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Problems in the Removal of a “Separate and Independent Claim or Cause of Action”

The procedural problems of the complex lawsuit have long been a source of agitation for the legal profession. In this Article, Professor Cohen first discusses the difficulties besetting both separable controversy removal and piece-meal controversy removal under the Judiciary Act of 1887-1888. The author then discusses the changes which were made by the Revisers of the 1948 Judicial Code. Professor Cohen analyzes the basic problems of interpretation and application posed by section 1441(c) in diversity and federal question cases. In addition, the author examines the constitutional problems posed by section 1441(c). He concludes that section 1441(c) should be repealed, not because of its doubtful constitutional validity, but rather because “it serves no useful purpose in multi-party cases.”

William Cohen*

As procedural rules for the joinder of parties and claims have been liberalized, puzzling problems have been created in defining the proper scope of federal jurisdiction. Procedural reformers have urged the efficiency of the larger law suit.1 But, the procedural gospel has often been met by a competing theology—narrowly defining congressional grants of jurisdiction to federal courts, particularly grants of diversity jurisdiction.2 It is little wonder that the

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1. This is a gospel which is no more clearly illustrated than in the liberal joinder, intervention, and third party practice of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 13, 14, 18, 20–24, 42. And see CLARK, CODE PLEADING 348, 435, 465–66 (2d ed. 1947) [hereinafter cited as CLARK].

answers to the jurisdictional problems created by the complex law suit have often exhibited considerable inconsistency. Nor is it surprising that procedural concepts of an earlier day often continue to set jurisdictional limits after they have been discarded as tools for solving the procedural problems for which they were created.

The push and pull of the competing pressures for procedural reform in the complex lawsuit and narrow jurisdictional construction is nowhere more apparent than in the treatment of cases removed from state to federal courts—an area where the basic rule itself has “quite anomalous implications.”

INTRODUCTION

A. HISTORICAL BACKGROUND

Until after the Civil War, under the Judiciary Act of 1789, only civil cases within the original jurisdiction of federal trial courts could be removed from state courts. The Separable Controversy Act of 1866 permitted a nonresident defendant to remove a portion of a “suit” by a resident plaintiff “if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as par-

3. See, e.g., Green, Jurisdiction of United States District Courts in Multiple-Claim Cases, 7 VAND. L. REV. 472 (1954); Note, 64 HARV. L. REV. 968 (1951).

4. Wechsler, supra note 2, at 233. As Professor Wechsler has pointed out:

Though the plaintiff who puts forth the federal claim is content to seek its vindication in the state tribunals, the defendant may insist upon an initial federal forum. When, on the other hand, the plaintiff’s reliance is on state law and the defendant claims a federal defense, neither party may remove—except, of course, the special case, to which attention has been called, of actions against federal officials. Nor is there either original jurisdiction or removal where both the initial claim and the defense rest on state law but the plaintiff contends that the defense put forth is nullified by federal law.

It would, it seems to me, be far more logical to shape the rule precisely in reverse, granting removal to defendants when they claim a federal defense against the plaintiff’s state-created claim and to the plaintiff when, as the issues have developed, he relies by way of replication on assertion of a federal right. The need is to remember that the reason for providing the initial federal forum is the fear that state courts will view the federal right ungenerously. That reason is quite plainly absent in the only situation where, apart from federal officers, removal now obtains: the case where the defendant may remove because the plaintiff’s case is federal. If in any case the reason can be present, it is only in the situations where removal is denied.

Id. at 233–34.

5. Judiciary Act of 1789, § 12, 1 Stat. 73.
ties in the cause. . . ."6 This piecemeal removal of only a portion of a lawsuit obviously necessitated multiple trials where a plaintiff proceeded against multiple defendants, and a diverse noncitizen procured removal of the suit only as it affected him.7 To meet this objection, section 2 of the Judiciary Act of 1875 provided that:

when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit. . . ."8

The Judiciary Act of 1887-1888 eliminated the provision for removal by plaintiffs,9 but the provision for removal of separable controversies continued unchanged until the 1948 revision of the Judicial Code.

Despite its longevity, the separable controversy provision contained one glaring anomaly.10 While the statute was designed to preclude the piecemeal litigation necessary under the 1866 Act, the test for removability was carried over from that Act. Thus, the test for removing the entire "suit" hinged upon the hypothetical practicability of severing a "controversy" from the "suit" and trying it alone. And, as a subsequent judicial interpretation of the statute was to make clear, piecemeal removal (and hence piecemeal litigation) remained.

That interpretation, in essence, established three classes of controversies. Assuming that a suit was not within the original jurisdiction of a federal trial court, and the suit involved merely non-separable controversies, removal was improper. And, of course, under the statute a separable controversy involving parties of complete diversity provided basis for removal of the entire suit. But finally, an additional category of controversy emerged—the separate controversy. A separate (as opposed to separable) controversy which could have been maintained, if brought alone, in an

7. Texas Employers Ins. Ass'n v. Felt, 150 F.2d 227, 233 (5th Cir. 1945).
8. 18 Stat. 470 (1875).
10. An additional difficulty is the language which refers the separable controversy provision to "any suit mentioned in this section." 28 U.S.C. § 71 (1940) provided only for removal of cases within the district court's original jurisdiction. If such a requirement were necessary for the application of § 71(c), then, of course, it could not serve as a vehicle for removing a case unless there was complete diversity. One way to make § 71(c) more than nominally significant was to ignore this language and permit removal of partial diversity cases on the basis of separable controversy. See Barney v. Latham, 103 U.S. 205 (1881).
original federal court action did not provide basis for removal of the entire case. The separate controversy with parties of complete diversity was, however, treated as a "suit" which could be removed by itself. But this tripartite division became enmeshed with the cause of action concept. A separate controversy clearly involved a separate cause of action. But it was not clear whether separable controversies represented single or separate "causes of action."

The structure can be rationally explained. Where the controversies in a single lawsuit were very closely related, the policy of Congress in restricting the right of removal to nonresident defendants, and the policy implicit in Strawbridge v. Curtiss of limiting federal jurisdiction to cases of complete diversity, should combine to leave the lawsuit in a state court. Where the controversies are less related, joinder of non-removable with removable controversies should not destroy the right of removal, yet the controversies are sufficiently related to require a single trial in a single tribunal. Where the controversies are extremely unrelated, single trial in a single tribunal no longer is compelled even if removal of a removable separate controversy should not be defeated by joinder.

11. The doctrine was born in the following dictum in Barney v. Latham, 103 U.S. 205, 214 (1881):

It may be suggested that, if the complaint has united causes of action, which, under the settled rules of pleading, need not, or should not have been united in one suit, the removal ought not to carry into the Federal court any controversy except that which is wholly between citizens of different states, leaving for the determination of the State court, the controversy between the plaintiffs and the land company. Removal of a separate controversy as a separate "suit" was directed in the Pacific R.R. Removal Cases, 115 U.S. 1, 18–23 (1885). For a collection of cases finding a "separate controversy" to exist, see Note, 52 Colum. L. Rev. 101, 102 n.4 (1952).


13. Moore, Commentary on the U.S. Judicial Code 244 (1949) [hereinafter cited as Moore] states that separable controversies involve a single cause of action "using that term in a broad sense." The terminology was always less than clear. Judge Holmes, in Texas Employers Ins. Ass'n v. Felt, 150 F.2d 227, 230 (5th Cir. 1945), refers to separable controversies as consisting of separate "causes of action" in a single "suit." Separate controversies are separate "suits." Ibid. This difficulty may explain why Judge Holmes later determined that "separable controversies" might also constitute "separate and independent claims or causes of action" within 28 U.S.C. § 1441(c) (1958). See note 44 infra. And see Pullman Co. v. Jenkins, 305 U.S. 534 (1939), discussed in Holmes, The Separable Controversy—A Federal Removal Concept, 12 Miss. L.J. 163 (1939); Note, 52 Colum. L. Rev. 101, 103 n.11 (1952).

14. 7 U.S. (3 Cranch) 267 (1806).

15. This accords with an explanation of "separable" controversy remov-
It was pointed out, however, that theory did not solve the problems of drawing the lines in practice. Nearly three-quarters of a century of interpretation could not give definitive meaning, for all imaginable kinds of multi-party litigation, to pigeonholes based upon related, less related and unrelated. Those distinctions which were taken between separable and non-separable controversies often could not be justified by pointing out that only in the former would the joinder unfairly restrict a defendant's right to remove. Primarily this was so because a controversy was not "separable" merely because it practically could have been tried as a separate lawsuit. For example, if \( P \) sued \( D_1 \) and \( D_2 \) to impose joint liability as joint tortfeasors, the two controversies were non-separable and the entire suit remained in the state court. On the other hand, if \( P \) sued \( D_1 \) and \( D_2 \) on the theory that either \( D_1 \) or \( D_2 \) was liable, in the alternative, for a single tortious injury, the controversies were separable and the entire suit could be removed. Assuming in both cases that there has been no "fraudulent" joinder to avoid removal, it is difficult to formulate persuasive policies which would justify allowing only one of these lawsuits to be removed to a federal court. Similarly, the separate contro-
versy in practice often failed to match theoretical justifications for its existence. The label "separate" had been applied to controversies which would most conveniently have been tried with the lawsuit from which they were separated. More important, the criteria for distinguishing the separate and separable controversy were even less satisfactory than those for distinguishing the separable and non-separable controversy.

B. Section 1441(c): The Demise of the Separable Controversy

The difficulties besetting both separable controversy removal and piecemeal separate controversy removal were attacked by the 1948 revision of the Judicial Code which provides in part:

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

The Reviser's Note can be read to indicate a simple and unsophisticated change. Removal on the basis of separable controversy was abolished. The former separate controversy removal was expanded to provide for removal of the entire litigation, not just a fragment, on the basis of a "separate and independent claim or cause of action." Coupled with separate controversy removal is a discretion to remand portions of the lawsuit beyond the separate controversy.

On its face, this change would seem to alleviate the above-discussed problems in administration of the pre-1948 law. The dis-
tinctions previously utilized to delineate between the single cause of action which was separable and that which was not have been put aside. In the examples given above, removal does not depend on whether the plaintiff's claims against defendants in a tort suit are "joint" or "several."\(^6\) Nor, in any case, is there necessity to fragmentize litigation that can best be handled in a single court, since no basis is recognized for removal of less than an entire "case."\(^7\) All this, of course, is to the good.

