Counterclaims, Civil Actions, and the Elusive Reach of the Well-Pleaded Complaint Rule

Patrick Woolley[*]

ABSTRACT: The role of counterclaims in federal subject-matter jurisdiction is widely misunderstood. The Supreme Court has entrenched one misunderstanding into law by holding that a counterclaim cannot provide the basis for statutory arising-under jurisdiction over a civil action. In so holding, the Court relied on a literal reading of the well-pleaded complaint rule. Others have invoked the Court's decision to argue that the well-pleaded complaint rule also governs diversity jurisdiction under 28 U.S.C. § 1332(a).

The Court's holding and efforts to extend it distort the law by conflating the well-pleaded complaint rule with the separate procedural principle that the plaintiff is the master of her complaint. Properly understood, the well-pleaded complaint rule does no more than bar defenses from providing a basis for arising-under jurisdiction. By contrast, the master-of-the-complaint principle—as given effect by the general removal statute—permits a plaintiff through her complaint to determine the availability of a federal forum in statutory arising-under and diversity jurisdiction cases alike.

The role of counterclaims has also been misconceived because of a widespread failure to grasp that Sections 1331 and 1332(a) grant jurisdiction over civil actions, not claims. That grant—together with the nature of arising-under jurisdiction—means that arising-under jurisdiction exists over a claim only if the claim itself provides a basis for arising-under jurisdiction over the civil action. And the Court has held that a counterclaim cannot serve that function. By contrast, Section 1332(a)'s amount-in-controversy requirement looks to the amount at stake in the action as a whole. And the Court's decisions

[*] A.W. Walker Centennial Chair in Law, The University of Texas School of Law. This Article was partially researched and written while I was the Beck Redden LLP Professor in Law. I thank Robert Bone, Kevin Clermont, Scott Dodson, Joan Steinman, and Jay Tidmarsh for helpful comments on earlier drafts. I also thank librarians Molly Brownfield, Jane O'Connell, and Matt Steinke, and students Thomas Cooke, Stefan Koller, Sean McKenzie, Nick Markwordt, Michael Steelman, Tyler Sullivan, Zachary Tavlin, Joel Thomason, Josh VonTrapp, and Simon Youngbloom, for their invaluable assistance with this Article.

indicate that a civil action for this purpose consists of the plaintiff's claims and the defendant's counterclaims.

INTRODUCTION

The proper role of counterclaims in federal subject-matter jurisdiction is widely misunderstood. The United States Supreme Court entrenched one misunderstanding into law twenty years ago when it held "that a counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for 'arising under' jurisdiction"[1] over a civil action. The Court held, in other words, that a counterclaim cannot satisfy the well-pleaded complaint rule. The Court's insistence that the well-pleaded complaint rule be applied with uncompromising literalism has fueled other misconceptions. Some, for example, have viewed the Court's understanding of the well-pleaded complaint rule as buttressing the common but mistaken view that counterclaims may not be considered in deciding whether a civil action satisfies the amount in controversy required for diversity jurisdiction under 28 U.S.C. § 1332(a). And many have overlooked a central consequence of the Court's decision: A literal reading of the well-pleaded complaint rule bars arising-under jurisdiction over counterclaims under 28 U.S.C. § 1331. All these misunderstandings find their genesis in a failure to fully appreciate the source and function of the well-pleaded complaint rule, to fully grasp that Sections 1331 and 1332(a) grant jurisdiction over *civil actions* (not claims), or both. This Article elucidates the role of counterclaims in federal subject-matter jurisdiction by addressing the misconceptions that have obscured a sound understanding of the topic.

Part I discusses arising-under jurisdiction. Section A rejects the widespread assumption that Section 1331 continues to authorize a federal district court to exercise arising-under jurisdiction over a counterclaim that arises under the Constitution, laws, or treaties of the United States. Because the only difference between a claim asserted by a plaintiff and a counterclaim asserted by a defendant is who sues first, it seems logical to conclude that a federal district court may exercise arising-under jurisdiction over both. But the Court in *Holmes Group v. Vornado Air Circulation Systems, Inc.*[2] expressly held that a counterclaim cannot serve as the basis for arising-under jurisdiction over a civil action under Section 1331. And because Section 1331 grants jurisdiction only over "civil actions," a federal district court may exercise arising-under jurisdiction over a claim *only if* the claim itself provides a basis for arising-under jurisdiction over the civil action. *Holmes Group* insists that a counterclaim cannot serve that function. Thus, a federal district court may not exercise arising-under jurisdiction over a counterclaim even if it has arising-under jurisdiction over the civil action initiated by the plaintiff.

Section B then explores and critiques the reasoning that led the Court in *Holmes Group* to adopt a literal reading of the well-pleaded complaint rule. The Court offered a number of justifications for that choice. But the key

1. Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831 (2002).
2. *Id.*

rationale on which it relied rests on the settled understanding that the availability of a *federal* trial forum for a civil action asserting claims based on federal law depends on claims in the plaintiff's complaint rather than counterclaims in the defendant's answer. The Court, however, mistakenly conflated the well-pleaded complaint rule with the separate *procedural* principle that the plaintiff (as master of her complaint) determines whether a federal forum is available for the civil action she initiates. The well-pleaded complaint rule, by contrast, was designed simply to exclude federal *defenses* from serving as a basis for jurisdiction under Section 1331.

Part II turns to the proper role of counterclaims in diversity jurisdiction under Section 1332(a). The Court's decision in *Holmes Group*—to treat as jurisdictional the principle that the availability of a federal trial forum depends on the plaintiff's complaint—has encouraged courts and commentators to conclude that the well-pleaded complaint rule applies to diversity jurisdiction as well as arising-under jurisdiction. The leading Federal Courts casebook suggests, for example, that *Holmes Group*'s "rationale would seem to apply equally"[3] to diversity jurisdiction. Others similarly have cited *Holmes Group* as authority for applying the well-pleaded complaint rule to diversity jurisdiction. Section A discusses these suggestions and explains that neither precedent nor the policies underlying the well-pleaded complaint rule justify extending the rule to diversity jurisdiction.

Section B then demonstrates that the diversity-of-citizenship and the amount-in-controversy requirements properly look not to particular claims in a civil action, but to the *civil action as a whole*. And as the Court has recognized since at least 1863,[4] the civil action for these purposes is comprised of the plaintiff's claims against the defendant and any counterclaims that the defendant brings against the plaintiff.[5] Indeed, although the Court has not addressed the issue in more than half a century, its decisions fully support the understanding that whether Section 1332(a)'s amount-in-controversy requirement is satisfied depends on the amount at stake *in the civil action*. A defendant, of course, may move to dismiss *before* filing a counterclaim that would cure a jurisdictional defect. But when the defendant has filed a counterclaim against the plaintiff, the civil action necessarily includes the counterclaim for the purpose of calculating the amount in controversy. Thus, neither the well-pleaded complaint rule nor any other jurisdictional principle

3. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1445 (7th ed. 2015) ("The Court's rationale [in *Holmes Group*] would seem to apply equally to a diversity case where the sole basis for asserting the requisite amount in controversy rests on the value of a counterclaim.").

4. *See* Ryan v. Bindley, 68 U.S. (1 Wall.) 66, 67–68 (1863).

5. *See infra* Section II.B.1. When multiple plaintiffs share a joint interest or multiple defendants share a joint obligation, a civil action within the meaning of Section 1332(a) may include more than one plaintiff or defendant. *See* Patrick Woolley, *Diversity Jurisdiction and the Common-Law Scope of the Civil Action*, 99 WASH. U. L. REV. 573, 576–603 (2021). For ease of exposition, this Article typically refers to a suit between one plaintiff and one defendant.

justifies the widespread view that claims and counterclaims asserted between a plaintiff and defendant may not be aggregated for purposes of satisfying the amount-in-controversy requirement.

Part III concludes the analysis by exploring in greater depth the source of the generally accepted understanding that the availability of a federal trial forum for a civil action depends on the plaintiff's claims rather than the defendant's counterclaims. Confusion about the source of that understanding appears to be at the root of the common misconception that counterclaims may not be considered in determining whether jurisdiction exists over a civil action. But the understanding that the availability of a federal trial forum for a civil action depends solely on the plaintiff's claims is—with one exception—properly based on removal *procedure* and the federal compulsory counterclaim rule, not the well-pleaded complaint rule. The general removal statute authorizes removal only if the plaintiff's claims—standing alone—would permit a federal district court to exercise original jurisdiction over the civil action. And the Court has held that this requirement is procedural and therefore waivable. The compulsory counterclaim rule, for its part, ensures that once a plaintiff has initiated a civil action in state court, a state-court defendant cannot—through the expedient of filing a separate action in federal court—compel the state-court plaintiff to reassert her claims as counterclaims in federal court. In short, the source of the generally accepted understanding that the availability of a federal trial forum for a civil action depends on the plaintiff's claims is procedural *not* jurisdictional.

I. ARISING-UNDER JURISDICTION

A. *THE COURT'S UNDERSTANDING OF THE WELL-PLEADED COMPLAINT RULE BARS ARISING-UNDER JURISDICTION OVER COUNTERCLAIMS UNDER SECTION 1331*

The starting point for any discussion of the proper role of counterclaims in arising-under jurisdiction must be the Court's 2002 decision in *Holmes Group*. There, the issue was whether 28 U.S.C. § 1295 granted the Federal Circuit appellate jurisdiction over a civil action that included a patent counterclaim.[6] With exceptions not relevant here, Section 1295 granted the Federal Circuit exclusive appellate jurisdiction if the jurisdiction of the district court rendering judgment "was based, in whole or in part, on section 1338."[7] And Section 1338, provided that "[t]he district courts shall have original

6. *Holmes Grp., Inc.*, 535 U.S. at 827.

7. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127(a), 96 Stat. 25, 37, *amended by* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 19(b), 125 Stat. 284, 331–32 (2011). Section 1295 excluded from the Federal Circuit's exclusive jurisdiction "a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under section 1338(a)." *Id.* Congress has amended Section 1295 to grant the Federal Circuit exclusive jurisdiction in "any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents or plant variety protection." 28 U.S.C. § 1295(a)(1) (2018).

jurisdiction of any civil action arising under any Act of Congress relating to patents."[8] Section 1338, the Court explained, required resort to the same well-pleaded complaint rule that governs Section 1331.[9] And because the only patent-law claim in the action was filed by the defendant as a counterclaim, the Court held that the Federal Circuit lacked appellate jurisdiction.[10] The Court emphasized that the well-pleaded complaint rule is not "the well-pleaded-complaint-*or-counterclaim* rule."[11]

Holmes Group expressly addressed whether a counterclaim may provide a basis for arising-under jurisdiction over a civil action, *not* whether a federal district court may exercise arising-under jurisdiction over a counterclaim.[12] It is for this reason that the significance of the Court's holding for arising-under jurisdiction over counterclaims under Section 1331 has been widely overlooked.[13] But as discussed in this Section, the two issues are inextricably

8. *See* 28 U.S.C. § 1338(a). Since *Holmes Group*, Congress has amended the second sentence of Section 1338 to deny state courts subject-matter jurisdiction over patent and plant variety protection counterclaims. *Id.* ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights."). Congress also granted parties authority to remove to federal court "[a] civil action in which any party asserts a claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights." 28 U.S.C. § 1454(a). For further discussion, see *infra* notes 49–54 and accompanying text.

9. *Holmes Grp., Inc.*, 535 U.S. at 826.

10. *See id.* at 829–34.

11. *Id.* at 832. Courts and commentators had often assumed previously that a pleading asserting a counterclaim could be characterized as a complaint for purposes of applying the well-pleaded complaint rule. *See, e.g.*, Aerojet-Gen. Corp. v. Mach. Tool Works, Oerlikon-Buehrle Ltd., 895 F.2d 736, 743 (Fed. Cir. 1990) (en banc) ("It should be remembered that the phrase 'well-pleaded complaint' is merely the name of the rule, not a statement of a principle of law."), *overruled by Holmes Grp., Inc.*, 535 U.S. 826. From this perspective, the "well-pleaded claim rule" would have been a more precise name for the rule. But until the Court in *Holmes Group* chose to give the figurative phrase "well-pleaded complaint" its literal meaning, the imprecision was of little moment.

12. *Holmes Grp., Inc.*, 535 U.S. at 830 ("Respondent argues that the well-pleaded-complaint rule, properly understood, allows a counterclaim to serve as the basis for a district court's 'arising under' jurisdiction. We disagree."). The petitioner nonetheless had specifically contended that a federal district court could exercise only *supplemental* jurisdiction over the compulsory counterclaim in the case. Transcript of Oral Argument at 20–22, *Holmes Grp., Inc.*, 535 U.S. 826 (No. 01-408), 2002 WL 485037, at *20–22; Reply Brief, *Holmes Grp., Inc.*, 535 U.S. 826 (No. 01-408), 2002 WL 417307, at *8–10. Justices Ginsburg and O'Connor, who tellingly refused to join the majority opinion, expressed intense skepticism at that contention during oral argument. *See* Transcript of Oral Argument, *supra*, at 19–22. Justice Ginsburg, with whom Justice O'Connor joined, instead concluded that a counterclaim may arise under the patent laws within the meaning of Section 1338. *Holmes Grp., Inc.*, 535 U.S. at 839 (Ginsburg, J., concurring in the judgment) ("I conclude that, when the claim stated in a compulsory counterclaim 'aris[es] under' federal patent law and is adjudicated on the merits by a federal district court, the Federal Circuit has exclusive appellate jurisdiction over that adjudication and other determinations made in the same case."). They concurred in the judgment "sole[ly]" because "no patent claim was actually adjudicated" in federal district court. *Id.* at 840.

13. Because *Holmes Group* was about subject-matter jurisdiction in actions involving patents, its allegedly negative effect on the patent system was immediately recognized and vigorously

intertwined, and the Court's holding in *Holmes Group* ineluctably leads to the conclusion that Section 1331 does not authorize a federal district court to exercise arising-under jurisdiction over counterclaims.

1. The Overlooked Significance of *Holmes Group*'s Holding

Because the only difference between a claim asserted by the plaintiff and a counterclaim asserted by the defendant is who sued first, it seems natural that a federal district court could exercise arising-under jurisdiction over a counterclaim if the counterclaim arises under the Constitution, laws, or treaties of the United States. And given the intuitive appeal of this result, courts and commentators for the most part have simply assumed (and sometimes expressly concluded) that it continues to be the law after *Holmes Group*.

A decision by one of the most highly respected federal district judges in the country—Lee H. Rosenthal—provides an excellent example of this assumption at work.[14] The plaintiff had removed the suit from state to federal

---

criticized. *See, e.g.*, Molly Mosely-Goren, *Jurisdictional Gerrymandering? Responding to* Holmes Group v. Vornado Air Circulation Systems, 36 J. MARSHALL L. REV. 1, 1–3 (2002); Janice M. Mueller, *"Interpretive Necromancy" or Prudent Patent Policy? The Supreme Court's "Arising Under" Blunder in* Holmes Group v. Vornado, 2 J. MARSHALL REV. INTELL. PROP. L. 57, 59 (2002). Concerns about the effect of *Holmes Group* on patent law led Congress to enact the so-called "Holmes Group fix." *See* Leahy-Smith America Invents Act, Pub. L. 112-29, § 19, 125 Stat. 284, 331–32 (2011) (codified at 28 U.S.C. §§ 1338(a), 1295(a)(1), 1454); H.R. REP NO. 112-98, pt. 1, at 81 (2011) ("The Committee Report accompanying H.R. 2955 (House Rep. 109-407), which we reaffirm, explains the bill's reasons for abrogating *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002), and more fully precluding state court jurisdiction over patent legal claims."). But putting aside *Holmes Group*'s effect on patent law, *Holmes Group*'s conclusion that counterclaims cannot satisfy the well-pleaded complaint rule has met with little criticism. For rare counterexamples, see F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 917 (2009) (arguing that the Court's decision in *Holmes Group* was unsound); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 319 n.59 (2007) ("In my view, [*Holmes Group*'s] extension of the well-pleaded complaint rule is unfortunate and unwarranted."); and Christopher A. Cotropia, *Counterclaims, the Well-Pleaded Complaint, and Federal Jurisdiction*, 33 HOFSTRA L. REV. 1, 3 (2004) ("By excluding federal law counterclaims, the well-pleaded complaint rule frustrates the purposes behind federal question jurisdiction."). Professor Freer does not appear to address whether a federal district court may exercise arising-under jurisdiction over a counterclaim. Professor Hessick's two-paragraph discussion of *Holmes Group* arguably recognizes that under that decision a federal district court lacks arising-under jurisdiction over counterclaims. Hessick, *supra*, at 916–17. He mostly discusses *Holmes Group* in terms of "whether a counterclaim [may] provide the basis for 'arising under' jurisdiction." *Id.* at 917. But he concludes his discussion by stating without further elaboration that "the same reasons underlying conferral of federal jurisdiction over federal claims brought by plaintiffs—ensuring uniformity of federal law and a neutral forum for federal claims—support federal jurisdiction over federal counterclaims." *Id.* Professor Cotropia, for his part, takes the position that a federal district court may exercise arising-under jurisdiction over a counterclaim even if a counterclaim cannot provide the basis for arising-under jurisdiction over a civil action. *See infra* notes 20–21 and accompanying text (discussing Professor Cotropia's views).

14. *See* FIA Card Servs., N.A. v. Gachiengu, No. H-07-2382, 2008 WL 336300, at *6–7 (S.D. Tex. Feb. 5, 2008). For a counterexample, see *Constant v. Webre*, No. 07-3042, 2008 WL 4330251, at *2 (E.D. La. Sept. 15, 2008) (recognizing that *Holmes Group* does not authorize a

court on the ground that arising-under jurisdiction existed over the counterclaim.[15] The plaintiff did so even though the general removal statute does not authorize plaintiffs to remove.[16] When the defendant tardily sought remand six months later, Judge Rosenthal recognized that removal by a plaintiff rather than a defendant constitutes a defect in removal procedure that may be waived if the defendant does not timely seek remand.[17] Then—without mentioning *Holmes Group*—Judge Rosenthal found that arising-under jurisdiction existed over the defendant's counterclaim because it "could have been filed within the original jurisdiction of the federal court."[18] Judge Rosenthal, in other words, assumed that *Holmes Group* had no bearing on whether a federal district court may exercise arising-under jurisdiction over a counterclaim.

To the extent *Holmes Group* has been deemed relevant to arising-under jurisdiction over counterclaims, the decision is often perceived as stating a condition precedent for such jurisdiction: namely, that there must *first* be a civil action over which arising-under jurisdiction exists before a federal district court may exercise arising-under jurisdiction over counterclaims within the action.[19] Christopher Cotropia, for example, has argued that the well-pleaded complaint rule serves as "an 'analytical filter'" that determines whether the civil action includes a "jurisdiction-conferring federal question."[20] If the civil action passes through this analytical filter, arising-under jurisdiction is then available over all claims in the civil action—including counterclaims—that "truly 'aris[e] under' federal law."[21] The Federal Circuit appears to have adopted a similar approach.[22]

---

federal district court to exercise statutory arising-under jurisdiction over a Section 1983 counterclaim).

15. *Gachiengu*, 2008 WL 336300, at *1.

16. 28 U.S.C. § 1441(a); *see infra* Section III.A.1.

17. *Gachiengu*, 2008 WL 336300, at*2–6. For further discussion of removal procedure, see *infra* Section III.A.2.

18. *Gachiengu*, 2008 WL 336300, at *7.

19. Before beginning work on this Article, I discovered that this was the most common understanding of *Holmes Group*, at least among the proceduralists and federal courts scholars who expressed a view on the matter on the civil procedure listserv or through one-on-one correspondence with me.

20. Cotropia, *supra* note 13, at 5–6 (quoting John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 TEX. L. REV. 1829, 1834 (1998)). Professor Cotropia relied on a framework laid out by John Oakley. *See* Oakley, *supra*, at 1834–43. Professor Oakley, however, understood the well-pleaded complaint rule to "make[] the issue of whether a civil action arises under federal law a function of whether some claim (as opposed to defense) arises under federal law." *Id.* at 1835 (emphasis omitted). Thus, Professor Oakley did not purport to address the problem posed in this Section.

21. Cotropia, *supra* note 13, at 5–6 (alteration in original) (quoting Oakley, *supra* note 20, at 1835).

22. *See* Microsoft Corp. v. GeoTag, Inc., 817 F.3d 1305, 1311–12 (Fed. Cir. 2016). For discussion of *Microsoft*, see *infra* notes 57–59 and accompanying text.

But the conclusion that a federal district court may exercise arising-under jurisdiction over a counterclaim under Section 1331 is inconsistent with the Court's holding in *Holmes Group*. The Court in that case declared "that a counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for 'arising under' jurisdiction"[23] over a civil action. And because Sections 1331 and 1338 grant jurisdiction only over "*civil actions*,"[24] a federal district court may exercise arising-under jurisdiction over a claim under these provisions only if the claim itself provides a basis for exercising arising-under jurisdiction over the civil action. *Holmes Group* held that a counterclaim cannot serve that function.[25] It follows that a federal district court may not exercise arising-under jurisdiction over a counterclaim under Sections 1331 or 1338. The next Section defends this conclusion by grounding it in a more comprehensive account of how federal subject-matter jurisdiction operates in a civil action under Section 1331.

