisdiction over class actions, is 15 U.S.C. § 77p(c) (2000). Section 77p(c), which allows the removal of state-court class actions that involve certain claims of securities fraud, was enacted as part of the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 101, 112 Stat. 3227, 3228 (1998), and was designed to close a loophole in federal securities-fraud class-action practice that allowed investors to bypass federal restrictions on securities claims by asserting only state-law securities claims in state-court class actions. *See Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107-108 (2d Cir. 2001) (describing the history of the statute). Using the same passive voice found in § 1453(b), § 77p(c) states that "[a]ny covered class action brought in any State court involving a covered security . . . shall be removable

that such removal was not within Congress's contemplation — for, unlike its specific mention of removal by defendants ("such action may be removed by any defendant"), it made no reference whatsoever to removal by plaintiffs. A third piece of linguistic evidence is the reference in section 1453(b) to section 1446, which describes the procedures by which "[a] defendant or defendants" wishing to remove a case may do so.[185] This "defendant or defendants" language mirrors "the defendant or the defendants" language of section 1441(a) — which, as we have seen, has been understood since *Shamrock Oil* to apply only to original defendants, not to counterclaim defendants.[186] The reference in section 1453(b) to section 1446, and section 1446(a)'s invocation of the "defendant or defendants" language that *Shamrock Oil* imbued with particular meaning, suggests that *Shamrock Oil*'s limitation of removal authority just to original defendants carries forward to section 1453(b). Finally, if section 1453(b) provides a removal power, the removing party must still point to another statute providing the necessary federal subject-matter jurisdiction. In all or nearly all cases, that grant will be section 1332(d)(2). But section 1332(d)(2)(A) is very specific: It grants jurisdiction only when "any member of a *class of plaintiffs* is a citizen of a State different from any *defendant*."[187] This language strongly suggests that, in enacting CAFA, Congress contemplated jurisdiction only over plaintiff class actions, not over counterclaim class actions.[188]

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to the Federal district court for the district in which the action is pending." This provision does not indicate which parties can invoke the removal power. I have found no cases discussing whether a party other than a defendant can do so. Because it is unlikely that a securities class action will arise by way of a counterclaim, the dearth of authority concerning this ambiguity in § 77p(c) is unsurprising.

185. 28 U.S.C. § 1446(a) (2000) provides in full:

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

186. 313 U.S. at 107-108; *see supra* nn. 114-124 and accompanying text.

187. 28 U.S.C.A. § 1332(d)(2)(A) (West 2006) (emphasis added). Comparable language exists in the context of foreign states and citizens; § 1332(d)(2)(B) provides jurisdiction when "any member of a *class of plaintiffs* is a foreign state or citizen or subject of a foreign state and any *defendant* is a citizen of a State," while § 1332(d)(2)(C) provides jurisdiction when "any member of a *class of plaintiffs* is a citizen of a State and any *defendant* is a foreign state or a citizen or subject of a foreign state." *Id.* at §§ 1332(d)(2)(B), (C) (emphasis added).

188. At this point, the ambiguity about whether § 1453(b) allows removal only of those class actions for which CAFA provides original jurisdiction in § 1332(d) or of any class action (including those that met the traditional jurisdictional requirements) comes into play. *See supra* n. 161 and accompanying text. If the former, then the "class of plaintiffs" language becomes very hard for a counterclaim defendant to overcome; it can do so only by convincing a court that a plaintiff facing a counterclaim is a "defendant," and a defendant asserting a counterclaim is a "plaintiff" within the meaning of § 1332(d)(2). If the latter interpretation of § 1453(b) is true, then the "class of plaintiffs" language would not be relevant to the removal of those class actions that met the pre-CAFA requirements for federal jurisdiction. *See supra* n. 28 (describing pre-CAFA jurisdictional requirements). Even here, the first three textual arguments in this paragraph would still apply to such class actions.

Standing alone, none of these textual arguments is completely airtight, but the sum total of all the pieces of textual evidence is compelling. If section 1453(b) grants any removal power at all, it grants that power only to the original defendants in the case. Never does the statute use "either party" language comparable to the removal statute in effect between 1875 and 1887.[189] Its only concern is removal by a "defendant" or "defendants."