But section 1441(c) contained some subtle problems of its own. As previously mentioned, the separable controversy statute was anomalous in basing removability of the entire lawsuit upon the hypothetical practicability of severing a portion for separate trial.\(^8\) Section 1441(c), by shifting emphasis to the "separate and independent claim or cause of action," emphasizes that it is the lack of connection between removable and non-removable claims that forms the basis for asserting federal jurisdiction over both. It may be conceded that awkward piecemeal trials are avoided in any event: if the lack of connection is not sufficient, the litigation remains wholly in the state court; if the lack of connection is sufficiently demonstrated, the entire litigation is removed to the federal court. And, such complete lack of connection as would demonstrate the lack of necessity for a single proceeding to try the removable and non-removable claims, need not result in federal trial of all claims. While the district court's discretion to remand "matters not otherwise within its original jurisdiction" is not defined or given guidance by the language of section 1441(c), it is not difficult to envisage that the discretion will be exercised where separate trials of the removable and non-removable claims would be appropriate.\(^9\) Conceding all this, section 1441(c) takes the unique ap-

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\(^6\) See note 17 supra.

\(^7\) See text accompanying note 20 supra. The pre-1948 removal statute provided for removal of an entire "suit" if a separable "controversy" existed within that "suit." Piecemeal litigation resulted when a "suit" was defined to encompass each of the "separate controversies" within a single litigation. See note 12 supra. In providing for removal of the entire "case," rather than a "suit," § 1441(c) was clearly designed to require removal, when allowed, to consist of the entire litigation.

\(^8\) See text following note 9 supra.

proach of authorizing federal jurisdiction of an entire complex litigation not within original federal jurisdiction only where the connection between parts of the litigation is most tenuous.\(^{30}\)

Despite the anomaly, section 1441(c), like the previous removal structure,\(^{31}\) can be rationalized. Avoiding piecemeal litigation is the theme.\(^{32}\) True, this could be most simply accomplished by restricting the right of removal to litigation which could have been maintained whole in a federal court.\(^{33}\) While normally only such cases can be removed, in those cases where plaintiff or plaintiffs have joined claims which are sufficiently disconnected, section 1441(c) retains a portion of the policy implicit in the prior law\(^{34}\) of not permitting that joinder to destroy the right to remove which would have existed absent joinder. While the entire litigation may be removed under section 1441(c), only those claims which can be tried together conveniently need be retained.

But on the face of the statute, it might be questioned whether theory would find fruition in practice. Section 1441(c) avoids the tripartite division into non-separable, separable and separate controversies necessitated by prior law. Still a bipartite division must be made between those claims which are “separate and independent” and those which are not. The division is expressed partly in terms of determining whether claims state separate “causes of action.” It no longer requires demonstration that distinctions between separate causes of action and single causes of action are slippery.\(^{35}\) And, it is open to question whether the old separate controversy cases can be reliable guides under section 1441(c). Section 1441(c) requires that the causes of action be “separate and independent”—

the district court’s decision to remand or keep the “matters not otherwise within its original jurisdiction,” see note 92 infra and accompanying text.\(^{30}\) The following is offered as a paraphrase of § 1441(c) in Hart & Wechsler 1046:

When a matter which would be independently within federal jurisdiction is associated in a state court proceeding with matters which would not be independently within federal jurisdiction, the whole proceeding can be removed to the federal court if the state and federal matters are sufficiently disconnected.\(^{31}\)

31. See text accompanying notes 13–14 supra.
32. Moore 250–51; Moore & Van Der Creek, supra note 25, at 497–98.
33. Lewin, supra note 29, at 430.
34. See text accompanying note 14 supra.
35. Clark 127–48. If the definition which Clark espouses for defining the permissible scope of joinder of causes is adopted, then the motion to remand the “matters not otherwise within [the district court’s] jurisdiction” would be nearly automatic once separate causes of action were found. Certainly if the boundaries are “set pragmatically with a considerable eye to trial convenience” separate causes of action exist only where the considerations which would justify remand of the remainder are present. Id. at 142. (Emphasis in original.)
emphasizing the possibility that claims found to present distinct causes of action nonetheless may not be sufficiently "separate and independent." The term "cause of action" may be given a broader construction than it was given in finding a separate controversy to exist under the pre-1948 law. It has been suggested that, prior to 1948, courts were tempted to find controversies "separate" rather than "severable" to avoid the necessity of removing an entire lawsuit with numerous parties because of the existence of diversity between a relatively small number of the parties.\textsuperscript{36} In light of the statement in the \textit{Reviser's Note} that section 1441(c) will "somewhat decrease the volume of Federal litigation,"\textsuperscript{37} it is questionable whether such decisions offer firm guidance under a statute where a finding of separateness operates to remove the entire litigation. Indeed, in difficult cases a court sensitive to increases in federal jurisdiction would strain to find that controversies are not separate.

Moreover, the pre-1948 cases defining separate controversies do not present a cogent body of decisions, even if reliance upon them were to be more clearly indicated.\textsuperscript{38} Thus, if the pre-1948 cases are to be the guide for application of section 1441(c), it is difficult to understand the Revisers' statement that the difficult distinctions between separate and separable controversy had been "illusory in substance."\textsuperscript{39} If "separate and independent claim or cause of action" is to be read as incorporating the pre-1948 separate controversy, then this is exactly the distinction which is perpetuated by section 1441(c). Obviously if the line marking the beginning of section 1441(c) is to be drawn at the precise point the line marking the separate controversy was drawn prior to 1948, the illusory line continues to exist at that point and to create as many problems in an attempt to plot its course.

\begin{thebibliography}{99}
\bibitem{36} Note, 52 \textit{Colum. L. Rev.} 101, 102 (1952).
\bibitem{37} Reviser's Note.
\bibitem{38} Note, 52 \textit{Colum. L. Rev.} 103 n.6 (1952); Note, 41 \textit{Harv. L. Rev.} 1048, 1051 (1928).
\bibitem{39} Subsection (c) has been substituted for the provision in section 71 of title 28, U.S.C., 1940 ed., "and when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States." This quoted language has occasioned much confusion. The courts have attempted to distinguish between separate and separable controversies, a distinction which is sound in theory but illusory in substance. (See 41 \textit{Harv. L. Rev.} 1048; 35 \textit{Ill. L. Rev.} 576).
\end{thebibliography}
Section 1441(c), unlike the separable controversy statute, applies to all separate controversies which "would be removable if sued upon alone." Its impact thus extends beyond diversity litigation. In federal question cases, puzzling problems of construction may arise in attempting to reconcile the section 1441(c) separate controversy—asserting jurisdiction on removal over unrelated state claims—and the pendent jurisdiction theory of \textit{Hurn v. Oursler}\(^{40}\)—asserting original federal jurisdiction over more or less related state claims.

Finally, section 1441(c) presents numerous constitutional problems. Because section 1441(c) stresses the lack of relationship between joined causes as the basis for asserting jurisdiction over the entire litigation, one of the most often asserted bases for upholding the separable controversy statute—pendent jurisdiction—is less clearly applicable. It is the purpose of this article to examine these constitutional problems, as well as the basic problems of interpretation and application posed by section 1441(c) in both diversity and federal question cases.

II. SECTION 1441(c) IN DIVERSITY CASES

A. THE FINN CASE

As might be suspected, initial lower court decisions construing section 1441(c) exhibited great diversity of opinion as to the meaning of the crucial term "separate and independent claim or cause of action."\(^{41}\) It required a Supreme Court decision to cast some definitive light upon its meaning.

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40. 289 U.S. 238 (1933).
41. Compare the opinions of Judges Hastie, Goodrich, and McLaughlin in Mayflower Indus. v. Thor Corp., 184 F.2d 537 (3d Cir. 1950). Cf. Snow v. Powell, 189 F.2d 172 (10th Cir. 1951); Willoughby v. Sinclair Oil & Gas Co., 188 F.2d 902 (10th Cir. 1951); Edwards v. E. I. Du Pont De Nemours & Co., 183 F.2d 165 (5th Cir. 1950); Victory Cabinet Co. v. Insurance Co. of No. America, 183 F.2d 360 (7th Cir. 1950); Bentley v. Halliburton Oil Well Cementing Co., 174 F.2d 788 (5th Cir. 1949).

Florence Finn, a Texas citizen, brought suit in a Texas state court to recover on a fire policy issued by American Fire & Casualty Co., a nonresident corporation. If American was not liable, she sought recovery in the alternative against Indiana Lumbermens Insurance Co., also a nonresident corporation. As a third alternative claim, she sought recovery from Joe Reiss, resident agent of both companies, for failure to procure insurance. As part of the last claim, she further alleged that Reiss' conduct also bound both companies. Both companies procured removal. Plaintiff's motion to remand was denied. After trial, judgment was given for Florence Finn against American Fire & Casualty Co. After its loss at the trial, American decided it had made a mistake in urging removal, and moved to vacate the judgment and remand to the state court. The district court denied the motion. Judge Edwin R. Holmes, no stranger to the problems of separate and separable controversies, wrote the decision, affirming, for the United States Court of Appeals for the Fifth Circuit. The portion of his opinion addressed to the issue whether plaintiff had stated "separate and independent" claims against the three defendants is short and succinct:

"The difference, if any, between separable controversies under the old statute and separate and independent claims under the new one is in degree, not in kind. It is difficult to distinguish between the two concepts, but it is not necessary to attempt it in a case like this, which would be removable under either statute. Under both, the removal jurisdiction of the federal court is broader than its original jurisdiction, and all questions of joinder, non-joinder, mis-joinder, or multi-fariousness, are for the federal court to determine after removal. We think that the court below correctly overruled appellant's motion to remand. See Rule 20(a) of Federal Rules of Civil Procedure . . ." 44

42. See Texas Employers Ins. Ass'n v. Felt, 150 F.2d 227 (5th Cir. 1945); Holmes, supra note 13.
43. American Fire & Cas. Co. v. Finn, 181 F.2d 845 (5th Cir. 1950).
44. Id. at 846.
The Supreme Court reversed in an opinion by Mr. Justice Reed. The Court emphasized the "congressional intention" to abridge the right of removal by requiring "more complete disassociation" between joined claims, and that the separable controversy no longer provided a basis for removal. Turning, then, to the definition of the term "cause of action" as used in section 1441 (c), the Court stated that the term should be given an "accepted meaning" consonant with the congressional "purpose of limiting and simplifying removal." Mr. Justice Reed's opinion, quoting a passage from *Baltimore S.S. Co. v. Phillips*, then proceeded to define that "accepted meaning":

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. Thus, we conclude that where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441 (c).

Turning to the case at hand, there was no right to removal.