2. Jurisdiction in a Civil Action Under Section 1331

Article III authorizes Congress to grant federal courts jurisdiction over a constitutional case that includes a federal "ingredient."[26] And the well-pleaded complaint rule—which the Court has held must be satisfied before a federal district court may exercise statutory arising-under jurisdiction over a civil action under Section 1331—further requires that the requisite federal ingredient be found in an *element* of a qualifying *claim* rather than in an affirmative defense.[27] Once that threshold requirement and other requirements for the exercise of arising-under jurisdiction are met,[28] it is settled that a federal district court has arising-under jurisdiction over the civil action even if some elements of the qualifying claim are founded in state law.[29] And

23. Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831 (2002).

24. 28 U.S.C. § 1331 (emphasis added); *id.* § 1338.

25. *Holmes Grp., Inc.*, 535 U.S. at 830.

26. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823 (1824) ("We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.").

27. *See* discussion *infra* Section I.B.1.i. The analysis in the text requires some modification in the context of a declaratory judgment claim. To avoid the possibility that a request for a declaratory judgment would expand the availability of arising-under jurisdiction, the well-pleaded complaint rule operates differently in that context. Specifically, the well-pleaded complaint rule will be satisfied only if a hypothetical coercive action by either the plaintiff or defendant concerning the same issue and between the same parties would satisfy the well-pleaded complaint rule. *See* 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2767, at 625–41 (4th ed. 2016).

28. A claim does not provide a basis for arising-under jurisdiction simply by satisfying the well-pleaded complaint rule. *See* Gunn v. Minton, 568 U.S. 251, 257–58 (2013); Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 19–22 (1983); Bell v. Hood, 327 U.S. 678, 681–82 (1946). The other requirements are not discussed in this Article.

29. *See Gunn*, 568 U.S. at 257–58.

because affirmative defenses are equally material to the resolution of a claim, a federal district court, having obtained arising-under jurisdiction on the basis of the qualifying claim, must similarly exercise jurisdiction over all affirmative defenses to such a claim. Jurisdiction over state-law elements *material* to a qualifying claim—including affirmative defenses—is based on the settled principle "that the Court which has jurisdiction of the principal question[] must exercise jurisdiction over every question."[30]

This principle also laid the groundwork for including related state-law claims within the civil action.[31] To the extent state-law claims are deemed part of the same constitutional case, they may be characterized as subordinate to the "principal question"[32] in the case.[33] Thus, before the enactment of the supplemental jurisdiction statute,[34] Section 1331's grant of arising-under jurisdiction over the civil action authorized jurisdiction over both (1) claims that *provided a basis* for arising-under jurisdiction over the civil action and (2) claims within the action that *depended* on a related claim to provide such a basis.[35]

---

30. *Osborn*, 22 U.S. at 884 (Johnson, J., dissenting) ("No one can question, that the Court which has jurisdiction of the principal question, must exercise jurisdiction over every question."); *see id.* at 822 (majority opinion) (holding that if jurisdiction can be based on the fact that a right "may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, . . . then all the other questions must be decided as incidental to this, which gives that jurisdiction"). Mary Brigid McManamon has argued persuasively that such authority derives from

> an ancient doctrine that the court that first has jurisdiction of a matter may decide every question in the case, even if some questions are normally outside that court's jurisdiction . . . . The framers of the Constitution and early justices of the Supreme Court recognized and accepted the doctrine without question.

Mary Brigid McManamon, *Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History*, 46 WASH. & LEE L. REV. 863, 865–66 (1989).

31. McManamon, *supra* note 30, at 865–66 (arguing that early American jurists applied this principle "to the same types of cases in which it had been used in England" and extended it "to solve the new, unique problem of nonfederal claims arising in federal cases"). For discussion of whether claims must be related to be part of the same case or controversy, see *infra* note 43.

32. *Osborn*, 22 U.S. at 884 (Johnson, J., dissenting).

33. *Cf.* McManamon, *supra* note 30, at 902–09 (discussing the origins of the principle that a court with jurisdiction over a federal claim may also adjudicate certain state claims).

34. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113–14 (codified at 28 U.S.C. § 1367 (2018)).

35. *Cf.* Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 36 (arguing before the enactment of the supplemental jurisdiction statute that Congressional authority to exercise supplemental jurisdiction in arising-under cases was properly founded in the grant of jurisdiction over a civil action found in Section 1331). For discussion of the limited scope of a civil action under Section 1331, see *infra* Section II.B.1 & note 161.

Although there was no statutorily prescribed term for jurisdiction over dependent claims, courts and commentators found it useful to separately label subject-matter jurisdiction over such claims. *See, e.g.*, United Mineworkers of Am. v. Gibbs, 383 U.S. 715, 726–29 (1966) (using the term "pendent jurisdiction" in holding that a court has discretion to decline to exercise

The supplemental jurisdiction statute—28 U.S.C. § 1367—simplified matters by implicitly limiting Section 1331's grant of jurisdiction. Only those claims that provide a basis for arising-under jurisdiction over the civil action now qualify for jurisdiction under Section 1331. Claims—such as counterclaims—that instead depend on a related claim to provide the basis for arising-under jurisdiction over the civil action are now governed by Section 1367 rather than Section 1331.[36]

The supplemental jurisdiction statute restates much of the law that existed before its enactment.[37] In particular, it has long been clear—and remains clear—that a federal district court may exercise jurisdiction over a plaintiff's state-law claims *provided* such claims are part of the same constitutional case as the claim that provides the basis for statutory arising-under jurisdiction.[38] It is similarly clear that when the law of procedure authorizes a defendant to assert a counterclaim, a federal court may exercise jurisdiction over the counterclaim *if* it is part of the constitutional case put in issue by the arising-under claim.[39]

---

jurisdiction over claims that do not provide a basis of arising-under jurisdiction even though such discretion generally does not exist over claims that provide a basis for arising-under jurisdiction over a civil action). The Court first used the term "pendent jurisdiction" in 1959. *See* Romero v. Int'l Terminal Operation Co., 358 U.S. 354, 380–81 (1959); *see also* McManamon, *supra* note 30, at 874 & n.71 (explaining that "no reported federal court opinion used the term 'pendent' to describe jurisdiction until 1942" when Judge Learned Hand did so in *Pure Oil Co. v. Puritan Oil Co.*, 127 F.2d 6, 7 (2d Cir. 1942)). *Cf.* Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1102 n.14 (1995) ("[S]upplemental jurisdiction has been variously called pendent, ancillary, auxiliary, incidental, and dependent jurisdiction.").

36. 28 U.S.C. § 1367(a) ("Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, *in any civil action* of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction *over all other claims* that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." (emphasis added)).

37. One way in which the supplemental jurisdiction statute extended the jurisdiction of a federal district court was by broadly authorizing what was known before enactment of the supplemental jurisdiction statute as pendent-party jurisdiction. *Cf.* Finley v. United States, 490 U.S. 545, 556 (1989) (stating that the Court in *Aldinger v. Howard*, 427 U.S. 1 (1976), "indicated that the *Gibbs* approach [which authorized pendent jurisdiction over a state-law claim by the plaintiff against the defendant] would not be extended to the pendent-party field, and we decide today to retain that line"). "A pendent plaintiff is one who appends a nonfederal claim to another plaintiff's federal claim against the same defendant. A pendent defendant is one against whom a plaintiff appends a nonfederal claim to a federal claim against another defendant." McManamon, *supra* note 30, at 867 n.22. 28 U.S.C. § 1367(a) expressly provides that "supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." The limits on pendent party jurisdiction before enactment of the supplemental jurisdiction statute were consistent with the limited scope of a civil action under Section 1331. *See infra* Section II.B.1 and note 161 (discussing that scope).

38. *See* City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164–65 (1997) (equating the scope of the constitutional "case or controversy" standard of Section 1367(a) with prior law).

39. *See generally* Moore v. N.Y. Cotton Exch., 270 U.S. 593 (1926) (upholding jurisdiction over a state-law counterclaim after dismissal of the plaintiff's federal antitrust claim).

Section 1367 is often used to obtain jurisdiction over state-law claims. But supplemental jurisdiction more broadly is available over *any* claim—state or federal—that is part of the same constitutional case as the claim that provides the basis for arising-under jurisdiction. The plain text of the statute draws no distinction between dependent claims based on state law and those based on federal law.[40] And although the statute was drafted before *Holmes Group* turned *all* compulsory counterclaims in a civil action under Section 1331 into dependent claims, there is no reason to exclude dependent claims based on federal law from the ambit of the statute.[41]

Supplemental jurisdiction must be grounded in a civil action,[42] but a civil action is not limited to a single constitutional case. A plaintiff, for example, might assert two wholly unrelated claims against the defendant, each of which would separately provide a basis for arising-under jurisdiction over the civil action. And although each claim would be part of a separate constitutional case,[43] there is no reason they could not be asserted in the same civil action.

---

40. *See* 28 U.S.C. § 1367(a) (drawing no distinction between state and federal claims).

41. If dependent claims based on federal law nonetheless were deemed to be outside the scope of the supplemental jurisdiction statute, such claims presumably would be included in the civil action over which Section 1331 grants arising-under jurisdiction. Although this Article takes the position that dependent claims based on federal law now properly fall within the scope of Section 1367, the choice of statute would matter only to the extent the scope of supplemental jurisdiction, as opposed to arising-under jurisdiction, over dependent claims were different. *Cf. supra* note 37 (explaining one way in which the supplemental jurisdiction statute expanded the subject-matter jurisdiction of federal district courts).

42. *See* 28 U.S.C. § 1367(a). For a historical counterpoint, see McManamon, *supra* note 30, at 904 (noting that when rules governing the joinder of claims and parties were more restrictive than they are today, a federal court could sometimes exercise ancillary jurisdiction over a suit if it had an independent basis of jurisdiction over another suit).

43. This Article assumes that claims may be part of the same constitutional case or controversy only if related. *See Int'l Coll. of Surgeons*, 522 U.S. at 164–65 ("This Court has long adhered to principles of pendent and ancillary jurisdiction by which the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact,' such that 'the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court . . . [is] one constitutional "case."'" (first alteration in original) (quoting United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966))); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 867 (1992) (citing *Gibbs*, 383 U.S. at 725, for the proposition that "for purposes of Article III, a 'case' or 'controversy' comprises not only the individual claim or claims for which there is proper subject matter jurisdiction, but all other related claims as well, even though these related claims are themselves jurisdictionally insufficient"). A handful of commentators have argued instead that a constitutional case should be defined by what may be included in a civil action under the Federal Rules of Civil Procedure. *See, e.g.*, Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1491 (1983) (arguing "that the only constitutional limit to supplemental jurisdiction is the presence of a nonfederal claim in the same 'case' or 'controversy' as a federal claim, and that a 'case' or 'controversy' is measured by federal procedural rules"); Thomas F. Green, Jr., *Federal Jurisdiction over Counterclaims*, 48 NW. U. L. REV. 271, 293–94 (1953) (arguing that an independent basis of subject-matter jurisdiction over a permissive counterclaim is unnecessary so long as it is part of a broader civil action brought by a

After *Holmes Group*, however, a civil action arising-under Section 1331 cannot include a claim and an *unrelated* counterclaim.[44] Because such claims would not be part of the same constitutional case, jurisdiction could exist over both claims in the civil action only if the plaintiff's claim and the defendant's counterclaim could each separately serve as a basis for arising-under jurisdiction over the civil action. But *Holmes Group* squarely holds that a counterclaim cannot provide the basis for arising-under jurisdiction over a civil action.[45] Thus, a federal district court would be required to dismiss the unrelated counterclaim unless jurisdictional defects of this kind may be cured by severing the claim from the counterclaim.[46]

---

plaintiff or plaintiffs within the subject-matter jurisdiction of the federal court). Because the Federal Rules authorize the inclusion of unrelated claims in the same civil action, this approach would not require that claims in a constitutional case or controversy be related. C. Douglas Floyd, for his part, has argued "that supplemental jurisdiction over permissive counterclaims should be recognized despite the absence of a transactional relationship among claims" because the exercise of jurisdiction in such circumstances "is necessary and proper to permit the court to fairly and efficiently resolve the plaintiff's main claim, which falls within the scope of Article III." C. Douglas Floyd, *Three Faces of Supplemental Jurisdiction After the Demise of* United Mine Workers v. Gibbs, 60 FLA. L. REV. 277, 331 (2008). Others have more modestly concluded that an unrelated claim may be included in a constitutional case as a defensive setoff if pleaded solely "for purposes of defeating or diminishing [the] plaintiff's recovery." 1 JAMES WM. MOORE & JOSEPH FRIEDMAN, MOORE'S FEDERAL PRACTICE § 13.03, at 696 (1938); *see* William A. Fletcher, *"Common Nucleus of Operative Fact" and Defensive Set-Off: Beyond the* Gibbs *Test*, 74 IND. L.J. 171, 172–73 (1998) (explaining that Professor Moore in 1938 was the first to "assert[] that a claim for defensive set-off is an exception to the general rule requiring an independent basis for jurisdiction for a permissive counterclaim" and noting that some courts "adopted Professor Moore's view"). "[S]everal courts have repeated the set off exception as settled law." Douglas D. McFarland, *Supplemental Jurisdiction over Permissive Counterclaims and Set Offs: A Misconception*, 64 MERCER L. REV. 437, 456 (2013). To the extent such a claim is asserted purely defensively, jurisdiction might be justified as an application of the principle that *defenses* to a claim are part of the same constitutional case as the claim itself. *See supra* note 30 and accompanying text. Although a defensive setoff pleaded solely to diminish or reduce a judgment may be characterized as a claim, it might alternatively be characterized as a defense for purposes of supplemental jurisdiction. *See* McLaughlin, *supra*, at 924 (noting that a defensive setoff "claim is more in the nature of a defense, rather than a claim, and arguably does not need a subject matter jurisdiction basis to be asserted").

44. This Article uses the term "unrelated counterclaim" rather than "permissive counterclaim" here for clarity because some lower court authority indicates that in some circumstances a "permissive counterclaim" asserted in response to a claim by the plaintiff may be related enough to the plaintiff's claim so as to be a part of the same "constitutional case or controversy." *See, e.g.*, Jones v. Ford Motor Credit Co., 358 F.3d 205, 212 (2d Cir. 2004).

45. Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 830 (2002). As discussed in detail below, the scope of a "civil action" as that term is used in Sections 1331 and 1332(a) is properly determined by the rules of party joinder at common law. *See infra* Section II.B.1 and note 161. Such an action will not always be initiated by a party denominated the "plaintiff" under the Federal Rules of Civil Procedure. *See infra* Section II.B.3 (providing an example of a civil action defined by the rules of party joinder at common law that would be initiated by a party identified as the "defendant" under the Federal Rules). To the extent *Holmes Group* pegs the well-pleaded complaint rule to modern rules of procedure, that choice provides an additional basis for criticizing the Court's literal reading of the well-pleaded complaint rule.

46. *See infra* note 114 and accompanying text. In any event, it would be inappropriate to dismiss the plaintiff's claim. Once the plaintiff asserts a claim that provides a basis for arising-

Congress could amend Section 1331 to authorize arising-under jurisdiction over claims that do not provide a basis for jurisdiction over a civil action.[47] Section 1331, for example, might be redrafted to grant "original jurisdiction over civil actions arising under the Constitution, laws or treaties of the United States, *and* over claims within that action that arise under the Constitution, laws or treaties of the United States."[48] But Section 1331—as currently drafted—does not include a grant of arising-under jurisdiction over counterclaims.

Congress, by contrast, has expressly authorized arising-under jurisdiction over civil actions on the basis of a counterclaim in certain circumstances. 28 U.S.C. § 1454, for example, grants federal district courts removal jurisdiction[49] over "[a] civil action in which *any party* asserts *a claim for relief* arising under any Act of Congress relating to patents, plant variety protection, or copyrights."[50]

---

under jurisdiction over a civil action, federal subject-matter jurisdiction attaches and cannot be divested by a defendant's later actions. *See* Freeport-McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428 (1991) (per curiam) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events.").

47. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 495 (1983) ("[T]he many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts." (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 n.51 (1959))).

48. Jurisdiction over such claims presumably would require that the claim itself be well-pleaded. *See infra* notes 66–67 and accompanying text (explaining that statutory arising-under jurisdiction requires that jurisdictional allegations be '"in legal and logical form,' such as is required in good pleading" (quoting Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1877))). Thus, a defense or anticipated defense to a claim does not provide a basis for arising-under jurisdiction over the claim. This approach to determining jurisdiction over a claim is indistinguishable from a figurative approach to determining whether the well-pleaded complaint rule is satisfied with respect to a civil action.

49. This Article "reserve[s] the phrase 'removal jurisdiction' for situations in which Congress enact[s] a grant of jurisdiction *available only upon removal*." 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721, at 11 (rev. 4th ed. 2018) (emphasis added) (citing AM. L. INST., FEDERAL JUDICIAL CODE REVISION PROJECT 401, 414, 419 (2004)). Removal jurisdiction does not refer to removal under a statute in which Congress has simply conferred a right to remove a suit over which a federal district court would have original jurisdiction. *See, e.g.*, 28 U.S.C. § 1441(a) (authorizing removal of "any civil action brought in a state court of which the district courts of the United States have original jurisdiction"). Imprecise use of the term "removal jurisdiction" may lead to serious confusion. *See, e.g.*, *infra* Section III.A (distinguishing jurisdiction from removal procedure).

50. 28 U.S.C. § 1454(a) (emphasis added). Section 1454 does not authorize a federal district court to exercise jurisdiction over "claims that are neither a basis for removal under subsection (a) nor within the original or supplemental jurisdiction of the district court under any Act of Congress." *Id.* § 1454(d)(1). Such claims must be remanded to state court. *Id.* As Edward Hartnett has argued in a different context, Congress has the power to authorize removal of a civil action in its entirety even if some claims within that action must then be remanded for lack of subject-matter jurisdiction. *See* Hartnett, *supra* note 35, at 1153–54 ("Simply because, under *Gibbs*, it may be unconstitutional to *adjudicate* factually unrelated claims, does not mean that it is unconstitutional for Congress to authorize a defendant to *remove* the entire case *in the first instance* so that the federal court can determine the scope of its own jurisdiction.").

A "claim for relief" within the meaning of Section 1454 includes counterclaims.[51] Congress similarly has conferred on the Federal Circuit exclusive appellate jurisdiction over "any civil action in which a party has asserted a *compulsory counterclaim* arising under, any Act of Congress relating to patents or plant variety protection."[52] These statutory provisions authorize the exercise of arising-under jurisdiction over counterclaims,[53] provided the counterclaims are well-pleaded and satisfy the other requirements of arising-under jurisdiction.[54] But outside the limited contexts in which Congress has specifically granted federal courts arising-under jurisdiction over counterclaims, *Holmes Group*'s reliance on a literal reading of the well-pleaded complaint rule bars arising-under jurisdiction over counterclaims.

3. The Footnote Four Fallacy

A handful of lower courts, relying on footnote four of *Holmes Group*, nonetheless have expressly rejected the argument that *Holmes Group* bars the exercise of arising-under jurisdiction over counterclaims. Footnote four rejected the relevance of the "cases relied upon by JUSTICE STEVENS and by the [Federal Circuit in *Aerojet*]" for the proposition that a counterclaim could satisfy the well-pleaded complaint rule.[55] The Court explained that the cases "simply address[ed] whether a district court can retain jurisdiction over a counterclaim if the complaint (or a claim therein) is dismissed or if a jurisdictional defect in the complaint is identified."[56]

The Federal Circuit relied on footnote four in holding that a federal district court may *retain* arising-under jurisdiction over a counterclaim based

---

51. *See, e.g.*, Masimo Corp. v. Mindray DS USA, Inc., No. 14-405, 2014 WL 7495105, at *3 (D.N.J. Sept. 5, 2014) ("[W]ith the enactment of . . . § 1454, courts have jurisdiction over counterclaims sounding in federal patent law.").

52. 28 U.S.C. § 1295(a)(1) (emphasis added). Subdivision (a) also grants the Federal Circuit exclusive appellate jurisdiction over "any civil action arising under . . . any Act of Congress relating to patents or plant variety protection." *Id.*

53. Congress has not otherwise authorized arising-under jurisdiction over a civil action on the basis of a counterclaim. The first sentence of Section 1338, for example, continues to provide: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks." 28 U.S.C. § 1338(a). Indeed, Congress specifically rejected an amendment to the first sentence of Section 1338(a). H.R. REP. NO. 109-407, at 5–6 (2006), *incorporated by reference in* H.R. REP. NO. 112-98, pt. 1, at 81 (2011). Thus, after *Holmes Group*, a federal district court cannot exercise arising-under jurisdiction over a counterclaim under Section 1338(a), unless a jurisdictional defect of that kind may be cured by severing the counterclaim from the plaintiff's claims. *See infra* note 114 and accompanying text.

54. *See supra* notes 28, 66–67 and accompanying text.