Three canons of statutory construction also support this conclusion. The first is the canon that Congress is aware of prior judicial interpretations of statutory language when it uses or incorporates that same language in later statutes. As the Court has stated:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.[190]

A second canon is *expressio unius est exclusio alterius* — loosely, "the expression of one thing excludes another."[191] A third canon of statutory construction — derived from *Shamrock Oil*[192] and applied by courts in the precise context of interpreting section 1453(b)[193] — is to construe removal statutes strictly in order to preserve the role of state courts in deciding questions of state law. In combination, these three canons suggest that, in mentioning only "defendant" and "defendants" in section 1453(b), Congress knew the rule from *Shamrock Oil* that these words did not, in the removal context, include counterclaim defendants; that in expressly discussing only the removal by a "defendant" or "defendants," Congress excluded the possibility of removal by other parties; and that this limitation on removal is justified because it assures to states a greater authority to adjudicate claims that arise under state law.

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189. *See supra* nn. 120-121 and accompanying text.

190. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Holder v. Hall*, 512 U.S. 874, 921 n. 22 (1994); *Cottage Sav. Assn. v. Commr.*, 499 U.S. 554, 562 (1991); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

191. *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *see also Barnhardt v. Peabody Coal Co.*, 537 U.S. 149, 168-169 (2003) (describing limits of the canon).

192. 313 U.S. at 108-109; *see supra* nn. 123-124 and accompanying text.

193. *See e.g. Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328 (11th Cir. 2006) ("The rule of construing removal statutes strictly and resolving doubts in favor of remand, however, is well-established.") (*citing Shamrock Oil*); *Abrego Abrego v. Dow Chem. Co*, 443 F.3d 676, 685 (9th Cir. 2006) (noting that "[t]his rule of restriction extends to removal jurisdiction, especially insofar as it is based on the diversity jurisdiction of the federal courts."); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094-1095 (10th Cir. 2005) ("It is well-established that statutes conferring jurisdiction upon the federal courts, and particularly removal statutes, are to be narrowly construed in light of our constitutional role as limited tribunals.") (*citing Shamrock Oil*).

In addition, this interpretation of section 1453(b) better comports with three jurisdictional canons. One is the rule that federal jurisdiction must be premised on the allegations in the original complaint, not on the allegations in subsequent pleadings.[194] Another, invoked by the Supreme Court in *West v. Aurora City*[195] and the Fifth Circuit in *Shamrock Oil*,[196] is that a party that has voluntarily chosen a state forum should not be allowed to remove from that forum.[197] Third, a distinct "voluntary/involuntary" rule holds that, if a case is not initially removable, it "must remain in state court unless a 'voluntary' act of the plaintiff brings about a change that renders the case removable."[198] In total, these canons lead to a simple conclusion: Because the financial institution's original complaint invoked only non-removable state-law claims, the institution cannot use the subsequent counterclaim pleadings of the consumer to remove the case to federal court. Congress, of course, can overcome these canons with clear language,[199] but nothing in section 1453(b) approaches the necessary specificity.

The inability of a counterclaim defendant to remove a class action under section 1453(b) is also consistent with CAFA's legislative history. As discussed above, the legislative history that specifically discusses removal is limited, and most consistent with the view that section 1453(b) provides no removal power.[200] What can also be gleaned from the history of the bill that became CAFA is Congress's absolute silence on the issue of removing counterclaim class actions — the idea seems never to have been in Congress's contemplation. Instead, the focus of the Senate Report was on the purported mischief of class actions asserted by plaintiff classes against defendants in state court.[201] Nowhere in the Report is there even the slightest hint of any congressional intent to upset the longstanding rule in *Shamrock Oil*. The same is true of the floor debates.[202]

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194. *See supra* nn. 128-137 and accompanying text.
195. 73 U.S. 139 (1868).
196. *Sheets*, 115 F.2d 880.
197. *See supra* nn. 107, 138-139 and accompanying text. Of course, a financial institution's decision to file a case against a consumer in state court is not voluntary in the sense that the institution had a choice of state or federal court; by hypothesis, the claim is too small to lie within federal jurisdiction. *See supra* n. 26 and accompanying text. But that does not seem to be the sense in which voluntariness is used, at least in *West v. Aurora City*, in which it was not clear that the plaintiff could have filed the case in federal court. *See* 73 U.S. at 142. Rather, the financial institution's voluntary decision is the decision to sue; once having made that choice, the institution must accept the good with the bad in the state forum.
198. *Self v. Gen. Motors Corp.*, 588 F.2d 655, 657 (9th Cir. 1978); *see Cal. v. Keating*, 986 F.2d 346 (9th Cir. 1993). In its modern form, this rule derives from *Great N. Ry. v. Alexander*, 246 U.S. 276 (1918).
199. *Keating*, 986 F.2d at 348-349.
200. *See supra* nn. 162, 175-178 and accompanying text.
201. For instance, the Senate Report listed litanies of state-court cases that it used as the poster children proving the need for federal, rather than state, jurisdiction; it also provided a series of examples showing how CAFA would work. Not even one of those actual or hypothetical cases was described as a counterclaim class action; they were all traditional class actions brought by plaintiffs. *See* Sen. Rpt. No. 109-14 at 15-20, 24-26, 38-39, 41, 48 (Feb. 28, 2005), (reprinted in 2005 U.S.C.C.A.N. 3, 15-20, 24-26, 37, 39, 45).
202. In the debates, there were only a few specific references to which parties were capable of removing, and all of the references support the view that only defendants can remove. 151 Cong. Rec. H732

