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REMOVED CASES AND UNINVOKED JURISDICTIONAL GROUNDS*

JEANNETTE COX**

Traditionally understood, a congressional grant of federal subject matter jurisdiction alone does not confer authority on a federal court to hear a case; a party to the case must also affirmatively invoke the applicable jurisdictional ground. In a sharp break from this traditional understanding, federal courts have recently begun to exercise jurisdiction over cases based on jurisdictional grounds no party has invoked. Courts adopting this practice have concluded that a district court must retain removed cases that meet the requirements of a congressionally authorized ground of subject matter jurisdiction even when an arguably antecedent requirement—party invocation of that jurisdictional ground—has not occurred. This Article identifies and criticizes this development, coining the phrase "mandatory retention" to describe federal courts' decision to exercise jurisdiction over cases based on jurisdictional grounds no party has invoked. The Article recommends that courts equalize plaintiffs' and defendants' abilities to amend their jurisdictional allegations rather than shift responsibility for establishing jurisdiction in removed cases from the defendant to the federal court.

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** Assistant Professor of Law, University of Dayton School of Law. For helpful comments on prior drafts of this Article, I thank Anthony J. Bellia, Benjamin Glatstein, Rachel Janutis, Rory Ryan, Michelle Slack, and Jay Tidmarsh. I also thank Emily Meyer for excellent research assistance, Kim Ballard for interlibrary loan assistance, and the University of Dayton School of Law for generous research support.

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INTRODUCTION

If a civil action falls within the concurrent jurisdiction of state and federal courts, the parties determine which forum will hear it. For a federal court to hear the case, one of the parties must affirmatively invoke a jurisdictional ground justifying federal court adjudication. If neither party invokes an adequate jurisdictional ground, the federal court lacks authority to hear the case, and the case will be heard, if at all, in state court.

Over the past fifteen years, a handful of federal courts have eschewed this traditional party-driven approach to the invocation of federal subject matter jurisdiction.[1] In cases that arrive on the docket via removal, these courts have deemed irrelevant the defendant's failure to invoke a jurisdictional ground that requires federal court adjudication.[2] They have suggested that when the defendant files a removal notice that fails to invoke an adequate jurisdictional ground, the court must determine for itself whether an uninvoked jurisdictional ground exists.[3] In other words, these opinions suggest that a district court must retain a removed case that meets the requirements of a congressionally authorized ground of subject matter jurisdiction even when an arguably antecedent requirement—party invocation of that jurisdictional ground—has not occurred.

Take the following scenario as an example. A complaint filed in state court raises only state law claims. The defendant files a notice of removal

1. *See, e.g.*, Williams v. Costco Wholesale Corp., 471 F.3d 975, 977 (9th Cir. 2006); Brockman v. Merabank, 40 F.3d 1013, 1017 (9th Cir. 1994); Buchner v. FDIC, 981 F.2d 816, 821 (5th Cir. 1993); *cf.* Adkins v. Ill. Cent. R.R. Co., 326 F.3d 828, 850–51 (7th Cir. 2003) (Ripple, J., dissenting); Sabater v. Lead Indus. Ass'n, Inc., No. 00-8026, 2001 WL 1111505, at *7 & n.4 (S.D.N.Y. Sept. 21, 2001).

2. *See id.*

3. 28 U.S.C. § 1441(a) allows defendants to remove cases to federal court that the plaintiff might have brought in federal court. 28 U.S.C. § 1441(a) (2000). A small number of other "special" removal statutes permit defendants to remove cases to federal court under additional circumstances. *See, e.g. id.* § 1442 (authorizing federal officers to remove cases filed against them); *id.* § 1444 (authorizing the removal of foreclosure actions filed against the United States).

that avers federal question jurisdiction on the rationale that resolution of the state law claims will require construction of a substantial question of federal law. The federal court considers the defendant's argument but rejects it, concluding that the case lacks a basis for federal question jurisdiction.[4]

Until recently, the federal court, after rejecting the defendant's jurisdictional contentions, would remand this case to state court without considering whether any other potential sources of jurisdiction existed that the defendant failed to invoke.[5] Even if the court observed that the parties were from different states and that the plaintiff had alleged damages in excess of $75,000, the federal court would not retain the case based on diversity jurisdiction;[6] instead, the court would remand the case to state court.[7] As one court succinctly stated, "[w]hen removal is attacked prior to final judgment and the alleged basis of subject matter jurisdiction is found wanting, the Court must remand the case without consideration of an alternative basis."[8] The rationale for this traditional approach to uninvoked jurisdictional grounds is that the responsibility to plead and prove a basis for federal subject matter jurisdiction lies with the party who desires a federal forum; the court's role is to judge the jurisdictional ground(s) that party invokes rather than to search for alternate grounds.[9]

In a major departure from the traditional view that district courts cannot look for alternate jurisdictional grounds, two circuits have held that a "district court has an independent obligation to determine whether it has

4. 28 U.S.C. § 1331 defines "federal question jurisdiction." *Id.* § 1331. Courts have interpreted § 1331 to provide that a case arises under federal law if federal law created the plaintiff's cause of action or if the plaintiff's right to relief under state law involves resolution of a substantial question of federal law. Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 27–28 (1983).

5. *See infra* Parts I.A & I.B.

6. *See* § 1441(a); *see also* 28 U.S.C. § 1332 (2000) (conferring "diversity jurisdiction" on federal courts, which enables federal courts to hear cases in which the plaintiff is a citizen of a state different from the defendant and the amount in controversy exceeds $75,000).

7. *Cf.* Adell v. Whall, 294 F. Supp. 2d 917, 919 (E.D. Mich. 2003) (" '[T]his action was not removed based upon diversity jurisdiction' . . . [so] subject matter jurisdiction in the action cannot and is not premised on diversity jurisdiction." (citation omitted)); Edwards v. Prudential Ins. Co. of Am., 213 F. Supp. 2d 1376, 1380 n.6 (S.D. Fla. 2002) (after rejecting a removal notice's contention that complete preemption supported jurisdiction, the court noted that diversity jurisdiction was likely present but held that "the Court shall not investigate the issue on its own . . . [because] it is quite clear that the burden of establishing removal jurisdiction rests squarely on the shoulders of the removing party").

8. Bond St. Assocs. Ltd. v. Ames Dep't Stores, Inc., 174 B.R. 28, 31 (S.D.N.Y. 1994).

9. *See* Ervast v. Flexible Prods. Co., 346 F.3d 1007, 1012 n.4 (11th Cir. 2003) (refusing to exercise jurisdiction where the defendant had unsuccessfully alleged jurisdiction based on complete preemption, the court observed that the requirements for diversity jurisdiction were present in the case but "decline[d] the invitation to exercise jurisdiction on that basis because [the defendant] had the burden to plead this basis in its notice of removal, and it did not").

subject matter jurisdiction" and thus must search for an alternate jurisdictional ground before remanding a case to state court.[10] These courts have held that remand of a case containing an uninvoked jurisdictional ground is reversible error.[11] If the case falls within a congressionally authorized jurisdictional grant, "exercise of that jurisdiction is mandatory."[12] In effect, these courts have reduced the defendant's responsibility to merely filing a petition for removal, or in other words, to merely expressing a preference for a federal forum.[13]

While this "mandatory retention" approach to removed cases containing uninvoked jurisdictional grounds is a striking shift from the traditional approach, its emergence is not altogether surprising. The prevailing treatment of removed cases that contain uninvoked jurisdictional grounds, which might be termed "mandatory remand," denies defendants any opportunity to amend their removal notices to add jurisdictional grounds not initially invoked.[14] A defendant who fails to allege an adequate jurisdictional ground in his initial removal notice forfeits his opportunity to obtain a federal forum. This unforgiving rule starkly contrasts with courts' liberality toward plaintiffs' jurisdictional amendments. Generally, a plaintiff may amend her jurisdictional allegations to invoke previously uninvoked jurisdictional grounds at any time, even as late as on appeal.[15] Although no court has cited this lack of parity between plaintiffs and defendants as a justification for adopting mandatory retention, part of mandatory retention's appeal may be that it roughly compensates for the limits on defendants' opportunities to amend their jurisdictional allegations.

This Article identifies and examines the mandatory retention doctrine: the view that federal courts may not remand removed cases that contain uninvoked jurisdictional grounds.[16] It concludes that although mandatory

10. Adkins v. Ill. Cent. R.R. Co., 326 F.3d 828, 850–51 (7th Cir. 2003) (Ripple, J., dissenting) (explaining the Fifth and Ninth Circuit's views); *see* Williams v. Costco Wholesale Corp., 471 F.3d 975, 977 (9th Cir. 2006); Brockman v. Merabank, 40 F.3d 1013, 1017 (9th Cir. 1994); Buchner v. FDIC, 981 F.2d 816, 821 (5th Cir. 1993).

11. *Brockman*, 40 F.3d at 1017; *Buchner*, 981 F.2d at 821.

12. *Adkins*, 326 F.3d at 851 (Ripple, J., dissenting) (explaining the Fifth and Ninth Circuit's views).

13. This, of course, contravenes the longstanding maxim that "it is not enough [for a party] to file a pleading and leave it to the court or the adverse party to negate jurisdiction." Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447 (7th Cir. 2005).

14. *See infra* note 113 and accompanying text.

15. *See infra* note 112 and accompanying text.