55. *See* Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 834 n.4 (2002) (citing Aerojet-Gen. Corp. v. Mach. Tool Works, Oerlikon-Buehrle Ltd., 895 F.2d 736 (Fed. Cir. 1990), which *Holmes Group* effectively overruled).

56. *Id.*

on patent law even if the court lacked jurisdiction over the plaintiff's claim.[57] Specifically, the Federal Circuit held that "where a complaint and a counterclaim both raise issues arising under federal patent law, the district court may retain subject matter jurisdiction over the counterclaim pursuant to 28 U.S.C. § 1338(a), even if the"[58] court lacks jurisdiction over the plaintiff's claims.[59] Because a court cannot retain arising-under jurisdiction over a counterclaim unless the court had arising-under jurisdiction over the counterclaim *before* dismissal of the plaintiff's claim, the Federal Circuit's holding appears to suggest that Sections 1331 and 1338 authorize federal district courts to exercise arising-under jurisdiction over counterclaims, at least when the plaintiff's complaint satisfies the well-pleaded complaint rule.

But for the reasons discussed in the previous Section, a federal district court cannot exercise arising-under jurisdiction over a counterclaim under Sections 1331 or 1338. And nothing in footnote four suggests otherwise. The

---

57. *See* Microsoft Corp. v. GeoTag, Inc., 817 F.3d 1305, 1311–12 (Fed. Cir. 2016). The other Supreme Court decision on which the Federal Circuit relied did not address the availability of arising-under jurisdiction over a counterclaim. *See* Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 96 (1993). Rather, the Court in *Cardinal* concluded that "a counterclaim seeking a declaratory judgment that [a] patent was invalid" could present an "actual controversy" for purposes of subject-matter jurisdiction even if the plaintiff's claim was dismissed on the ground that the patent had not been infringed. *Id.* at 94–98 (internal quotation marks omitted) (quoting Arrowhead Indus. Water, Inc. v. Ecolochem, Inc. 846 F.2d 731, 734–35 (Fed. Cir. 1988)).

58. *Microsoft Corp.*, 817 F.3d at 1311–12. The Federal Circuit's holding appears to endorse Professor Cotropia's understanding of statutory arising-under jurisdiction over counterclaims. *See supra* notes 20–21 and accompanying text. The federal district court in *Wells Fargo Bank v. TACA International Airlines* went even further than the Federal Circuit, reading footnote four as authorizing arising-under jurisdiction over a counterclaim in a case in which the plaintiff's complaint had not satisfied the well-pleaded complaint rule. Wells Fargo Bank Nw., N.A. v. TACA Int'l Airlines, S.A., 314 F. Supp.2d 195, 198–99 (S.D.N.Y 2003). After losing on the merits, the defendants in *Wells Fargo* argued that the removal had been improper because there was no independent basis of jurisdiction over the plaintiff's claims. *Id.* at 197. The defendants relied on *Holmes Group* for the proposition that the district court lacked arising-under jurisdiction over the counterclaim. *Id.* at 198. The district court properly insisted that even if the removal had been improper, what mattered was the existence of jurisdiction at the time of judgment. *Id.* But the court then mistakenly held that it had arising-under jurisdiction over the defendant's counterclaim and could therefore exercise *supplemental* jurisdiction over the plaintiff's claims. *Id.* ("Here, defendants asserted federal claims against Wells Fargo and another party, which claims were sufficient to invoke federal jurisdiction; the Court then had supplemental jurisdiction over the various other related claims of all parties."). The court also concluded that it had diversity jurisdiction over the plaintiff's claims. *Id.* at 199–200.

59. *Microsoft Corp.*, 817 F.3d at 1312 ("The District Court retained subject matter jurisdiction over GeoTag's patent infringement counterclaims pursuant to § 1338(a), such that we need not determine whether the District Court properly found that it had jurisdiction over Google's First Amended Complaint."). The possibility that the plaintiff's claim might lack subject-matter jurisdiction was based on the argument that no actual controversy existed under the Declaratory Judgment Act. *See id.* at 1309 (noting GeoTag's argument that "'[t]he . . . allegations' in the First Amended Complaint did not establish a substantial controversy between GeoTag and Google 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment'" (alteration in original) (quoting Microsoft Corp. v. Geotag, Inc., No. 11-175, 2014 WL 4312167, at *1–2 (D. Del. Aug. 29, 2014))).

Court did not state in footnote four that a federal district court may exercise *arising-under* jurisdiction over a counterclaim under Section 1331 or 1338. Nor did the Court endorse the view that jurisdiction had been properly retained in the cited cases. Rather, the Court concluded that the cited cases were irrelevant to whether a counterclaim could satisfy the well-pleaded complaint rule. As the Court emphasized, the cases did "not even mention the well-pleaded-complaint rule that the statutory phrase 'arising under' invokes."[60] Thus, footnote four provides no authority for the proposition that a federal district court may exercise arising-under jurisdiction over a counterclaim under Sections 1331 or 1338.

* * *

The conclusion that federal district courts lack arising-under jurisdiction over counterclaims under Sections 1331 and 1338 is not a happy one. It makes no practical sense for a federal district court to have arising-under jurisdiction over a claim asserted by a plaintiff but not over an identical claim asserted by a defendant. But the Court's holding in *Holmes Group*—read against a proper understanding of the nature of arising-under jurisdiction and Sections 1331, 1338, and 1367—leaves no alternative. This anomaly is itself a sign that the Court erred in reading the well-pleaded complaint rule literally. The next Section—which establishes that there is no sound justification for a literal reading of the well-pleaded complaint rule—provides further evidence that the Court erred.

B. THE ORIGINS AND PROPER SCOPE OF THE WELL-PLEADED COMPLAINT RULE

As explained in the previous Section, the Court's holding that a counterclaim cannot satisfy the well-pleaded complaint rule compels the conclusion that a federal district court may not exercise arising-under jurisdiction over a counterclaim under Sections 1331 and 1338. This Section critiques the Court's unfortunate decision to give the well-pleaded complaint rule a literal reading.

When the well-pleaded complaint rule was first given its name in 1963, the reference to the "complaint" could be understood as figurative—as intended to convey in a pithy way that arising-under jurisdiction could not be based on defenses or anticipated defenses to a claim. An answer, for example, could be treated as a *figurative* complaint for purposes of determining whether a counterclaim satisfied the well-pleaded complaint rule. But the Court in *Holmes Group* insisted on a literal reading of the rule and held that "a counterclaim—which appears as part of the defendant's answer, not as part

60. *Holmes Grp., Inc.*, 535 U.S. at 834 n.4. Indeed, one of the cases cited by Justice Stevens and the Federal Circuit did not even involve arising-under jurisdiction. *See* Pioche Mines Consol., Inc. v. Fidelity-Phila. Tr. Co., 206 F.2d 336, 336–37 (9th Cir. 1953) (concluding that a federal district court may retain jurisdiction over a counterclaim that qualifies for diversity jurisdiction).

of the plaintiff's complaint—cannot serve as the basis for 'arising under' jurisdiction"[61] under Sections 1331 and 1338.

The Court in *Holmes Group* read the well-pleaded complaint rule as it did primarily to protect the plaintiff's choice of forum. The law is settled that a plaintiff may structure her suit so as to block removal and remain in state court.[62] But the well-pleaded complaint rule is not meant to protect the plaintiff's right (as master of her complaint) to control the availability of a federal forum.[63] Rather, the rule serves two primary purposes: It limits the volume of federal litigation, and in so doing, promotes federalism by leaving to state courts controversies that are likely to be resolved without reference to federal law. Neither of these purposes supports the conclusion that a federal district court lacks arising-under jurisdiction over a counterclaim.

Section I.B.1 below discusses the origins of the well-pleaded complaint rule and draws a sharp distinction between that rule and the separate principle that the plaintiff is the master of her complaint. The failure to draw such a distinction appears to be at the heart of the Court's unfortunate insistence that the well-pleaded complaint rule be understood literally. Section I.B.2 then turns to the policies the Court and others have offered for the well-pleaded complaint rule generally and demonstrates that these policies provide no support for the conclusion that counterclaims cannot satisfy the well-pleaded complaint rule.

---

61. *Holmes Grp., Inc.*, 535 U.S. at 831.

62. This is the settled rule with respect to removal based on Section 1331 arising-under jurisdiction. *See* 14C WRIGHT ET AL., *supra* note 49, § 3721.1, at 68 ("The grounds for removal also must inhere in the plaintiff's claim, rather than be based on a defense or counterclaim."); *id.* § 3721, at 14 ("[C]ourts often say that the state-court plaintiff is the master of his claim, which means that if the plaintiff chooses not to assert a federal claim, . . . or properly joins a nondiverse party, defendants cannot remove the action to federal court . . . ." (footnotes omitted)). There is less clarity about whether a compulsory counterclaim may supply the required amount in controversy for removal. *Federal Practice and Procedure* notes that "the majority of the reported cases and almost all of the more recent decisions appear to deny removal" unless the plaintiff's claims—by themselves—satisfy the amount-in-controversy requirement. 14AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3706, at 730–31 (4th ed. 2013). For the reasons discussed below, a counterclaim may not provide the amount in controversy required for removal. *See infra* Section III.A.

63. Since 1894, the well-pleaded complaint rule has meant that a federal *defense* cannot provide a basis for removal. *See infra* notes 72–74 and accompanying text. To that extent, the well-pleaded complaint rule is properly understood as safeguarding the plaintiff's right (as master of the complaint) to lock the suit into state court.

1. The Well-Pleaded Complaint Rule and the Master-of-the-Complaint Principle

i. The Origins of the Well-Pleaded Complaint Rule

What is now known as the well-pleaded complaint rule has been a part of the law of federal subject-matter jurisdiction since at least 1888. In that year, the Court in *Metcalf v. Watertown* held:

> Where . . . the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character . . . .[64]

Metcalf emphasized that a lack of original jurisdiction cannot be cured by the assertion of a federal defense in the answer.[65] The Court had earlier stated that the jurisdictional allegations must be "'in legal and logical form,' such as is required in good pleading."[66] And as the Court later recognized, this also meant that a plaintiff could not obtain arising-under jurisdiction by *anticipating* federal defenses in his declaration or bill.[67]

Because *only* the plaintiff's "well-pleaded" allegations counted for purposes of original jurisdiction, the well-pleaded complaint rule became inextricably intertwined with original arising-under jurisdiction. *Metcalf*, however, did not bar *removal* on the basis of federal defenses pleaded by the defendant. Indeed, it expressly recognized that removal—as opposed to original—jurisdiction

---

64. Metcalf v. Watertown, 128 U.S. 586, 589 (1888). The Court continued:

> [I]n other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading, must dismiss the suit . . . .

Id.

65. As the Court explained:

> [A federal court] cannot retain [the suit] in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind.

Id.

66. Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1877) (citation omitted).

67. Bos. & Mont. Consol. Copper & Silver Mining Co. v. Mont. Ore Purchasing Co., 188 U.S. 632, 639–40 (1903) (stating that "[t]he only way in which it might be claimed that a Federal question was presented [in the case] would be in the complainant's statement of what the defence of defendants would be and complainant's answer to such defence," and holding "that jurisdiction is not conferred by allegations that defendant intends to assert a defence based on the Constitution or a law or treaty of the United States, or under statutes of the United States, or of a State, in conflict with the Constitution" (quoting Arkansas v. Kan. & Tex. Coal Co., 183 U.S. 185, 188 (1901))).

could be premised on a federal defense asserted in an answer.[68] Under the Judiciary Act of 1875 which was in force at the time *Metcalf* was decided, *either* the plaintiff or the defendant could *remove* a suit from state to federal court if a federal question was present in the suit.[69] And although a federal defense could not properly be anticipated in the complaint, a federal defense could be pleaded in an answer "'in legal and logical form,' such as is required in good pleading."[70] Thus, as Michael G. Collins has explained, "[u]nder the 1875 scheme, . . . the *Metcalf* rule served as a housekeeping principle for regulating the timing of the attachment of federal jurisdiction in cases that presented federal defenses."[71] This remained the case until *Tennessee v. Union and Planters' Bank*.[72]

The question posed in *Planters' Bank* was whether the Judiciary Act of 1887 had changed the law to authorize removal only if a federal court could have exercised original jurisdiction over the suit if brought in federal court. The Court so held.[73] And because original jurisdiction could not be premised on a federal defense or anticipated federal defense, removal similarly could no longer rest on a well-pleaded federal defense.[74]

---

68. *Metcalf*, 128 U.S. at 588–89 (recognizing that "[i]t has been often decided by this court that a suit may be said to arise under the Constitution or laws of the United States, within the meaning of that act, even where the Federal question upon which it depends is raised, for the first time in the suit, by the answer or plea of the defendant," yet noting that "these were removal cases, in each of which the grounds of Federal jurisdiction were disclosed either in the pleadings, or in the petition or affidavit for removal").

69. Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470, 470–71 (providing that in a suit over which a federal circuit court has original jurisdiction "either party may remove").

70. *Keyes*, 96 U.S. at 203 (citation omitted).

71. Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 733 (1986).

72. *See* Tennessee v. Union & Planters' Bank, 152 U.S. 454, 461–62 (1894).

73. *Id.* ("[S]ection 2 [of the Judiciary Act of 1887] allows removals from a state court to be made only by defendants, and of suits 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding section,' thus limiting the jurisdiction of a Circuit Court of the United States on removal by the defendant, under this section, to such suits as might have been brought in that court by the plaintiff under the first section." (quoting Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553)). For a thorough and persuasive argument that the Court misread the removal provision of the Act, see Collins, *supra* note 71, at 734–56. In *Planters' Bank*, the Court did not address whether a counterclaim could provide a basis for a defendant to remove a suit to federal court. But an 1867 decision suggested that a defendant who voluntarily asserts a counterclaim in state court would waive her right to remove. *See infra* note 222 and accompanying text.

74. The classic statement of the rule is found in *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). The Court wrote:

> [A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution

Such was the state of the law in 1963 when the term "well-pleaded complaint rule" first appeared in the scholarly literature.[75] The term was a catchy name for the doctrine that Paul Mishkin in a 1953 article had less felicitously called "the 'well-pleaded' rule,"[76] "[t]he 'well-pleaded on the face of the complaint' rule,"[77] and "the well pleaded in the complaint rule."[78] Professor Mishkin had used these phrases in an early effort to christen the principle that defenses and anticipated defenses to a claim have no bearing on original statutory arising-under jurisdiction. He sought to describe—not confine—the Court's precedents by giving the principle a name. And although he took the position "that a court's jurisdiction of a suit must be determined as of the entrance of the litigation into the tribunal,"[79] he did not expressly address whether counterclaims could satisfy the well-pleaded complaint rule. Indeed, the sole reference to counterclaims in his article had nothing to do with the well-pleaded complaint rule.[80]

The Court itself did not use the term "well-pleaded complaint rule" until 1974.[81] And it was not until 2002 that the Court in *Holmes Group* dramatically extended the exclusionary reach of the rule by holding that a counterclaim could not provide a basis for arising-under jurisdiction over a civil action.[82]

ii. The Master-of-the-Complaint Principle

The Court's holding in *Holmes Group* can be traced in part to its uncritical extension of a 1987 decision discussing the well-pleaded complaint rule,

---

> would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.

Id.

75. *See* CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 18, at 53 (1963) ("[*Mottley*] illustrates strikingly the proposition that original federal question jurisdiction is not coextensive with the constitutional grant of jurisdiction, but it also shows the practical inconvenience of the 'well-pleaded complaint' rule."); Recent Cases, *Conflict of Laws–State's Determination of Subject Matter Jurisdiction over Border Land Is Open to Collateral Attack in the Bordering State*, 111 U. PA. L. REV. 1214, 1218, 1222 n.19 (1963) ("On the 'well-pleaded' complaint rule for establishing district court jurisdiction, see Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 164, 176–77 (1953).").

76. Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 176 (1953) (emphasis omitted).

77. *Id.* at 169 n.54; *see also id.* at 170 (referencing "the 'face of the complaint' rule").

78. *Id.* at 164 n.33.

79. *Id.* at 164.

80. *Id.* at 193 n.153 (noting that under the Miller Act, Pub. L. No. 74-321, 49 Stat. 793, 794 (1935), "a counter-claim against the United States will not lie").

81. Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 676 (1974) ("Nor in sustaining the jurisdiction of the District Court do we disturb the well-pleaded complaint rule of *Taylor v. Anderson* and like cases." (citation omitted)); *id.* at 665 ("The Court of Appeals affirmed, with one judge dissenting, ruling that the jurisdictional claim 'shatters on the rock of the "well-pleaded complaint" rule for determining federal question jurisdiction.'" (quoting Oneida Indian Nation v. Cnty. of Oneida 464 F.2d 916, 918 (2d Cir. 1972))).

82. Holmes Grp., Inc., v. Vornado Air Circulation Sys., 535 U.S. 826, 831–32 (2002).

Caterpillar Inc. v. Williams.[83] Quoting *Caterpillar*, *Holmes Group* stated: "[S]ince the plaintiff is 'the master of the complaint,' the well-pleaded-complaint rule enables him, 'by eschewing claims based on federal law, . . . to have the cause heard in state court.'"[84] *Caterpillar* was the first decision in which the Court used the term "master of the complaint."[85]

The principle that *Caterpillar* invokes can be traced back to *The Fair v. Kohler Die & Specialty Co*.[86] There, the Court wrote that "the party who brings a suit is master to decide what law he will rely upon" in describing the policy that a federal defense or an anticipated federal defense does not provide a basis for statutory arising-under jurisdiction.[87] Later cases used similar phrases to make the point that a party who has both state and federal claims may avoid statutory arising-under jurisdiction by relying only on state law grounds.[88]

---

83. Caterpillar Inc. v. Williams, 482 U.S. 386, 388–89 (1987).

84. *Holmes Grp., Inc.*, 535 U.S. at 831 (second alteration in original) (quoting *Caterpillar Inc.*, 482 U.S. at 398–99). *Caterpillar* identified as "paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar Inc.*, 482 U.S. at 398–99. This formulation is curious. The second "policy" merely restates the core requirement of the well-pleaded complaint rule. And as *Holmes Group* recognizes, the third "policy" identified in *Caterpillar* simply explains the consequences of recognizing that "the plaintiff is 'the master of the complaint.'" *Holmes Grp., Inc.*, 535 U.S. at 831. The Court may have used the formulation it did in an effort to emphasize that the master-of-the-complaint principle is subordinate to the well-pleaded complaint rule.

85. *Caterpillar Inc.*, 482 U.S. at 398–99. *Caterpillar* also used the term "master of the claim." *Id.* at 392. Six years earlier, an article in the *Duke Law Journal* had used the term "master of his claim" and "master of his own complaint." *See* Michael B. Thornton, *Intimations of Federal Removal Jurisdiction in Labor Cases: The Pleadings Nexus*, 1981 DUKE L.J. 743, 745–46 (discussing the conflict between the master-of-the-complaint principle and the complete-preemption doctrine). And three years before *Caterpillar*, an article in *The University of Chicago Law Review* had used the terms "master of his complaint" and "master of his own complaint" in discussing the complete-preemption doctrine. *See* Richard E. Levy, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 658–59 (1984) (drawing a distinction between the master-of-the-complaint principle and the well-pleaded complaint rule in the complete-preemption context).

86. *See* The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913).

87. *Id.* ("Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defence even when anticipated and replied to in the bill.").

88. *See, e.g.*, Pan Am. Petroleum Corp. v. Superior Ct. of Del., 366 U.S. 656, 662 (1961) ("Since 'the party who brings a suit is master to decide what law he will rely upon,' the complaints in the Delaware Superior Court determine the nature of the suits before it." (citation omitted) (quoting *The Fair*, 228 U.S. at 25)); *see also* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 406–07 (1981) (Brennan, J., dissenting) (relying on the principle "that 'the party who brings a suit is master to decide what law he will rely upon'" to support the proposition that "[w]here the plaintiff's claim might be brought under either federal or state law, the plaintiff is normally free to ignore the federal question and rest his claim solely on the state ground" (quoting *The Fair*, 228 U.S. at 25)).

From the perspective of these cases, the master-of-the-complaint principle simply describes the effect of what later came to be known as the well-pleaded complaint rule.

The term "master of the complaint," however, has more broadly come to describe the value our legal system places on party autonomy in asserting claims.[89] Thus understood, a tension exists between the well-pleaded complaint rule and the master-of the-complaint principle. The well-pleaded complaint rule focuses on how a plaintiff, for example, *should* have pleaded her claim,[90] not on whether the plaintiff—as master of the complaint—actually injected a federal element into the complaint. Through the well-pleaded complaint rule, a plaintiff, for example, is denied the freedom to rely on an anticipated federal defense to establish jurisdiction, even if it is clear that the case will turn on that defense. That is because an anticipated defense would not appear on the face of a *well-pleaded* complaint. From this perspective, the well-pleaded complaint rule sometimes overrides the master-of-the-complaint principle.