The most tantalizing piece of legislative history, however, involves a prior iteration of CAFA introduced in the previous Congress — the Class Action Fairness Act of 2003.[203] In the version of the section that became section 1453(b), the 2003 bill permitted removal "by any plaintiff class member who is not a named or representative class member without the consent of all members of such class."[204] This provision was jettisoned in CAFA itself, one of a dozen changes to the 2003 bill designed to win sufficient support to invoke cloture.[205] But its presence in the 2003 version of CAFA shows that Congress had considered (and had even crafted language to cover) the possibility of removal by plaintiffs, that Congress had specifically wished to limit the plaintiffs entitled to remove just to plaintiff class members, and that Congress had not wished to allow plaintiffs facing a counterclaim class action to remove a case. Of course, because this language had been stricken before the bill that became CAFA was introduced, drawing conclusions from this language is a delicate matter, but the language certainly does nothing to strengthen the hand of anyone arguing that CAFA allows the removal of counterclaim class actions.[206]

Facing insuperable textual and interpretive hurdles, some counterclaim defendants have turned to policy to support their removal efforts, arguing that CAFA's general policy favoring a federal forum for class actions should carry over to the

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(daily ed. Feb. 17, 2005) (statement of Rep. Boucher) (in discussing § 1332(d)(11), noting that "defendants will be able to remove mass actions to Federal court under the same circumstances in which they will be able to remove class actions"); *id.* at H732-733 (statement of Rep. Sensenbrenner) (noting that "if the plaintiff files an amended complaint in State court that creates jurisdiction, or if subsequent events create jurisdiction, the defendant can then remove the case to Federal court"); 151 Cong. Rec. S1231 (daily ed. Feb. 10, 2005) (statement of Sen. Feingold) (introducing an unsuccessful amendment intended to prevent "defendants from removing cases that should still be in State court"); *id.* at S1247 (statement of Sen. Reid) (stating that "a defendant incorporated in a State other than Nevada could remove the case from Nevada State court").

203. S. 1751, 108th Cong. (Oct. 17, 2003).

204. *Id.* at § 5(a).

205. *See* Summary of Changes to S. 1751 as Agreed to by Senators Frist, Grassley, Hatch, Kohl, Carper, Dodd, Landrieu, and Schumer (undated) (reprinted in 151 Cong. Rec. S1078 (daily ed. Feb. 8, 2005)). The Class Action Fairness Act of 2003 had failed by one vote to secure the necessary sixty votes to end a filibuster. *See* S. Roll Call Vote No. 403, 108th Cong. (2003) (available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00403). The stricken language permitting removal by class plaintiffs remained in the parallel bill introduced in the House, *see* Class Action Fairness Act of 2005, H.R. 516, 109th Cong. § 5(a) (Feb. 2, 2005), but the House instead voted in favor of the Senate version, *see* H.R. Roll Call 38, 109th Cong. (2005) (available at http://clerk.house.gov/evs/2005/roll037.xml).

206. The deleted language solves one mystery in CAFA — the curious use of a passive voice that fails to assign to any party a right to remove. *See supra* text following n. 155; *supra* n. 173 and accompanying text. As originally written, before the "removal by plaintiff class member" language was deleted, the bill made somewhat clearer who could remove: defendants facing a class action and class plaintiffs. The deleted language might appear to undercut my claim that § 1453(b) is best understood as creating no removal power. *See supra* nn. 170-179 and accompanying text. In fact, the opposite is true. The unenacted House version of § 1453(b) bears little resemblance to the enacted version. It was designed to override procedural barriers to removability: the requirement in *Shamrock Oil* that only defendants could remove, the home-state non-removability limitation of § 1441(b), and the Supreme Court's gloss that all defendants needed to join in the removal petition. Indeed, the unenacted version specifically acknowledged that, in other regards, removal could occur only "in accordance with this chapter" — including, presumably, the jurisdictional limitation of § 1441(a). *See* H.R. 516, 109th Cong. § 5(a) (Feb. 2, 2005).