16. Legal commentators have all but ignored this novel doctrinal development. *See* Don Zupanec, *Post-Removal Amendment to Complaint Does Not Require New Notice of Removal*, 22 FED. LITIG. 11 (2007) (noting that courts and commentators have overlooked the question of whether courts have subject matter jurisdiction based on uninvoked jurisdictional grounds).

retention is a doctrinal misstep that should be abandoned, the emergence of mandatory retention may serve two useful functions. First, mandatory retention prompts reexamination of the respective roles played by courts and litigants in the process of invoking federal subject matter jurisdiction. Although modern litigation has in many respects shifted responsibility for directing the course of litigation from litigants to courts, the literature has not yet examined whether federal courts should undertake a greater role in the process of establishing their own authority to adjudicate. Second, and more narrowly, mandatory retention invites examination of the continued justification for the long-held doctrine that denies defendants opportunities to amend jurisdictional allegations that plaintiffs routinely enjoy.

Part I outlines the traditional approach to uninvoked jurisdictional grounds, which places responsibility for invoking federal court jurisdiction with the litigants rather than the federal court. It argues that the traditional approach serves to prevent federal court encroachment on state court jurisdiction by ensuring that federal courts do not play an active role in the process of determining whether they will hear cases that fall within concurrent state-federal jurisdiction. Part II examines the emerging mandatory retention doctrine and the failure of courts adopting this doctrine to adequately justify their departure from the traditional approach to uninvoked jurisdictional grounds.

Part III traces the origins of the rule preventing defendants from amending their jurisdictional allegations to nineteenth-century courts' efforts to respect the then-existing role of state courts in the removal process. This historical examination reveals not only the erosion of the initial justification for limiting defendants' amendments, but also the modern expansion of this limitation beyond its historical parameters. Part IV argues that courts should equalize plaintiffs' and defendants' abilities to amend their jurisdictional allegations rather than shift responsibility for establishing jurisdiction to the federal courts. The Article concludes that the comity concerns underlying the prohibition on amendments to removal petitions would be best served by preserving the traditional view that a party desiring a federal forum must invoke a jurisdictional ground justifying federal court adjudication.

I. THE TRADITIONAL APPROACH TO UNINVOKED JURISDICTIONAL GROUNDS

Traditionally understood, "jurisdiction[] . . . must have a pleading as well as an actual existence,"[17] and the party invoking jurisdiction "bears the

17. Miller v. Soule, 221 F. 493, 496 (E.D. Pa. 1915).

burden of proving proper federal jurisdiction."[18] In other words, the mere fact that a case falls within a congressional grant of federal subject matter jurisdiction does not give a federal court authority to hear a case; a party must also affirmatively *invoke* the applicable ground or grounds of congressionally authorized jurisdiction.[19] Congress and the party invoking the congressionally authorized jurisdictional ground *together* confer on the federal court authority to adjudicate.

A. *Historical Application of the Traditional Approach*

From the first cases filed in federal court, the requirement that a party invoke an adequate jurisdictional ground has resulted in federal courts refusing to hear cases that otherwise fall within their original jurisdiction.[20]

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18. Leonard v. Enterprise Rent a Car, 279 F.3d 967, 972 (11th Cir. 2002).

19. *See* Loughlin v. United States, 393 F.3d 155, 171–72 (D.C. Cir. 2004) ("[J]urisdiction must be pleaded by the party claiming it.... The court cannot act without jurisdiction and it is the complaining party's burden to plead it."); Viqueira v. First Bank, 140 F.3d 12, 19–20 (1st Cir. 1998) (refusing to entertain the plaintiff's argument that an alternate, previously uninvoked source of jurisdiction existed because "[t]he plaintiffs had adequate opportunity to seek permission to amend ... yet they failed to do so"); Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1207–08 (7th Cir. 1980) (refusing to provide "carte blanche for unlimited successive complaint amendments [because] the ultimate duty of pleading his case rests upon the party and not upon the district court" (internal citation omitted)); Miller v. Davis, 507 F.2d 308, 311 (6th Cir. 1974) ("While we proceed to the merits of this appeal, Appellants must file, within ten days of this decision, a proper amendment in this Court alleging diversity jurisdiction. If appellants fail to do so, the case will be placed on the rehearing docket, and the question of jurisdiction will be reconsidered."); Littleton v. Berbling, 468 F.2d 389, 394 (7th Cir. 1972) ("[T]he ultimate duty of pleading his case rests upon the party and not upon the district court to divine what is not reasonably there."), *vacated and remanded on other grounds*, Spomer v. Littleton, 414 U.S. 514 (1974); Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co., 121 F.2d 561, 563 (8th Cir. 1941) (concluding, in a case where diversity jurisdiction existed but was not pleaded, "if no amendment to the complaint showing [diversity jurisdiction is made], the complaint must be dismissed for want of jurisdiction"); Adekalu v. N.Y. City, 431 F. Supp. 812, 820–21 (S.D.N.Y. 1977) (after determining that the pro se plaintiff could not support his federal question claim, the court granted him "twenty days within which to move to amend his complaint affirmatively to allege diversity jurisdiction.... In the event that plaintiff fails to take th[is] action ..., the case will be dismissed."); Rose v. Elliott, 70 F.R.D. 422, 424 (E.D. Tenn. 1976) ("This Court will allow the plaintiff to amend her defective allegations of the diversity jurisdiction of this Court within 20 days herefrom .... Upon the failure of the plaintiff to so amend her complaint ... this action will be dismissed for lack of jurisdiction of the subject matter."); Dodrill v. N.Y. Cent. R.R. Co., 253 F. Supp. 564, 566 (S.D. Ohio 1966) ("Where certain allegations are the essence of jurisdiction, they are essential; being essential, their absence can neither be overlooked nor supplied by inference.").

20. *See, e.g.*, Norton v. Larney, 266 U.S. 511, 515–16 (1925) ("[T]he jurisdiction of a federal court must affirmatively and distinctly appear and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings. If it does not thus appear by the allegations of the bill or complaint, the trial court, upon having its attention called to the defect or upon discovering it, must dismiss the case, unless the jurisdictional facts be supplied by amendment."); Kinney v. Columbia Sav. & Loan Ass'n, 191 U.S. 78, 81 (1903) (describing the "duty resting on all Federal courts not to entertain jurisdiction, if it does not affirmatively appear").

Even if a federal court could easily discern the existence of a congressionally authorized jurisdictional ground, it would dismiss a case if no party had invoked it.[21] It was not enough that a congressionally authorized ground of jurisdiction was present in the case.[22]

A late nineteenth-century case, *Woolridge v. McKenna*,[23] illustrates the traditional understanding of uninvoked jurisdictional grounds as applied to the types of cases now subject to the mandatory retention doctrine. In *Woolridge*, the defendant's removal petition alleged diversity jurisdiction, but the court concluded that diversity jurisdiction did not in fact exist.[24] The court then noted that it had "no doubt" that the defendant could have alleged federal question jurisdiction in his removal petition because one of the plaintiff's claims was based on federal law.[25] Nonetheless, the court quickly decided that it could not rely on the uninvoked ground of federal question jurisdiction to adjudicate the case because "we can only obtain jurisdiction by removal."[26] The court remanded the case to state court, emphasizing that it had no power to hear a case in which the defendant had not invoked an adequate jurisdictional ground.[27]

B. *Modern Application of the Traditional Approach*

Today, most federal courts have not discarded the traditional rule requiring the party desiring a federal forum to invoke an adequate jurisdictional ground. Although attitudes toward pleading requirements have grown more liberal, most modern courts will dismiss a case

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21. For example, a plaintiff's failure to allege the parties' diverse citizenship would result in dismissal even if the parties were, in fact, diverse. As Justice Story once explained, "the question was, whether the citizenship of the parties, as described in the record, gave the court jurisdiction; not whether [the parties were,] in fact[, diverse]." Wood v. Mann, 30 F. Cas. 447, 449 (C.C.D. Mass. 1834) (No. 17,952); *see also* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1837 (2007) ("For all anyone knows, the parties may well have been diverse. But that possibility was not part of the Court's inquiry, as opposed to the sufficiency of the plaintiff's pleading.") (describing Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804)).

22. *See supra* note 20.

23. 8 F. 650 (C.C.W.D. Tenn. 1881).

24. *Id.* at 677–78.

25. *Id.* at 677.

26. *Id.*

27. *Id.* at 685; *cf.* Kennedy v. Bank of Ga., 49 U.S. (8 How.) 586, 610–11 (1850) (noting that the ordinary practice is to dismiss cases where jurisdiction is present in fact, yet defectively alleged, unless the district court permits amendment of the pleadings); Bingham v. Cabot, 3 U.S. (3 Dall.) 382, 383–84 (1798) ("The Court were [sic] clearly of opinion, that it was necessary to set forth the citizenship (or alienage, where a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the Circuit Court; and that the record, in the present case, was in that respect defective. This cause and many others, in the same predicament, were, accordingly, struck off the docket."); Deford, Hinkle & Co. v. Mehaffy, 13 F. 481, 487 (C.C.W.D. Tenn. 1882) ("The rule that the record must show the jurisdictional facts is very strict . . . .").

containing a congressionally authorized jurisdictional ground if the party desiring federal court adjudication has not invoked it.[28] For example, the Eighth Circuit concluded, in a case initiated in federal court in which diversity jurisdiction was present but not invoked, "if no amendment to the complaint showing [diversity jurisdiction is made], the complaint must be dismissed for want of jurisdiction."[29] Similarly, the D.C. Circuit upheld dismissal of a case where the plaintiffs—who had improperly invoked federal question jurisdiction—could have invoked diversity jurisdiction but failed to amend their complaint to do so.[30] The court explained that "jurisdiction must be pleaded by the party claiming it. . . . The court cannot act without jurisdiction and it is the complaining party's burden to plead it."[31]

Similarly, most courts continue to dismiss removed cases in which the defendant failed to invoke an adequate jurisdictional ground even when a congressionally authorized jurisdictional ground is obviously present. For example, in a case where the defendant had unsuccessfully alleged

28. *See* Evans-Hailey Co. v. Crane Co., 207 F. Supp. 193, 198 (M.D. Tenn. 1962) ("[I]t is the duty of any federal court, trial or appellate, not to proceed with a case after defects in jurisdictional allegations come to its attention, by motion of the parties or otherwise, until the defects have been cured.").

29. Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co., 121 F.2d 561, 563 (8th Cir. 1941); *see also* Viqueira v. First Bank, 140 F.3d 12, 20 (1st Cir. 1998) (refusing to entertain the plaintiff's argument that an alternate, previously uninvoked source of jurisdiction existed because "[t]he plaintiffs had adequate opportunity to seek permission to amend . . . yet they failed to do so"); DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1262 n.1 (5th Cir. 1983) (refusing to retain a case on the grounds of maritime jurisdiction where the plaintiffs did not allege this jurisdictional basis in their complaint, which relied solely on diversity jurisdiction); Miller v. Davis, 507 F.2d 308, 311 (6th Cir. 1974) ("While we proceed to the merits of this appeal, Appellants must file, within ten days of this decision, a proper amendment in this Court alleging diversity jurisdiction. If appellants fail to do so, the case will be placed on the rehearing docket, and the question of jurisdiction will be reconsidered."); Littleton v. Berbling, 468 F.2d 389, 394 (7th Cir. 1972) ("[T]he ultimate duty of pleading his case rests upon the party and not upon the district court to divine what is not reasonably there."), *vacated and remanded on other grounds*, Spomer v. Littleton, 414 U.S. 514 (1974).

Even jurisdictions that occasionally help plaintiffs identify an uninvoked jurisdictional ground pursuant to a policy to confer "heightened solicitude" on pro se plaintiffs require these plaintiffs to amend their complaints. *See, e.g.*, Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1207–08 (7th Cir. 1980) (refusing to "provide a carte blanche for unlimited successive complaint amendments [because] the ultimate duty of pleading his case rests upon the party and not upon the district court" (quoting Littleton v. Berbling, 468 F.2d 389, 394 (7th Cir. 1972))); Adekalu v. N.Y. City, 431 F. Supp. 812, 820–21 (S.D.N.Y. 1977) (determining that the pro se plaintiff could not support his federal question claim, the court granted him "twenty days within which to move to amend his complaint affirmatively to allege diversity jurisdiction. . . . In the event that plaintiff fails to take th[is] action . . . , the case will be dismissed").

30. Loughlin v. United States, 393 F.3d 155, 171–72 (D.C. Cir. 2004).

31. *Id.* at 172; *see also supra* note 19 (illustrating the requirement that a party must affirmatively invoke the applicable ground(s) of congressionally authorized jurisdiction in order for a federal court to have the authority to hear a case).

jurisdiction based on complete preemption, the Eleventh Circuit observed that the requirements for diversity jurisdiction were present in the case but held that jurisdiction could not be sustained on that basis because the defendant "had the burden to plead this basis in its notice of removal, and it did not."[32] Similarly, a district court explained that "[w]hile pleadings, and consequently removal notices, are to be construed with some liberality, Defendants clearly may not remove on grounds not even obliquely referred to in the Notice of Removal."[33] In the same way, another district court, after rejecting a removal notice's contention that complete preemption supported jurisdiction, noted that diversity jurisdiction was likely present but held that "the Court shall not investigate the issue on its own [because] it is quite clear that the burden of establishing removal jurisdiction rests squarely on the shoulders of the removing party."[34]

C. Purposes Animating the Traditional Approach

Federal courts' discussion of the party-invocation requirement suggests two rationales for regarding it as essential to the exercise of federal jurisdiction. The first rationale is to prevent federal courts from exceeding the limits of their congressionally authorized jurisdiction. The second rationale is to ensure that federal courts play a passive role in the process of determining whether a state or federal court will hear cases that fall within concurrent jurisdiction. Both rationales derive from the fundamental difference between state and federal courts: state courts enjoy general jurisdiction whereas federal courts possess only limited jurisdiction.

American courts borrowed the party-invocation requirement from English law, in which some courts had general jurisdiction and other courts had limited jurisdiction. English courts of general jurisdiction presumed themselves to have jurisdiction unless a party opposing jurisdiction specifically proved otherwise.[35] By contrast, English courts of limited jurisdiction operated under the opposite presumption: they assumed that

32. Ervast v. Flexible Prods. Co., 346 F.3d 1007, 1012 n.4 (11th Cir. 2003).

33. Hinojosa v. Perez, 214 F. Supp. 2d 703, 707 (S.D. Tex. 2002) (citation omitted).

34. Edwards v. Prudential Ins. Co. of Am., 213 F. Supp. 2d 1376, 1380 n.6 (S.D. Fla. 2002); *see also In re* Kevin Adell's Petition, 294 F. Supp. 2d 917, 919 (E.D. Mich. 2003) (" '[T]his action was not removed based upon diversity jurisdiction' [so] subject matter jurisdiction in the action cannot and is not premised on diversity jurisdiction." (citation omitted)).

35. *See* Anthony J. Bellia, Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 284 (2007). As Bacon's *Abridgement* described it, "every thing is supposed to be done within their Jurisdiction [of a court of general jurisdiction], unless the contrary appears; but, on the other hand, nothing shall be intended within the Jurisdiction of an inferior Court, but what is expressly alledged." IV MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 32 (6th ed. 1793).

they lacked jurisdiction until the party desiring jurisdiction specifically invoked a particular jurisdictional ground and pled all of its requirements.[36]

In the 1793 case *Shedden v. Custis*,[37] Chief Justice John Jay and Justice James Iredell determined that the newly created American federal courts should follow this aspect of English practice.[38] Justice Iredell explained that "[t]he jurisdiction of the [federal] court is limited ... and, therefore, must be averred."[39] Agreeing with Justice Iredell, Chief Justice Jay reasoned that requiring a party to invoke jurisdiction would prevent federal courts from exceeding the limits of their congressionally authorized jurisdiction. By requiring the plaintiff to plead the facts necessary to support jurisdiction, the federal court would "not exceed its limits, and try causes not within its jurisdiction."[40]

Chief Justice Jay's *Shedden* opinion also hinted that, in addition to preventing federal courts from exceeding the scope of their congressionally authorized jurisdiction, the party-invocation requirement would serve an additional function: it would prompt federal courts to defer to state courts' authority to adjudicate cases that fall within concurrent state-federal jurisdiction.[41] The Chief Justice explained that "[t]he English ... rules are more necessary to be observed here [i.e., in the United States] than there [i.e., in England], on account of a difference of the general and state governments, which should be kept separate, and each left to do the business properly belonging to it."[42] Chief Justice Jay would have understood "the business properly belonging to" state courts as including not only cases falling outside the scope of federal subject matter

36. *See* Moravia v. Sloper, 125 Eng. Rep. 1039, 1041 (Ct. Com. Pl. 1737) (explaining that it is "necessary" for a plaintiff "to set forth that the cause of action arose within the jurisdiction of the Court"); IV BACON, *supra* note 35, at 32 ("[N]othing shall be intended within the Jurisdiction of [a court of limited jurisdiction], but what is expressly alledged to be so ...."); Bellia, *supra* note 35, at 285 (citing cases).

37. 21 F. Cas. 1218, 1219 (C.C.D. Va. 1793) (No. 12,736).

38. The Supreme Court later explained in 1799 that

> the fair presumption is (not as with regard to a Court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears. This renders it necessary, in as much as the proceedings of no court can be deemed valid further than its jurisdiction appears, ... to set forth upon the record of a [federal] Court, the facts or circumstances, which give jurisdiction ....

Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 11 (1799).

39. *Shedden*, 21 F. Cas. at 1219.

40. *Id.*

41. *Id.*

42. *Id.*

jurisdiction but also the vast majority of cases that fall within it.[43] The federalist structure created by the Constitution presumed that state courts could—and routinely would—hear cases that contain non-exclusive grounds for federal jurisdiction.[44]

Many modern courts have similarly suggested that concern for state courts' concurrent jurisdiction animates the party-invocation requirement. In the words of one federal court explaining its insistence that a party invoke an adequate jurisdictional ground, "considerations of state sovereignty, comity, and traditional judicial respect for the jurisdiction of other courts invoke the rule of caution on questions of conflicting [i.e., concurrent] jurisdiction" between state and federal courts.[45] Along the same lines, other courts have indicated that "the interests of comity and federalism require that federal jurisdiction be exercised only when it is clearly established" by the party desiring a federal forum.[46]

This comity rationale for federal courts' passive role in the process of determining the existence of jurisdiction is especially salient in removed cases.[47] Unlike a case initiated in federal court, where the possibility of state court adjudication is more theoretical than real, a removed case involves a federal court hearing a case initially lodged in a state court.[48] This procedural posture has led many modern federal courts to express

43. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 396–97 (1821) ("State Courts have a concurrent jurisdiction with the federal Courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal Courts be rendered exclusive by the words of the third article [of the Constitution].").