The past history of removal of "separable" controversies, the effort of Congress to create a surer test, and the intention of Congress to restrict the right of removal leads us to the conclusion that separate and independent causes of action are not stated. The facts in each portion of the complaint involve Reiss, the damage comes from a single incident. The allegations in which Reiss is a defendant involve substantially the same facts and transactions as do the allegations in the first portion of the complaint against the foreign insurance companies. It cannot be said that there are separate and independent claims for relief as § 1441 (c) requires.

46. Id. at 12.
47. "[U]nless it also constitutes a separate and independent claim or cause of action." Id. at 11. If a separable controversy can also be a "separate and independent claim or cause of action," more doubt is cast on the proposition that § 1441 (c) merely incorporates the pre-1948 "separate controversy" as a standard. See text at notes 36–39 supra. A similar statement is found in the Reviser's Note. "Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action . . . ." (Emphasis added.) Reviser's Note. Cf. MOORE 238.
48. 341 U.S. at 12.
49. 274 U.S 316, 321 (1927).
50. 341 U.S. at 14. At this point, the court cited CLARK 137 for "a discussion of cause of action in code pleading."
51. That "intention" is made less than clear in the Reviser's Note. It is, at least, difficult to find from the Reviser's statement that the new test "will somewhat decrease the volume of Federal litigation." That this was a statement of a purpose to narrow removal rather than of a collateral consequence of a "surer test" was first suggested by MOORE 239.
52. 341 U.S. at 16.
B. After Finn

The Finn case may have resulted in a "surer test"—at least a surer result—in one large group of cases. Since this group was easily the largest numerically, and had presented the most troublesome problems under the old separable controversy statute, this may be counted as a reduction in the problems of diversity jurisdiction and as a major gain in simplicity at least. In multiple-defendant cases where plaintiff is seeking money damages, and where the payment of a judgment against one defendant will be credited to other defendants in full, the claims against that defendant are not "separate and independent" from those against the other defendants. Thus, in cases like Finn, the difficulty of

53. Thus, § 1441(c) in operation does bear out the statement in the Reviser's Note, supra note 51. Some of these cases would have been removable under the pre-1948 law. See text accompanying notes 18–19 supra.

54. The following cases, since Finn, purport to permit removal or state that removal would be appropriate under § 1441(c): Hartford Acc. & Indem. Co. v. Shaw, 273 F.2d 133 (8th Cir. 1959) (action for declaration of insurance coverage separate and independent from action for cancellation of truck leasing agreement); Evangelical Lutheran Church v. Standolind Oil & Gas Co., 251 F.2d 412 (8th Cir. 1958) (quiet title action against defendants with diverse claims of title); Greenshields v. Warren Petroleum Corp., 248 F.2d 61 (10th Cir.), cert. denied, 355 U.S. 907 (1957) (suit by royalty owner against oil and gas lessees and gas plant operators; removing defendants' obligation covers less extensive gas zone than remaining defendants and is alleged to result from subsequent and different acts); Division of Labor Law Enforcement v. Stanley Restaurants, 228 F.2d 420 (9th Cir. 1955) (determination of relative priority of assignee's expenses and state statutory labor liens separate and independent from determination of federal government's priority to those liens); Vogel v. Northern Assur. Co., 219 F.2d 409 (3d Cir. 1955) (buyer allowed to collect on both seller's and buyer's insurance for real estate fire loss although recovery exceeded loss; neither insurer is entitled to credit for recovery against the other; claims against two companies are separate and independent); Komlos v. Compagnie Nationale Air France, 209 F.2d 436 (2d Cir. 1953) (single plaintiff and single defendant; $1,500 loss-of-baggage claim held separate and independent from $150,000 wrongful death claim); Yuba Consol. Gold Fields v. Kilkeary, 206 F.2d 884, 890 n.10 (9th Cir. 1953) (multiple plaintiffs); Shelley v. The Maccabees, 180 F. Supp. 517 (E.D.N.Y. 1959) (claim for inducing breach of contract separate and independent from claim for breach; court notes plaintiff is entitled to recover damages for inducement beyond compensatory damages for breach); Swift & Co. v. United Packinghouse Workers, 177 F. Supp. 511 (D. Colo. 1959) (federal question case; plaintiff's claims are either separate and independent under § 1441(c) or pendent to federal claims justifying removal under § 1441(a)); Bresloman v. American Liberty Ins. Co., 169 F. Supp. 531 (E.D.N.Y. 1959) (defendant insurers liable on six policies covering different buildings destroyed in single fire); Tsavdaridis v. T. J. Stevenson & Co., 165 F. Supp. 174 (S.D.N.Y. 1958) (single alien plaintiff v. single domestic corporate defendant; alternative ground—claims are either pendent or separate and independent); Baltimore Gas & Elec. Co. v. United States Fid. & Guar. Co., 159 F. Supp. 738 (D. Md. 1958) (insurance policies covering pro-rata propor-
making distinctions between joint and several claims, and between necessary and merely proper parties, required by the former law, no longer exists. Going beyond these cases, however, the test suggested by the Court and the results in subsequent cases are more uncertain. In fact, the opinion in Finn contains enough “all-things-to-all-men” language in defining a cause of action to create debate, at least, in the following types of multiple-party cases: multiple-defendant cases where payment of a judgment against one de-


Of the above-cited cases, only two involve situations where the plaintiff clearly would be entitled to only a single satisfaction. In Alabama Vermiculite Corp. v. Patterson, 149 F. Supp. 534 (W.D.S.C. 1955), § 1441(c) was only an alternative ground for removal since the court supported removal also on the ground of fraudulent joinder of the non diverse parties. In Leppard v. Jordan’s Truck Line, 110 F. Supp. 811 (E.D.S.C. 1953), the court found that the actions were separate primarily because state law prohibited joinder. In 67 HARV. L. REV. 519 (1954) the case is severely criticized on grounds that there was but a single wrong, that it is inconsistent to base removal on joinder of misjoined parties, and that under North Carolina law the plaintiff has no action against the insurer until judgment has been obtained against the insured. Emery v. Chicago B. & Q.R.R., 119 F. Supp. 654 (S.D. Iowa 1954), may also fall into this category since the plaintiff’s claims seem to be in the alternative; the court reasoned that the non-FELA claims were separate and independent since they resulted from events occurring subsequent to the personal injury.

55. See note 18 supra.
fendant need not be credited in full to other defendants;\textsuperscript{56} multiple-defendant cases where plaintiff is seeking relief other than money damages;\textsuperscript{57} multiple-plaintiff cases;\textsuperscript{58} and cases where contro-


Further, the Supreme Court in \textit{Finn} stated that Barney v. Latham, 103 U.S. 205 (1881), would no longer be removable, 341 U.S. at 12 n.5. But in that case plaintiff's claims were neither alternative nor overlapping. HART & WECHSLER 1047. \textit{Cf.} Meade v. Weddington, 145 F. Supp. 183 (E.D. Ky. 1956) (libel claim against defendants who made statements and against newspaper which published them not separate and independent; "test" is whether there could be a verdict in favor of the individual defendants and against the newspaper).

\textsuperscript{57} Of the 27 reported cases permitting removal under § 1441(c) since Finn, the following 3 cases fit in this category: Hartford Acc. & Indem. Co. v. Shaw, 273 F.2d 133 (8th Cir. 1959); Evangelical Lutheran Church v. Stanolind Oil & Gas Co., 251 F.2d 412 (8th Cir. 1958); Division of Labor Law Enforcement v. Stanley Restaurants, 228 F.2d 420 (9th Cir. 1955) \textit{(semble)}. \textit{Cf.} Santa Margarita Mut. Water Co. v. State Water Rights Bd., 165 F. Supp. 870 (S.D. Cal. 1958) (claims of adverse water rights claimants in state court mandamus proceeding not separate and independent); \textit{In re} Green River Drainage Area, 147 F. Supp. 127 (D. Utah 1956) (claims of adverse water rights claimants in suit for determination of water rights not separate and independent); State v. American Mach. & Foundry Co., 143 F. Supp. 703 (D. Colo. 1956) (action to condemn land presents no separate and independent claim even if defendants own separate interests).

\textsuperscript{58} Of the 27 reported cases permitting removal under § 1441(c) since \textit{Finn} the following 4 cases fit in this category: Komlos v. Compagnie Nationale Air France, 209 F.2d 436 (2d Cir. 1953) (plaintiff suing in two capacities); Yuba Consol. Gold Fields v. Kilkearry, 206 F.2d 884 (9th Cir. 1953); Reynolds v. Bryant, 107 F. Supp. 704 (S.D.N.Y. 1952); and Schell- deler v. Jones, 105 F. Supp. 726 (S.D.N.Y. 1952). \textit{Cf.} Rosen v. Rozan, 179 F. Supp. 829 (D. Mont. 1959) (claims of plaintiffs, tenants in common, to quiet title, arise out of common source and hence are not separate and independent). It is, at least anomalous to hold that claims of joined plain-
versies are introduced by counterclaim, cross-claim, third-party claim, intervention or garnishment.\textsuperscript{59}

The Court's opinion seems to take both sides of the McCaskill-Clark debate on the definition of a cause of action.\textsuperscript{60} First, comes the admission that "cause of action is a term with many meanings."\textsuperscript{61} Then, after concluding that the term should be given an "accepted meaning,"\textsuperscript{62} McCaskill is given a clear endorsement with the quotation from \textit{Baltimore S.S. Co. v. Phillips}\textsuperscript{63} that "a cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."\textsuperscript{64} Next, as the "wrong" is

tiffs are separate and independent so long as they are not "joint." First, this keeps alive the distinction between "joint" and "several" claims which plagued the pre-1948 law (see note 18 \textit{supra}) and which has been done away with by § 1441(c) in cases of claims against joined defendants. Moreover, it is difficult to construct a significant policy which would permit removal where closely related claims are joined by several plaintiffs against one defendant, yet deny removal where closely related claims are joined by one plaintiff against several defendants. Note, 52 \textit{COLUM. L. REV.} 101, 106–07 (1952). \textit{Cf.} text accompanying note 69 \textit{infra}.


60. For a resume of the numerous articles written during that debate, by the participants and others, see \textit{CLARK} 132 n.149, nn.177–79. Clark summarizes Professor McCaskill's position as follows: "the cause of action should be considered as limited by the right which is being enforced and that the extent of such right should be determined by the precedents." \textit{Id.} at 132. Clark's own position is summarized as follows: "The cause of action must, therefore, be such an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right . . . . The extent of the cause is to be determined pragmatically by the court, having in mind the facts and circumstances of the particular case." For purposes of determining appropriate joinder, the controlling factor will be "trial convenience." \textit{Id.} at 137.