specific issue of permitting removal counterclaim class actions.[207] In a related context, however, courts have not allowed CAFA's general policy to override the ordinary requirement that the removing party bears the burden of proving federal jurisdiction — even though the legislative history states clearly that CAFA intended to effect such an override.[208] Given the legislative history's silence about the removability of counterclaim class actions, and its exclusive focus on traditional class actions asserted by a plaintiff class, counterclaim defendants that seek to create a removal power out of the general policy of section 1453(b) are making the legislative history do far more work than it reasonably can. Indeed, in light of the Supreme Court's recent refusal to bend the language of other removal statutes to the purported requirements of the "better" policy,[209] the attempt to elevate a policy stated at its most abstract level ("favor the federal forum for class actions") over the text of section 1453(b) and the principles of sound construction is quixotic at best.

Unsurprisingly, therefore, courts have been dismissive of the argument that counterclaim defendants can remove under section 1453(b). The assessment in *Progressive West* was short, blunt, and unforgiving:

> Although CAFA does eliminate three significant barriers to removal for qualifying actions, CAFA does not create an exception to *Shamrock*'s longstanding rule that a plaintiff/cross-defendant cannot remove an action to federal court. CAFA's removal provision, section 1453(b), provides that "[a] class action may be removed to a district court . . . in accordance with section 1446." Section 1446, in turn, sets forth the removal procedure for "[a] defendant or defendants desiring to remove any civil action . . . from a State court." The interpretation of "defendant or defendants" for purposes of federal removal jurisdiction continues to be controlled by *Shamrock*, which excludes plaintiff/cross-defendants from qualifying "defendants."
>
> Nor can we accept Progressive's invitation to read CAFA liberally as making a *sub silentio* exception to *Shamrock*. We have declined to construe CAFA more broadly than its plain language indicates. "Faced with statutory silence . . . we presume that Congress

207. *See Progressive W. Ins. Co. v. Preciano*, 479 F.3d 1014, 1017 (9th Cir. 2007); Pet. of CitiFinancial, *supra* n. 39, at 7.

208. *Compare e.g. Blockbuster, Inc. v. Galeno*, 472 F.3d 52 (2d Cir. 2006) (applying the usual rule that a defendant bears the burden of proving federal jurisdiction on removal), *and Abrego Abrego v. Dow Chem. Co*, 443 F.3d 676, 685 (9th Cir. 2006) (also applying the rule that a defendant must prove jurisdiction on removal), *with e.g.* Sen. Rpt.109-14 at 42 (Feb. 28, 2005) (reprinted in 2005 U.S.C.C.A.N. 3, 40) ("If a purported class action is removed pursuant to [CAFA], the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)."). *Cf. Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006) (imposing burden on removing defendant to prove federal jurisdiction, but on plaintiffs to prove an exception to jurisdiction that justifies remand). Cases such as *Blockbuster* and *Abrego Abrego* are especially significant not only because they reflect the unwillingness of courts to abide by legislative history far more pointed than any legislative statements a financial institution could find to justify the removal of counterclaim class actions, but also because they demonstrate the unwillingness of federal courts to unsettle well-established rules governing the removal process without crystalline textual authority to do so.

209. *See supra* n. 144 and accompanying text.

> is aware of the legal context in which it is legislating." This presumption is especially appropriate here, where "[t]he legal context in which the 109th Congress passed CAFA into law features a longstanding, near-canonical rule" that a state plaintiff forced to defend on the basis of a cross-complaint is without authority to remove.[210]

Other courts have come to the same conclusion, also in short order.[211] One of the courts even sanctioned counsel for the counterclaim defendant for the frivolity of attempting removal under CAFA.[212]

Although I do not go so far as to suggest that the argument favoring removal of a counterclaim class action under section 1453(b) is frivolous, it is assuredly weak enough to teeter near that line. The principal problem with the argument — a problem on which the cases have not even focused so far — is that section 1453(b) is best construed to provide no removal power to any party, and certainly none to a counterclaim defendant.[213] But even on the arguable view that section 1453(b) contains a removal power, there is no warrant in the language, in interpretive principles, in the legislative history, or in the cases to believe that counterclaim defendants are among the parties that can remove a class action to federal court.