Caterpillar so understood the relationship between the two. The Court there explained that a plaintiff's choice to plead a completely preempted state-law claim overrides the principle that a plaintiff—as master of the complaint—may avoid federal-question removal by pleading only state-law claims.[91] The soundness of the complete-preemption doctrine has been vigorously called into question.[92] But one way of reconciling the doctrine with the well-pleaded complaint rule is to insist that a "well-pleaded complaint" would necessarily plead the valid *federal* claim that Congress intended as a substitute for the invalid state claim.[93] So understood,[94] the well-pleaded

89. *See infra* notes 96–99 and accompanying text.

90. *Cf.* Paul E. McGreal, *In Defense of Complete Preemption*, 156 U. PA. L. REV. PENNUMBRA 147, 148 (2007) ("[A] well-pleaded complaint is one that a reasonable lawyer would draft under the circumstances.").

91. Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987). The Court nonetheless concluded that a state-law claim for the breach of an individual employment contract was not completely preempted by section 301 of the Labor Management Relations Act and held that the removal had been improper. *Id.* at 398–99.

92. *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 11–13 (2003) (Scalia, J., dissenting).

93. *See* Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 22 (1983) ("Although we have often repeated that 'the party who brings a suit is master to decide what law he will rely upon,' it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." (citation omitted) (quoting *The Fair*, 228 U.S. at 25)).

94. Whether this understanding provides persuasive support for the complete-preemption doctrine is open to debate. One might argue in the alternative that a complaint asserting a state-law claim that is completely preempted should be treated as simply asserting an invalid claim. *See, e.g.*, *Beneficial Nat'l Bank*, 539 U.S. at 20 (Scalia, J., dissenting) ("Federal jurisdiction is ordinarily determined . . . on the basis of what claim is pleaded, rather than on the basis of what claim can prevail."). Professor McGreal argues otherwise, suggesting that treating a completely preempted claim as an invalid state claim "abandons the reasonable lawyer view of the well-pleaded complaint" rule. McGreal, *supra* note 90, at 155–56. This Article does not take a position on this question.

complaint rule displaces the master-of-the-complaint principle in such cases by denying the plaintiff the right to assert a state-law claim (albeit an invalid one).

The Court has primarily referenced the master-of-the-complaint principle in the context of statutory arising-under jurisdiction,[95] but it has not confined the principle to that context.[96] The principle can be understood more generally as describing the high value our legal system places on the autonomy of parties asserting claims, specifically the interest of a party in determining what claims to assert and whom to sue. Thus understood, the principle—while not absolute—helps shape the construction of federal rules and statutes that otherwise limit or might be read to limit party autonomy. It explains, for example, why the required-party rule is read narrowly and a party asserting a claim in federal court enjoys a high degree of freedom in deciding whom to sue.[97] It also explains why it is uncontroversial that a defendant asserting a counterclaim is entitled to as much autonomy as a plaintiff in deciding what claims to assert against the plaintiff and whether to add additional counterclaim defendants.[98]

The phrase "master of the complaint," however, is sometimes used literally—rather than figuratively—to refer to the value placed on the interest of a *plaintiff* in determining the forum in which her suit will proceed.[99] This

---

95. *See, e.g.*, *Beneficial Nat'l Bank*, 539 U.S. at 12 (Scalia, J., dissenting); City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 163–64 (1997); *Caterpillar Inc.*, 482 U.S. at 394–95.

96. Lincoln Prop. Co. v. Roche, 546 U.S. 81, 91 (2005) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties." (alteration in original) (quoting 16 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.14[2][c], at 107–67 (3d ed. 2005))); *id.* at 94 ("It was not incumbent on Lincoln to propose as additional defendants persons the Roches, as masters of their complaint, permissively might have joined."); *cf.* Rolan v. Atl. Richfield Co., No. 16-cv-357, 2017 WL 3191791, at *18 (N.D. Ind. July 26, 2017) ("Despite being the master of the complaint, a plaintiff must join all of the required parties to an action . . . .").

97. *See supra* note 96 and accompanying text.

98. *See* FED. R. CIV. P. 13(a)–(b) (authorizing the assertion of compulsory and permissive counterclaims against an opposing party); FED. R. CIV. P. 13(h) ("Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim."). A defendant, of course, may lose the ability to assert claims against the plaintiff in a later action if the counterclaim is "compulsory." *See* FED. R. CIV. P. 13(a). But that does not change the fact that the defendant chooses whether—and if so—what claims to assert against a plaintiff and additional counterclaim defendants. *See* FED. R. CIV. P. 13(a)–(b). The law of preclusion may similarly require a plaintiff to assert all related theories against a defendant in one action or lose those she chooses not to assert. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (AM. L. INST. 1982) ("When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.").

99. A few lower courts have even used the master-of-the-complaint metaphor to explain why the plaintiff's choice of forum is given substantial weight in a Section 1404(a) analysis. *See, e.g.*, Brightway Adolescent Hosp. v. Haw. Mgmt. All. Ass'n, 139 F. Supp.2d 1220, 1225–26 (D. Utah 2001) ("As master of the complaint, deference is given to plaintiff's forum selection. 'The

usage is usually innocuous, if imprecise. That is because the propriety of removal from state to federal court generally depends on whether there is statutory arising-under or diversity jurisdiction over one or more claims by the *plaintiff*.[100] It is not enough that there be arising-under or diversity jurisdiction over one or more of the defendant's claims and supplemental jurisdiction over the plaintiff's claims. Thus, if a plaintiff chooses not to plead a federal claim or not to assert claims against completely diverse defendants that satisfy the amount-in-controversy requirement, removal is improper even if a federal district court would have subject-matter jurisdiction over all the claims in the civil action. Put another way, the right of a plaintiff to lock her suit into state court is derivative of her autonomy to decide what claims to bring and whom to sue.

The Court in *Holmes Group* invoked this literal understanding of the master-of-the-complaint principle.[101] But *Holmes Group* involved the appellate jurisdiction of the Federal Circuit rather than removal.[102] The applicable statute, 28 U.S.C. § 1295, authorized the Federal Circuit to exercise appellate jurisdiction *if* the jurisdiction of the district court rendering judgment was based in whole or in part on arising-under jurisdiction under Section 1338 with respect to patents.[103] And jurisdiction under Section 1338 turned on the well-pleaded complaint rule.[104] Thus, unless the well-pleaded complaint rule itself barred the patent claim from serving as the basis of jurisdiction over the civil action, Section 1295 provided no purchase for the conclusion that the plaintiff—as master of the complaint—could determine whether the Federal Circuit had appellate jurisdiction. The Court therefore had to determine whether the well-pleaded complaint rule should be read literally or figuratively.

---

defendants' burden is heavy, and unless the circumstances of the case weigh heavily in favor of the transfer, the plaintiff's choice should not be disturbed.'" (citation omitted) (quoting Frontier Fed. Sav. & Loan Ass'n v. Nat'l Hotel Corp., 675 F. Supp. 1293, 1301 (D. Utah 1987))). The use of the master-of-the-complaint metaphor in this context is misleading because the deference given to the plaintiff to choose the forum is not derivative of the plaintiff's autonomy in determining what claims to bring and whom to sue. *See supra* notes 96–98 and accompanying text. The plaintiff—asserting the same claims and suing the same defendants—may be able to select among several fora in which a forum court would have personal jurisdiction of the parties and in which venue would be properly laid. For that reason, the term "venue privilege" in this context better describes the autonomy of the plaintiff to select a forum than the master-of-the-complaint metaphor. *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 63 (2013) ("Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdiction and venue limitations), we have termed their selection the 'plaintiff's venue privilege.'" (quoting Van Dusen v. Barrack, 376 U.S. 612, 635 (1964))).

100. *See infra* Part III.

101. Holmes Grp., Inc., v. Vornado Air Circulation Sys., 535 U.S. 826, 832 (2002) ("[W]e decline to transform the longstanding well-pleaded-complaint rule into the 'well-pleaded-complaint-*or-counterclaim* rule' urged by respondent.").

102. *Id.* at 827.

103. *Id.* at 829.

104. *Id.* at 830.

The Court, of course, chose a literal reading but, as discussed in the next Section, failed to provide a persuasive basis for its choice.

2. Counterclaims and the Policies Underlying the Well-Pleaded Complaint Rule

The Court has rarely tried to justify the well-pleaded complaint rule on policy grounds.[105] In the seminal *Metcalf* case, for example, the Court made no effort to explain *why* original statutory arising-under jurisdiction must depend on allegations in the plaintiff's complaint.[106] Commentators, for their part, have offered two satisfactory justifications for the well-pleaded complaint rule, but neither supports barring statutory arising-under jurisdiction over counterclaims.

One central and oft-cited justification for the rule is that it serves to limit the volume of litigation in federal court.[107] It is uncontroversial that granting

---

105. The Court has tried to do so on occasion. *See infra* notes 117–18 and accompanying text (discussing *Holmes Group* and *Franchise Tax Board*). Had the Court in applying the well-pleaded complaint rule simply executed the intent of Congress, separation-of-powers considerations might be justification enough. But it does not appear that Congress sought to limit statutory arising-under jurisdiction in the way the Court did. *See* Collins, *supra* note 71, at 723 ("[T]he framers of the 1875 statute seemed to think of the constitutional and statutory provisions as coextensive.").

106. The Court stated its holding, *see supra* notes 64–65 and accompanying text, but made no effort to justify it.

107. *See, e.g.*, Freer, *supra* note 13, at 315 (noting that identically construing the constitutional and statutory grants of arising-under jurisdiction would have "threatened to smother the lower federal courts"); Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 653 (1987) ("[A] common justification for the *Mottley* rule is that it helps control the caseload of the federal courts."); William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 891 (1967) (noting that construing the grant of statutory arising jurisdiction identically to the constitutional grant would have been "impractical" and would have made federal "courts substantially courts of general jurisdiction, since large numbers of law suits could be said to depend potentially on relevant issues of federal law"); Mishkin, *supra* note 76, at 164 ("Behind the stricter requirement was not only the conceptual notion that anything not well-pleaded could not have legal consequences, but, more important, the practical realization that without such a limitation, federal jurisdiction could be created over a tremendous number of cases which should actually remain in the local courts."); G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 37–38 (1947) ("The fact, then, that defendants are usually not prejudiced in state courts when they defend on federal grounds, and that the right to remove to the federal courts on the basis of the answer greatly burdens the federal dockets and gives the defendant an unfair advantage, naturally influenced the thinking of the Court." (footnote omitted)); Ray Forrester, *The Nature of a "Federal Question,"* 16 TUL. L. REV. 362, 385 (1942) ("It may be said that the statute should be narrowly construed in order to limit the number of cases to be handled by the courts of the federal system, and that the Constitutional clause should be broadly construed to maintain a broad reservoir of potential federal judicial power for possible use, within the discretion of Congress, in an uncertain and unpredictable future."). Professor Collins has argued that the *Planters Bank* Court acutely felt this pressure. *See* Collins, *supra* note 71, at 764–65 (noting that "[b]y the late 1880's complaints against the growth of federal jurisdiction had climbed to a fever pitch," and concluding that the Court

federal district courts the full breadth of Article III arising-under jurisdiction would redirect a vast current of state-court litigation into the federal courts. And limiting the volume of potential litigation is critical to the ability of the federal court system to function. Indeed, even Theodore Eisenberg, who argued that the Constitution in principle mandates that the lower federal courts be given the full sweep of their Article III jurisdiction, recognized that Congress may impose "prudent" limits to "avoid case overloads."[108] Thus, in a world in which the federal courts do not have unlimited resources, some method must be found to allocate between state and federal courts those cases within the scope of Article III's Arising Under Clause.[109] That is not to say that the well-pleaded complaint rule is necessarily the optimal way of both avoiding case overloads and achieving the purposes of arising-under jurisdiction.[110] But the rule undoubtedly serves to limit substantially the number of cases in federal court.

By contrast, a literal reading of the well-pleaded complaint rule to bar arising-under jurisdiction over counterclaims should have no more than a marginal effect on the ability of a federal district court to hear a suit removed on the basis of a counterclaim. Even before *Holmes Group* created a *jurisdictional* obstacle to removal on the basis of a counterclaim,[111] removal on that basis had long been barred as a matter of removal *procedure*.[112] And although the procedural bar still in effect is less absolute than the jurisdictional bar,[113] there

---

"through self-help, . . . succeeded in subtracting an important chunk of potential litigation from the lower federal courts").

108. Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 516 (1974).

109. As a leading civil procedure casebook explains:

> [F]ederal and state substantive law overlap and intertwine in many areas, and many disputes involve questions of both federal and state law. Therefore, a principle of federal question/federal forum is impossible to implement fully without drawing large numbers of cases into district court, many of which will substantially depend for their resolution on questions of state law. [¶] The problem thus is to devise a rule that will divide the cases of mixed state and federal law in a reasonable manner between the federal and state courts.

GEOFFREY C. HAZARD, JR., WILLIAM A. FLETCHER, STEPHEN MCG. BUNDY & ANDREW D. BRADT, PLEADING AND PROCEDURE: CASES AND MATERIALS 241 (12th ed. 2020).

110. Richard Posner, in my view, offers the best justification for using the well-pleaded complaint rule to regulate the volume of litigation in federal court. He writes: "In many [cases] the federal defense would have little merit—would, indeed, have been concocted purely to confer federal jurisdiction—yet this fact might be impossible to determine with any confidence without having a trial before the trial." RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 302 (2d prtg. 1999).

111. If a civil action nonetheless is removed to federal district court despite the bar on statutory arising-under jurisdiction over a counterclaim, see *infra* Section III.A.2, it may be possible to cure the jurisdictional defect *if* the claim and counterclaim are severed after removal. *See infra* note 114 and accompanying text.

112. *See infra* Section III.A.

113. *See infra* Section III.A.2.

is no reason to believe that the procedural nature of the bar had led federal courts to adjudicate a substantial number of suits that had been improperly removed on the basis of a counterclaim.

Moreover, using the well-pleaded complaint rule to bar statutory arising-under jurisdiction over counterclaims may increase the number of civil actions in federal district court. A plaintiff is not likely to premise a decision to file in federal court on whether the court would have subject-matter jurisdiction over the defendant's counterclaim. And those who are jurisdictionally barred from filing a counterclaim that would qualify for arising-under jurisdiction had a plaintiff asserted the claim may either file a separate action or seek to split the claim and counterclaim into separate actions through severance.[114] The need to resolve the parties' claims in two actions rather than one may create additional work for federal district courts. The Court, for example, has held that a plaintiff consents to personal jurisdiction and venue with respect to a defendant's counterclaims.[115] That straightforward resolution of personal jurisdiction and venue defenses is not available to a party in a separate action.

The well-pleaded complaint rule has also been justified on the ground "that considerations of federalism make it appropriate to give the state court . . . the first crack when the claimant seeks to enforce state law and federal law merely limits the extent to which state law may be validly enforced."[116] This

114. *See, e.g.*, Constant v. Webre, No. 07-3042, 2008 WL 4330251, at *2 (E.D. La. Sept. 15, 2008) (recognizing that *Holmes Group* does not permit statutory arising-under jurisdiction over a Section 1983 counterclaim but finding that the counterclaim plaintiff "may assert these claims as a new suit in federal court by filing a complaint which shall be re-allotted and assigned a new case number"). The Fourth Circuit has recognized severance as a method to cure a jurisdictional defect in the context of diversity jurisdiction. *See* C.L. Ritter Lumber Co. v. Consolidation Coal Co., 283 F.3d 226, 229–30 (4th Cir. 2002) (holding that the district court's severance after judgment of the action into two actions cured any defect in diversity jurisdiction). *But see* Ravenswood Inv. Co. v. Avalon Corr. Servs., 651 F.3d 1219, 1224 (10th Cir. 2011) (rejecting severance as exceeding its authority to cure defects in diversity jurisdiction while incorrectly stating that "there is no authority for the proposition that creating multiple federal actions is a permissible way to cure a jurisdictional defect in a diversity case").

The Court has not considered the use of severance to cure jurisdictional defects. But the Court in a different context refused to conclude that a jurisdictional statute required the dismissal of one or both parts of an action for lack of subject-matter jurisdiction when jurisdiction could properly be exercised over *both* parts of the action if asserted in different actions. *See* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 381 (1959). Because the federal district court in that case could have exercised subject-matter jurisdiction over both parts of the suit had the suit been split in two, the Court concluded that the district court could exercise jurisdiction over the action as a whole. *Id.* Given that *Holmes Group* held that a counterclaim cannot provide a basis for arising-under jurisdiction over a civil action, *Romero*'s sensible result can be achieved in this context only by permitting severance or overruling *Holmes Group*. For further discussion of *Romero*, see Woolley, *supra* note 5, at 624.

115. *See* Adam v. Saenger, 303 U.S. 59, 67–68 (1938) (personal jurisdiction); Gen. Elec. Co. v. Marvel Rare Metals Co., 287 U.S. 430, 435 (1932) (venue).

116. FALLON ET AL., *supra* note 3, at 810; *see also* Collins, *supra* note 71, at 758 ("States have an obvious interest in enforcing state-created causes of action in their own courts."). *But see*

justification might alternatively be understood as providing a reason why the well-pleaded complaint rule is arguably the optimal mechanism for regulating the volume of arising-under litigation. But even assuming federalism independently justifies the well-pleaded complaint rule, federalism lends no support to the view that the well-pleaded complaint rule may not be satisfied through a counterclaim. To the extent a counterclaim is based on federal law, it cannot be said that the suit seeks to enforce only state-law claims.

The Court in *Holmes Group* also asserted that "allowing responsive pleadings by the defendant to establish 'arising under' jurisdiction would undermine the clarity and ease of administration of the well-pleaded complaint doctrine, which serves as a 'quick rule of thumb' for resolving jurisdictional conflicts."[117] But reliance on the well-pleaded complaint rule to avoid "jurisdictional conflicts" had previously been premised on the contingent nature of federal defenses anticipated by the plaintiff or alleged by the defendant. As explained in the very case that *Holmes Group* cited for this argument, the problem with premising arising-under jurisdiction on federal defenses is that federal defenses typically "lurk[]" in the background and may not become relevant until the plaintiff has proved its case.[118] Considerations of federalism and resource allocation suggest that cases in which federal questions lurk in the background may best be left to the state courts.[119] And while federal defenses will sometimes be obviously dispositive,[120] applying a blanket rule treating federal defenses as irrelevant to arising-under jurisdiction promotes clarity and ease of administration.

But this rationale does not fit counterclaims. A federal question is no more likely to lurk in the background of a counterclaim that satisfies the well-pleaded complaint rule (figuratively understood) than a claim asserted by the plaintiff in the complaint. Moreover, if arising-under jurisdiction is available over counterclaims, it will sometimes be *easier* to determine whether arising-under jurisdiction exists over a defendant's counterclaim than whether an independent basis of jurisdiction exists over the plaintiff's claim.[121] Thus, a

---

FALLON ET AL., *supra* note 3, at 810 (noting "that federal statutory or constitutional defenses can frequently be recast as affirmative claims of federal right").

117. Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 832 (2002) (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 11 (1983)).

118. *Franchise Tax Bd.*, 463 U.S. at 11–12 (quoting Gully v. First Nat'l Bank, 299 U.S. 109, 117 (1936)). *Franchise Tax Board* stated that "[f]or many cases in which federal law becomes relevant only insofar as it sets bounds for the operation of state authority, the well-pleaded complaint rule makes sense as a quick rule of thumb," but admitted that "[t]he rule . . . may produce awkward results." *Id.* at 11–12.

119. *See* POSNER, *supra* note 110, at 302.

120. *See, e.g.*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) (holding that arising-under jurisdiction did not exist even though the constitutionality and meaning of the statute on which the defendant relied for its preemption defense was the sole issue in the case).

121. *See, e.g.*, Wells Fargo Bank Nw., N.A. v. TACA Int'l Airlines, S.A., 314 F. Supp.2d 195, 198–200 (S.D.N.Y. 2003) (concluding that arising-under jurisdiction existed over defendant's counterclaim and supplemental jurisdiction over the plaintiff's claim before concluding that

flat rule barring the exercise of arising-under jurisdiction over a counterclaim undermines rather than furthers the considerations that *Holmes Group* invokes.

In short, there is no sound policy justification for concluding that a counterclaim cannot satisfy the well-pleaded complaint rule. The only remaining basis for that view is the insistence that jurisdiction over a civil action be determined at the outset of the litigation. Reliance on a defendant's counterclaim to create arising-under jurisdiction over a civil action, in this view, violates the principle "that a court's jurisdiction of a suit must be determined as of the entrance of the litigation into the tribunal."[122] But the notion that arising-under jurisdiction over a civil action cannot rest on a defendant's counterclaim is in serious tension with the longstanding principle that defects in subject-matter jurisdiction may be cured. The U.S. Supreme Court in the context of diversity jurisdiction recognized as early as 1833 that a jurisdictional defect could be cured before entry of the *decree*.[123] And because a claim and its defenses are asserted in the same civil action, there is no *a priori* reason why the pleading of a federal defense could not cure a defect in original jurisdiction.[124] There are plausible policy grounds for concluding that a federal *defense* may not cure a defect in arising-under jurisdiction.[125] But as discussed above, none of those justifications warrant concluding that a counterclaim cannot provide a basis for arising-under jurisdiction over a civil action.[126]

This is not to suggest that a plaintiff should be able to initiate a civil action if it cannot allege in good faith that its complaint provides an independent basis of federal subject-matter jurisdiction. A plaintiff bears an affirmative

---

"[t]he record . . . establishe[d]" that the plaintiff "is a real party in interest such that its citizenship is determinative of diversity jurisdiction").