61. 341 U.S. at 12.
62. \textit{Ibid}.
63. 274 U.S. 316, 321.
64. 341 U.S. at 13.
defined to consist of the failure to pay for the loss of the property, the entire case is brought within this definition of a cause of action. Now, however, the opinion becomes less clear. For, after reviewing the facts, the Court reasons that there was but a single wrong in this case because the facts supporting each claim "involve substantially the same facts and transactions. . . ." Round two goes to Clark.

What guidance exists, then, for lower courts in applying Finn beyond multiple-defendant cases where satisfaction of a judgment against one defendant will satisfy the plaintiff's claim? The simplest example of the problem is in those multiple-defendant cases where plaintiff is entitled to several judgments against several defendants. A recurring situation is this: A owns a building, covered by two separate fire insurance policies issued by different companies. After a fire destroys the building, A sues both companies, alleging that each is responsible for a pro-rata share of the loss. One company is of common citizenship. From the Finn case, equally cogent arguments can be made to support or defeat removal by the diverse company. The argument for removal is pitched, of course, to the separate "rights" against the separate companies in that plaintiff seeks "separate" judgments against them. The argument for remand emphasizes the policy of limiting federal jurisdiction and the close factual connection between the claims. Divergence of results in the decided cases is not surprising.

65. Id. at 14.
66. Id. at 14–16.
67. Id. at 16.
68. For an argument that Mr. Justice Reed's opinion "swallowed the Yale Law School party line" on the meaning of a cause of action, and that there were three causes of action under the McCaskill theory, see Keeffe, Thaler, Bernstein, Wright & Gillmer, Venue and Removal Jokers in the New Federal Judicial Code, 38 VA. L. Rev. 569, 605, 607 (1952). See also Note, 46 Ill. L. Rev. 335 (1951); Note, 49 Mich. L. Rev. 1236 (1951); Note, 100 U. Pa. L. Rev. 277 (1951); Note, 35 Minn. L. Rev. 413 (1951); Note, 25 Tul. L. Rev. 284 (1951).
Arguments emphasizing that, since several judgments may be rendered, plaintiff has several “rights” and hence “separate and independent claims or causes of action” must eventually lose sight of any sound policy to distinguish those cases which can be removed and those which must remain in state court. In tort cases, for example, where defendants operate independently to the injury of plaintiff, whether all defendants are jointly liable for the entire injury or liable severally for portions of the injury depends on policies entirely remote from removal of multi-party cases. It is difficult, too, to assert that the definition of a “cause of action” to determine removability under section 1441(c) should hinge closely on state law damage concepts.

On the other hand, carried to a logical extreme, arguments emphasizing factual similarity to defeat removal under section 1441(c) could largely render that section nugatory in multi-party diversity cases. This is especially true if the argument is accepted that

71. In Montrey v. Schweitzer, 105 F. Supp. 708 (D.N.J. 1952), plaintiffs sought recovery for river pollution by two corporate defendants, holding that the claims against the two defendants were not separate and independent regardless of whether the complaint alleged concert of action between the two defendants, the court noted that the complaint alleged the impossibility of dividing damages and thus sought joint recovery. Id. at 714–15. Whether damages will be apportioned as between tortfeasors not acting in concert or plaintiff will be entitled to a joint judgment for the full amount of his damages against each tortfeasor should depend only in part upon the practical apportionability of damages. Various subtle factors, such as the availability or non-availability of contribution among joint tortfeasors, may operate in weighing potential unfairness to plaintiff in receiving inadequate recovery and potential unfairness to defendants in paying a disproportionate share of the plaintiff’s loss. See 2 HARPER & JAMES, TORTS 1128-31 (1956); PROSSER, TORTS 226-29 (2d ed. 1955).

72. Further, if removal turns upon whether damage awards against defendants will be joint or several, the merits of the plaintiff’s claim become inextricably intertwined with the right to remove. For example, suppose the position is taken that separate and independent claims are not presented where the size of an award against one defendant depends upon the size of recovery against another. See cases cited in note 70 supra. On the other hand, it is conceded that separate and independent claims are presented if the awards against each defendant are distinct. Breslerman v. American Liberty Ins. Co., 169 F. Supp. 531 (E.D.N.Y. 1959); Moore & Van Der Creek, supra note 25, at 504. If both propositions are assumed true, then removability in such cases as Vogel v. Northern Assur. Co., 219 F.2d 409 (3d Cir. 1955) turns on the merits. There the sole issue was whether the buyer of real property could recover in full under both his and the seller’s fire insurance policies, although the total recovery would exceed the loss. The court permitted removal, but also held that plaintiff could recover in full under both policies. Would removal have been improper if the decision had been that plaintiff was only entitled to pro-rata recoveries against the two defendants? Cf. Montrey v. Schweitzer, 105 F. Supp. 708, 715 (D. N.J. 1952), where the court stated that doubts under state law as to apportionability of damages should be resolved in favor of leaving the case in the state court rather than in favor of removal.
section 1441(c) applies only to claims joined by a plaintiff or plaintiffs. The most liberal provisions for joinder of parties require a common question of law or fact and that the claims arise out of related transactions. Almost invariably this means that joined claims will share a core of common and interlocked facts. If section 1441(c) is based on coherent policy, a result rendering that section largely useless in multi-party cases can be defended. Permitting removal on the basis of a separate controversy can be explained, if at all, on the notion that joinder of disconnected claims should not destroy a defendant's right of removal. But in multi-party cases, some connection must exist between properly joined claims under present procedural rules. Section 1441(c), then, carries the seeds of its own destruction. In multi-party diversity cases, for which it is primarily designed, the rules for joinder of parties demonstrate that it is needed least. If joinder rules normally result in joinder of claims more than tenuously connected, then there is little need for rules providing for removal of tenuously connected claims. The paucity of reported cases in the ten years since Finn which permit section 1441(c) to be used to remove multi-party cases indicates that the practical necessity for its existence in such cases is doubtful. And, since the primary virtue in jurisdictional rules is ease of application, the use of the cloudy cause of action concept to mark federal jurisdictional limits in these cases is even less understandable.

It has been argued that existing rules directed toward disregarding "fraudulent" joinder to defeat diversity are inadequate, necessitating rules to permit removal when joined claims are more

73. The divergent authorities are collected in note 59 supra.
75. Leppard v. Jordan's Truck Line, 110 F. Supp. 811 (E.D.S.C. 1953), permits removal on the basis of misjoined claims, however. The case is criticized in Note, 67 HARV. L. REV. 519 (1954). However, even if the statement that claims improperly joined may provide the basis for removal under § 1441(c) is sound, the need for a removal provision governing claims misjoined under state law is nonexistent. Should defendants desire, plaintiff can be required in the state court to proceed only against properly joined defendants. If misjoinder provided no basis for removal, and the case against properly joined defendants was removable, defendants could then perfect removal after the misjoinder was cured. 28 U.S.C. § 1446(b) (1958).
76. Twenty-seven cases are cited in note 54 supra. One does not involve multiple parties, and two do not involve diversity. If those cases where there is substantial doubt as to the propriety of removal (evidenced by contrary or difficult-to-distinguish cases denying removal) are excluded, the remaining 24 cases would be cut substantially. See notes 56–59, 69–70, supra.
tenuously connected.77 Even if this assertion is true, however, the fault, if any, is with those rules. If it is too easy to defeat diversity jurisdiction by joinder of nominal parties, it is too easy to do so in cases where the causes are clearly connected as well as in those cases where the causes are disconnected.

Section 1441(c), however, may also be applicable to a limited number of single-plaintiff-defendant diversity cases, since Congress has provided that specified cases may not be removed.78 It is common to provide that one plaintiff may join all claims which he has against a single defendant.79 Thus, it is possible, in a case where two parties are of diverse citizenship, to encounter the joinder of an unremovable claim with a totally disconnected claim which would otherwise be removable.80 Assuming that the non-removable claim is sufficiently substantial to pass muster under the fraudulent joinder rules, the combined force of the policies generally precluding removal of the unremovable claim81 and those permitting joinder argue for leaving the entire litigation in the state court. In any event, the fact that there are few reported cases of this kind which permit removal argues against the necessity of general rules to safeguard against joinder of disconnected non-removable causes in two-party cases to preclude removal.82

C. THE CONSTITUTIONAL PROBLEM IN DIVERSITY CASES

Initially, it should be pointed out that section 1441(c) applies to two forms of diversity cases where complete diversity of citizenship exists. In these, there is no constitutional question. In the first type, discussed immediately above, there are a single plaintiff and a single defendant of diverse citizenship, but among the plaintiff's multiple claims is one that Congress has specified as non-removable. The proscription on removal precludes removal under section

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80. Of the 27 reported cases permitting removal under § 1441(c) since Finn, only 1 falls in this category: Emery v. Chicago B. & Q.R.R., 119 F. Supp. 654 (S.D. Iowa 1954). And that decision may be erroneous no matter what view is taken of the significance of the Finn case.

81. See Moore & Van Dercreek, supra note 25, at 497 n.34.

82. In addition to Emery, 2 cases involving this situation have denied removal under § 1441(c): Pate v. Standard Dredging Co., 193 F.2d 498 (5th Cir. 1952); Hall v. Illinois Cent. Ry., 152 F. Supp. 549 (W.D. Ky. 1957).
1441(a) and section 1441(b), but if the plaintiff asserts a "claim or cause of action" that is "separate and independent" from the non-removable claim, the separate claim "would be removable if sued upon alone" and thus may arguably provide a basis for removal of the entire litigation under section 1441(c). In the second type, there are multiple-defendants all of whom are of citizenship diverse from that of the plaintiff, but some defendants are residents of the state of suit or have failed to join in the petition for removal. Since section 1441(a) requires all defendants to join in the petition for removal§ and section 1441(b) requires that, in diversity cases, all of the defendants must be nonresidents of the state of suit, sections 1441(a) and 1441(b) do not authorize removal in such cases even though the action would be within the district court's original jurisdiction. However, section 1441(c) may be invoked by nonresident defendants involved in a separate and independent claim or cause of action. Since, in both situations complete diversity exists, congressional authority to invoke removal can be rested simply on the diversity clause of article III of the Constitution without reference to the question whether Congress is empowered to vest jurisdiction in cases of less than complete diversity.

The constitutional problem arises in the more typical section 1441(c)-diversity cases, where there is only partial diversity. The

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83. See notes 80–82 supra. It may be questionable whether removal should carry the non-removable claim. See note 81 supra.

84. 28 U.S.C. § 1441(a) (1958). "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." See, e.g., Universal Sur. Co. v. Manhattan Fire & Marine Ins. Co., 157 F. Supp. 606, 610 (D.S.D. 1958).