B. Realigning the Parties as a Means of Making a Class Action Counterclaim Removable

Perhaps sensing the futility of arguing for a right to remove a counterclaim class action, some financial institutions have recently begun to employ a little-known jurisdictional sleight of hand to hold onto the federal forum after removal: They have requested the federal court to realign the parties, so that the original defendant and the class of consumers that he or she represents become the plaintiffs, and the financial institution becomes the defendant. If the maneuver is successful, the counterclaim class action becomes the principal claim, and the original claim against the consumer becomes the counterclaim.[214] Once realigned as the defendant, the financial institution

210. 479 F.3d at 1017-1018 (*quoting Abrego Abrego*, 443 F.3d at 683-684).

211. *Palisades Collections LLC v. Shorts*, 2008 WL 163677 (N.D. W. Va. Jan. 16, 2008); *CitiFinancial, Inc. v. Lightner*, 2007 WL 1655225 (N.D. W. Va. June 6, 2007); *Unifund CCR Partners v. Wallis*, 2006 WL 908755 (D.S.C. Apr. 7, 2006).

212. *Unifund*, 2006 WL 908755 at *3 (imposing $500 sanction).

213. *See supra* nn. 170-179 and accompanying text.

214. There is a significant body of law regarding the ability of a defendant to assert a counterclaim against an individual class representative or class member. Some courts have refused to permit their assertion. *Compare e.g. Donson Stores, Inc. v. Am. Bakeries Co.*, 58 F.R.D. 485 (S.D.N.Y. 1973) (refusing to permit counterclaim against plaintiff class members), *with e.g. Natl Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 75 F.R.D. 40 (S.D.N.Y. 1977) (permitting counterclaim against class members), *and Johns v. Rozet*, 141 F.R.D. 211 (D.D.C. 1992) (permitting counterclaim against class representative); *see also* Wright et al., *supra* n. 52, at § 1404, 25 & n. 19 (noting the split in the cases); *cf. Maddox v. Ky. Fin. Co.*, 736 F.2d 380 (6th Cir. 1984) (holding that individual debt-collection counterclaims should be dismissed because they were permissive rather than compulsory and no independent basis of federal jurisdiction existed to hear them). Other courts have allowed them; some of these courts have then used the counterclaims' presence as a reason not to certify the class action. *Compare e.g. Heaven v. Trust Co. Bank*, 118 F.3d 735 (11th Cir. 1997)

thus becomes a "defendant" entitled to remove the case under the ordinary principles of section 1441(a) (and, to the extent that it grants an independent removal power, section 1453(b)).

Thus far, the courts that have addressed realignment in the counterclaim class action context have been unimpressed with the argument.[215] Their skepticism is justified. The doctrine of realignment is tailored to the requirements of diversity jurisdiction, in which all plaintiffs must usually be of diverse citizenship from all defendants.[216] For purposes of determining whether complete diversity exists, however, party status as a plaintiff or defendant is not determined by the labels that the parties use in the pleadings; federal courts have the power to determine the issue as a matter of federal law.[217] Therefore, even if the parties are otherwise designated in the pleadings, a federal court can realign a plaintiff as a defendant, or a defendant as a plaintiff. This realignment might result switching a case from complete to incomplete diversity, thus thwarting federal jurisdiction; or it might result in switching a case from incomplete to complete diversity, thus creating federal jurisdiction.[218] In most cases, realignment reshuffles some of the parties from one side to another.

In the counterclaim-removal context, however, realignment seeks to flip over the case entirely, making all the original plaintiffs into defendants and all the original

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(affirming the denial of class certification based in part on the presence of individual counterclaims that would have made the class action unmanageable), *with e.g. Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978) (reversing the denial of class certification and holding that presence of potential counterclaims did not make the class unmanageable), *aff'd on other grounds* sub nom. *Deposit Guardian Natl. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326 (1980) *and Gilkey v. C. Clearing Co.*, 202 F.R.D. 515 (E.D. Mich. 2001) (certifying class despite potential counterclaims). Apparently, financial institutions making the realignment argument are willing to accept the risk of dismissal of their original claims in return for the benefits of obtaining the federal forum on the consumer's class claims and securing the opportunity to argue that the presence of its individual claims against the class representative should prevent class certification.