44. *See* Mannhardt v. Soderstrom, 1 Binn. 138, 143 (Pa. 1806) ("[W]here the state courts had jurisdiction prior to the adoption of the [C]onstitution, and where the acts of Congress have not vested an exclusive jurisdiction in their own courts, the courts of the several states retain a concurrent jurisdiction.").

45. Evans-Hailey Co. v. Crane Co., 207 F. Supp. 193, 198 (M.D. Tenn. 1962) (citing Metcalf Bros. & Co. v. Barker, 187 U.S. 165, 176 (1902)).

46. Holston v. Carolina Freight Carriers Corp., No. 90-1358, 1991 WL 112809, at *3 (6th Cir. June 26, 1991).

47. *See* Mize v. Amercraft Corp., 874 F. Supp. 356, 360 (M.D. Ala. 1994) ("[C]omity requires federal courts to allow state courts to proceed with their cases unless those cases are clearly and unequivocally removable.").

48. In language quoted ubiquitously in removed cases, the Supreme Court has "call[ed] for the strict construction of [removal statutes] . . . [because] [d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–09 (1941) (internal citation omitted). For cases citing *Shamrock Oil*, see, for example, Brierly v. Alusuisse Flexible Packaging, Inc., 1999 FED App. 0214A, ¶ 13 (6th Cir.), 184 F.3d 527, 534 ("In interpreting the statutory language, we are mindful that the statutes conferring removal jurisdiction are to be construed strictly because removal jurisdiction encroaches on a state court's jurisdiction." (citing *Shamrock Oil*, 313 U.S. at 108–09)); Lupo v. Human Affairs Int'l., Inc., 28 F.3d 269, 273–74 (2d Cir. 1994) ("[F]ederal courts construe the removal statute narrowly, resolving any doubts against removability." (citing *Shamrock Oil*, 313 U.S. at 108)).

concern that "removal jurisdiction encroaches on a state court's jurisdiction"[49] and "encroach[es] upon states' rights to resolve controversies in their own courts."[50] Thus, in practice, the traditional requirement that the defendant desiring removal invoke an adequate jurisdictional ground serves to "strike a delicate balance between a defendant's right of removal and the infringement of removal upon state sovereignty."[51] By placing responsibility for establishing federal court jurisdiction on the parties, the party-invocation rule reduces the friction that might arise between federal and state courts if federal courts could establish their own jurisdiction to hear a case.

In essence, the party-invocation requirement establishes a default rule that cases involving concurrent state-federal jurisdiction will be heard, if at all, in state court. This default rule aligns with the distinction between courts of general jurisdiction and courts of limited jurisdiction. State courts, which have general jurisdiction, may assume that they have authority to hear a case. Federal courts, by contrast, must assume they do not have authority to hear a case unless a party demonstrates otherwise.

In sum, the traditional approach to uninvoked jurisdictional grounds—which applies to cases initiated in federal court and perhaps even more strongly to cases removed to federal court—appears to have two rationales. The first rationale is to prevent federal courts from exceeding the limits of their congressionally authorized jurisdiction. The second rationale is to ensure that federal courts play a passive role in the process of determining whether a state or federal court will hear cases that fall within concurrent state-federal jurisdiction. In order to further these purposes, courts have traditionally viewed congressional authorization for federal court jurisdiction as insufficient to confer power on a court to exercise that jurisdiction; instead, a party to the suit must affirmatively *invoke* Congress's jurisdictional grant.

II. THE EMERGING MANDATORY RETENTION DOCTRINE

In a sharp break from the traditional approach to uninvoked jurisdictional grounds, courts embracing mandatory retention assert that "[o]nce a case has been properly removed, the district court has jurisdiction over it on all grounds apparent from the complaint, not just those cited in

49. Brierly v. Alusuisse Flexible Packaging, Inc., 1999 FED App. 0214A, ¶ 13 (6th Cir.), 184 F.3d 527, 534.

50. Davis v. Pizza Hut of Am., Inc., No. 06-0340, 2006 WL 1876903, at *1 (W.D. Mo. July 5, 2006).

51. Beard v. Lehman Bros. Holdings, Inc., 458 F. Supp. 2d 1314, 1321 (M.D. Ala. 2006).

the removal notice."[52] These courts reason that when a defendant removes a case, the federal court automatically takes hold of all the possible jurisdictional grounds therein, not solely the jurisdictional ground or grounds that the removing defendant lists in his removal notice.[53]

A. *Mandatory Retention In Practice*

Courts have applied the mandatory retention doctrine in situations where the jurisdictional ground the defendant invoked was adequate at the time of removal but thereafter became insufficient to require the court to retain the case.[54] In such situations, courts adhering to the traditional approach would remand the case to state court without regard to whether the remaining claims meet the requirements for an original ground of jurisdiction that the defendant has not invoked.[55] By contrast, mandatory retention courts consider whether the remaining claims contain an uninvoked jurisdictional ground, such as diversity jurisdiction.[56] If an uninvoked jurisdictional ground is present, a mandatory retention court regards itself as lacking discretion to remand the state law claims,

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52. Williams v. Costco Wholesale Corp., 471 F.3d 975, 977 (9th Cir. 2006); *see also* Brockman v. Merabank, 40 F.3d 1013, 1016 (9th Cir. 1994) ("[O]nce the case was removed to federal court by the FDIC [by virtue of the FDIC's status as a party], the district court had original jurisdiction over all claims by virtue of the FDIC's status as a party *and* by virtue of the RTC's status as a party.").

53. *Id.*

54. *Williams*, 471 F.3d at 977; *Brockman*, 40 F.3d at 1017; Buchner v. FDIC, 981 F.2d 816, 821 (5th Cir. 1993); *cf.* Adkins v. Ill. Cent. R.R., 326 F.3d 828, 850–51 (7th Cir. 2003) (Ripple, J., dissenting); Sabater v. Lead Indus. Ass'n, No. 00-8026, 2001 WL 1111505, at *7 & n.4 (S.D.N.Y. Sept. 21, 2001).

55. *See, e.g.*, Goulet v. Carpenters Dist. Council, 884 F. Supp. 17, 25 (D. Mass. 1994) (declining to continue exercising supplemental jurisdiction over the plaintiff's remaining claims even though they appeared to meet the requirements for diversity jurisdiction in a case removed by defendants to adjudicate a successful preemption claim). When a case involving state and federal claims is removed to federal court and then the federal court dismisses all of the federal claims on the merits, the invoked jurisdictional ground (federal question jurisdiction) is no longer sufficient to require the federal court to adjudicate the remaining state law claims. Section 1367(c) of Title 28 permits the court to continue exercising supplemental jurisdiction over the state law claims but provides that the exercise of such jurisdiction is discretionary. *See* 28 U.S.C. § 1331 (2000); *id.* § 1367 ("The district courts may decline to exercise supplemental jurisdiction . . . if . . . the district court has dismissed all claims over which it has original jurisdiction."); *id.* § 1441; Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988) (holding that a federal district court has discretion to remand a properly removed case to state court when the claims over which it had taken original jurisdiction have been eliminated).

56. *Brockman*, 40 F.3d at 1017; *Buchner*, 981 F.2d at 820; *cf. Williams*, 471 F.3d at 977 (holding that even if the federal question claim which was the proffered basis for removal is dismissed, the district court must retain the case if another ground of subject matter jurisdiction is present); *Sabater*, 2001 WL 1111505, at *7 & n.4 (implying that a federal court has no discretion to remand a case, even if all federal question claims are dismissed, if the case appears to meet the requirements for diversity jurisdiction).

reasoning that the existence of an uninvoked jurisdictional ground makes "retention of th[e] case . . . mandatory, not discretionary."[57]

Mandatory retention courts take the same approach in cases in which the only defendant remaining in the case expressly waived his opportunity to raise *any* ground of federal subject matter jurisdiction. Such cases arise in situations where a special removal statute enables a single defendant to unilaterally remove a case without obtaining the other defendants' consent.[58] In these situations, a defendant may waive his opportunity to remove but then nonetheless end up in federal court because a later-added defendant removes the case on the basis of a special removal statute.[59] If the later-added defendant who removed the case is subsequently dismissed, non-mandatory retention courts will regard themselves as having discretion either to continue exercising supplemental jurisdiction over the rest of the case or to remand it to state court.[60] In practice, courts will usually remand the remainder of the case.[61] Mandatory retention courts, by contrast, regard themselves as compelled to keep the case on the basis of the jurisdictional ground the remaining defendant declined to invoke.[62]

For example, in *Buchner v. FDIC*,[63] defendant FDIC waived its opportunity to remove pursuant to a special removal statute that gives federal courts authority to hear cases involving the FDIC.[64] After the FDIC's deadline to remove the case passed, the plaintiff joined as a defendant an FBI officer who removed the case pursuant to a special removal statute that enables federal officers to remove state court actions

57. *Brockman*, 40 F.3d at 1017. *See Buchner*, 981 F.2d at 821; *cf. Williams*, 471 F.3d at 977; *Sabater*, 2001 WL 1111505, at *7 & n.4.