85. 28 U.S.C. § 1441(b) (1958). "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought."

86. There is reason to doubt whether § 1441(c) applies to a situation where removal might have been perfected under §§ 1441(a) and 1441(b) but for the failure of all defendants to join in the petition for removal. Universal Sur. Co. v. Manhattan Fire & Marine Ins. Co., 157 F. Supp. 606 (D.S.D. 1958), holds that it does not on the ground that joined separate and independent claims or causes of action solely against nonresident defendants would have been removable had such defendants petitioned for removal. Therefore, the court reasoned that the claim against the removing defendant, even if separate and independent of that against the non-removing defendant, had not been joined with a claim "otherwise non-removable" as required by § 1441(c).
pre-1948 statute similarly authorized the removal of cases, on the basis of a separable controversy, where only partial diversity existed.\textsuperscript{87} The Supreme Court never squarely decided whether the statute was constitutional in authorizing such jurisdiction.\textsuperscript{88} It is significant, however, that the basic statutory structure persisted for nearly three-quarters of a century without a successful constitutional challenge. Two arguments were advanced to sustain the statute. First was the argument that \textit{Strawbridge v. Curtiss},\textsuperscript{89} in requiring complete diversity of citizenship, was merely interpreting the Judicial Code's authorization of diversity jurisdiction and not the parallel language of the Constitution.\textsuperscript{90} The second argument was that of pendent jurisdiction—the remainder of the lawsuit was pendent to the complete-diversity separable controversy which was the basis for removal.

The pendent jurisdiction rationale was stated most forcefully by Judge Holmes in \textit{Texas Employers' Ins. Ass'n v. Felt}.\textsuperscript{91}

The jurisdiction of merely local controversies that the federal district courts exercise in cases of removal on the ground of separable controversies is a different class of jurisdiction from that ordinarily defined by the Constitution and statutes of the United States. It is of a class variously called ancillary, auxiliary, dependent, incidental, or supplementary. It is an extraordinary kind of ancillary jurisdiction in that it arises from an act of Congress expressly conferring it. Under the statute, it exists, not in its own right, but by virtue of its relation to a controversy of which the court is capable of receiving, and has been given, independent jurisdiction under the Constitution. It is analogous to such ancillary jurisdiction as is exercised by the courts by virtue of their inherent powers.

The economical and expeditious administration of justice often requires more than one controversy to be embraced in a single suit, regardless of the citizenship of the parties. Where one of such controversies would be removable to the federal court if separately brought in a state court, Congress has a reasonable range of legislative discretion to determine whether such suit, in its entirety, shall be left in the state court, removed to the federal court, or split into two parts.

88. See \textit{Texas Employers Ins. Ass'n v. Felt}, 150 F.2d 227, 233 n.22 (5th Cir. 1945).
89. 7 U.S. (3 Cranch) 267 (1806).
The primary difficulty with application of the pendent jurisdiction theory to section 1441(c) diversity cases is that orthodox pendent jurisdiction theory emphasizes connection between the principal and pendent claims. In sharp contrast, section 1441(c) makes lack of connection between the removed claims the sine qua non of removability. The pendent jurisdiction justification for section 1441(c), then, depends upon a theory which places the constitutional foundation of pendent jurisdiction on a base broader than close connection between joined claims. Since section 1441(c) can constitutionally be predicated upon the diversity clause of article III without reference to pendent jurisdiction, and since pendent jurisdiction provides the sole justification for application of section 1441(c) to non-diversity cases, the question whether a broader foundation for pendent jurisdiction exists will be deferred to the later discussion of federal question cases. But, as previously indicated, current joinder rules in multi-party cases preclude joinder of totally disconnected claims and result almost invariably in joinder of causes having a substantial nub of connected and interlocking facts.\textsuperscript{92} In simple, two-party federal question cases, by contrast, joinder rules may permit joinder of totally disconnected claims.\textsuperscript{93} The joinder rules for multi-party cases may make section 1441(c) seldom or never applicable in diversity cases as indicated above. But if, as will be discussed below, the constitutional frontiers of pendent jurisdiction extend at least beyond the narrow cause-of-action metaphysics of \textit{Hurn v. Oursler},\textsuperscript{94} section 1441(c) can be more easily defended on orthodox pendent jurisdiction theories in multi-party diversity cases than in two-party federal question cases.\textsuperscript{95}

The easier, and more readily apparent, constitutional justification for section 1441(c) in diversity cases is that “cases” of partial diversity are “controversies . . . between citizens of different states” within the meaning of article III, section 2 of the Constitution.\textsuperscript{96} The late Professor Chafee, in arguing for jurisdiction in federal interpleader, has convincingly demonstrated that \textit{Strawbridge v. Curtiss}\textsuperscript{97} does not define the constitutional limits of diversity jurisdiction in requiring complete diversity of citizenship.\textsuperscript{98}

\textsuperscript{92} Note 74 supra.
\textsuperscript{93} See note 79 supra.
\textsuperscript{94} 289 U.S. 238 (1933).
\textsuperscript{95} See text accompanying notes 155–197 infra.
\textsuperscript{96} “The judicial power shall extend to . . . controversies . . . between citizens of different states . . . .”
\textsuperscript{97} 7 U.S. (3 Cranch) 267 (1806).
Marshall squarely rested his opinion on the Judiciary Act and not on the Constitution. The Constitution, as a broad outline for the scheme of national government, need not be cramped by the limited constructions that practical necessity may demand for similar statutory language. Chafee's conclusions have never been tested in the United States Supreme Court. But the Interpleader Act has been read to justify jurisdiction on the basis of minimal diversity and, so read, has been upheld by lower federal courts. Since a conclusion that the Constitution requires complete diversity might sterilize some of the more useful applications of the federal interpleader device, it is difficult to conclude that the Supreme Court, squarely faced with the question, would reject Chafee's argument. If partial diversity meets the constitutional standard, section 1441(c) could not be beyond constitutional bounds simply because there is reason to doubt its practical utility or necessity. There may, however, be constitutional limits even to the partial diversity theory—limits that Chafee had no call to ex-


99. The words of the act of Congress are, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state."

The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts.

7 U.S. (3 Cranch) at 267. (Emphasis added.)

100. The converse reasons have clearly led to a reading of the general federal question statute, 28 U.S.C. § 1331 (1958), to permit a narrower scope of federal jurisdiction than might be conferred by a complete grant of the federal question jurisdiction permitted by article III. Mishkin, The Federal "Question" in the District Courts, 53 COLUM. L. REV. 157, 162 (1953).

101. There are dicta in Shields v. Barrow, 58 U.S. (17 How.) 130, 145 (1855) referring to the complete diversity requirement as one required both by the Constitution and the statute. The question was squarely presented in Blake v. McKean, 103 U.S. 336, 339 (1881) and in Case of the Sewing-Machine Companies, 85 U.S. (18 Wall.) 553, 586–87 (1874). In both cases, statutory interpretation made decision of the constitutional question unnecessary. See also the concurring opinion of Mr. Justice Bradley in Removal Cases, 100 U.S. 457, 479 (1879).


103. See Haynes v. Felder, 239 F.2d 868 (5th Cir. 1957) and cases therein cited.

104. The constitutional question was presented in an interpleader case in Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939). Disregarding the stakeholder, the suit was found to satisfy the requirement of complete diversity, making it unnecessary to determine whether the interpleader statute or the Constitution authorized jurisdiction in cases of minimal diversity. Id. at 71–72.
plore. Thus it may be argued that Congress could not call disparate, *unconnected* litigation a "case" and assert federal jurisdiction merely because of some diversity of citizenship in parties to the disconnected parts. But, again, the joinder rules which raise questions as to the utility of section 1441(c) ease the task of constitutional interpretation. Since those joinder rules require some connection between joined claims in multi-party cases, section 1441(c) does not reach the constitutional frontier in those cases which certainly can be as easily considered a "case" in the constitutional sense as can the interpleader cases. Marking the boundaries of the frontier, if it exists, can then be left to some more radical congressional experiment.

D. Conclusion

In diversity cases, section 1441(c) is of doubtful utility if it is assumed that it rests upon saving the right to remove which would have existed but for the joinder of disconnected claims. In multi-party diversity cases, joinder rules forbidding joinder of totally disconnected claims provide built-in protection against joinder of disconnected claims to preclude removal. To the extent that cause-of-action metaphysics are utilized by courts to permit removal under section 1441(c), it will continue to be difficult to formulate coherent policies to distinguish those cases held not removable under section 1441(c). The few cases which have been removed provide scant justification for the cloudy and troublesome line which must be drawn to define the "separate and independent claim or cause of action." But the same joinder rules which preclude joinder of disconnected claims in multi-party diversity cases make it easier to bring section 1441(c) within the ambit of the constitutional justifications given to uphold removal under the former separable controversy statute. Since joined claims in cases which raise the constitutional issue will, if properly joined, share a core of connecting facts, section 1441(c) can be upheld in such cases on the basis of partial diversity.

III. SECTION 1441(c) IN FEDERAL QUESTION CASES

The application of section 1441(c) to non-diversity cases raises special problems for three reasons. *First*, the pre-1948 separable controversy statute, by its terms, applied only to diversity cases.  

105. Hart & Wechsler 1046.
106. See note 74 *supra*.
Separate controversies arising under the Constitution or laws of the United States did, however, provide a basis for excision and removal of the separate controversy. Since section 1441(c) provides for removal of the "entire case" on the basis of a "separate and independent claim or cause of action, which would be removable if sued upon alone" it is clear both that section 1441(c) is not limited in its application to diversity cases, and that in non-diversity cases section 1441(c) will operate to expand rather than contract removal jurisdiction. Second, without the aid of section 1441(c), cases of joined federal and non-federal claims can be removed so long as the joined claims would be within the district court's original jurisdiction. The district court would have original jurisdiction of joined non-federal claims sufficiently related to the federal claim to be "pendent" to it. With the adoption of section 1441(c), removal will also carry a joined non-federal claim which is sufficiently unrelated to constitute a "separate and independent claim or cause of action." This creates problems of interpretation. Is it possible for a joined non-federal claim to be neither sufficiently related to fall within the ambit of original pendent jurisdiction, nor sufficiently unrelated to constitute a "separate and independent claim or causes of action"? Or must a joined non-federal claim inevitably be either sufficiently related to be pendent to the federal claim, or sufficiently unrelated to be separate and independent? Third, section 1441(c), as in a small proportion of the diversity cases, applies to non-diversity cases between a single plaintiff and a single defendant. Under joinder rules permitting joinder by plaintiff of all claims against the single defendant, properly joined claims can be totally disconnected in such cases. And, unlike the diversity cases of this type, permitting removal of the entire cases presents serious constitutional problems. Where removal is effected under section 1441(c) on the basis of properly joined unrelated claims, removal can be justified only on the argument that the constitutional frontier of the pendent jurisdiction concept encompasses factually unrelated as well as related claims.