215. *Palisades Collections LLC v. Shorts*, 2008 WL 163677 (N.D. W. Va. Jan. 16, 2008); *CitiFinancial, Inc. v. Lightner*, 2007 WL 1655225 (N.D. W. Va. June 6, 2007); *Williamsburg Plantation, Inc. v. Bluegrass Corp.*, 478 F. Supp. 2d 861, 864 (E.D. Va. 2006) (refusing to realign parties so that federal-question counterclaim, brought as an opt-in class action, could be used to establish subject-matter jurisdiction; noting that the presence of a counterclaim class action "is an insufficient reason for realigning the parties"); *Great E. Resort Corp. v. Bluegreen Corp.*, 2006 WL 331504 (W.D. Va. 2006); *see Rodriguez v. Fed. Natl. Mortg. Assn.*, 268 F. Supp. 2d 87 (D. Mass. 2003) (refusing to permit removal even after the dismissal of the financial institution's original claim and the transfer of the consumer's counterclaim class action to the docket of a state court of general jurisdiction); *Green Tree Fin. Corp. v. Arndt*, 72 F. Supp. 2d 1278 (D. Kan. 1999) (refusing to permit realignment after plaintiff dismissed its claim in non-class-action case); *OPNAD Fund, Inc. v. Watson*, 863 F. Supp. 328 (S.D. Miss. 1994) (refusing to permit realignment in non-class-action case).

216. *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). The rule of complete diversity is a statutory gloss; Article III requires only minimal diversity. *St. Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

217. *City of Indianapolis v. Chase Natl. Bank of City of N.Y.*, 314 U.S. 63, 69 (1941) ("Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to look beyond the pleadings, and arrange the parties according to their sides in the dispute.") (internal quotation marks omitted).

218. *See* Charles Alan Wright et al., *Federal Practice and Procedure* vol. 13B, § 3607 (2d ed., West 1984).

defendants into plaintiffs.[219] And therein lies its difficulty. Realignment ensures that adverse parties line up on opposite sides of the suit.[220] In the counterclaim context, the original claim by the plaintiff against the defendant renders the parties adverse to each other; the assertion of the counterclaim only heightens their adversity. Because the requisite adversity exists, there is no reason to realign the plaintiff/counterclaim defendant as the "true" defendant.

This sensible conclusion has one small crack in its armor, and it has been this crack that some counterclaim defendants have tried to widen into a road big enough to drive their cases into federal court. The seminal modern case on realignment, *City of Indianapolis v. Chase National Bank of City of New York*,[221] can be read in two ways. The narrower, and more sensible reading, is to permit realignment only to ensure that adverse parties end up on opposing sides in the case.[222] But *City of Indianapolis* can also be read more broadly — to allow realignment based on the "principal purpose of the dispute" or the "primary and controlling matter in dispute."[223] Seizing on these ambiguous phrases, some financial institutions have argued that, once the counterclaim asserts class-action allegations, the counterclaim dwarfs the original claim, so that the "principal purpose of the dispute" or "primary and controlling matter in dispute" now becomes the adjudication of the class-action counterclaim. On this broad view, the court is justified in realigning the parties, making the financial institution into the defendant and allowing it to remove the case under the removal authority given to defendants.

But this argument makes a couple of loose phrases in *City of Indianapolis* do work for which they were never intended. To begin with, *City of Indianapolis* did not involve a counterclaim that the counterclaim defendant tried to flip over to the main claim. The case involved a mortgagee that held a security interest in certain property of one of the defendants. The defendant leased the property to a second defendant in return for a certain guaranteed rate of return. The second defendant honored the lease for more than twenty years, then transferred its assets, including the property subject to the lease, to a third defendant. The third defendant denied that the lease was valid, and refused to honor its terms. Claiming diversity of citizenship and the requisite amount in controversy, the mortgagee, a citizen of New York, sued all three defendants, who were all citizens of Indiana, in federal court.[224] Although there was a dispute between

219. *See* Wright et al., *supra* n. 46, at § 3731 (noting that realignment can occur in the removal context).
220. *See* Charles Alan Wright et al., *supra* n. 218, at § 3607 ("The generally accepted test of realignment is whether the parties with the same 'ultimate interests' in the outcome of the action are on the same side.").
221. 314 U.S. 63 (1941).
222. *Id.* at 69 ("To sustain diversity jurisdiction there must exist an 'actual,' 'substantial' controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side.") (internal citations and some punctuation omitted).
223. *City of Indianapolis v. Chase Natl. Bank of City of New York*, 314 U.S. 63, at 69 (1941) ("Whether the necessary 'collision of interests' exists, it is therefore not to be determined by mechanical rules. It must be ascertained from 'the principal purpose of the suit' and 'the primary and controlling matter in dispute' . . . .") (internal citations and some punctuation omitted).
224. *Id.* at 70-72.