58. In more typical cases, removed pursuant to 28 U.S.C. § 1441(a), all the defendants must consent to removal of the case. *See* Hewitt v. City of Stanton, 798 F.2d 1230, 1232 (9th Cir. 1986) (describing the "rule of unanimity"); Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986) (same); N. Ill. Gas Co. v. Airco Indus. Gases, 676 F.2d 270, 272 (7th Cir. 1982) (same); Cornwall v. Robinson, 654 F.2d 685, 686 (10th Cir. 1981) (same).

59. *See* Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co., 644 F.2d 1310, 1315 (9th Cir. 1981) (holding that a federal officer may remove a case pursuant to 28 U.S.C. § 1442 without obtaining the consent of his co-defendants).

60. *See* Robinson v. U.S. Cold Storage, Inc., No. 01-697, 2002 WL 187511, at *3 (D. Del. Feb. 5, 2002) ("Where the federal defendants have been dismissed from a case which has been removed under § 1442(a)(1) . . . the district court can either exercise supplemental jurisdiction over the case or remand to state court. When deciding whether to continue to exercise jurisdiction, the district court must consider judicial economy, convenience, and fairness to the litigants." (citation omitted)).

61. *See, e.g.*, Goulet v. Carpenters Dist. Council, 884 F. Supp. 17, 25 (D. Mass. 1994) (remanding the remainder of the case to state court).

62. *See, e.g.*, *Brockman*, 40 F.3d at 1017; *Buchner*, 981 F.2d at 821 (maintaining jurisdiction based on uninvoked grounds).

63. 981 F.2d at 821.

64. 12 U.S.C. § 1819(b)(2)(B) (2000).

filed against them.[65] When the district court dismissed the FBI officer, it remanded the remainder of the case,[66] noting that the FDIC had "waived its right of removal . . . long ago."[67] The Fifth Circuit reversed, asserting that a defendant's "waiver of its right to remove the case cannot affect the court's subject matter jurisdiction."[68] The Fifth Circuit declared that "[t]he fact that the FDIC waived its right to remove the . . . case is irrelevant to the determination of whether the case should have or could have been remanded once it had been . . . removed."[69] It concluded that the district court erred by declining to retain the case pursuant to the FDIC removal statute even though the FDIC had passed up its opportunity to remove the case.[70] The Ninth Circuit later reached the same conclusion in a case with substantially similar facts, concluding that "retention of th[e] case [based on a jurisdictional ground the remaining defendant waived] was mandatory, not discretionary."[71]

In resolving these cases, the Fifth and Ninth Circuits might have restricted the mandatory retention doctrine to the factual scenarios at hand: situations in which the invoked jurisdictional ground was adequate at the time of removal but subsequently became inadequate to require the case to remain in federal court.[72] Instead, both circuits' reasoning indicates that the

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65. 28 U.S.C. § 1442 (2000).

66. *Buchner*, 981 F.2d at 818 (describing the unpublished district court opinion).

67. *Id.* (quoting the unpublished district court opinion).

68. *Id.* at 821.

69. *Id.* at 818.

70. *Id.*; *see* Adkins v. Ill. Cent. R.R., 326 F.3d 828, 850–51 (7th Cir. 2003) (Ripple, J., dissenting) ("*Brockman* and *Buchner* make clear that the district court has an independent obligation to determine whether it has subject matter jurisdiction. If that examination reveals the existence of subject matter jurisdiction, the exercise of that jurisdiction is mandatory, not discretionary, and the actions of a party cannot affect the court's responsibility to exercise its jurisdiction. Consequently, because the district court had subject matter jurisdiction over the claim involving Amtrak, the district court's exercise of that jurisdiction was mandatory, and the actions of Amtrak's counsel did not divest the court of its responsibility to adjudicate the claim at issue.").

71. Brockman v. Merabank, 40 F.3d 1013, 1017 (9th Cir. 1994).

72. Such factual scenarios are less problematic for state court concurrent jurisdiction than scenarios in which no party ever invoked an adequate jurisdictional ground. Supplemental jurisdiction principles provide that when a party invokes an adequate jurisdictional ground, federal jurisdiction attaches to the entire case so that when the court later dismisses the claims on which the invoked jurisdictional ground rests, it has discretionary authority to continue adjudicating the remaining claims. *See* 28 U.S.C. § 1367(c) (2000); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988) (holding that a federal district court has discretion to continue exercising jurisdiction over supplemental state law claims after the claims over which it took original jurisdiction have been eliminated). Mandatory retention's directive that a court must retain such claims if they contain an uninvoked source of original jurisdiction merely eliminates a federal court's existing choice to retain or remand claims over which it has taken supplemental jurisdiction. Thus, in such cases, mandatory retention is a relatively minor encroachment on state

mandatory retention doctrine applies not only to cases in which the jurisdictional ground was adequate at the time of removal, but also to cases in which the invoked jurisdictional ground was never adequate.[73] It indicates that a federal court has an "independent obligation to determine whether it has subject matter jurisdiction"[74] regardless of whether the jurisdictional grounds the defendant invoked were adequate at an earlier point in the case.[75]

Both the Fifth and Ninth Circuits base their adoption of the mandatory retention doctrine on their interpretation of the statute governing the remand of removed cases.[76] They have concluded that § 1447(c) of Title 28 requires district courts to retain removed cases that contain uninvoked jurisdictional grounds.

Section 1447(c) of Title 28, which governs the vast majority of remands of removed cases to state court, provides that

> [a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal .... If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.[77]

This provision divides removal defects into two categories: "lack of subject matter jurisdiction" defects and "defect[s] other than lack of subject matter jurisdiction."[78] As one would expect, the statute limits remands for "defect[s] other than lack of subject matter jurisdiction," which under previous versions of the statute (including the version in effect when the Fifth and Ninth Circuits adopted mandatory retention) were termed "procedural defects."[79] The statute provides that a court may not remand

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court jurisdiction because it simply requires federal courts to retain claims that they already have discretionary authority to retain.

73. *See* Williams v. Costco Wholesale Corp., 471 F.3d 975, 977 (9th Cir. 2006) ("Once a case has been properly removed, the district court has jurisdiction over it on all grounds apparent from the complaint, not just those cited in the removal notice."); *Brockman*, 40 F.3d at 1016 ("[O]nce the case was removed to federal court by the FDIC [by virtue of the FDIC's status as a party], the district court had original jurisdiction over all claims by virtue of the FDIC's status as a party *and* by virtue of the RTC's status as a party.").

74. *Adkins*, 326 F.3d at 850–51 (Ripple, J., dissenting) (explaining the Fifth and Ninth Circuit's views); *see Brockman*, 40 F.3d at 1016–17; *Buchner*, 981 F.2d at 820.

75. Thus, future courts following the Fifth and Ninth Circuits' rationale may retain cases in which no defendant ever invoked an adequate jurisdictional ground, such as the hypothetical put forth at the beginning of this Article. *See Adkins*, 326 F.3d at 848 (Ripple, J., dissenting); *Brockman*, 40 F.3d at 1016–17; *Buchner*, 981 F.2d at 820.

76. *See Brockman*, 40 F.3d at 1016–17; *Buchner*, 981 F.2d at 820.

77. 28 U.S.C. § 1447(c) (2000).

78. *Id.*

79. 28 U.S.C. § 1447(c) (1990) (amended 1996).

sua sponte for procedural, or non-jurisdictional defects[80] and may remand for such defects on the plaintiff's motion only within thirty days of removal. By contrast, defects that amount to a "lack of federal subject matter jurisdiction" require remand to state court if the plaintiff or the court raises the defect "any time before final judgment."[81]

According to the Fifth and Ninth Circuits, a district court does not "lack subject matter jurisdiction" within the meaning of § 1447(c) if the case contains an uninvoked jurisdictional ground.[82] Thus, the defendant's failure to invoke an adequate jurisdictional ground in such a case is a procedural defect for which a case may be remanded only during the thirty-day period following removal, and only on the plaintiff's motion.[83]

B. Problems With Mandatory Retention

In concluding that § 1447(c) requires federal courts to retain cases based on uninvoked jurisdictional grounds, both circuits' statutory analysis has not engaged the traditional view—which is likely implicit in the statute's terms—that party invocation of an adequate jurisdictional ground is an essential component of federal jurisdiction.[84] The Fifth and Ninth Circuits' reading of § 1447(c) assumes that the statute rejects the traditional understanding that courts lack jurisdiction over cases in which no party has invoked an adequate jurisdictional ground.

The Fifth and Ninth Circuits have not justified this reading of § 1447(c). Section 1447(c) provides no definition for the phrase "lack [of]

80. *See* Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co., 346 F.3d 1190, 1193 (9th Cir. 2003); Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc., 254 F.3d 1317, 1321 (11th Cir. 2001); *In re* FMC Corp. Packaging Sys. Div., 208 F.3d 445, 451 (3d Cir. 2000); Page v. City of Southfield, 1995 FED App. 0030P, ¶ 9 (6th Cir.), 45 F.3d 128, 133; *In re* Cont'l Cas. Co., 29 F.3d 292, 294 (7th Cir. 1994); *In re* Allstate Ins. Co., 8 F.3d 219, 223 (5th Cir. 1993).