A. THE INTERPRETATION PROBLEM IN NON-DIVERSITY CASES

Understanding the problem of application raised by section 1441(c) in cases arising under federal law necessitates an excur-

108. See, e.g., Pacific R.R. Removal Cases, 115 U.S. 1, 18-23 (1885).
111. See note 30 supra.
112. See note 80 supra.
113. See note 79 supra.
114. See text accompanying note 82 supra.
sion into the doctrine of pendent jurisdiction, and the leading Supreme Court decision, *Hurn v. Oursler.* 115 There plaintiffs brought an original action in federal district court to enjoin performance of defendants' play, alleging that defendants had infringed plaintiffs' copyrighted play and were also guilty of common-law unfair competition by appropriating the idea of a spiritualistic seance from plaintiffs' copyrighted play. The complaint further alleged unfair competition in appropriation of the same idea from an uncopyrighted revision of plaintiffs' play. The district court, finding no infringement, dismissed the copyright claim on the merits, and dismissed the remaining two claims for lack of jurisdiction. The Second Circuit affirmed. 116 The Supreme Court held that the decree should be modified to dismiss the claim for unfair competition growing out of the alleged copying of the copyrighted play on the merits. The non-federal claim based on the uncopyrighted play, however, was held to be dismissed properly for lack of jurisdiction. Mr. Justice Sutherland's opinion quoted language in *Siler v. Louisville & Nashville R.R.* 117 to the effect that once jurisdiction had attached by reason of the existence of a federal question the court "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." 118 But, to this proposition, he added an important qualification:

But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal cause of action; in the latter it may not do so upon the nonfederal cause of action. 119

The claim for unfair competition constituted simply an alternative non-federal ground to the infringement claim since it sought redress for the same "wrong"—the right to protection of the copy-

115. 289 U.S. 238 (1933).
116. 61 F.2d 1031 (2d Cir. 1932).
117. 213 U.S. 175, 191 (1909).
118. 289 U.S. at 243.
119. Id. at 245–46.
righted play.' The Court further emphasized that the non-federal claim rested upon identical facts and that the disposition of the federal claim on the merits also disposed of the non-federal claim. The unfair competition claim relating to the uncopyrighted revision, however, alleged violation of a "distinct right" to protection of the uncopyrighted revision. Since this claim represented a "separate and distinct cause of action," the district court had properly dismissed it for lack of jurisdiction.

Since Hurm, the debate has continued as to the appropriate scope of a "cause of action" for pendent jurisdiction. On the one side have been the arguments for narrow construction to require, as in Hurm itself, almost complete identity of facts for the exercise of pendent jurisdiction. The proponents of a more expansive view of a "cause of action" have argued that a single cause should be found where the facts sufficiently overlap to provide a basis for conveniently trying the federal and non-federal claims together.

120. Id. at 246-47.
121. Id. at 246.
122. Id. at 247.
123. Id. at 248.
124. The Supreme Court has significantly touched on the doctrine only once since Hurm. Armstrong Paint & Varnish Works v. Nu-Enamel Paint Corp., 305 U.S. 315 (1938). Cf. Romero v. International Terminal Operating Co., 358 U.S. 354, 380-81 (1959). The debate was complicated by the enactment, in 1948, of 28 U.S.C. § 1338(b) (1958) which provides: "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trade-mark laws." (Emphasis added.) The Reviser's Note to § 1338 hardly clarifies the problem whether the statute was intended to do more than codify the Hurm principle:

Subsection (b) is added and is intended to avoid "piecemeal" litigation to enforce common-law and statutory copyright, patent, and trademark rights by specifically permitting such enforcement in a single civil action in the district court. While this is the rule under federal decisions, this section would enact it as statutory authority. The problem is discussed at length in Hurm v. Oursler . . . and in Musher Foundation v. Alba Trading Co. (C.C.A. 1942), 127 F.2d 9, (majority and dissenting opinions).


125. See, e.g., Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961); French Renovating Co. v. Ray Renovating Co., 170 F.2d 945 (6th Cir. 1948); Newport Indus., Inc. v. Crosby Naval Stores, Inc., 139 F.2d 611 (5th Cir. 1944); Musher Foundation, Inc. v. Alba Trading Co., 127 F.2d 9 (2d Cir. 1942).

How does the controversy as to the scope of pendent jurisdiction in federal question cases affect section 1441(c)? Perhaps the problem can best be understood in the framework of the following hypothetical case.

A brings an action for damages in four counts against B in a state court. A and B are of common citizenship. Count one alleges that B, a police officer acting "under color of state law" had illegally held him incommunicado and had beaten him. Count two alleges the same facts, but omits the allegation that B's actions were "under color of state law." Count three alleges the theft of A's watch by B during the interrogation. Count four alleges the non-payment of a past-due promissory note held by A and signed by B. Count one, standing alone, presents a federal claim which would be within the district court's original jurisdiction.\(^1\) Under any interpretation of *Hurn v. Oursler*, Count two is pendent to Count one.'\(^2\) If the complaint, then, had been limited to the first two counts, the action would be removable without reference to section 1441(c).\(^3\) Count four, probably, is a "separate and independent claim or cause of action" under any interpretation of section 1441(c).\(^4\) If the complaint were limited to the first, second and fourth counts, counts one and two would be "removable if sued upon alone" and the entire case could be removed under section 1441(c). But what of the third count? The entire case is removable, whether it is pendent to the first count or, like the fourth, "separate and independent."\(^5\) Is it possible that the third count fits neither category—that it is too unrelated to the first count to be pendent to it, yet too related to the first two counts to be "separate and independent"? If so, the entire case is non-removable.\(^6\) Or do the two concepts dovetail so that the joined non-federal claim must be either pendent or "separate and independent"?

Lewin argues that a hiatus does exist.\(^7\) The argument first in-

\(^2\) The only factual difference is the absence of the "color of law" allegation from count two. Thus, even under the more restrictive interpretation of *Hurn*, count two is probably properly pendent to count one. See cases cited noted 125 *supra*.
\(^4\) See text accompanying notes 69–70 *supra*.
\(^5\) If count three is pendent to count one, counts one, two and three represent a claim "removable if sued upon alone." If count three is "separate and independent," it would, like count four, come along with the removal of counts one and two.
\(^6\) Counts one, two and three would not then be "removable if sued upon alone," and counts one and two would not be "separate and independent" of count three.
\(^7\) Lewin, *The Federal Courts' Hospitable Back Door—Removal of*
interprets the words "separate and independent" in section 1441(c) to permit the removal only of "entirely unrelated" claims. At the same time, a narrower view of the "cause of action" concept of pendent jurisdiction is taken, requiring considerable factual overlapping for the existence of a unitary cause of action. Thus, a tripartite division emerges, not unlike the tripartite division which existed under the separable controversy statute in diversity cases, between related, less related and unrelated claims. Professors Moore and Van Der Creek, conceding that "the matter is not without difficulty," have argued that "in most instances" a claim is either pendent or "separate and independent."134 However, they also seem to countenance the possibility of a hiatus between pendent jurisdiction and section 1441(c) in the case of joined federal and non-federal claims which represent two causes of action not "separate and independent."135

Concededly, tenable arguments can be built to support such a hiatus—through a narrow view of "cause of action" for pendent jurisdiction purposes,136 coupled with a broad "cause of action" concept under section 1441(c),137 or through emphasis on the words "separate and independent" as qualifying "cause of action" in section 1441(c). But such a construction has little to commend it. It necessitates placing state claims joined with federal claims into three pigeonholes based upon the degree of connection between them, making for even more difficulty than in diversity cases where section 1441(c) requires the drawing of only one line.138 It was just such a tripartite division, necessitated by the separable controversy statute in diversity cases,139 that the Revisers intended to abolish by the adoption of section 1441(c).140 If, on the other hand, pendent jurisdiction and section 1441(c) are fully complementary, the necessity for drawing any line vanishes. If state claims joined with federal claims in state court actions must be either pendent to the federal claim or separate and independent, the entire case may be removed in any event. Once the case is removed, the determination of whether to retain the entire case for

135. Ibid.
136. See cases cited note 125 supra.
137. See text accompanying note 70 supra.
138. The single line, of course, is not easy to draw. See text accompanying notes 55–60, 69–70 supra.
139. See text accompanying note 17 supra.
140. See text preceding note 35 supra.
federal trial or remand a portion can depend upon pragmatic factors of trial convenience, thus avoiding the impossible problem of attempting to formulate abstract verbal formulae to determine what degree of togetherness or apartness will justify removal.\textsuperscript{141} And, since the question of federal or state trial is left to the trial judge's discretion, there is less chance of appellate reversal after trial which would exist if the question of federal or state trial were made an orthodox jurisdictional determination.\textsuperscript{142}

Providing a rational and workable structure and avoiding the rock of line-drawing on which section 1441(c) has faltered in diversity cases\textsuperscript{143} is probably reason enough for interpreting section 1441(c) and pendent jurisdiction as fully complementary in removed federal question cases. And, such a construction does not do violence to either the pendent jurisdiction concept or to section 1441(c). The parallel between the Court's language in \textit{Hurn v. Oursler}\textsuperscript{144} and the words of section 1441(c) is striking. In \textit{Hurn}, the Court refers to the non-federal claims beyond the scope of pendent jurisdiction as those which are "separate and distinct."\textsuperscript{145} Section 1441(c) permits removal if the federal claim is "separate and independent."\textsuperscript{146} While it is doubtful that the Re-
visers considered the impact of section 1441(c) beyond diversity cases, in light of the Revisers’ clearly stated purpose to simplify removal. It is not difficult to attribute to the Revisers an intention in federal question cases to place all non-federal claims beyond the scope of pendent jurisdiction automatically into the category of “separate and independent claims or causes of action.”