the plaintiff and the first defendant (which was legally obligated to pay the interest on the bonds that the mortgagee held), the first defendant had no assets other than the property with which to make the payments, and had every incentive to (and did) assert throughout the case that the lease was valid. That assertion put the first defendant in line with the plaintiff, which took also the position that the lease was valid, and in opposition to the other defendants, which argued that the lease was invalid and not binding on them.[225]

According to Justice Frankfurter, these "facts leave no room for doubt that on the merits only one question permeates this litigation: Is the lease whereby [the first defendant] conveyed all its gas plant property to [the second defendant] valid and binding upon [the third defendant]? This is the 'primary and controlling matter in dispute.'"[226] On that controlling issue, the majority in *City of Indianapolis* held that the plaintiff and the first defendant were "partners in litigation";[227] their unity of interest made their division into plaintiff and defendant "window-dressing designed to satisfy the requirements of diversity jurisdiction"[228] and an "illusive artifice[ ]."[229] Therefore, the Court realigned the first defendant as a plaintiff. Because that realignment left citizens of Indiana on both sides of the dispute and defeated the requirement of complete diversity, the Court held that the federal courts lacked jurisdiction to decide the dispute.[230]

Unfortunately, *City of Indianapolis* used numerous phrases — "actual" and "substantial controversy," "collision of interests," and "principal purpose of the suit" — to describe the approach that courts should use in assessing whether realignment is proper. At the margins, these phrases can lead to different results on the issue of realignment, and lower courts have sometimes struggled in their efforts to determine the proper approach.[231] Of these varying descriptions, only the "principal purpose" test provides any refuge to a counterclaim defendant trying to remove a case from state

225. *City of Indianapolis*, 314 U.S. at 71, 73.
226. *Id.* at 72.
227. *Id.* at 74.
228. *Id.* at 72.
229. *Id.* at 76.
230. *Id.* at 74-75. A dissent, joined by four Justices, argued that the original plaintiff's claim against the first defendant, which defaulted on its obligations when the third defendant repudiated the lease, amounted to more than $1,000,000, for which it was ultimately held solely responsible when the district court held that the lease did not bind either of the latter two defendants. *Id.* at 78-79. On that issue and others, there was a sufficiently "sharp conflict" to deny realignment. *Id.* at 81. Indeed, it is language in the dissent — which sought to characterize the majority's decision as one in which a "relatively less important" claim is subject to realignment because of a "dominant" claim, "or because one is more 'actual' or 'substantial' than the other," *id.* at 80, that serves as the best support for financial institutions' arguments in favor of realignment. But this characterization is not an accurate description of the majority's position.
231. Finding the "principal purpose" test to be particularly unhelpful and inflexible, the Second Circuit has instead adopted the "collision of interests" language from *City of Indianapolis* when it performs a realignment analysis. *See Md. Cas. Co. v. W.R. Grace & Co.*, 23 F.3d 617 (2d Cir. 1993). *See also In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230 (3d Cir. 1994) (although the "principal purpose" is generally appropriate, applying the "substantial conflicts" approach to realignment in a Foreign Sovereign Immunities Act case); *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 44 F. Supp. 2d 870, 874-875 (E.D. Mich.1999) (surveying which circuits apply the "substantial dispute" and which apply the "principal purpose" test).

court on the basis of the counterclaim. Understood in its context, however, *City of Indianapolis*'s loose and imprecise "principal purpose" language gives a court no license to realign parties simply because the value of the counterclaim exceeds that of the original claim. Rather, this language was designed to give the court a limited power to re-position some of the parties from one side to another side in order to ensure sufficient adversity of interests between the opposing sides. Once that adversity exists, the power to realign ends. In the context of the counterclaim class action, the original claim establishes the requisite adversity, and the assertion of the counterclaim does nothing to dull the competitive edge between the parties. Therefore, realignment is inappropriate.

City of Indianapolis particularly supports that result in the context of state-court counterclaim class actions sought to be removed under CAFA. Having held that realignment was necessary, the Court closed with a policy argument intended to cinch its holding. Realignment, the Court noted, "must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts."[232] The "dominant note" in the grants of diversity jurisdiction to the federal courts "is one of jealous restriction, of avoiding offense to state sensitivities, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business."[233] And what case did the Court cite for this proposition? None other than *Shamrock Oil*,[234] which had held just a few months earlier that counterclaim defendants cannot remove a case to federal court. Therefore, a counterclaim defendant's attempt to use the realignment doctrine to vault state-law claims pending in state court into federal court is an especially ironic misunderstanding and misuse of a limited federal power.