122. Mishkin, *supra* note 76, at 164. Professor Mishkin more fully argued:

> Starting with the almost self-evident postulate that a court's jurisdiction of a suit must be determined as of the entrance of the litigation into the tribunal, it became clear that although appellate jurisdiction may be made to depend upon the whole record below, the only material available in the court of first instance is the initial pleading. From this, it would seem to follow that original jurisdiction must be established by what is contained in the complaint.

Id. Professor Mishkin did not expressly discuss whether counterclaims may satisfy the well-pleaded complaint rule. *See supra* text accompanying notes 79–80.

123. *See* Vattier v. Hinde, 32 U.S. (7 Pet.) 252, 261–62 (1833). For discussion of *Vattier*, see Woolley, *supra* note 5, at 603–06 (tracing origins of the rule that defects in diversity jurisdiction can be cured). *See also* Herman L. Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 VAND. L. REV. 445, 461 (1954) ("The Supreme Court has recognized in several diversity cases that jurisdiction of the subject matter may be ascertained and perfected after the action is commenced.").

124. Trautman, *supra* note 123, at 461 ("There is nothing in either the Constitution or the statute which compels the conclusion that the jurisdiction of the court must be determined finally from the plaintiff's complaint." (footnote omitted)).

125. *See supra* notes 107–10, 116–20 and accompanying text.

126. *See supra* notes 107–21 and accompanying text.

obligation to plead federal subject-matter jurisdiction.[127] And a defendant may move to dismiss an action for lack of subject-matter jurisdiction *before* pleading a counterclaim.[128] But if the defendant pleads a counterclaim that provides a basis for arising-under jurisdiction before the action is dismissed, arising-under jurisdiction should exist over the civil action. The only question before the court should be whether jurisdiction also exists over the plaintiff's claim, either because the plaintiff's claim separately provides a basis for arising-under jurisdiction over the civil action or because the district court has supplemental jurisdiction over the plaintiff's claim.

* * *

In short, although *Holmes Group* requires a different result, neither the history of the well-pleaded complaint rule, nor the sound justifications offered for it, support the conclusion that there can be no statutory arising-under jurisdiction over a counterclaim. The next Part addresses whether the well-pleaded complaint rule governs diversity jurisdiction.

II. DIVERSITY JURISDICTION UNDER SECTION 1332(a)

A. THE NOTION THAT THE WELL-PLEADED COMPLAINT RULE GOVERNS DIVERSITY JURISDICTION IS MISGUIDED

The argument that the well-pleaded complaint rule applies to diversity jurisdiction is not new.[129] As early as 1961, a four-Justice dissent expressly argued that the principles underlying the well-pleaded complaint rule should govern the amount-in-controversy requirement.[130] But *Holmes Group*'s decision

127. That obligation has been codified in the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 8(a) ("A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . . ."). But the obligation to plead federal subject-matter jurisdiction predates the Federal Rules. *See generally* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829 (2007) (discussing the historical role of pleadings in assessing the existence of federal subject-matter jurisdiction).

128. *Compare* FED. R. CIV. P. 12(b) (authorizing assertion of the defense before the filing of a responsive pleading), *with* FED R. CIV. P. 13(a)–(b) (providing that counterclaims must be asserted in a pleading). A federal district court similarly may dismiss *sua sponte* for lack of subject-matter jurisdiction before the defendant pleads a counterclaim. 5C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1393, at 545–49 (3d ed. 2004) ("Because an objection to subject matter jurisdiction calls into question [the] constitutional and statutory . . . power of the federal court to hear and decide the case before it, it is now well-settled that a lack of subject matter jurisdiction may be asserted by the federal court itself . . . ."); *cf.* FED R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

129. The well-pleaded complaint rule, if applied to the amount-in-controversy requirement, arguably overlaps with the "plaintiff viewpoint" theory first articulated by Armistead Dobie in 1925. For discussion of the plaintiff viewpoint theory, see *infra* notes 194–96 and accompanying text.

130. *See* Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 358 (1961) (Clark, J., dissenting). Chief Justice Warren and Justices Brennan and Stewart joined the dissent. *See id.* at 355.

to read the well-pleaded complaint rule as protecting the interest of the plaintiff in determining the forum in which her suit will proceed has further encouraged some to conclude that the well-pleaded complaint rule also governs diversity jurisdiction under Section 1332(a).[131] The leading Federal Courts casebook, for example, claims that "[t]he Court's rationale [in *Holmes Group*] would seem to apply equally to a diversity case where the sole basis for asserting the requisite amount in controversy rests on the value of a counterclaim"[132] and insists that *Holmes Group* "strongly implies"[133] that a

131. *See, e.g.*, Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193, 212 (2007) ("In a diversity case, the [well-pleaded complaint] rule operates somewhat differently: Whether the case is filed in federal court or removed there, what must appear on the face of the plaintiff's well-pleaded complaint is complete diversity between opposing sides and the requisite amount in controversy."); Wyatt v. Charleston Area Med. Ctr., Inc., 651 F. Supp. 2d 492, 496 (S.D. W. Va. 2009) ("Fraudulent joinder and fraudulent misjoinder are two distinct legal doctrines that provide exceptions to the well-pled complaint rule as it applies to removal based on diversity jurisdiction by allowing courts to disregard the citizenship of certain parties.").

At least one commentator has suggested that the well-pleaded complaint rule and *Holmes Group* provide a rationale for the so-called voluntary-involuntary rule (which arguably bars removal of a diversity case unless the plaintiff *voluntarily* dismissed the defendant whose joinder prevented removal). *See* E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 209–10 & n.145 (2005) (noting that one rationale for the voluntary-involuntary rule is to be "consistent with and supportive of the well-pleaded complaint rule established by the Court in *Louisville & Nashville Railroad Co. v. Mottley*," and that another is adhering to the notion "that the plaintiff is the 'master of the complaint'" (quoting Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831–32 (2002))).

Some courts have agreed that the analogy to the well-pleaded complaint rule is sound. *See, e.g.*, Self v. Gen. Motors Corp., 588 F.2d 655, 658–59 (9th Cir. 1978) (stating that the well-pleaded complaint rule and the voluntary-involuntary rule share "common origins" and concluding that "the determination of whether federal subject-matter jurisdiction exists depends only upon plaintiff's complaint and the context in which it is found").

Others have sought to narrow the voluntary-involuntary rule to cases in which the involuntary dismissal of the nonremovable defendant remains subject to appeal. *See, e.g.*, Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 40 n.2 (2d Cir. 1980) ("The purpose of this distinction is to protect against the possibility that a party might secure a reversal on appeal in state court of the non-diverse party's dismissal, producing renewed lack of complete diversity in the state court action, a result repugnant to the requirement in 28 U.S.C. § 1441 that an action, in order to be removable, be one which could have been brought in federal court in the first instance." (citation omitted)).

The Court has decided at least one case that appears to adopt the master-of-the-complaint rationale for the rule and whose facts cannot be reconciled with a narrower interpretation of the rule. *See* Lathrop, Shea & Henwood Co. v. Interior Constr. & Improvement Co., 215 U.S. 246, 248–51 (1909) (concluding that removal after the dismissal of the nondiverse defendant that had been affirmed on appeal was improper because it was done without the consent of the plaintiff). As discussed *supra* Section I.B.1, the master-of-the-complaint principle should not be conflated with the well-pleaded complaint rule. The policies underlying removal give special force to the plaintiff's right to choose what claims to bring and whom to sue and to the plaintiff's derivative right to lock a suit into state court. *See infra* Section III.A.

132. FALLON ET AL., *supra* note 3, at 1445.

133. *Id.* at 1444. *Hart & Wechsler* stated this view even more strongly shortly after *Holmes Group* was decided, arguing that "the Supreme Court" in *Holmes Group* "appears to have settled the

counterclaim cannot satisfy the amount-in-controversy requirement for diversity jurisdiction. A four-Justice dissent in *Home Depot USA v. Jackson*[134] similarly has suggested that the well-pleaded complaint rule serves the same function in diversity jurisdiction as it does in arising-under jurisdiction:

> The [well-pleaded complaint rule ("WPC rule")] is all about a plaintiff's ability to choose the forum in which its case is heard, by controlling whether there is federal jurisdiction . . . .
>
> Under the WPC rule, we consider only the plaintiff's claims to see if there is federal-question jurisdiction. Whether the defendant raises federal counterclaims (or even federal defenses) is irrelevant. Likewise, in a case involving standard diversity jurisdiction (based on complete diversity under § 1332(a) . . .), it is "the sum demanded . . . in the initial pleading" that determines whether the amount in controversy is large enough. In both kinds of cases, a federal court trying to figure out if it has "original jurisdiction," as required for removal of cases under § 1441(a), must shut its eyes to the defendant's filings. Only the plaintiff's complaint counts. So says the WPC rule.[135]

In concluding that the well-pleaded complaint rule governs diversity jurisdiction, the *Home Depot* dissent failed to distinguish between subject-matter jurisdiction and a *party*'s right to control what claims she asserts and whom she sues. That right is best described as resting on the master-of-the-complaint principle. And under the applicable provisions of the general removal statute, that right further affords the plaintiff a *derivative* procedural right to lock her case into state court. The *Home Depot* dissent is not alone in conflating these important procedural rights with the well-pleaded complaint rule.[136] But doing so rips the well-pleaded complaint rule from the context in which it was developed and ignores the function that it is designed to serve. Specifically, the argument that the well-pleaded complaint rule applies to diversity jurisdiction ignores the fact that the well-pleaded complaint rule is designed to determine *which* pleaded allegations of a federal nature are relevant to a determination of arising-under jurisdiction. As *Holmes Group* explained in distinguishing certain cases that cut against its reasoning: "They

---

question" of the relevance of a counterclaim to the amount in controversy requirement and claiming that "[t]he Court's rationale" in *Holmes Group* "would appear equally applicable in a diversity case where the sole basis for asserting the requisite amount in controversy rests on the amount in dispute with respect to a counterclaim." RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1480 (5th ed. 2003).

134. *See* Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1762–63 (2019) (Alito, J., dissenting). Chief Justice Roberts and Justices Gorsuch and Kavanaugh also joined the dissent. *See id.* at 1751.

135. *Id.* (second alteration in original) (citations omitted) (first quoting 28 U.S.C. § 1446(c)(2); and then quoting 28 U.S.C. § 1441(a)) (citing *Holmes Grp., Inc.*, 535 U.S. at 831).

136. *See infra* Section II.B.2; *supra* notes 130–33 and accompanying text.

do not even mention the well-pleaded-complaint rule *that the statutory phrase 'arising under' invokes*."[137]

Nor does the fact that *Holmes Group* incorporates the master-of-the-complaint principle into the well-pleaded complaint rule undermine the conclusion that the well-pleaded complaint rule has no role to play in diversity jurisdiction. As discussed in detail in the previous Section, it is a mistake to conflate the well-pleaded complaint rule with the master-of-the-complaint principle.[138] That said, it is at least plausible to treat the master-of-the-complaint principle as a component of the well-pleaded complaint rule in the context of arising-under jurisdiction. In that context, *both* the rule and the principle treat as irrelevant certain properly pleaded allegations of a federal nature. But there is no plausible basis for conflating the two in the context of diversity jurisdiction.

Diversity jurisdiction is about the citizenship of the parties, not whether the parties' allegations rest on state or federal law.[139] The Court accordingly has looked to the complete-diversity requirement (rather than the well-

137. *Holmes Grp., Inc.*, 535 U.S. at 834 n.4 (emphasis added). It is true that the Court has held that a jurisdictional statute that did not use the term "arising under" nonetheless required use of the same "jurisdictional test . . . as the one used to decide if a case 'arises under' a federal law." Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. 374, 377 (2016). But that decision involved a statute that granted federal district courts exclusive jurisdiction over suits "brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder." *Id.* at 378–79. (alteration in original) (quoting 15 U.S.C. § 78aa(a)); *see also* Pan Am. Petroleum Corp. v. Superior Ct., 366 U.S. 656, 662 (1961) (applying the well-pleaded complaint rule in construing a federal jurisdictional statute providing "that '[t]he District Courts of the United States . . . shall have exclusive jurisdiction of violations of this [statute] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this [statute] or any rule, regulation, or order thereunder.'" (second and third alteration in original) (quoting Natural Gas Act, Pub. L. No. 75-688, ch. 556, § 22, 52 Stat. 821, 833 (1938) (codified at 15 U.S.C. § 717u (2018)))).The Court's insistence on using the same test to decide whether an alleged violation of a federal statute provides a basis for federal subject-matter jurisdiction reflects a determination that jurisdictional statutes based on an alleged violation of federal law should be treated identically in the absence of any indication that Congress "wished to depart from what we now understand as the 'arising under' standard." *Merrill Lynch*, 578 U.S. at 385. Indeed, the Court's reasoning provides further evidence that the well-pleaded complaint rule is specific to grants of jurisdiction designed specifically to address alleged violations of federal law. As the Court explained:

> This Court has long read the words "arising under" in Article III to extend quite broadly, "to all cases in which a federal question is 'an ingredient' of the action." In the statutory context, however, we opted to give those same words a narrower scope "in the light of [§ 1331's] history[,] the demands of reason and coherence, and the dictates of sound judicial policy." Because the resulting test does not turn on § 1331's text, there is nothing remarkable in its fitting as, or even more, neatly a differently worded statutory provision.

Id. (alterations in original) (first quoting Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 807 (1986); and then quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959)).

138. *See supra* Section I.B.1.

139. 28 U.S.C. § 1332(a).

pleaded complaint rule) in limiting the availability of diversity jurisdiction.[140] The amount-in-controversy requirement, for its part, serves as a separate statutory mechanism for controlling the volume of litigation that works by raising (or lowering) the required amount in controversy in a *civil action* within the meaning of Section 1332(a).[141] The fact that the plaintiff is the master of her complaint in arising-under and diversity actions alike does not make the well-pleaded complaint rule relevant to diversity jurisdiction.

The Court's cases since *Holmes Group* do not suggest otherwise.[142] It is true that the Court's decision in *Exxon Mobil v. Allapattah*[143] might be construed as suggesting that the well-pleaded complaint rule applies to diversity jurisdiction.[144] But *Allapattah* need not and should not be read in this problematic way. The Court in *Allapattah* held that "[w]hen the *well-pleaded complaint* contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question, has original jurisdiction over that claim."[145] But the Court nowhere stated that that the well-pleaded complaint *rule* governs diversity jurisdiction. And the Court had used the phrase "well-pleaded complaint" before simply to refer to complaints that meet the requirements of good

140. Woolley, *supra* note 5, at 589–90 (noting that the complete-diversity requirement restricts the ability of federal courts to protect against bias but that the Court nonetheless was intent on narrowly reading the Congressional grant of diversity jurisdiction). When the complete-diversity requirement led to what the Court viewed as undue restrictions with respect to diversity jurisdiction over corporations, the Court modified the rules governing their citizenship to make it easier for them to sue or be sued in federal court. *See* Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853, 863–70, 873–88 (1943) (tracing the shift from requiring shareholders to be completely diverse from opposing parties to requiring only that the corporation be completely diverse from opposing parties).

141. 28 U.S.C. § 1332(a).

142. In a case that had nothing to do with diversity jurisdiction, the Court in a footnote once described the well-pleaded complaint rule in an ambiguous way that could be read to suggest either (1) that diversity jurisdiction is not governed by the well-pleaded complaint rule or (2) that the well-pleaded complaint rule applies differently in diversity cases. *See* Kircher v. Putnam Funds Tr., 547 U.S. 633, 644 n.12 (2006). The Court wrote: "Section 1442(a) is an exception to the 'well-pleaded complaint' rule, under which (absent diversity) 'a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case "arises under" federal law.'" *Id.* (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 10 (1983)).

143. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549–50 (2005).

144. *See, e.g.*, Tidmarsh, *supra* note 131, at 211–12 & n.130 ("[T]he Supreme Court has recently recited [the well-pleaded complaint rule] in the diversity context . . . ." (citing *Allapattah*, 545 U.S. at 559)); Christopher A. Pinahs, Note, *Diversity Jurisdiction and Injunctive Relief: Using a "Moving-Party Approach" to Value the Amount in Controversy*, 95 MINN. L. REV. 1930, 1944 n.104 (2011) ("The well-pleaded complaint rule is typically applied in federal-question cases, but the Supreme Court recently explained its application in the diversity context." (citation omitted) (citing *Allapattah*, 545 U.S. at 559)).

145. *Allapattah*, 545 U.S. at 559 (emphasis added).

pleading.[146] Good pleading requires, among other things, allegations demonstrating that the pleader may properly invoke the jurisdiction of the federal district court.[147] *Allapattah*'s reference to the "well-pleaded complaint" is fully consistent with the understanding that diversity jurisdiction should be properly pleaded and with the Court's insistence on resolving only the narrow question presented by the case: "The single question before us . . . is whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other plaintiffs do not, presents a 'civil action of which the district courts have original jurisdiction.'"[148] Because *all* the claims in *Allapattah* had been asserted in the complaint, the Court had no occasion to address whether the well-pleaded complaint rule governs diversity jurisdiction.[149]

Home Depot similarly did not decide that the well-pleaded complaint rule governs diversity jurisdiction. Rather, the Court cited Section 1446(c)(2) to argue that removal depends on whether there is diversity jurisdiction over the plaintiff's claim. In so doing, the Court insisted that it was "this statutory context, not 'the policy goals behind the [well-pleaded complaint] rule,'" on which the Court relied to support its holding.[150] The dissent, for its part,

146. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable . . . ."); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 n.20 (1970) ("The purpose of the 1963 amendment [to Rule 56] was to overturn a line of cases, primarily in the Third Circuit, that had held that a party opposing summary judgment could successfully create a dispute as to a material fact asserted in an affidavit by the moving party simply by relying on a contrary allegation in a well-pleaded complaint."). Although these cases refer to well-pleaded complaints, there is no question that the same requirements apply to any pleading asserting a claim for relief. *Cf.* FED. R. CIV. P. (8)(a) (providing that pleading requirements set forth therein apply to any "pleading that states a claim for relief").

147. Rule 8 specifically provides: "A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; . . . ." FED. R. CIV. P. 8(a). For discussion of the allegations a party asserting diversity jurisdiction should make, see 5 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1208, at 144–52 (4th ed. 2021).

148. *Allapattah*, 545 U.S. at 558.

149. *Id.* at 558–59. This Article does not address the separate question of whether supplemental jurisdiction in a diversity case should be available only if the *plaintiff's* claims provide the basis of a civil action under Section 1332(a). Even before enactment of the supplemental jurisdiction statute, the Court had made clear that in diversity cases "a defending party haled into court against his will" should enjoy more latitude to invoke supplemental jurisdiction than a "plaintiff[] who voluntarily chose to bring suit . . . in a federal court." Owen Equip. & Erection Co. v. Kroger, Adm'x, 437 U.S. 365, 376 (1978). Congress wrote this policy into the supplemental jurisdiction statute. *See* 28 U.S.C. § 1367(b) (limiting the ability of plaintiffs to rely on supplemental jurisdiction in diversity cases). Allowing a defendant's counterclaim to provide the basis for supplemental jurisdiction arguably would undermine this policy. Thus, it could be argued that a civil action initiated by a plaintiff must satisfy the requirements of diversity jurisdiction before a basis exists for the exercise of supplemental jurisdiction. This possibility, however, has no bearing on whether a counterclaim may provide a basis for the exercise of diversity jurisdiction outside the context of supplemental jurisdiction.

150. Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1748 (2019) (alteration in original).

partially quoted Section 1446(c)(2) to support the proposition that diversity jurisdiction is governed by the well-pleaded complaint rule.[151] But for the reasons discussed in Part III, it is a mistake to read that provision as evidence that the well-pleaded complaint rule governs diversity jurisdiction. The provision instead reflects the fact that removal *procedure* embodies the policy that the plaintiff (as the master of her complaint) may decide whether a federal forum is available for the adjudication of the civil action she initiates.[152]

B. COUNTERCLAIMS AND THE COMMON-LAW SCOPE OF THE CIVIL ACTION

Section 1332(a) grants federal district courts original jurisdiction over *civil actions* in which the diversity-of-citizenship and amount-in-controversy requirements have been satisfied.[153] And because Section 1332(a) does not invoke the well-pleaded complaint rule, whether these jurisdictional requirements are met depends on the civil action *as a whole*, not simply those parts of the civil action the well-pleaded complaint rule deems jurisdictionally relevant.