Nor need the fear of an impending flood of litigation stand in the way of a construction of section 1441(c) permitting removal of the entire case whenever it contains a claim arising under federal law. First, it should be pointed out that federal claims which pass all the tests for original federal jurisdiction cannot be conjured out of thin air. Federal law must form the basis of the plaintiff’s claim and not merely the basis of the defendant’s defense. More important, the plaintiff’s claim must arise “directly” out of federal law. Finally, the plaintiff is master of his case, and, should he desire to keep his case in state court, could base his claim squarely on state law rather than assert a parallel federal right—at least where federal law has not pre-empted concurrent state remedies. Second, and most persuasive in minimizing the “flood of litigation” argument is the fact that, since 1948, no such flood has been forthcoming. Indeed, only two reported cases have been faced squarely with the problem of reconciling section 1441(c) and pendent jurisdiction. In one of these cases, removal was appropriate, on an alternative ground, without reference to section 1441(c). In the other case the correlative interpreta-

151. Albright v. Teas, 106 U.S. 613 (1883). Even where the defendant claims that federal law has pre-empted the state claim asserted by plaintiff, the federal defense provides no basis for removal. Tennessee v. Union & Planters’ Bank, 152 U.S. 454 (1894). Cf. Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955). Where pre-emption has occurred by the creation of a federal remedy, however, the court may construe plaintiff’s complaint as seeking the federal remedy and thus arising under federal law despite plaintiff’s insistence that he is seeking the state remedy. Swift & Co. v. United Packinghouse Workers, 177 F. Supp. 511, 512–13 (D. Colo. 1959).
tion of pendent jurisdiction and section 1441(c) is clearly adopted. The lack of reported cases, however, raises serious questions as to the necessity of a statute permitting removal jurisdiction broader than the scope of original federal jurisdiction. If we are to judge by the reported cases, in non-diversity cases the only achievement of section 1441(c) has, thus far, been to spare one district judge the necessity of determining whether joined non-federal claims were pendent. On this evidence, it would seem that, so far as federal question cases are concerned, the repeal of section 1441(c) would be less than significant in its impact upon withholding wages without sufficient cause. The court held that the action was removable under § 1441(a) on the ground that plaintiff was an alien and the three claims could be aggregated to meet the then jurisdictional amount requirement of $3,000. As an alternative ground, the court concluded that since the second and third claims aggregated more than the jurisdictional amount, and would be properly removable, the entire litigation was properly removable. "The remaining claim (breach of employment contract and failure to pay wages) can be retained under the doctrine of pendent jurisdiction. 28 U.S.C. § 1441(c) (1952)." 165 F.Supp. at 176–77. It is difficult to determine from the bare citation of § 1441(c) whether the district court interpreted § 1441(c) as simply restating the doctrine of pendent jurisdiction (which it obviously does not, see text accompanying note 157 infra) or meant to conclude that the first claim must either be pendent to the other two claims or separate and independent. Cf. Darwin v. Jess Hickey Oil Corp., 153 F. Supp. 667, 673 (N.D. Tex. 1957). 153. Swift & Co. v. United Packinghouse Workers, 177 F. Supp. 511 (D. Colo. 1959). This was an action brought in a state court by an employer against an international union, a union local and officials of the local. Seeking damages and specific relief, the following three claims were made against all defendants: (1) breach of the collective bargaining agreement; (2) conspiracy to violate the collective bargaining agreement; (3) inducing others to break the collective bargaining agreement. Defendants moved to remove, alleging that plaintiff is an employer in industry affecting commerce and that defendants are representatives of employees in industry affecting commerce. On plaintiff's motion to remand, the court remanded so much of the complaint as sought injunctive relief on the ground that jurisdiction had been withdrawn by the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101–15 (1958). Insofar as the three claims sought damages, however, the entire action was held properly removable. The first claim was held to be one arising under federal law. Labor Management Relations Act § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958). "Whether plaintiff's three causes of action be considered as 'separate and independent' under 28 U.S.C.A. § 1441(c), or as a single cause of action under the 'single wrong' test, ... does not affect the disposition to be made of this motion. If the allegations of conspiracy and interference of contractual relations be considered as separate and independent causes of action, they may be removed under 28 U.S.C.A. § 1441(c) along with the cause of action for breach of contract; whereas, if there is but one cause of action for a wrong, the primary wrong against the plaintiff is the breach of the collective bargaining agreement and the cause may be removed under 28 U.S.C.A. § 1441(a)." 177 F. Supp. at 515. 154. Swift & Co. v. United Packinghouse Workers, 177 F. Supp. 511 (D. Colo. 1959).
federal judicial business. And, if section 1441(c) applied solely to federal question cases, a persuasive case for the necessity of such a provision would be difficult to make.

B. THE CONSTITUTIONAL PROBLEM IN NON-DIVERSITY CASES

If the application of section 1441(c) to federal question cases proposed above is sound, section 1441(c) permits removal of the entire litigation whenever plaintiff asserts a claim arising directly under federal law regardless of the number and relationship of non-federal claims joined. As previously indicated, the Court's opinion in *Hum v. Oursler* states clearly that the rule of pendent jurisdiction "does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action." Under any construction of section 1441(c), it is clear that section 1441(c) does go so far. Can section 1441(c) then be constitutional?

The constitutional question has caused much perplexity and has been the subject of lengthy debate. As previously indicated, the separable controversy statute was defended on grounds, among others, of pendent jurisdiction. Since section 1441(c) so clearly authorizes jurisdiction beyond the traditional scope of pendent jurisdiction in federal question cases, the arguments advanced to bolster the separable controversy statute are of little help. Yet the

155. 289 U.S. 238 (1933).
156. 289 U.S. at 245–46.
157. Whether or not there is a hiatus between statutory pendent jurisdiction and § 1441(c)—see text accompanying notes 131–41 *supra*—§ 1441(c) permits removal of "separate and independent" non-federal claims. If § 1441(c) operated only to permit removal of all claims pendent under the *Hum* principle, it would have no effect on removal in federal question cases. If all non-federal claims are pendent to asserted federal claims, removal would be appropriate under § 1441(a). See note 129 *supra*. Cf. *Tsavaridis v. T. J. Stevenson & Co.*, 165 F. Supp. 174 (S.D.N.Y. 1958).
constitutional argument over the validity of section 1441(c) has roots which predate the passage of section 1441(c) by 20 years. A Note in the 1928 Harvard Law Review concluded that Congress could authorize removal of the entire suit based upon a “separate” controversy which would have been within original federal jurisdiction. After mentioning that the validity of separable controversy removal was unquestioned, this conclusion was based solely on the ground that, the distinction between separate and separable controversies, which the Note had discovered to be cloudy and confusing, could not be a constitutional law distinction.

The later citation of the Harvard Law Review Note in the Reviser's Note to section 1441(c) indicates that the Revisers acted on this advice.

The proposal and passage of section 1441(c), however, occasioned some constitutional doubts. Professor Moore defended the validity of section 1441(c) rather abruptly by stating that it was within congressional power to restrict removal by eliminating the separable controversy, and to substitute “one of two or more causes of action as a basis of removal” while retaining “the convenience of the joinder of actions, by providing that the entire case should be kept as a unit for removal purposes.”

After the decision in Finn, the cause of the constitutional doubters was strengthened by a scholarly article by Mr. Lewin. Mr. Lewin noted that as distinguished from separable controversy removal, the lack of relationship between joined federal and non-federal claims which would place the non-federal claims beyond the ambit of pendent jurisdiction in an original action provided the basis for removal under section 1441(c). From the decision in Hurn v. Oursler and other fields of ancillary jurisdiction, he concluded that Congress lacked power to permit institution originally in federal court, or removal to federal court, of separate and independent non-federal causes of action joined with federal causes of action since such litigation could not be considered as one “case”

159. Note, 41 Harv. L. Rev. 1048 (1928).
160. Id. at 1049 n.13. The author appears to have been thinking in terms of multi-party diversity cases. “If the causes are properly joined under common law rules, Congress may clearly authorize the removal of an entire suit containing ‘separate’ controversies, one or more of which would not have been within the jurisdiction of the federal courts if sued independently.” Id. at 1049. Cf. text accompanying notes 92-95 supra.
161. See note 39 supra.
162. Moore 253.
163. Lewin, supra note 133, at 431-42.
164. Id. at 441-42.
165. 289 U.S. 238 (1933).
within the meaning of article III, section 2. 166 Finally, he argued that procedural and trial convenience “provide no valid grounds for flouting express basic limitations.” 167 Nor could the statute be saved by the trial judge’s discretion to remand, “since it confers a discretion to take jurisdiction not constitutionally conferred.” 168

Since the Lewin article, section 1441(c) remained largely undefended until recently, when its defense was renewed by Professors Moore and Van Dercreek. 169 They reiterate Moore’s earlier statement that the constitutional problem lacks substance. 170 Basically, they argue for a “broad and liberal construction of article III of the Constitution” to give its language a “living flexibility.” 171 The “legitimate end” sought by section 1441(c) is the restriction of removal while preserving the unity of the lawsuit. 172 Hurn, they argue, merely represents an interpretation of jurisdictional statutes rather than the Constitution. 173 Finally, arguing by analogy to suits by and against federal receivers, they claim that the Constitution does not require a relationship between claims to invoke the ancillary concept. 174

With all deference, both the constitutional attack and the defense leave disturbing questions unanswered. Lewin’s thesis is built entirely on the foundation of an assumption that the limits of pendant jurisdiction drawn in Hurn 175 are constitutional limits. The foundation, however, is assumed and not proved. 176 Even the pro-

166. Lewin, supra note 133, at 434–35.
167. Id. at 436.
168. Id. at 442 n.48.
170. It seemed that the constitutional problem was not of large dimension, but we did not reckon with a peculiar school of American Constitutional law. In this school the legislative outs believe the ins act unconstitutionally, and the commentators treat both the ins and the outs as suspect. In deference to a judicial murmur and a learned article we shall add a few thoughts, mindful always that extensive treatment of the problem tends to give a substance, while the decisions of the courts reflect none.
171. Id. at 495–96. (Footnotes omitted.)
172. Id. at 497.
173. Id. at 498.
174. Ibid.
175. 289 U.S. 238 (1933).
176. After citing the language in Hurn to the effect that the rule of pendant jurisdiction “does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action,” 289 U.S. at 245–46, the following statement is made: “Thus it seems clear that a ‘separate and independent’ non-federal claim is not constitutionally
ponents of a narrow construction of the jurisdictional grants in article III of the Constitution are willing to concede that many jurisdictional limits found by courts in general jurisdiction statutes merely constitute statutory interpretation rather than a limiting construction of parallel constitutional provisions. This is particularly true in the case of interpretations of the general federal question statute. Particularly, it is difficult to understand why the cause of action metaphysics in _Hum_ are indelibly inscribed as constitutional limitations. If it is urged that _Hum_ does more than interpret jurisdictional statutes, the burden of proof must be on the proponent of that position. Further, once having made the assumption that _Hum_ is a constitutional decision, Lewin is willing to accept the possibility that the complete diversity requirement of _Strawbridge v. Curtiss_ is not a constitutional requirement. More surprising, although he contends that litigation joining unrelated federal and state claims cannot be a “case” arising under federal law within the meaning of article III of the Constitution, Lewin is willing to concede that, with partial diversity of citizenship the same litigation may constitute a “case” between citizens of different states within article III.