In short, the point of realignment is only to ensure that the requisite diversity exists. The addition of a counterclaim does nothing to affect the analysis of that question, for, as we have seen, only the original claims, and not counterclaims, count for purposes of establishing federal jurisdiction.[235] Indeed, a number of federal courts have held that counterclaims are irrelevant in deciding whether to realign parties. As explained in *Zurn Industries, Inc. v. Acton Construction Co.*:

> The objective of *City of Indianapolis* realignment is only to insure that there is a *bona fide* dispute between citizens of different states. The determination of the "primary and controlling matter in dispute" does not include the cross-claims and counterclaims filed by the defendants. Instead, it is to be determined by plaintiff's principal purpose for filing its suit.[236]

232. *City of Indianapolis*, 314 U.S. at 76.
233. *Id.* (quoting Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928).
234. 313 U.S. 100 (1941).
235. *See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002); *supra* nn. 128-137 and accompanying text.
236. 847 F.2d 234, 237 (5th Cir. 1988) (citation omitted).

Other courts are in accord.[237]

A plaintiff facing a counterclaim class action in state court cannot employ the realignment doctrine to convert a non-removable case into a removable one. As the Article has already shown, the plaintiff is also unable to effect removal under sections 1441(a) or 1453(b). Therefore, a counterclaim class action filed in state court will be adjudicated in state court.

IV. CONCLUSION

CAFA created the concern that little work would be left for state courts in the field of class actions, and consequently that states would have limited opportunities to make an impact on developments in the law of class actions — and on developments in the law of complex litigation more generally. In the main, that concern might prove valid. Whether originally filed in federal court or removed there from state court, many class actions that would have been resolved in state court before CAFA are now being handled in federal court.[238] Whether this loss of class-action competition from the state laboratories[239] is outweighed by the policy arguments supporting CAFA's expansion of federal jurisdiction[240] is a question that will play out as the federal courts gain more experience handling the increased load of class actions.

Whatever the ultimate answer to that question, this Article has shown that the eulogy for state-court class-action practice is a bit premature. In a small corner of class-action practice — counterclaims brought by classes of consumers against financial institutions seeking to one of the consumer's debt — state courts will continue to play the principal role, and will therefore continue to contribute to the development of the law of class actions. As the Article has also shown, state-court counterclaim class actions also help us to understand the ambiguities in, and the better

237. *MCI Telecomm. Corp. v. Logan Group, Inc.*, 848 F. Supp. 86 (N.D. Tex. 1994); *U.S. Fid. & Guar. Co. v. A & S Mortg. Co.*, 839 F. Supp. 347 (D. Md. 1993); *Olin Corp. v. Ins. Co. of N. Am.*, 807 F. Supp. 1143 (S.D.N.Y. 1992) ("[P]laintiff cites no case where realignment was found to be appropriate on a counterclaim where the court had proper subject matter jurisdiction over the main action."). Federal courts still retain the power to realign a counterclaim as an original claim for case-management or trial purposes. *See e.g. ANR W. Coal Dev. Co. v. Basin Elec. Power Coop.*, 276 F.3d 957, 960 (8th Cir. 2002); *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 204 (5th Cir. 1996); *White v. Grinfas*, 809 F.2d 1157 (5th Cir. 1987). But that type of realignment, which is usually based on efficiency concerns, is a far cry from jurisdictional realignment, which is controlled by *City of Indianapolis* and its progeny.

238. *See supra* n. 22 and accompanying text (describing post-CAFA migration of more class actions to federal courts).

239. *See New St. Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") (Brandies, J., dissenting).

240. For these arguments, *see* Sen. Rpt. 109-14, at 10-27 (Feb. 28, 2005), (reprinted in 2005 U.S.C.C.A.N. 3, 11-27). The legislative history evinces Congress's belief that such competition unduly favored class plaintiffs, and was therefore to be curtailed. *Cf.* Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007) (arguing that, in seventeenth century England, competition among the royal common-law courts favored plaintiffs).

practices for, federal joinder rules,[241] and provide a critical lens through which to understand the proper scope of section 1453(b).[242] These analyses, which flow from a single and modest aspect of state-court practice, suggest that lawyers, judges, and scholars who deal with complex litigation in federal court should keep an eye on state courts for other worthy ideas.

241. *See supra* Part II.B.
242. *See supra* Part III.A.2.