---

151. *Id.* at 1762–63 (Alito, J., dissenting). Removal practice—as codified in part by Section 1446(c)(2)—is harder to reconcile with the well-pleaded complaint rule than the dissent's partial quotation would suggest. Section 1446(c)(2) expressly allows a defendant to state an amount in controversy in her notice of removal if the state in which suit was brought "permits recovery of damages in excess of the amount demanded." 28 U.S.C. § 1446(c)(2)(A)(ii). Similarly, when nonmonetary relief is sought, Section 1446(c)(2) provides that the notice of removal may state an amount in controversy with respect to such relief. *Id.* § 1446(c)(2)(A)(i). And even before Section 1446(c)(2) was enacted, courts did not limit their inquiry on removal to whether the plaintiff had pleaded in her complaint an amount in controversy that gave the federal court original jurisdiction over the claims asserted in the plaintiff's complaint. Courts, for example, sometimes looked to allegations in the *defendant*'s notice of removal to provide the requisite allegation that the plaintiff's claims satisfied the amount-in-controversy requirement. *See* 14C WRIGHT ET AL., *supra* note 49, § 3725.1, at 423–25. These provisions might nonetheless be understood as an attempt to determine whether a well-pleaded complaint originally filed in federal district court would have alleged the requisite amount in controversy. *Cf. id.* § 3734, at 717 ("There are many situations in which the requisite jurisdictional facts do not appear on the face of the state-court complaint, and a defendant who could not establish federal jurisdiction by including in the notice of removal matters missing from the complaint might be deprived of the statutory right to remove.").

152. *See infra* Section.III.A.1.

153. 28 U.S.C. § 1332(a). The Court in *Snyder v. Harris* stated that its application of the amount-in-controversy requirement rested on its "interpretation of the statutory phrase 'matter in controversy.'" Snyder v. Harris, 394 U.S. 332, 336 (1969). But the scope of the "matter in controversy" is indistinguishable from the scope of the civil action under Section 1332(a). The statute, after all, grants original jurisdiction, not over the "matter in controversy" but over a "civil action[] where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a). *Cf. Kroger*, 437 U.S. at 374 (explaining that complete diversity would have been lacking because "in the plain language of the statute, the 'matter in controversy' could not be 'between . . . citizens of different States'" (alteration in original) (quoting 28 U.S.C. § 1332(a))). This issue is discussed in greater detail in Woolley, *supra* note 5, at 579–80, 585–86.

1. The Amount-in-Controversy Requirement as Measured Through the Common-Law Scope of a Civil Action

As explained at length in a separate article,[154] a civil action within the meaning of Section 1332(a) is properly understood to have the scope of a suit at common law.[155] And that scope is defined by the rules of *party* joinder at common law.[156] The principle that the scope of a "civil action" within the meaning of Section 1332(a) is defined by the rules of party joinder at common law had its origins in the Court's construction of the Judiciary Act of 1789.[157] Specifically, the Marshall Court construed *both* the amount-in-controversy and diversity-of citizenship requirements in section eleven of the Judiciary Act of 1789 in the light of the rules of party joinder at common law even when adjudicating suits—such as suits in equity—brought under rules of party joinder more liberal than those at common law.[158]

The common law authorized the joinder of more than one plaintiff in a suit only if the plaintiffs shared a joint right and authorized the joinder of more than one defendant only if the defendants shared a joint obligation to the plaintiff or plaintiffs.[159] Thus, in suits brought under more liberal rules of party joinder, "parties on the same side of the 'v.' who had distinct—as opposed to joint—interests were treated as if they were part of *separate suits*

---

154. *See* Woolley, *supra* note 5, at 573–621.

155. *Id.* As explained in that article:

> The term "suit of a civil nature, in law and equity" [generally] was used to describe the original jurisdiction of the federal circuit and district courts from the Judiciary Act of 1789 to the 1948 Revision of the Judicial Code. The 1948 Revision substituted the term "civil action" for "suit of a civil nature in law and equity." But there is no indication in the legislative history of the 1948 Revision that Congress or the Revisers sought to change the scope of the relevant unit for determining the subject-matter jurisdiction of the federal courts for purposes of Section 1332(a). Instead, the change was a cosmetic one intended to "conform to Rule 2 of the Federal Rules of Civil Procedure." Revisers' Notes to 28 U.S.C. § 1332 (1948). Nor have the Court's cases suggested that the Revisers' attempt to modernize the language of the jurisdictional statutes was intended to or did have any substantive effect on the subject matter jurisdiction of the federal courts. In fact, the opposite is true. *See* Finley v. United States, 490 U.S. 545, 555 (1989) (noting that the insertion in 1948 of "civil action" in the provisions of Title 28 addressing the jurisdiction of the federal district courts "is more naturally understood as stylistic").

Id. at 614 n.191

156. Woolley, *supra* note 5, at 573–621.

157. *Id.* at 576–609.

158. *See id.* at 580–81, 587–603.

159. *See* Jeffrey L. Rensberger, *The Amount in Controversy: Understanding the Rules of Aggregation*, 26 ARIZ. ST. L.J. 925, 939–40 (1994) ("It was impossible to have a common law case in which one might seek to aggregate several and distinct claims by or against multiple parties because the rules of joinder at common law forbade joining such claims in the first place."); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 485, at 535 (4th ed. 1846) ("Now, in a suit at Common Law, . . . no persons can be made parties, except those, whose interest is joint . . . ."); Woolley, *supra* note 5, at 577 n.6.

for" purposes of analyzing *both* the diversity-of-citizenship and the amount-in-controversy requirements.[160]

The settled rules governing the amount-in-controversy requirement are the product of this historical understanding.[161] And the text of Section 1332(a) provides no basis for treating the scope of a civil action differently for purposes of determining whether the diversity-of-citizenship requirement is met.[162] The Court's modern cases, for their part, are consistent with the historical understanding of the complete-diversity requirement elaborated by the Marshall Court.[163] Thus, the common-law rules of party joinder continue to govern the scope of a civil action for purposes of determining whether both the diversity-of-citizenship and amount-in-controversy requirements have been satisfied under Section 1332(a).[164]

Common-law procedure also imposed limits on the number and kind of demands that could be asserted in a common-law suit.[165] But there is no evidence that common-law limits on demands had any bearing on the definition of a suit for purposes of Section 1332(a). The case law provides no explanation for the divergent treatment of the rules governing party joinder and those governing the assertion of claims between a plaintiff and defendant. The best explanation rests in how a suit was defined at the time the Judiciary Act of 1789 was enacted. As Mark Moller has noted, "eighteenth-century treatises and courts defined a 'suit' as an association, or relation, that subsisted

160. *See* Woolley, *supra* note 5, at 587.

161. *Id.* at 578–85. When Congress granted federal courts general statutory arising-under jurisdiction in 1875, the common-law scope of the civil action became applicable, not just to diversity jurisdiction, but to general federal question jurisdiction. *See* Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470. Once the amount-in-controversy requirement was repealed for general arising-under jurisdiction, however, it became unnecessary to consider whether a civil action arising under the Constitution, laws, or treaties of the United States involved joint rights or obligations. *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369. Those considerations may determine whether the amount-in-controversy or complete-diversity requirements are satisfied. But they have no bearing on the arising-under requirement.

162. Woolley, *supra* note 5, at 585–86.

163. *Id.* at 615–21.

164. Congress has expanded the scope of the relevant civil action under certain jurisdictional statutes. *See, e.g.*, *infra* note 167 and accompanying text (discussing the scope of a civil action for purposes of supplemental jurisdiction). The general removal statute also relies on an expanded definition of the "civil action" to implement a policy against splitting a suit first brought in state court between state and federal courts in the absence of express Congressional authorization. *See infra* notes 218–20 and accompanying text.

165. *See* ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 111 (1952) ("According to the rule of the common law, joinder of causes of action was limited to the case where all fell within the same form of action, with the two exceptions, accounted for historically, that detinue might be joined with debt and trover with trespass on the case.").

only 'between' the 'parties to the suit.'"[166] Because this definition assumes a bipolar controversy, claims between co-parties should be treated as if asserted in a separate civil action unless included in the expanded civil action authorized by the supplemental jurisdiction statute.[167] But with that exception, common-law limits on *claim* joinder have no bearing on the scope of a "suit." That is why a plaintiff, for example, may aggregate unrelated claims against a single defendant to meet the amount-in-controversy requirement.[168]

The same principle applies to counterclaims asserted by the defendant against the plaintiff. A defendant's ability to assert what would now be considered a counterclaim was severely limited at common law.[169] Indeed, it

166. Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*, 51 WM. & MARY L. REV. 1113, 1136 (2009); *see also id.* ("If the 'suit' were matter, the 'party to the suit' was an atom—the suit's component piece or building block.").

167. In enacting Section 1367, Congress made clear that the "civil action" over which jurisdiction is authorized by that statute may *include* claims that do not provide a basis for the exercise of federal question or diversity jurisdiction. *See* 28 U.S.C. § 1367(a) (providing with specified exceptions that "*in* any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." (emphasis added)). The fact that a suit by one co-defendant against another in equity might be viewed as a separate suit did not necessarily mean that diversity jurisdiction over the suit by the co-defendant was required. *See* McManamon, *supra* note 30, at 904–05 (noting that historically a cross suit filed by one co-defendant against another in equity could be deemed part of the same case as the original suit by the plaintiff against the co-defendants for purposes of ancillary jurisdiction); *cf.* MILLAR, *supra* note 165, at 139 ("The right of a defendant to advance against a co-defendant a claim concerning the subject matter of the suit was something wholly unknown to the common-law system, but was recognized in equity . . . .").

168. The rule that a plaintiff may aggregate unrelated claims against a single defendant for the purpose of satisfying the amount-in-controversy requirement is well-settled. *See* Steven S. Gensler, *Diversity Class Actions, Common Relief, and the Rule of Individual Valuation*, 82 OR. L. REV. 295, 306–07 (2003) ("It is well-settled that, when a single plaintiff joins claims against a single defendant under Rule 18(a), the aggregate value of the joined claims determines whether the amount-in-controversy requirement is satisfied, regardless of whether the claims are transactionally related.").

169. Professor Millar has argued that "[s]omething in the nature of a claim for affirmative relief advanced by the defendant may be seen in the common-law action of replevin where he set up a right to the chattel in suit." MILLAR, *supra* note 165, at 123. The origins of the modern counterclaim must otherwise be traced to the doctrine of setoff. *See id.* The common-law doctrine of recoupment "was purely defensive in character." 6 WRIGHT ET AL., *supra* note 128, §1401. Recoupment permitted a defendant "to show that the plaintiff had not sustained damages to the extent alleged, and thus to reduce, or altogether to defeat, the plaintiff's recovery." THOMAS W. WATERMAN, TREATISE ON THE LAW OF SET-OFF, RECOUPMENT, AND COUNTER CLAIM § 456, at 477 (2d ed. 1872). A set-off, by contrast, referred to "a counter demand which the defendant [held] against the plaintiff arising out of a transaction extrinsic to the plaintiff's cause of action." *Id.* §§ 1–2, at 1, 3 ("Set-off signifies the substraction or taking away of one demand from another opposite or cross demand, so as to extinguish the smaller demand and reduce the greater by the amount of the less[er]; or, if the opposite demands are equal, to extin[g]uish both."). And as the Waterman treatise further explains:

was statute law—rather than the common law—that authorized defendants to assert "setoffs" in suits at common law.[170] But a defendant's setoff nonetheless was considered part of the "suit" for purposes of determining the amount in controversy under the Judiciary Act of 1789.

As the Court explained in *Ryan v. Bindley*, a setoff pleaded by the defendant "*may . . . change the original character of the suit*" with respect to the amount in controversy.[171] While that 1863 case involved the Court's appellate jurisdiction,[172] its reasoning on this point applies equally to original jurisdiction:

> The allegation in the declaration [pleading an amount in controversy of $1,000] must be taken, generally, as fixing the amount or value for the purposes of jurisdiction. But the subsequent pleadings may so change the original character of the suit as to involve an amount or value in excess of two thousand dollars . . . .
>
> In this case Ryan interposed a notice of set-off, and insisted that Bindley owed him four thousand dollars, for goods sold and money lent, which he claimed the right to set off against Bindley's demand, and to recover against Bindley a judgment for the excess. By the laws of Ohio such a defence is permitted, and if the defendant succeeds in proving his set-off, and it is larger than the plaintiff's claim, he is entitled to a judgment for the excess. . . . *The plea in this case was therefore proper, and after it was interposed the matter in dispute rightfully exceeded the sum of two thousand dollars,* exclusive of costs, and as the plaintiff had judgment, it is plain that the defendant had the right to sue out his writ of error.[173]

> [At common] law, where there were mutual cross demands unconnected with each other, the defendant was not permitted to show that the plaintiff was indebted to him in a larger sum than that sought to be recovered, but must bring a separate suit against the other for the debt he claimed, or resort to a court of equity to have his claim set off or discounted from his adversary's judgment.

Id. §10, at 11–12.

170. WATERMAN, *supra* note 169, §10, at 11 ("[T]he remedy by set-off was unknown at common law, but is a creature of the statute."). Some of these statutes were in effect well before the Judiciary Act of 1789. *Id.* §10, at 11–12 n.* ("It seems that the doctrine of set-off was introduced into the colony of New York as early as September 4th, 1714."); William H. Loyd, *The Development of Set-off*, 64 U. PA. L. REV. 541, 553–62 (1916) (discussing early American statutes beginning with a 1645 Virginia statute).

171. Ryan v. Bindley, 68 U.S. (1 Wall.) 66, 67–68 (1863) (emphasis added).

172. *Id.* at 67.

173. *Id.* at 67–68 (emphasis added). The Court in *Hilton v. Dickinson* later insisted that what mattered for purposes of its appellate jurisdiction was the amount in controversy at the time of appeal, not the amount in controversy in the circuit court:

> [W]e have jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counter-claim for enough to give us jurisdiction,

The Court's more recent cases similarly are consistent with the understanding that the amount-in-controversy requirement may be satisfied through either the plaintiff's claim or the defendant's counterclaim. In *Mackay v. Uinta Development Co.*, for example, the Court recognized that a counterclaim that exceeds the amount-in-controversy requirement permits a trial court to exercise jurisdiction over a *suit* by diverse parties.[174] In that 1913 case, a diverse defendant asserting a counterclaim in excess of the amount-in-controversy requirement removed the suit to federal court even though the plaintiff's claim did not satisfy the amount-in-controversy requirement.[175] The Court had no difficulty concluding that there was diversity jurisdiction over the suit: "[W]hile the parties could not give jurisdiction by consent, there was the requisite amount and the diversity of citizenship necessary to give the United States Circuit Court jurisdiction of the cause."[176]

More recently, the Court in *Horton v. Liberty Mutual Insurance Co.*[177] similarly looked to the value of the counterclaim in deciding that the amount-in-controversy requirement had been satisfied. In that 1961 case, the plaintiff insurer filed suit against the defendant employee to set aside a $1,050 workers compensation award.[178] But the plaintiff insurer also claimed that Mr. Horton, the employee, would seek to recover the full $14,035 he had sought against the insurer before the workers compensation board.[179] Mr. Horton then filed a parallel suit in state court seeking to set aside the award and recover $14,035.[180]

> he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed.

Hilton v. Dickinson, 108 U.S. 165, 175 (1883). The Court in *Hilton* read *Ryan* consistently with that rule:

> The plaintiff [in *Ryan*] recovered a judgment for $575.85, and the defendant brought a writ of error, upon which jurisdiction was sustained because the defendant sought to defeat the judgment against him altogether, and to recover a judgment in his own favor and against the plaintiff for at least $2,000, and possibly $4,000. Thus the matter in dispute in this court exceeded $2,000.

Id. at 173. But the time at which the amount in controversy should be measured for purposes of appellate jurisdiction has no bearing on the soundness of *Ryan*'s conclusion that the claim asserted by the defendant was part of the amount in controversy in the suit in circuit court.

174. Mackay v. Uinta Dev. Co., 229 U.S. 173, 175 (1913); *cf.* Am. Sheet & Tin Plate Co. v. Winzeler, 227 F. 321, 324 (N.D. Ohio 1915) ("It is *established, of course,* that, when the jurisdictional amount is in question, the tendering of a counterclaim in an amount which in itself, or added to the amount claimed in the petition, makes up a sum equal to the amount necessary to the jurisdiction of this court, jurisdiction is established, whatever may be the state of the plaintiff's complaint." (emphasis added)).

175. *Mackay*, 229 U.S. at 173–74.

176. *Id.* at 176. For further discussion of the *Mackay* decision, see *infra* notes 234–41 and accompanying text.

177. Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353–55 (1961).

178. *Id.* at 349.

179. *Id.* at 349–50.

180. *Id.* at 350.

And when he answered the federal suit, Mr. Horton both alleged a lack of subject-matter jurisdiction and filed a conditional counterclaim in federal district court against the company for $14,035, in the event he was unsuccessful in obtaining a dismissal.[181] Focusing on the fact that Mr. Horton continued to seek the full $14,035, the Court concluded that the amount-in-controversy requirement had been satisfied.[182]

Had the Court believed that the well-pleaded complaint rule governed the amount-in-controversy requirement, it would have ignored the fact that Mr. Horton in his counterclaim sought an amount in excess of the amount-in-controversy requirement. Both the counterclaim—and the company's anticipation of the counterclaim in its complaint—would have been irrelevant. Indeed, the dissent vigorously argued that the Court's decision was inconsistent with the well-pleaded complaint rule.[183]

Many commentators have sought to limit *Horton*'s reach.[184] Kevin Clermont suggests, for example, that *Horton* might be understood as limited

181. *Id.*

182. *Id.* at 352–54.

183. *Id.* at 359 (Clark, J., dissenting) ("[W]e have never permitted a District Court to acquire jurisdiction under 28 U.S.C. § 1331(a) where the plaintiff does not allege a federal question but claims that the defendant will raise such an issue. . . . To allow such a procedure in diversity cases is to unbalance the entire jurisdictional pattern." (footnote omitted)).

The dissent did not cite *Saint Paul Mercury Indemnity Co. v. Red Cab Company*, 303 U.S. 283 (1938). The Court in that 1938 case wrote: "[U]nless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *Id.* 288–89 (footnotes omitted). The focus of the "legal certainty test" on the *plaintiff*'s allegations suggests that the test might be understood as an application of the well-pleaded complaint rule. However, the presumption that the plaintiff's allegations with respect to the amount in controversy control unless to a legal certainty the claim is really for less than the required jurisdictional amount is better understood as reflecting the measure of autonomy the master-of-the-complaint principle grants a party in identifying the value of her claim. *See Horton*, 367 U.S. at 353–54 (applying the legal certainty test to support a finding that the amount-in-controversy requirement was met when the plaintiff alleged an amount in controversy based in part on the defendant's anticipated counterclaim).

184. *Hart & Wechsler*, for example, has suggested as an alternative possibility that *Horton* might be understood as a disguised declaratory judgment action in which the insurer essentially sought a declaration of nonliability and the answer containing the counterclaim was the relevant pleading. FALLON ET AL., *supra* note 133, at 1481 ("Can the Horton case be explained as simply an example of the principle . . . governing actions for a declaratory judgment?"); *see id.* at 1480 ("The potential monetary value of the right, or amount of the liability, in such a coercive action, is normally considered to be the amount in controversy in the declaratory suit." (quoting *Developments in the Law: Declaratory Judgments—1941–1949*, 62 HARV. L. REV. 787, 801 (1949))). But the dissent rejected the view that the suit was properly treated as one for a declaratory judgment. *Horton*, 367 U.S. at 359 (Clark, J., dissenting) ("The complaint filed in the District Court was not styled a declaratory judgment action, and it did not seek such relief. More importantly, respondent has succeeded in avoiding the element of discretion permitted by the statute."). And although the dissent accused the majority of permitting the insurance company "to turn its suit into an action for a declaratory judgment," the Court's opinion provides no basis for concluding that the majority so understood its decision. *Id.* For a survey of the ways in which commentators have

to common-law compulsory counterclaims.[185] A common-law compulsory counterclaim arises when "the 'relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.'"[186] Professor Clermont argues that "common-law compulsory counterclaims like the one in *Horton* help to define the amount of the main claim and so should receive consideration, not as a counterclaim but as an aid in measuring the main claim."[187]

Jay Tidmarsh relatedly suggests that *Horton*

> is best explained by principles of res judicata; if the carrier succeeded in setting aside the Board's $1,050 award, it might also (depending on the grounds the federal court used to decide the case) be able to use the necessary factual findings in the judgment as direct estoppel against the employee in the $14,035 case in state court.[188]

For that reason, Professor Tidmarsh claims "*Horton* is a rare case in which the legal value of the judgment to the plaintiff ($14,035) was greater than the face value of the complaint ($1,050) — and that fact was true regardless of whether the employee filed a federal counterclaim."[189]

Professors Clermont and Tidmarsh identify matters that can properly be considered in deciding the value of a *claim*.[190] But the *Horton* opinion—fairly

---

sought to diminish the significance of *Horton*, see 14AA WRIGHT ET AL., *supra* note 62, § 3706, at 734–40.

185. *See* Kevin M. Clermont, *Common-Law Compulsory Counterclaim Rule: Creating Effective and Elegant Res Judicata Doctrine*, 79 NOTRE DAME L. REV. 1745, 1754 n.43 (2004).

186. *Id.* at 1751–52 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 22 (AM. L. INST. 1982)).

187. *Id.* at 1754 n.43.