81. 28 U.S.C. § 1447(c) (2000). The temporal limitation on remands for lack of jurisdiction appears to reflect the Supreme Court's treatment of uninvoked jurisdictional grounds. *See infra* Part II.B.

82. *See* Brockman v. Merabank, 40 F.3d 1013, 1016 (9th Cir. 1994) ("The district court's decision to remand was not authorized by § 1447(c) because it did not lack subject matter jurisdiction."); Buchner v. FDIC, 981 F.2d 816, 820 (5th Cir. 1993) ("§ 1447(c) allows a district court to remand a case if the court lacks subject matter jurisdiction over the case, or on timely motion if there is a defect in the removal procedure. As discussed above, the Buchners' claims are treated as arising under federal law; therefore, the district court has original subject matter jurisdiction of this case under 28 U.S.C. § 1331. . . . [T]he plain language of . . . [§] 1447(c) grants the district court only limited authority to remand a case."); *cf.* Heller v. Allied Textile Cos. 276 F. Supp. 2d 175, 180 (D. Me. 2003) (interpreting "any defect other than lack of subject matter jurisdiction" as encompassing "any defect that does not go to the question of whether the case originally could have been brought in federal district court").

83. § 1447(c).

84. *See supra* Part I.

subject matter jurisdiction"[85] and accordingly provides no indication as to whether Congress rejected the traditional view that a federal court does not have jurisdiction over a case unless a party has affirmatively invoked an adequate jurisdictional ground.[86] The legislative history of § 1447(c) is similarly silent on this question. Given the absence of textual or historical indicia that Congress rejected the view that a district court "lacks subject matter jurisdiction" if no party has invoked an adequate jurisdictional ground, mandatory retention courts have not adequately explained their conclusion that § 1447(c) rejects this traditional understanding.[87]

In fact, when read in tandem with the Supreme Court's treatment of the category of cases specifically excepted from its provisions, § 1447(c) appears not to reject but to incorporate the traditional approach to uninvoked jurisdictional grounds.[88] Section 1447(c) instructs courts to remand for lack of subject matter jurisdiction during the period "before final judgment."[89] This temporal limitation is difficult to explain within the mandatory retention framework for reading § 1447(c). If the language "lacks subject matter jurisdiction" encompasses only cases over which Congress has not authorized jurisdiction (and not cases containing uninvoked jurisdictional grounds), there would be no need for the statute to distinguish between pre-judgment and post-judgment jurisdictional problems. Obviously, if Congress has not authorized jurisdiction, the case must be remanded to state court regardless of whether it has reached judgment.[90]

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85. *Id.*

86. *Id.*

87. Finley v. United States, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.' " (quoting Anderson v. Pac. Coast S.S. Co., 225 U.S. 187, 199 (1912)). Most commentators have inferred that § 1447(c) incorporates the traditional understanding of uninvoked jurisdictional grounds. *See, e.g.*, Christopher L. Shaw, Note, *Removal of Causes: The Dilemma of the Improperly Removed Case*, 27 OKLA. L. REV. 99, 101 (1974) ("The statute clearly gives the federal court a mandate to remand an improperly removed case if the impropriety is discovered before final judgment."); *see also id.* at 104 ("A case which is improperly removed to a federal court is in jeopardy of remand at any time until judgment is entered.").

88. *See* Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 702 (1972); Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951).

89. 28 U.S.C. § 1447(c) (2000); *see id.* (instructing courts to remand "[i]f at any time *before final judgment* it appears that the district court lacks subject matter jurisdiction . . . ." (emphasis added)).

90. Appellate courts, like district courts, must verify the existence of a congressionally authorized source of subject matter jurisdiction and return the case to state court if no congressionally authorized source of subject matter jurisdiction is present. *See, e.g.*, *In re* Carter, 618 F.2d 1093, 1098 (5th Cir. 1980) ("Even after entry of final judgment, the constitutional balance of policies that underlies the Article III grant of judicial power impels the vacation of that

A possible explanation for the statute's limitation of remands to the period "before final judgment" is that the statute incorporates a line of Supreme Court cases holding that *after* final judgment, an appellate court need not shuttle a case back to state court if it contains an uninvoked jurisdictional ground.[91] These cases reason that by the time a removed case reaches judgment, concerns of judicial economy and efficiency justify retaining the case in federal court despite the defendant's failure to invoke the appropriate jurisdictional ground that exists within the case.[92] After final judgment, the overarching goal within the state-federal system of furthering judicial economy and efficiency outweighs the comity-based reasons for requiring party invocation of the jurisdictional ground justifying federal court adjudication.

The Supreme Court endorsed appellate court reliance on uninvoked jurisdictional grounds at the beginning of the twentieth century in *Baggs v. Martin*.[93] In this case, the defendant who had removed the case to federal court challenged his loss on the merits by arguing that the jurisdictional ground he invoked in his removal petition was not, in fact, present.[94] Assuming this contention to be correct, the Supreme Court concluded that because a separate, *uninvoked* jurisdictional source not noticed by the defendant was present in the case, the defendant who "voluntarily brought the cause into the [federal] court ... cannot, after that court has passed upon the matter in controversy, be heard to object to the power of that court to render judgment ...."[95] Acknowledging that the defendant would have escaped the adverse judgment if the case contained no congressionally authorized jurisdictional grounds, the Court held, based on an estoppel theory, that the defendant could not escape the judgment based on his own failure to invoke the jurisdictional ground that was present in the case.[96] As the Court later explained, "[s]ince the federal court could have had jurisdiction originally," retaining the case in federal court on an uninvoked jurisdictional ground "did not endow [the court] with a jurisdiction it could not possess."[97]

Much later, in *Grubbs v. General Electric Credit Corp.*,[98] the Supreme Court extended the *Baggs* exception to the party-invocation rule to include

judgment and remand to the state court having jurisdiction when it is determined that the federal court was without power to act ....").

91. *See* Baggs v. Martin, 179 U.S. 206, 209 (1900); *Grubbs*, 405 U.S. at 702.

92. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 75–77 (1996).

93. 179 U.S. 206 (1900).

94. *Id.* at 208–09.

95. *Id.*

96. *Id.*

97. Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951).

98. 405 U.S. 699 (1972).

not only cases that have reached judgment against the removing defendant, but also cases that have reached judgment against the *plaintiff* where the plaintiff failed to object to the defendant's invocation of the wrong jurisdictional ground.[99] The Court concluded that

> where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.[100]

As in *Baggs*, the Court indicated that only after judgment may courts distinguish between cases containing no jurisdictional grounds and cases containing uninvoked jurisdictional grounds.[101]

The *Baggs-Grubbs* exception for post-judgment reliance on uninvoked jurisdictional grounds suggests that the Supreme Court continues to accept the traditional view that a district court may not rely on an uninvoked jurisdictional ground prior to judgment.[102] The post-judgment need to salvage the time and effort a federal court has expended on a case does not arise, of course, immediately after expiration of the thirty-day period following removal.

According to the Supreme Court, the need to salvage spent costs does not arise until after the case reaches judgment. Only at that point have "considerations of finality, efficiency, and economy become [sufficiently] overwhelming" to justify departure from the rule that federal courts may not adjudicate a case in which no party has invoked an adequate jurisdictional ground.[103] Earlier in the case, the comity-based rationales for requiring party invocation of the adequate jurisdictional ground continue to be present. The deference the federal court owes the state court in which the case was initially filed continues to be paramount.

In sum, courts adopting the mandatory retention doctrine have failed to adequately explain their departure from the traditional approach to uninvoked jurisdictional grounds. In essence, by requiring federal courts to rely on uninvoked jurisdictional grounds early in the case, mandatory retention courts invert the traditional rule that the party desiring a federal

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99. *Id.* at 702.

100. *Id.*

101. *Id.*

102. *See Am. Fire & Cas. Co.*, 341 U.S. at 17; *Grubbs*, 405 U.S. at 702.

103. Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 (1996); *see also* Ayres v. Gen. Motors Corp., 234 F.3d 514, 518 n.3 (11th Cir. 2000) ("[W]e believe that to remand this case which satisfies all federal jurisdictional requirements to state court 'would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.' " (quoting *Lewis*, 519 U.S. at 77)).

forum "must 'overcome a strong presumption that federal jurisdiction does not exist.' "[104] They have created a default rule that removed cases stay in federal court.

III. THE ALTERNATIVE: PERMIT DEFENDANTS TO AMEND NOTICES OF REMOVAL

Unfortunately, the current alternative to mandatory retention—the approach still followed by the majority of federal courts—does not harmonize the treatment of uninvoked jurisdictional grounds with another important value: equity between plaintiffs and defendants. Most courts resolve the problem of a removed case that contains an uninvoked jurisdictional ground by automatically returning the case to state court. They do not permit the defendant to amend his removal notice to allege the uninvoked jurisdictional ground.[105] Virtually all courts agree that defendants may amend their removal notices to allege previously uninvoked jurisdictional grounds only within the thirty-day window in which they may exercise their right to remove a case.[106] Plaintiffs, by contrast, are free to amend their jurisdictional allegations at any time.[107]

This inequity might contribute to a court's willingness to adopt mandatory retention. Although none of the courts adopting mandatory retention have cited concerns about defendants' inability to amend their jurisdictional allegations as justification for mandatory retention, such concerns—stated or unstated—may fuel courts' further acceptance of the mandatory retention doctrine. Mandatory retention ameliorates defendants' inability to amend by essentially directing courts to amend removal notices on defendants' behalf.