Moore and Van Dercreek properly point out that Lewin’s case rests upon an unproven assumption. They do not contend, however, that because pendent or ancillary jurisdictional limits are not constitutionally defined in _Hum_, that there are no constitutional limits. Rather, they seem to argue, the question is whether extension of pendent jurisdiction may be supported when related to a legitimate congressional end. Up to this point, their argument is easy within the jurisdiction of the federal courts.” Lewin, _supra_ note 133, at 434. (Emphasis added.) Lewin’s statement that trial convenience does not excuse “flouting express basic limitations,” _id_. at 436, is significant only if it is assumed that the _Hum_ principle does provide that limitation.

_Cf._ Darwin v. Jess Hickey Oil Corp., 153 F. Supp. 667 (N.D. Tex. 1957). This is a case brought originally in federal court and involving, _inter alia_, the problem of determining whether a claim under the Texas Securities Act was pendent to a claim stated under the Federal Securities Act. The court cites the _Finn_ case for the proposition that separate and independent non-federal claims are not within the constitutional jurisdiction of the federal courts, and that the 1948 Judicial Code restricted jurisdiction of non-federal matters! _Id_. at 673.

177. See, _e.g._, _Romero v. International Terminal Operating Co._, 358 U. S. 354, 379–80 (1959) (“It is a statute, not a Constitution, we are expounding.”); _Textile Workers Union v. Lincoln Mills_, 353 U.S. 448, 470 (1957) (dissenting opinion).


179. 7 U.S. (3 Cranch) 267 (1806).

180. _Lewin_, _supra_ note 133, at 442 n.48.

181. _Ibid_.

182. “There is nothing about it [§ 1441(c)] that smacks of arbitrary ac-
enough to follow. But the legitimate end which they put forward as supporting pendent jurisdiction under section 1441(c) is that of restricting removal while preserving the unity of the lawsuit. It may be true that, taken as a whole, section 1441(c) permits the removal of fewer cases than were removable under the prior separable controversy statute. But while section 1441(c) precludes removal of many cases formerly removable, its structure permits removal of entire cases formerly removable only in part, if at all. This is particularly true in federal question cases to which the former separable controversy statute was inapplicable. To the extent that section 1441(c) enlarges jurisdiction on removal, it is little answer to contend that the enlargement must be valid for the purpose of restricting jurisdiction because jurisdiction in other cases has been restricted.

The question then becomes whether section 1441(c) can be fitted into a legitimate and relevant congressional purpose. That legitimate end can be found in the protection of litigants' access to the federal courts. The trend of procedural reform has been consistently in the direction of permitting the joinder in one lawsuit of all matters which can be most efficiently and expeditiously tried together. If the constitutional limits of federal jurisdiction are not large enough to encompass multi-claim cases where some claims only fit within the article III categories, the parties may not have a truly free choice between state and federal court. Practicalities of expense and convenience may force them into state courts in states with enlightened joinder provisions permitting an efficient single trial of all matters rather than piecemeal trial of state and federal claims. And, where federal question claims are placed within exclusive federal court jurisdiction, Congress should not be compelled to require parties to bear the expense of inconvenient multiple trials as the constitutionally-required price of exception unrelated to a legitimate end of restricting removal, yet preserving the unity of a lawsuit.” Moore & Van Dercreek, supra note 134, at 497. “The fact that claim two is unrelated to claim one does not necessarily put it beyond the pale of ancillary jurisdiction.” Id. at 498. (Emphasis added.)

183. Moore and Van Dercreek seem to argue that a fortiori a case removable as a whole under the separable controversy statute would not be removable under § 1441(c), while those cases removable in part under the separate controversy doctrine now are removable in toto. Id. at 490–91; cf. text accompanying notes 36–39 supra. Thus Moore and Van Dercreek are arguing that enlarged removal of cases in class A can be defended as a reduction of removal jurisdiction because cases in class B, formerly removable, have been withdrawn from removal jurisdiction.

184. Note 107 supra.
186. See CLARK 434–35.
exclusive federal jurisdiction. Therefore, the constitutional scope of pendent jurisdiction in federal question cases should encompass, at a minimum, all claims which can be expeditiously tried in a single proceeding. And, since there is no constitutional obstacle to permitting broader removal jurisdiction than original jurisdiction, there can be no objection that Congress has extended this larger scope of pendent jurisdiction only to removed cases.

But in single plaintiff-single defendant federal question cases, section 1441(c) permits removal of all claims joined in the proceeding without reference to the convenience of a single proceeding. If it is true that the constitutional frontier of pendent jurisdiction extends to embrace only those joined non-federal claims which can be tried conveniently in a single proceeding with the federal claims, is section 1441(c) unconstitutional in granting discretion to retain all "otherwise non-removable" claims? Certainly, section 1441(c) can be read as not giving an uninformed, unbridled discretion to the district judge. There are no reported cases where "otherwise non-removable claims" have been retained for federal court trial separate from the removed claims. It is difficult, perhaps impossible, to formulate any verbal standard which will define for a myriad of cases that degree of relationship between joined causes which will result in a more expeditious joint trial as opposed to separate trial. For this reason, the trend of procedural reform is toward giving up the effort—at least in cases with single plaintiffs and single defendants. The question whether the relationship between the joined claims is too tenuous to make joint trial advantageous is left to the trial judge's discretion. Such a system has obvious advantages over employing a cumbersome verbal

187. Indeed, the pendent jurisdiction problem is most acute where the federal claim is within exclusive federal jurisdiction. A narrow view of the appropriate scope of pendent jurisdiction in such cases, as in Hurst itself, leaves the plaintiff no choice but to incur the expense of separate state and federal trials to vindicate his state and federal rights. It is no accident that statutory treatment of the Hurst principle is contained in a subsection of a statute conferring exclusive federal jurisdiction. 28 U.S.C. § 1338 (1958).

188. Where the scope of pendent jurisdiction is determined in a non-constitutional context, such as in interpreting federal jurisdictional statutes or the scope of the Federal Rules of Civil Procedure, considerations of trial convenience may yield to countervailing considerations. See Note, 64 HARV. L. REV. 968, 975-76 (1951). The existence of such countervailing considerations, however, should not serve as a basis for limiting Congressional freedom to choose boundaries of pendent jurisdiction solely on criteria of procedural convenience and desirable judicial administration.

189. Tennessee v. Davis, 100 U.S. 257 (1879).

190. See text accompanying notes 136-47 supra.

191. See note 29 supra.

standard which may permit an appellate court to unscramble the results of completed litigation because the higher court disagrees with the lower court's application of that standard. If the conclusion reached earlier, that statutory pendent jurisdiction and section 1441(c) are fully correlative, is sound, section 1441(c) should operate in practice in much the same way. In the previous section, it was argued that such an interpretation of section 1441(c) in federal question cases avoids the line-drawing problems which have plagued courts in applying section 1441(c) to diversity cases. In other words, section 1441(c) should invariably permit the removal of claims arising under federal law. Whether joined non-federal claims should be retained for a single federal trial or remanded for separate state trial is left to the sound discretion of the trial judge. Constitutional problems may be presented in such cases where the trial judge retains the non-federal matters for separate federal trial with no collateral procedural advantage to having the separate trial in federal court. Whether or not this is such an abuse of the discretion conferred upon the trial judge by section 1441(c) as to be reviewable on appeal, the mere fact that the draftsmen have failed to circumscribe that discretion by the use of a verbal standard should not provide a basis for overturning the entire statutory structure.

193. See text accompanying notes 136–47 supra.
194. See notes 56–59, 69–70 supra.
196. There is no reason why constitutional infirmity should arise if Congress should make district court decisions in favor of jurisdiction immune from appellate reversal. Compare the rule that federal jurisdiction cannot be collaterally attacked. HART & WECHSLER 723-27. The discretion device can be treated as one which, at least for debatable decisions, accomplishes much the same purpose as immunization from appellate review. See text accompanying note 142 supra.
197. A provision which specifically defined that "discretion" so as to require, in terms, remanding non-federal claims unless they were to be tried in a single proceeding with the federal claims would have been unwise, at least in multiple party cases. For example, there may be cases where establishing the liability of one defendant may turn upon establishing the liability of another defendant and then proving additional facts. There may be no advantage, in terms of trying all issues in a single trial, in retaining the claims against both defendants. But there may be an advantage in trying both claims before a single judge in a single court so that the second defendant is bound by a determination of the first defendant's liability. Any attempt to draft a single standard to determine the propriety of retaining the joined non-removable claims runs the dangers of failing to appropriately take care of unanticipated situations and of increasing appellate reversal. At least, the congressional choice of defining no verbal standard to limit the district court's discretion should not raise constitutional problems.
C. CONCLUSION

If the "separate and independent claim or cause of action" is interpreted to begin where pendent jurisdiction ends, section 1441 (c) does not present the difficult line-drawing problem in federal question cases which it poses in the diversity cases. In addition to providing a more workable structure, section 1441(c) may also present a more rational removal philosophy in single defendant-single plaintiff federal question cases than in the multi-party diversity cases. Under the interpretation urged, section 1441(c) invariably provides for removal of federal claims asserted by plaintiff with discretion in the trial judge to determine whether to remand joined state claims for separate state trial. Viewing the trial judge's discretion to remand non-federal matters in proper perspective, the constitutionality of section 1441(c) can be defended in federal question cases upon a theory of pendent jurisdiction which recognizes congressional power to extend jurisdictional boundaries to encompass joined non-federal claims which can be conveniently tried with federal claims. But despite its more rational and workable structure in federal question cases, and despite the fact that constitutional objections should not prove insurmountable, there is real reason to doubt the practical necessity, in such cases, of a removal provision permitting removal broader than original jurisdiction.

CONCLUSION

Section 1441(c) should be repealed, but not because its constitutionality is doubtful. Under existing joinder rules, it serves no useful purpose in multi-party cases. In single plaintiff, single defendant cases, the few reported indicate that it is questionable whether there is a practical need for a device to preclude destruction of the right to remove by joinder of unrelated causes. If such a need does exist in these cases, it is more than outweighed by the difficulties of construction and administration presented. The reduction of removal jurisdiction and simplicity of administration sought by the Revisers of the Judicial Code in proposing section 1441(c) would best have been obtained by limiting removal to those cases within original federal jurisdiction.