188. Tidmarsh, *supra* note 131, at 213 n.136.

189. *Id.*

190. The rule suggested by Professors Clermont and Tidmarsh may be dispositive when a claim necessary to satisfying the amount in controversy is not part of the civil action in question. The Court's decision in *Kirby v. American Soda Fountain Company*, 194 U.S. 141 (1904), provides a useful illustration. *Kirby* concluded that the value of the claim the plaintiff had voluntarily dismissed could be considered in deciding whether the counterclaim satisfied the amount-in-controversy requirement because a decision on the counterclaim would also resolve whether the plaintiff would be entitled to relief in a separate action:

> [T]he Circuit Court in its decree referred to the plaintiff's bill and the relief thereby sought, in connection with the cross bill, and, we think, was justified in doing this as the record had not passed from under its control, and *it was apparent that the decree on the cross bill disposed of the contention of plaintiff in respect of the cancellation of the contract.* Taking the bill, defendant's answer and the cross bill together, the jurisdictional amount was made out.

Kirby v. Am. Soda Fountain Co., 194 U.S. 141, 145 (1904) (emphasis added). The Court in *Kirby* also separately relied on the principle that once the plaintiff had filed an amended petition in excess of $2,000, and the suit was removed to circuit court, federal subject-matter jurisdiction attached, and the later dismissal of the petition could not affect jurisdiction over the cross-complaint. *Id.* at 145–46.

read—cannot be so limited. The majority opinion focused on the size of the "*controversy*"[191] between the parties. As the Court explained: "[T]he record . . . shows . . . that [defendant] claims more than $10,000 from the [plaintiff] and the [plaintiff] denies it should have to pay [defendant] anything at all. No matter which party brings it into court, the controversy remains the same . . . ."[192] The Court made no reference to the considerations that Professors Clermont and Tidmarsh urge as the basis for understanding *Horton* even though the defendant had expressly argued that the potential res judicata effect of the judgment should have no bearing on the Court's decision.[193]

Efforts to read *Horton* narrowly presuppose, of course, that counterclaims should rarely, if ever, be considered in determining whether a civil action satisfies the amount-in-controversy requirement. They reflect a strain of thought that finds support in the highly influential "plaintiff viewpoint" theory first articulated by Armistead Dobie in 1925.[194] The theory rests on the proposition that "[*t*]*he amount in controversy in the United States District Court is always to be determined by the value to the plaintiff of the right which he in good faith asserts in his pleading that sets forth the operative facts which constitute his cause of action.*"[195] Professor Dobie accordingly argued that counterclaims were entitled to virtually no consideration in calculating the amount in controversy:

---

191. Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 354 (1961) (emphasis added); *cf. supra* note 153 (explaining that "the scope of the 'matter in controversy' is indistinguishable from the scope of the civil action under Section 1332(a)").

192. *Horton*, 357 U.S. at 354; *see also id.* at 353 ("It would contradict the whole record as well as the allegations of the complaint to say that this dispute involves only $1,050.").

193. Brief for Petitioner, Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961) (No. 478), 1961 WL 101791, at *20–21 ("A plaintiff should not be able to add the value of these potential counterclaims simply because the principle of *res judicata* would bar defendant from later asserting them if they are not raised in the instant suit.").

194. *See* Armistead M. Dobie, *Jurisdictional Amount in the United States District Court*, 38 HARV. L. REV. 733, 734, 744–45 (1924–1925).

195. *Id.* at 734. The theory, if adopted in full, is in some ways more restrictive than the well-pleaded complaint rule. The latter presumably looks exclusively to the value of the *claim* alleged by the plaintiff in his complaint (and when read figuratively, to the separate value of the counterclaim alleged by the defendant/counterclaim plaintiff). But the plaintiff viewpoint rule further posits that only the value to the plaintiff rather than the cost to the defendant matters. Although the value to the plaintiff and the cost to the defendant will be the same in an ordinary damages action, that may not be the case when injunctive relief is sought. *See, e.g.*, Glenwood Light & Water Co. v. Mut. Light, Heat & Power Co., 239 U.S. 121, 123–24 (1915) (noting that the value to the plaintiff of requiring the defendant to move certain electrical poles and wires was higher than was the cost to the defendant of moving those items). For that reason, the viewpoint from which the amount in controversy is calculated may be crucial. But because the value to the plaintiff and the cost to the defendant represent different approaches to placing a dollar amount on the *same claim*, neither approach is necessarily inconsistent with the well-pleaded complaint rule. In any event, "[a]lthough the cases are not uniform, the general tendency is to find jurisdiction if the amount in controversy is satisfied when viewed from *either* the plaintiff's or the defendant's perspective." HAZARD ET AL., *supra* note 109, at 267–68 (citing 14AA WRIGHT ET AL., *supra* note 62, § 3703). "Neither Dean Dobie nor those who have accepted his view have pointed to any Supreme Court decision rejecting subject matter jurisdiction when the statutorily prescribed

> [T]he counterclaim is no part of the right asserted by the plaintiff, and should not be considered. Its function should be strictly limited to the rôle of an evidential fact which might, in rare cases, prove the plaintiff's lack of good faith in asserting a claim in excess of the jurisdictional amount.[196]

Professor Dobie explained that a counterclaim should not be considered because "[t]he defendant can assert his counterclaim in a separate suit"[197] and "[t]he counterclaim . . . bears no essential relation to the right claimed by the plaintiff."[198] But while the quoted observations undoubtedly are true when the plaintiff's claim and the defendant's counterclaim are unrelated, history, text, and Supreme Court precedent indicate that the amount in controversy is measured by the civil action *as a whole*, not by whether the claim and counterclaim could be pursued in separate civil actions.[199]

Professor Dobie also suggested that a court should dismiss a plaintiff's claim for less than the amount in controversy "on its own motion," and claimed that "[t]o permit the defendant, by his own affirmative act, to confer the jurisdiction thus lacking, would seem to be opposed to the whole spirit of the federal judicial system."[200] But as noted earlier, the law has been clear since at least 1833 that defects in diversity jurisdiction may be cured, and there is no reason in principle why a defendant should be unable to cure a jurisdictional defect. The rule that a federal *defense* cannot cure a defect in

---

amount in controversy was satisfied from the defendant's viewpoint, but not from the plaintiff's." 14AA WRIGHT ET AL., *supra* note 62, § 3703, at 552.

196. Dobie, *supra* note 194, at 745.

197. *Id.* at 746.

198. *Id.* at 746–47.

199. *See supra* notes 153–82, 190–92 and accompanying text. Professor Dobie discussed four Supreme Court cases that he argued had been erroneously cited for the proposition that a counterclaim may be considered in determining the amount in controversy. Dobie, *supra* note 194, at 746–49 (first citing Kirby v. Am. Soda Fountain Co., 194 U.S. 141 (1904); then citing Merchants Heat & Light Co. v. J.B. Clow & Sons, 204 U.S. 286 (1907); then citing Mackay v. Uinta Dev. Co., 229 U.S. 173 (1913); and then citing Yankaus v. Feltenstein, 244 U.S. 127 (1917)). He correctly asserts that reliance on *Merchants Heat* and *Yankaus* is mistaken. *See id.* at 748–49. He is similarly correct that *Kirby* can be distinguished. *See id.* at 747–48; *cf. supra* note 190 (discussing *Kirby*). But his discussion of *Mackay* is wholly unpersuasive because he failed to distinguish between diversity jurisdiction and removal procedure. *See* Dobie, *supra* note 194, at 749 & n.53 ("Mr. Justice Lamar, holding in favor of the jurisdiction by waiver, was careful to say that the decision made it unnecessary to consider whether 'a nonresident defendant, sued in a state court for $1950, could, by filing a counterclaim for $3000, acquire the right to remove the case to the United States court.'" (footnote omitted) (quoting *Mackay*, 229 U.S. at 175–76)). The lower court cases that Professor Dobie cites as standing for the proposition that a counterclaim may not be considered in measuring the amount in controversy, all involve removal. *See id.* at 749–51. As discussed below, those cases correctly state the rule imposed by the general removal statute, see *infra* Section III.A, not by Section 1332(a).

200. Dobie, *supra* note 194, at 746 (footnote omitted).

arising-under jurisdiction is an exception rooted in policy considerations applicable only to arising-under jurisdiction.[201]

2. The Case Law in the Lower Courts

Three federal circuits have concluded since *Horton* was decided that a counterclaim may satisfy the amount-in-controversy requirement in a civil action.[202] Recognition that a civil action within the meaning of Section 1332(a) may include both demands and counterdemands makes clear that these cases correctly conclude that a counterclaim may supply the requisite amount in controversy. The history laid out in this Article, however, suggests these cases may be too restrictive in at least one respect. All the modern circuit court cases that recognize that a counterclaim may be considered in calculating the amount-in-controversy requirement might be read to require that the counterclaim be compulsory.[203] Indeed, *Federal Practice and Procedure* more broadly notes that "most federal courts" insist that that an unrelated counterclaim independently satisfy the amount-in-controversy requirement even if the plaintiff's claim has done so.[204]

The treatise suggests that the insistence that a claim and a permissive counterclaim *each* independently satisfy the amount-in-controversy requirement is evidence that "most federal courts have construed the basic subject matter jurisdiction statutes literally."[205] This suggestion presumably rests on the conclusion that the plaintiff's claims and a defendant's permissive counterclaim are separate controversies within the meaning of Section 1332(a). But that

---

201. *See supra* notes 122–26 and accompanying text.

202. *See* Spectacor Mgmt. Grp. v. Brown, 131 F.3d 120, 121 (3d Cir. 1997) ("We hold that where, as here, a defendant elects not to file a motion to dismiss for lack of jurisdiction, but answers a complaint by asserting a compulsory counterclaim, the amount of that counterclaim may be considered by the court in determining if the amount in controversy exceeds the statutory requirement for diversity jurisdiction." (footnote omitted)); Geoffrey E. Macpherson, Ltd. v. Brinecell, Inc., 98 F.3d 1241, 1245 & n.2 (10th Cir. 1996) (noting "that a defendant's compulsory counterclaim which exceeded the jurisdictional amount [is] sufficient to invoke the jurisdiction of the district court even though the plaintiff's complaint [does] not aver the required jurisdictional amount" and relying on that approach as an alternative basis of finding subject-matter jurisdiction (citing Fenton v. Freedman, 748 F.2d 1358, 1359 (9th Cir. 1984))); *Fenton*, 748 F.2d at 1359 ("[A] counterclaim that exceed[s] the necessary amount in controversy [is] sufficient to bring the entire case within the jurisdiction of the district court, 'regardless of the lack of jurisdictional averments in the bill of complaint.'" (quoting Roberts Mining & Milling Co. v. Schrader, 95 F.2d 522, 524 (9th Cir. 1938))).

203. *See supra* note 202 and accompanying text. Although *Fenton* arguably does not require that the counterclaim be compulsory, the Ninth Circuit emphasized that the counterclaims in that case were compulsory, and the precedent on which it relied involved what would be compulsory counterclaims under current law. *See Fenton*, 748 F.2d at 1359.

204. 14AA WRIGHT ET. AL., *supra* note 62, § 3706, at 725 ("[A] permissive counterclaim asserting a diversity of citizenship claim that fails to involve the applicable amount in controversy should be dismissed because it does not independently satisfy the statutory more-than $75,000 requirement." (citing various cases where the court dismissed a counterclaim for the reason stated)).

205. *Id.*

conclusion cannot withstand scrutiny. To begin with, there is no sound basis for the conclusion that unrelated claims cannot be part of the same matter in controversy. Indeed, the well-settled rule that a plaintiff may aggregate unrelated claims against a defendant to satisfy the amount-in-controversy requirement indicates otherwise.[206] Moreover, as discussed above, the matter in controversy historically included *all* claims properly brought in a suit defined by the rules of party joinder at common law. And whether a counterclaim is permissive or compulsory has nothing to do with the rules of party joinder. Thus, Section 1332(a) provides no basis for treating permissive counterclaims differently from compulsory counterclaims in determining whether a civil action satisfies the amount-in-controversy requirement.[207]

Some of the circuit court cases that endorse looking to a compulsory counterclaim to determine whether the civil action initiated by the plaintiff satisfies the amount-in-controversy requirement also include language suggesting that a counterclaim must be able to satisfy the requirement *by itself*.[208] But what

206. *See supra* note 168 and accompanying text. *Federal Practice and Procedure* notes that "some case law" authorizes "the aggregation of counterclaims, whether they all be permissive or be both permissive and compulsory." 14AA WRIGHT ET. AL., *supra* note 62, § 3706, at 729. The treatise concludes that "[t]hese decisions appear sound because the position of a permissive counterclaimant is closely analogous to that of an original plaintiff." *Id.*

207. At least one federal district court relied on its understanding of Supreme Court precedent in concluding that there was no diversity jurisdiction over a permissive counterclaim that did not independently satisfy the amount-in-controversy requirement. *See* Curtis v. J.E. Caldwell & Co., 86 F.R.D. 454, 457 (E.D. Pa. 1980); *see also* Garcia v. Madison River Commc'ns, L.L.C., No. CIV.A. 02-0015, 2002 WL 1798774, at *4 & n.3 (E.D. La. Aug. 5, 2002) (relying in part on *Curtis* to hold that diversity jurisdiction was lacking over the counterclaim because the counterclaim was below the required amount in controversy). The federal district court in *Curtis* argued that "[i]n *Moore v. New York Cotton Exchange*, [270 U.S. 593, 609 (1926)], the Supreme Court left open the question whether permissive counterclaims require an independent basis of jurisdiction." 86 F.R.D. at 457. But *Moore* has no bearing on whether a permissive counterclaim must independently satisfy the amount-in-controversy requirement. In *Moore*, the alleged jurisdictional defect with respect to the counterclaim was the lack of diversity of citizenship because all of the parties were citizens of New York. Moore v. N.Y. Cotton Exch., 296 F. 61, 66 (2d Cir. 1923). And the case cited by the Supreme Court in *Moore* for the proposition that a permissive counterclaim requires an independent basis of jurisdiction did not discuss the amount-in-controversy requirement. *Moore*, 270 U.S. at 609 (citing Cleveland Eng'g Co. v. Galion Dynamic Motor Truck Co., 243 F. 405, 407 (N.D. Ohio 1917)); *see Cleveland Eng'g Co.*, 243 F. at 407 ("[I]f there is not diversity of citizenship, or if the subject-matter of a counterclaim is not within the jurisdiction of a federal court, the counterclaim should be stricken out for want of jurisdiction.").

208. *See* State Farm Mut. Auto. Ins. Co. v. Narvaez, 149 F.3d 1269, 1271 (10th Cir. 1998) (reading its earlier decision in *Geoffrey E. Macpherson, Ltd. v. Brinecell, Inc.*, 98 F.3d 1241, 1245 n.2 (10 Cir. 1996), as standing for the proposition that a "counterclaim can be considered when, standing alone, it satisfies the amount in controversy requirement" but concluding that it was unnecessary in this case to "decide whether the value of an insufficient counterclaim can be added to the value of an insufficient claim to calculate the amount in controversy"); *Fenton*, 748 F.2d at 1359 (noting the lack of jurisdictional allegations in the plaintiffs' complaint while emphasizing that the defendants' counterclaims independently satisfied the amount in controversy). *But see* Spectacor Mgmt. Grp. v. Brown, 131 F.3d 120, 121 (3d Cir. 1997) (holding in a case in which the counterclaims alone satisfied the amount-in-controversy requirement that "where . . . a defendant . . . answers a complaint by asserting a compulsory counterclaim, the amount of that counterclaim

should matter is whether the *civil action as a whole* satisfies the amount-in-controversy requirement. That does not mean that it will always be appropriate to aggregate the plaintiff's claims and the defendant's counterclaims. Aggregation is impermissible when it would lead to double counting.[209] But in other situations, aggregation will accurately reflect the amount at stake in the civil action as a whole.[210]

3. Counterclaims Involving Additional Counterclaim Defendants

The discussion thus far has assumed that a counterclaim is asserted by the defendant against the plaintiff. But the Federal Rules of Civil Procedure authorize broader party joinder than did the common law. Rule 13(h), for example, authorizes a defendant (as a counterclaim plaintiff) to *add* counterclaim defendants in addition to the plaintiff.[211] Consider a counterclaim asserted by the defendant/counterclaim plaintiff against the plaintiff/counterclaim defendant *and an additional* counterclaim defendant with whom the plaintiff/counterclaim defendant allegedly is jointly and severally liable. Such a counterclaim would be inconsistent with the rules of party joinder at common law.[212] For that reason, if supplemental jurisdiction

may be considered by the court in determining if the amount in controversy" requirement is satisfied and concluding "the amount in controversy easily clears the jurisdictional hurdle when [the] counterclaims are included" (footnote omitted)).

209. *See, e.g.*, Home Life Ins. Co. v. Sipp, 11 F.2d 474, 476 (3d Cir. 1926) (recognizing "that 'when the jurisdictional amount is in question, the tendering of a counterclaim in an amount which in itself, or added to the amount claimed in the petition, makes up a sum equal to the amount necessary to the jurisdiction of this court, jurisdiction is established, whatever may be the state of the plaintiff's complaint,'" but concluding the counterclaim could not be added to the claim in that case because the insurer's counterclaim sought only a credit against any amount owed to the insured (quoting Am. Sheet & Tin Plate Co. v. Winzeler, 227 F. 321, 324 (N.D. Ohio 1915))); 14AA WRIGHT ET AL., *supra* note 62, § 3706, at 724 (noting that claims and counterclaims may be alter egos of each other). *Horton* is an excellent example of a case in which aggregation would be inappropriate. *See supra* notes 177–82 and accompanying text.

210. Assume, for example, that a plaintiff has a $50,000 claim and a defendant has an unrelated $30,000 counterclaim. The maximum available in that suit is a $50,000 judgment for the plaintiff, and if both parties prevail on their claims, judgment will be entered for the plaintiff in the amount of $20,000. But it would be a mistake to conclude that $50,000 is the amount in controversy. If the plaintiff fails to recover on his claim, and the defendant prevails on her counterclaim, for example, the plaintiff will have suffered a loss of $80,000. And the same is true for the defendant if the plaintiff prevails on his claim, and the defendant fails to recover on her counterclaim.

211. FED. R. CIV. P. 13(h) ("Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.").

212. *See supra* note 159 and accompanying text (describing the rules of common-law party joinder as permitting multiple plaintiffs to join together and multiple defendants to be joined together in limited circumstances). A party added as an additional defending party to a counterclaim asserted by the defendant is neither a plaintiff nor a defendant, but simply an additional counterclaim defendant. The joinder of such a party was not authorized even under the more liberal rules of party joinder in equity. *See* Philip M. Payne, *Counterclaims Under New Federal Equity Rule 30*, 10 VA. L. REV. 598, 616–17 (1924) (noting that even under the liberal joinder provisions of the Federal Equity Rules of 1912, the court would strike "[a] counterclaim alleging a cause of action against

over such a counterclaim is lacking, the counterclaim should be treated as a separate civil action within the meaning of Section 1332(a). Put another way, such a counterclaim may not rely on the civil action initiated by the plaintiff to satisfy the diversity-of-citizenship and amount-in-controversy requirements.

III. THE NON-JURISDICTIONAL BASIS OF THE PLAINTIFF'S LIMITED RIGHT TO LOCK ITS CLAIMS IN STATE COURT

A. THE LAW OF REMOVAL

1. The Basis of the Plaintiff's Right to Lock a Suit into State Court

Holmes Group reasoned that permitting a counterclaim to satisfy the well-pleaded complaint rule "would allow a defendant to remove a case brought in state court under state law, thereby defeating a plaintiff's choice of forum, simply by raising a federal counterclaim."[213] The Court further expressed concern that giving defendants such power "would radically expand the class of removable cases."[214] This analysis is fundamentally unsound.[215]

Well before *Holmes Group*, it was clear that whether a suit could be removed from state to federal court on the basis of a federal question generally depended on whether a district court could exercise statutory arising-under jurisdiction over a claim by the plaintiff; a defendant's counterclaim is generally irrelevant for that purpose. But this settled understanding is not the product

---

one who is not a party . . . since a party may not be brought into a suit in equity by counterclaim"); *cf.* MILLAR, *supra* note 165, at 128 ("The counterclaim, as originally regulated, contemplated a controversy between one or more of the defendants and one or more of the plaintiffs in the principal action, and not involving other parties."). Professor Millar dates the "commonest provision" authorizing the joinder of new parties to a counterclaim to the Kentucky Code of 1851. *Id.*

213. Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831–32 (2002).

214. *Id.* at 832.