However, the acceptance of mandatory retention as the solution to defendants' inability to amend is not inevitable. Instead, mandatory retention may serve as a catalyst for re-examining the rule limiting defendants' jurisdictional amendments. Closer examination of the limit on defendants' jurisdictional amendments reveals little justification for its continued application. The nineteenth-century rationale for the rule has eroded and, even to the extent the historical rationale persists, it cannot justify the current scope of the amendment restriction, which is now broader than it was in the nineteenth century.

104. Bailey v. J.B. Hunt Transp., Inc., No. 06-240, 2007 WL 764286, at *3 n.4 (E.D. Pa. Mar. 8, 2007) (quoting Mercante v. Preston Trucking Co., No. CIV. A. 96-5904, 1997 WL 230826, at *1 (E.D. Pa. May 1, 1997)).

105. *See infra* note 113 and accompanying text.

106. *Id.*

107. *See infra* note 112 and accompanying text.

A. *The Judicially Created Amendment Barrier*

No statute bars amending removal notices to add previously uninvoked jurisdictional grounds. In fact, nearly 100 years ago, Congress made clear that defendants' ability to amend jurisdictional allegations in their removal petitions should parallel plaintiffs' ability to amend jurisdictional allegations in their complaints.[108] The Law and Equity Act of 1915 provided

> [t]hat where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, *either party may amend* at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as *to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded* at the inception of the suit, or, if it be a removed case, *in the petition for removal.*[109]

In 1948, Congress expanded the 1915 statute's amendment authorization to include not only amendments to insufficient diversity allegations, but also amendments to all insufficient jurisdictional allegations.[110] The current statute, 28 U.S.C § 1653, provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."[111]

Section 1653 does not expressly indicate whether it authorizes amendments that change jurisdictional grounds in addition to amendments that merely correct already-invoked jurisdictional grounds. Section 1653's language, however, is sufficiently open-ended to permit parties not only to correct deficiencies in jurisdictional grounds previously invoked, but also to amend pleadings to add wholly different jurisdictional grounds. Courts interpret § 1653 in this manner in plaintiff-filed cases, permitting plaintiffs whose complaints allege federal question jurisdiction to amend in order to

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108. *See* Law and Equity Act of 1915, Pub. L. No. 63-278, 38 Stat. 956 (current version at 28 U.S.C. § 399 (1940)).

109. *Id.* (emphasis added).

110. Act of June 25, 1948, Pub. L. No. 80-773, § 1653, 62 Stat. 869, 944. As the Revisor's Note to 28 U.S.C. § 1653 explains, § 1653 "extend[s the former § 274c] to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship." 28 U.S.C. § 1653 (2000).

111. § 1653.

allege diversity jurisdiction and vice versa.[112] However, in removed cases, courts will permit defendants to amend removal notices only to correct inadequate averments previously made, such as adding a corporation's place of incorporation to correct an imperfect statement of citizenship.[113]

112. *See* USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 204 (3d Cir. 2003) ("[W]e have held that a district court abused its discretion by *not* allowing plaintiffs to amend their complaint to allege jurisdiction on diversity grounds where diversity existed but had not been a necessary basis for jurisdiction before the federal claims in the case were dismissed."); Whitmire v. Victus Ltd., 212 F.3d 885, 890 (5th Cir. 2000) (declaring that allowing a plaintiff "to amend its pleadings to inform the court of an existing basis for subject matter jurisdiction is [nothing] more than [a] 'technical' or 'formal' amendment for which § 1653 was crafted"); Scattergood v. Perelman, 945 F.2d 618, 627 (3d Cir. 1991) ("[T]he district court abused its discretion in not allowing the plaintiffs to amend their complaint to allege diversity."); Miller v. Stanmore, 636 F.2d 986, 990 (5th Cir. 1981) ("The requested amendment would have done no more than state an alternative jurisdictional basis for recovery upon the facts previously alleged. In the absence of any bad faith or undue delay on the part of the plaintiffs or undue prejudice to the defendants, the district court therefore abused its discretion by not allowing the plaintiffs an opportunity to amend.").

113. *See USX Corp.*, 345 F.3d at 206 n.11 (noting the prohibition against adding completely new grounds for removal to the removal notice after the time for removal has expired); ARCO Envtl. Remediation, L.L.C. v. Dep't of Health and Envtl. Quality, 213 F.3d 1108, 1117 (9th Cir. 2000) ("The Notice of Removal 'cannot be amended to add a separate basis for removal jurisdiction after the thirty day period.' [Such an] amendment is more than a correction of a 'defective allegation of jurisdiction' permissible under 28 U.S.C. § 1653." (citation omitted) (quoting O'Halloran v. Univ. of Wash., 856 F.2d. 1375, 1381 (9th Cir. 1988))); Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269, 274 (2d Cir. 1994) ("It would be contrary to any concept of sensible judicial administration to permit HAI to amend its notice of removal at this juncture (well beyond thirty days after HAI first received [the] complaint, *see* 28 U.S.C. § 1446(b)) . . . ."); Shaw v. Dow Brands, Inc., 994 F.2d 364, 368 (7th Cir. 1993) ("Removal petitions may be freely amended for thirty days . . . ." (citing 28 U.S.C. § 1446(b) (1988))); Uppal v. Elec. Data Sys., 316 F. Supp. 2d 531, 536 (E.D. Mich. 2004) (remanding, holding that, after expiration of time to remove, the defendant would not be permitted to amend its removal notice to assert diversity grounds for removal when such grounds had not been invoked in initial removal notice); Muhlenbeck v. KI, L.L.C., 304 F. Supp. 2d 797, 801 (E.D. Va. 2004) ("Section 1653 . . . permits amendments of 'defective allegations' of jurisdiction, not the addition of additional allegations."); Arancio v. Prudential Ins. Co. of Am., 247 F. Supp. 2d 333, 337 (S.D.N.Y. 2002) ("A notice of removal may not be untimely amended to add a 'new avenue of jurisdiction.' "); Briarpatch Ltd. v. Pate, 81 F. Supp. 2d 509, 517–18 (S.D.N.Y. 2000) (holding, in a case originally removed based on diversity jurisdiction, that failure to assert federal question jurisdiction is a substantive defect which a defendant cannot cure by amendment after expiration of the thirty-day time limit for removal); Iwag v. Geisel Compania Maritima, S.A., 882 F. Supp. 597, 601 (S.D. Tex. 1995) ("Section 1653 does not allow the removing party to assert additional grounds of jurisdiction not included in the original pleading."); Garza v. Midland Nat'l Ins. Co., 256 F. Supp. 12, 15 (S.D. Fla. 1966) ("Since the thirty-day period allowed for the removal procedure, 28 U.S.C. § 1446(b), has passed, this Court lacks jurisdiction to grant an amendment to supply missing allegations of jurisdiction. Only an amendment to cure a defective allegation may be brought after the thirty days."); 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 107.30[2][a][iv] (3d ed. 2007) ("[A]mendment may be permitted after the 30-day period if the amendment corrects defective allegations of jurisdiction, but not to add a new basis for removal jurisdiction."); AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 340 (1969) ("Perhaps it is right to hold that a petition for removal on the basis of a federal question cannot be amended, after the statutory period has run, to claim removal on the basis of diversity." (citing United Gas Pipe Line Co. v. Brown, 207 F. Supp. 139, 141 (E.D. La. 1962)

Modern courts base their refusal to permit defendants to amend in order to add previously uninvoked jurisdictional grounds on 28 U.S.C. § 1446(b), which sets out a thirty-day deadline for removing a case to federal court. Section 1446(b) provides:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . .
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty 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 . . . .[114]

This provision does not, however, address amendments. It simply provides that a defendant seeking to remove a case must do so within thirty days of receiving the complaint or—if the case could not be removed on the basis of the initial complaint—within thirty days after receiving notice that the case is removable.[115]

In fact, if any inference regarding amendments may be drawn from 28 U.S.C. § 1446(b), the inference would be that civil defendants *may* switch jurisdictional grounds outside the period for effecting removal. Section 1446(c), which immediately follows § 1446(b), expressly prohibits *criminal* defendants from amending removal notices to add new grounds for federal court adjudication that existed at the time of removal.[116] Section 1446(b)'s comparative silence regarding amendments in civil cases

(holding that a defendant cannot switch grounds after the time period has run) and Devlin v. Flying Tiger Lines, Inc., 220 F. Supp. 924, 928 (S.D.N.Y. 1963) (allowing defendant to switch grounds after the time period has run))); 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3733 (3d ed. 1998) ("[N]ew removal grounds cannot be added by amendment . . . ."). *But see* Thompson v. Wheeler, 898 F.2d 406, 408 (3d Cir. 1990) ("28 U.S.C. § 1653 . . . could probably be invoked here if the case was removed under the wrong section.").

114. 28 U.S.C. § 1446(b) (2000).

115. *Id.*

116. *Id.* § 1446(c)(2) ("A notice of removal of a *criminal* prosecution shall include all grounds for such removal [and a] failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds . . . ." (emphasis added)). This express restriction of amendments was enacted in 1977 as part of a package of reforms designed to streamline the criminal removal process. S. REP. NO. 95-354, at 12 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 527, 535 (suggesting that the changes to criminal removal procedure adopted in 1977 were designed "to minimize the disruption and unnecessary delay in State criminal proceeding that can result from frivolous and dilatory petitions for removal under the current procedure").

suggests that civil defendants, unlike criminal defendants, may amend their removal notices to add previously uninvoked grounds.