215. The Court cited three court of appeals decisions in support of its analysis. *Id.* at 831 (first citing *In re* Adams, 809 F.2d 1187, 1188 n.1 (5th Cir. 1987); then citing Fed. Deposit Ins. Corp. v. Elefant, 790 F.2d 661, 667 (7th Cir. 1986); and then citing Takeda v. Nw. Nat'l Life Ins. Co., 765 F.2d 815, 822 (9th Cir. 1985)). The Ninth Circuit—like the Court in *Holmes Group* proceeded to do—had conflated limits on removability with the well-pleaded complaint rule. *See Takeda*, 765 F.2d at 821–22 (arguing that "[a] straightforward application of the well-pleaded complaint rule" meant that defendant's counterclaim under the Employee Retirement Income Security Act, 29 U.S.C. § 1132, did not provide a basis for removal). The Fifth Circuit, for its part, had asserted, without analysis, that a counterclaim cannot satisfy the well-pleaded complaint rule. *See In re Adams*, 809 F.2d at 1188 n.1 ("The district court aptly noted that [counterclaims based on federal antitrust law] are unavailing to compel federal court jurisdiction, based on the well-pleaded complaint rule."). By contrast, the Seventh Circuit appeared to rely on the law of removal rather than (as *Holmes Group* mistakenly did) the well-pleaded complaint rule. *See Elefant*, 790 F.2d at 667 (stating, without ever mentioning the well-pleaded complaint rule, that "the propriety of removal depends on whether the suit—as the plaintiff framed or easily could have framed it in the complaint—would have been within the district court's original jurisdiction at the time of the removal").

of the well-pleaded complaint rule.[216] It is instead the product of the removal statute, as the Court itself later recognized in *Home Depot*.[217]

The argument from the removal statute properly rests in substantial part on the meaning of a "civil action" as that term is used in Section 1441(a). As the Court explicitly recognized in *Allapattah*, a civil action as that term is used in Sections 1331 and 1332(a) may consist of fewer than all of the claims in a complaint.[218] By contrast, the term "civil action" as used in Section 1441(a) includes *all* of the claims properly asserted in a state court suit at the time of removal.[219] Indeed, "[g]iving the term 'civil action' a narrower scope in the context of § 1441(a) would run afoul of a longstanding Congressional policy against splitting between state and federal courts claims properly brought in state court unless Congress has expressly authorized splitting such claims."[220]

In view of the meaning of "civil action" as used in Section 1441(a), a compelling argument may be made that the party initiating the suit in state court must be deemed the "plaintiff" and not a "defendant" for purposes of the removal statute. In *Shamrock Oil & Gas Corp. v. Sheets*, the Court accepted that argument, holding that the plaintiff in a state court suit cannot be a

---

216. By contrast, with respect to federal defenses, the well-pleaded complaint rule properly provides *a* basis for the settled understanding that the plaintiff generally determines whether a suit may be removed from state to federal court. *See supra* Section I.B.1.

217. Home Depot U. S. A., Inc. v. Jackson, 139 S. Ct. 1743, 1748 (2019) ("It is this statutory context, not 'the policy goals behind the [well-pleaded complaint] rule,' that underlies our interpretation of the phrase 'the defendant or the defendants.'" (alteration in original) (citation omitted)).

218. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005) ("If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint.").

219. *See* 28 U.S.C. § 1441(a). From this perspective, a civil action over which there is original jurisdiction within the meaning of Section 1441(a) may consist of multiple civil actions over which a federal district court would have jurisdiction within the meaning of Sections 1331, 1332(a), 1367, or a combination thereof. *See id.* §§ 1331, 1332(a), 1367.

220. Woolley, *supra* note 5, at 614 n.190. *Compare, e.g.*, 28 U.S.C. § 1441(a) ("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 . . . ."), *with id.* § 1441(c) (expressly authorizing removal of a civil action over which a federal district court would not have original jurisdiction if the civil action includes a federal-question claim and requiring the remand to state court of claims over which the federal district court lacks jurisdiction). This general policy against splitting state suits has been a part of the law of removal since at least 1880. *See* Barney v. Latham, 103 U.S. 205, 211–13 (1880) (construing the second sentence of section two of the Judiciary Act of 1875 as requiring removal of the suit filed in state court *in its entirety* even if a federal court would have had original jurisdiction over "a separable controversy" in the suit); *cf.* Woolley, *supra* note 5, at 606 n.161 (raising the possibility that "[t]he scope of a 'suit' subject to removal under § 12" of the Judiciary Act of 1789 was narrower than that subject to removal under section two of the Judiciary Act of 1875). It is uncontroversial that for a period before the Judiciary Act of 1875, Congress authorized splitting suits originally filed in state court between state and federal courts. *See generally* Hartnett, *supra* note 35 (discussing removal provisions spanning the time from the Judiciary Act of 1789 to the Judicial Improvements Act of 1990).

defendant for purposes of removal even if the plaintiff is also a counterclaim defendant.[221]

What *Shamrock* did not explicitly resolve was whether, after asserting a counterclaim, the *defendant* could remove on the basis of that counterclaim. But the waiver theory—first enunciated in *West v. Aurora City*[222] and adopted in *Shamrock*[223]—made clear that a party that voluntarily asserts a claim in state court waives its right to remove. Although *Shamrock* and *West* relied in part on this theory to deny plaintiffs the right to remove,[224] the theory applies equally to a defendant seeking to remove on the basis of a permissive counterclaim.

Whether a defendant may remove on the basis of a compulsory counterclaim, however, could not be answered by the waiver theory. That is because a defendant asserting a compulsory counterclaim must either assert the claim or lose it. Since 1949, however, the removal statute has included strong textual evidence that even a compulsory counterclaim does not provide a basis for removal.[225] Specifically, Congress amended Section 1446(b) in 1949 to add the following paragraph:

> If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.[226]

---

221. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 107–08 (1941).

222. West v. Aurora City, 73 U.S. (6. Wall.) 139, 142 (1867). The Court wrote:

> In the case before us, West and Torrance, citizens of Ohio, voluntarily resorted, as plaintiffs, to the State court of Indiana. They were bound to know of what rights the defendants to their suit might avail themselves under the code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants to a suit, removable on their application to the Circuit Court of the United States.

Id.

223. *Shamrock*, 313 U.S. at 107 (stating that the Judiciary Act of 1887 "indicat[ed] the Congressional purpose to narrow the federal jurisdiction on removal by reviving in substance the provisions of § 12 of the Judiciary Act of 1789 as construed in *West v. Aurora City*.").

224. *See supra* notes 221–22 and accompanying text.

225. The law had previously been unclear on whether removal could be premised on a compulsory counterclaim. *See* Comment, *Federal Jurisdiction in Cases Involving Counterclaims*, 45 YALE L.J. 1479, 1484–85 & nn. 23–24 (1936) (collecting cases).

226. Act of May 24, 1949, ch. 139, Pub. L. No 81-72, § 83, 63 Stat. 89, 101 (codified as amended at 28 U.S.C. § 1446(b)). Similar language has been included in each iteration of Section 1446. For the most recent version of the language enacted as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. 112-63, § 103, 125 Stat. 758, 760, see 28 U.S.C. § 1446(b)(3). The most recent amendment to Section 1446 also included a separate provision on which the Court in *Home Depot* relied. Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1748 (2019); *see* 28 U.S.C. § 1446(c)(2) (noting, subject to exceptions, that "[i]f removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in

The focus on the "case stated by the initial pleading" and the permission granted for removal "after receipt by the defendant" of a "paper from which it may first be ascertained" that the case is removable strongly suggests that only claims asserted by the plaintiff may properly provide a basis for removal. And the natural implication of this provision is consistent with the weight traditionally given in statutory construction to a plaintiff's choice of forum.[227]

In short, Sections 1441(a) and 1446 are best read to prohibit a defendant from asserting a counterclaim and removing on that basis. And although the removing party in *Home Depot* was neither a plaintiff nor a defendant,[228] the Court's decision in that case is consistent with this analysis. Specifically, *Home Depot* stands for the proposition that Sections 1441(a) and 1446 do not authorize removal from state to federal court unless the plaintiff's complaint or amended complaint would have provided an independent basis for jurisdiction had the plaintiff filed originally in federal district court.[229]

2. The Procedural Nature of Removal

The Court's longstanding removal precedents further make clear that the right granted to a plaintiff—as master of its complaint—to determine whether a defendant may remove from state to federal court generally is *procedural* in nature and subject to waiver.[230] As one perceptive federal district court recently explained in summarizing the law with respect to Sections 1441(a) and 1446, "the removal statute imposes no limitations on subject matter jurisdiction independent of the general federal question and diversity

---

controversy"). Section 1446(c)(2) provides less powerful evidence for the proposition that a defendant may not remove on the basis of a counterclaim than Section 1446(b)(3).That is because the point of Section 1446(c)(2) is to provide defendants with a remedy if the plaintiff seeks to avoid removal by understating the amount in controversy. A plaintiff presumably would not need such protection if a defendant were permitted to remove on the basis of a compulsory counterclaim. A defendant seeking to remove would have no incentive to lowball the value of its compulsory counterclaim.

227. Reading Section 1446 as evidence that only claims by plaintiffs may properly provide a basis for removal does not prevent a state-court defendant from filing a separate, parallel suit in federal court to assert its federal claims as a plaintiff. *See infra* Section III.B.

228. The removing party, Home Depot, was added to the action as an additional counterclaim defendant by the defendant/counterclaim plaintiff. *Home Depot*, 139 St. Ct. at 1747. Borrowing questionable terminology from the courts below, the Court referred to Home Depot as a "third-party counterclaim defendant." *Id.* at 1747–48.

229. *See id.* at 1748.

230. This understanding governs removal only when removal jurisdiction is coextensive with original jurisdiction. It does not apply when the removal jurisdiction of a federal district court is broader than its original jurisdiction. Section 1454(a), for example, authorizes removal over a civil action in state court that includes a counterclaim arising under any Act of Congress relating to patents, plant variety protection, and copyright even though such a counterclaim would not provide a basis for jurisdiction over a civil action under Section 1338. *See supra* notes 49–51 and accompanying text for further discussion of Section 1454.

statutes."[231] Thus, "any irregularities in removal which do not implicate the court's subject matter jurisdiction are inherently procedural in nature and therefore, like defects in personal jurisdiction and process generally, are waived by a party's voluntary submission to the court's jurisdiction."[232] For that reason, so long as there is *original* jurisdiction over the "civil action" as that term is used in Section 1441(a),[233] removal on the basis of a counterclaim (rather than the plaintiff's complaint) constitutes a procedural defect subject to waiver rather than a nonwaivable jurisdictional defect.

The Court's decision in *Mackay v. Uinta Development Co.*[234] illustrates this principle. There, the plaintiff had filed suit in state court on a claim that did not meet the amount-in-controversy requirement.[235] The defendant in an amended answer asserted a counterclaim that independently satisfied the

231. Grecon Dimter, Inc. v. Horner Flooring Co., No. 02-cv-101, 2007 WL 121732, at *4 (W.D.N.C. Jan. 11, 2007) (relying on Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699 (1972) and Mackay v. Uinta Dev. Co., 229 U.S. 173 (1913) among other cases). An early circuit court decision was even more evocative. *See* Wenzler v. Robin Line S.S. Co., 277 F. 812, 819 (W.D. Wash. 1921) (remarking that removal "is merely the machinery for getting the case into the right court").

232. *Grecon Dimter*, 2007 WL 121732, at *4. Scott Dodson implicitly rejects this understanding in criticizing a Ninth Circuit decision that held that the forum-defendant rule, 28 U.S.C. § 1441(b)(2), is non-jurisdictional. *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 83 (2008) (criticizing the reasoning in Lively v. Wild Oats Mkts., Inc., 456 F.3d 933 (9th Cir. 2006)). Professor Dodson argues that *Grubbs* did not address "the process of characterizing rules as jurisdictional or procedural." *Id.* But *Grubbs* and *Mackay* make clear a jurisdictional defect exists on removal only if a court would lack original subject-matter jurisdiction over a claim originally been brought in federal court. *See infra* text accompanying note 241 (quoting *Mackay*, 229 U.S. at 176); *Grubbs*, 405 U.S. at 703 (quoting *Mackay*, 229 U.S. at 176–77). Professor Dodson, however, ultimately appears agnostic on the question of whether Section 1441(a) is a jurisdictional provision. *Compare* Dodson, *supra*, at 86 ("Assuming § 1441(a) is a jurisdictional provision, reading § 1441(b) as an express exception to § 1441(a) may turn § 1441(b) into a jurisdictional limitation by reference." (footnote omitted)), *with id.* at 61 n.38 ("It strikes me that perhaps removal 'jurisdiction' is not an affirmative form of 'jurisdiction' at all but instead is merely a nonjurisdictional procedure for bringing a case already within federal original or appellate jurisdiction before a federal court.").

233. It is uncontroversial that a federal district court has original jurisdiction over a civil action within the meaning of Section 1441(a) even if it has only supplemental jurisdiction over some of the claims in the civil action removed from state court. This accords with a standard definition of "original jurisdiction." *See* Joan Steinman, *Claims, Civil Actions, Congress & the Court: Limiting the Reasoning of Cases Construing Poorly Drawn Statutes*, 65 WASH. & LEE L. REV. 1593, 1612 (2008) ("The widely-held understanding is that the term 'original jurisdiction' embraces (trial court) jurisdiction over both freestanding claims and supplemental claims, that is, claims within supplemental jurisdiction."); John B. Oakley, *Reporter's Memorandum on the Claim-Specific Nature of the Original Jurisdiction of the Federal Courts* in FEDERAL JUDICIAL CODE REVISION PROJECT 599 (2004) ("[S]upplemental jurisdiction is not distinct from, but rather is a form of the original jurisdiction of the district courts.").

234. *Mackay*, 229 U.S. at 176.

235. *Id.* at 173–74.

requirement.[236] Without objection, the defendant removed the suit to federal court.[237] Judgment was entered for the plaintiff after trial.[238]

The Supreme Court was asked to determine whether the trial court had the power to decide the case.[239] The Court refused to decide whether removal on the basis of the counterclaim was proper,[240] deciding instead that an improper removal would constitute a waivable procedural defect:

> The case was removed in fact, and, while the parties could not give jurisdiction by consent, there was the requisite amount and the diversity of citizenship necessary to give the United States Circuit Court jurisdiction of the cause. The case, therefore, resolves itself into an inquiry as to whether, if irregularly removed, it could be lawfully tried and determined.
>
> Removal proceedings are in the nature of process to bring the parties before the United States court. As in other forms of process, the litigant has the right to rely upon the statute and to insist . . . [on] compliance with its terms . . . .
>
> What took place in the state court may, therefore, be disregarded by the court because it was waived by the parties, and regardless of the manner in which the case was brought or how the attendance of the parties in the United States court was secured, there was presented to the Circuit Court a controversy between citizens of different States in which the amount claimed by one non-resident was more than $2,000, exclusive of interest and costs.[241]

Thus, *Mackay* establishes that so long as a federal district court would have the required original jurisdiction over a civil action, noncompliance with other requirements of the general removal statute leads only to a procedurally defective

236. *Id.* at 174. The counterclaim was compulsory in a limited sense under the law of the forum state. *Id.* ("The claims of the parties were so related that either could have been interposed as a counter-claim to the other; or they could have been determined in different suits—subject to the provision that, under the Wyoming statute, a defendant who failed to set up his counter-claim and subsequently made it the subject of a separate action could not recover costs if he prevailed therein.").

237. *Id.* (stating that "Mackay . . . filed in the state court a petition to remove the case" and noting that "[a]n order removing the case was granted on the theory that the parties were citizens of different States; that the construction of the Federal statutes was necessarily involved, and that the amount in dispute, as disclosed by the counter-claim, exceeded $2,000"). The Supreme Court did not address whether there was arising-under jurisdiction over the counterclaim.

238. *Id.* at 175.

239. *Id.*

240. *Id.* at 175–76 (concluding that it was "unnecessary to consider . . . whether Mackay, a non-resident defendant, sued in a state court for $1,950, could, by filing a counter-claim for $3,000, acquire the right to remove the case to the United States court").

241. *Id.* at 176.

removal.[242] *Mackay* also establishes that the plaintiff's right—as master of its complaint—to prevent a defendant from removing on the basis of a counterclaim that qualifies for diversity jurisdiction is not a matter of jurisdictional principle.[243]

In short, the general removal statute, properly construed, has—as a matter of procedure—prohibited a defendant from removing on the basis of a compulsory counterclaim since at least 1949 and on the basis of a permissive counterclaim since at least 1941.[244] Thus, *Holmes Group* is largely cumulative in terms of protecting a plaintiff's right—as master of the complaint—to lock her suit into state court.

B. THE FEDERAL COMPULSORY COUNTERCLAIM RULE

The plaintiff's right—as master of the complaint—to frame its complaint to ensure a state-court forum is also protected by the compulsory counterclaim rule. If the claims of a state-court defendant qualify for federal subject-matter jurisdiction, the defendant may file a separate, parallel suit in federal district court as a plaintiff.[245] But if the state-court plaintiff sued first, the compulsory counterclaim rule will never require the state-court plaintiff to assert counterclaims in the federal court suit. That is because Rule 13(a) expressly provides that "[t]he pleader need not state" a claim as a compulsory

242. The Court has cited *Mackay* three times. *See* Pegram v. Herdrich, 530 U.S. 211, 215 n.2 (2000) ("Herdrich's amended complaint alleged ERISA violations, over which the federal courts have jurisdiction, and we therefore have jurisdiction regardless of the correctness of the removal." (citing *Mackay*, 229 U.S. 173)); Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 703 (1972) (quoting *Mackay*, 229 U.S. at 176–77); Ariz. & N.M. Ry. Co. v. Clark, 235 U.S. 669, 674 (1915) ("The removal proceedings were in the nature of process to bring the parties before that court, and the voluntary appearance of the parties there was equivalent to a waiver of any formal defects in such proceedings." (citing *Mackay*, 229 U.S. at 176)). For recent applications of *Mackay* in the courts of appeals, see, for example, Ariel Land Owners, Inc., v. Dring, 351 F.3d. 611, 614 (3d Cir. 2003) (quoting *Mackay*, 229 U.S. at 176, in part to support the conclusion that the one-year limit on the removal of a diversity action is non-jurisdictional); Peterson v. BMI Refractories, 124 F.3d 1386, 1392 (11th Cir. 1997) (quoting *Mackay*, 229 U.S. at 176, in part to support the conclusion "that removal to the wrong federal district is a procedural defect subject to waiver"); and Baris v. Sulpicio Lines, Inc., 932 F.2d 1540, 1545 (5th Cir. 1991) (quoting *Mackay*, 229 U.S. at 176–77, in part to support the proposition that removal of a claim made nonremovable by statute is a procedural defect subject to waiver). *Cf.* Archuleta v. Lacuesta, 131 F.3d 1359, 1365 (10th Cir. 1997) (Baldock, J., dissenting) ("One *cannot* reasonably argue that the removal statutes, including § 1441(a), set forth principles of subject matter jurisdiction, although that's what this court says the district court opined. The unreasonableness of this court's position is not surprising, but rather apparent, because the removal statutes are solely procedural in nature." (citing *Mackay*, 229 U.S. at 176)).

243. Because *Mackay* did not address whether there was arising-under jurisdiction over the counterclaim, the Court's holding is fully consistent with its holding in *Holmes Group*.

244. *See supra* notes 219–29 and accompanying text (explaining how the general removal statute bars removal on the basis of a counterclaim).

245. *See* Kline v. Burke Constr. Co., 260 U.S. 226, 234–35 (1922) (holding that a federal court with subject-matter jurisdiction cannot refuse jurisdiction simply because the parties are also before a state court with subject-matter jurisdiction).

counterclaim "if . . . when the action was commenced, the claim was the subject of another pending action."[246] Thus, by choosing to frame a complaint to avoid federal subject-matter jurisdiction and filing suit in state court, a plaintiff—through the rules governing removal and through the compulsory counterclaim rule—may lock its claims into state court.

CONCLUSION

Holmes Group distorted the law of jurisdiction by concluding that the well-pleaded complaint rule is an appropriate vehicle for safeguarding a plaintiff's right to choose the forum. The well-pleaded complaint rule was not intended to safeguard the plaintiff's choice of forum. Removal procedure and the federal compulsory counterclaim rule better elucidate the circumstances in which a plaintiff may lock her case into state court. And these procedural policies do not interfere—as *Holmes Group* does—with the ability of a federal district court to exercise arising-under jurisdiction over counterclaims in a civil action.

The unfortunate effect of *Holmes Group* on statutory arising-under jurisdiction is unavoidable unless and until the decision is overruled. But courts should decline to extend the damage to diversity jurisdiction. The well-pleaded complaint rule is no more a policy of diversity jurisdiction than the complete-diversity rule is a policy of arising-under jurisdiction. The Court had made clear before *Holmes Group* that the well-pleaded complaint rule does not apply to diversity jurisdiction in decisions that looked to the *defendant*'s counterclaims to satisfy the amount-in-controversy requirement for the civil action as a whole. These decisions properly rest on the longstanding principle that the amount in controversy should be measured by looking to the amount at stake in a civil action as defined by the rules of party joinder at common law. Neither *Holmes Group* nor any subsequent decision of the Court is inconsistent with this principle. And Congress alone should make any modification to an understanding of the amount-in-controversy requirement rooted in the construction of the Judiciary Act of 1789. The plaintiff's right—as master of her complaint—to lock her case into state court should be vindicated in diversity cases through removal procedure and the compulsory counterclaim claim rule, not through extension of the well-pleaded complaint rule to diversity jurisdiction.

246. FED. R. CIV. P. 13(a)(2)(A). A defendant, of course, need not assert a permissive counterclaim in the forum that the plaintiff has chosen. *See* FED R. CIV. P. 13(b).