In addition to the inference that "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,"[117] the differences between civil and criminal litigation highlight the comparatively weak rationale for restricting a civil defendant's ability to amend his removal notice vis-à-vis a civil plaintiff's parallel ability to amend his complaint. Unlike the grounds for removal of criminal prosecutions, which have little connection to the grounds for initiating a criminal prosecution in federal court, the grounds for removal of civil cases parallel the grounds for filing such actions in federal court. Furthermore, the party occupying the position of defendant in a civil case often could just as easily occupy the position of plaintiff had he filed suit first. Thus, unlike the criminal context, there is little justification for imposing different pleading requirements on civil defendants than civil plaintiffs.

Accordingly, the text of 28 U.S.C. § 1446(b) does not support the judicial rule restricting defendants' jurisdictional amendments in civil cases to the thirty-day period for effecting removal.[118] Instead, § 1446(b)—which contains no restriction on amendments to civil removal petitions—aligns with 28 U.S.C. § 1653's parallel treatment of plaintiff and defendant amendments in civil cases.

B. Nineteenth-Century Amendment Practice

The judicial rule restricting jurisdictional amendments to the thirty-day period for effecting removal appears to be a confused remnant from late nineteenth-century removal practice in which state courts played a more significant role in the removal process than they do today. Prior to the 1948 revision of removal procedure, defendants filed their petitions for removal not directly in federal court, as is today's practice, but in state court.[119] The deadline for filing a petition for removal was tied to the time

117. Babbitt v. Sweet Home Chapter of Cmtys., 515 U.S. 687, 724 (1995) (citing Keene Corp. v. United States, 508 U.S. 200, 208 (1993)).

118. *See supra* notes 113–14 and accompanying text.

119. *See* Act of Mar. 3, 1911, ch. 231, § 29, 36 Stat. 1094, 1095 (current version at 28 U.S.C. § 72 (1940)) ("[H]e or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried and before the trial thereof for the removal of such suit into the circuit court to be held in the district where such suit is pending . . . . [After the defendant files a bond and a copy of the record in the federal court, i]t shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit."). For an earlier version, see Act of Mar. 3, 1875, ch. 137, § 3, 18 Stat. 470, 471 ("[H]e may make and file a petition in such suit in such State court at the time, or any time before the defendant is required

frame in which state law required the defendant to file an answer, which was usually twenty or thirty days.[120]

Unlike today's practice, under which the federal court alone judges the adequacy of the defendant's removal notice, under pre-1948 practice state courts also considered the defendant's removal petition to determine the facial adequacy of the defendant's jurisdictional allegations. If the case was facially removable, the state court entered an order granting the removal.[121]

1. Amendment Restrictions

State courts' role in the removal process shaped the amendment restrictions nineteenth-century federal courts imposed on defendants. Federal courts allowed a defendant to amend his jurisdictional allegations only if his removal petition, on its face, stated an adequate jurisdictional ground.[122] Nineteenth-century courts reasoned that in the absence of facially adequate jurisdictional averments in state court (the requirement that must be met for state courts to relinquish their jurisdiction), jurisdiction remained with the state court, even if the state court had mistakenly entered an order granting removal.[123] If the state court record

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by the laws of the state of the rule of the State court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit .... [After the defendant files a bond and a copy of the record in the federal court, i]t shall be the duty of the State court to accept said petition and bond, and proceed no further in such suit.").

120. § 29, 36 Stat. at 1095.

121. *Id.*; R.R. Co. v. Koontz, 104 U.S. 5, 14 (1881) ("[W]hen a sufficient case for removal is made in the State court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored.").

122. *See* Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 101 (1898) ("A petition for removal, when presented to the state court, ... must doubtless show ... the jurisdictional facts upon which the right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction; and, if it does, the [federal court] cannot allow an amendment of the petition, but must remand the case."); Jackson v. Allen, 132 U.S. 27, 34 (1889) ("It appears from the record that the citizenship of the parties at the commencement of the actions, as well as at the time the petitions for removal were filed, was not sufficiently shown, and that therefore the jurisdiction of the state court was never divested. This being so, the defect cannot be cured by amendment." (citation omitted)); Crehore v. Ohio & Miss. Ry. Co., 131 U.S. 240, 244–45 (1889) ("[N]o amendment of the record made in the [federal court] could affect the jurisdiction of the [state court] ...."); Waite v. Phoenix Ins. Co., 62 F. 769, 770 (C.C.M.D. Tenn. 1894) ("Defendant accompanies his record with a petition to this court alleging facts that do not appear in his petition to the state court. It cannot be looked to as conferring jurisdiction on this court. If the petition in the state court does not allege sufficient grounds for removal, its failure to do so cannot be remedied by the amended petition. It can only be looked to when the petition filed in the state court shows on its face sufficient grounds for removal ....").

123. B.C. MOON, THE REMOVAL OF CAUSES 471–72 (1901) ("If the facts entitling the petitioner to a removal are not stated in the petition filed in the State court, and do not otherwise appear in the record of such court as it exists at the time of filing the petition, the jurisdiction of

did not contain facially adequate jurisdictional allegations, the federal court lacked jurisdiction over the case, even for the purpose of allowing an amendment to show that jurisdiction existed in fact.[124]

In the words of the late nineteenth-century Supreme Court, "amendments may be allowed when, and only when, the petition, as presented to the state court, shows upon its face sufficient ground for removal"[125] because "no amendment of the record made in the [federal] [c]ourt can affect the jurisdiction of the state court . . . ."[126] Thus, the standard that the federal court applied for taking jurisdiction over a case mirrored the standard that the state court applied for relinquishing jurisdiction. The federal court reasoned that if the petition did not state a facially adequate jurisdictional ground, the state court's power over the case did not cease. Accordingly, if the removal petition lacked a facially adequate ground for federal jurisdiction, the defendant could not amend in federal court to cure the defect.[127]

The design of the amendment restriction reflected federal courts' respect of state courts' role in the removal process. In essence, federal courts reasoned that permitting defendants to amend facially inadequate removal petitions in federal court would render meaningless the state court's task of judging the facial adequacy of the jurisdictional allegations the defendant made in state court.[128] Federal courts demonstrated their deference to state courts' role in the removal process by permitting defendants to only amend petitions that stated facially adequate jurisdictional grounds.

2. Amendments To Add Uninvoked Jurisdictional Grounds

Cases from this period suggest that courts found no intrinsic problem with amendments to allege new jurisdictional grounds; the problem was with amendments that had the effect of rendering meaningless the state court's role in the removal process. Unlike modern courts, nineteenth-century courts were unconcerned with whether a proposed amendment sought to add a new jurisdictional ground. So long as the removal petition presented in the state court stated a facially adequate jurisdictional ground, the defendant could amend it in federal court in any manner.

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the State court over the case continues, notwithstanding it may order the suit removed. Such jurisdiction cannot be divested by stating the facts authorizing a removal in an amended petition filed in the Federal Court, or by bringing such facts into the record in any other manner in the Federal Court.").

124. Martin v. Balt. & Ohio R.R. Co., 151 U.S. 673, 691 (1894).

125. *Id.*

126. Graves v. Corbin, 132 U.S. 571, 590 (1890).

127. *Id.*

128. *Id.*

In conformity with this rationale, a nineteenth-century court concluded that a defendant could amend its petition for removal to change the ground on which the petition rested from diversity of citizenship to federal question jurisdiction.[129] As another court explained:

> [W]here the facts, as stated, or which are in the record, if true, would give the [federal] court jurisdiction, then the jurisdiction attaches, and then the amendments may be allowed, even to the extent of changing the grounds upon which the court is to continue its jurisdiction . . . .[130]

After the turn of the century, the Supreme Court approved this practice, indicating that a defendant may amend a facially sufficient removal petition to change the jurisdictional ground on which the petition rests.[131]

Given this history, there appears to be little justification for modern courts' refusal to permit defendants to amend their removal notices to add previously uninvoked jurisdictional grounds. Under post-1948 removal procedure, state courts no longer judge the sufficiency of a defendant's jurisdictional allegations but instead simply halt their proceedings when a defendant files a removal notice.[132] Based on this changed procedure, federal courts now regard the mere filing of a removal notice as dislodging the case from the state court and providing the federal court authority to

129. Woolridge v. McKenna, 8 F. 650, 679 (C.C.W.D. Tenn. 1881) (allowing "an entire change of the petition by alleging another ground for removal than that contained in the petition"); *see also* Merchants' Nat'l Bank v. Thompson, 4 F. 876, 877–78 (C.C.D. Mass. 1880) (describing a case in which the court allowed a defendant to amend his petition for removal after judgment was entered for the defendant to state an uninvoked jurisdictional ground).

130. Freeman v. Butler, 39 F. 1, 4 (C.C.D. Ky. 1889). The court relied on language in *Carson v. Dunham*, 121 U.S. 421 (1887), which provided "we think it was proper [for the circuit court to permit the defendant] to amend a petition which on its face showed a right to transfer. Whether this could have been done if the petition as presented to the state court had not shown on its face sufficient ground of removal we do not now decide." *Freeman*, 39 F. at 4 (quoting *Carson*, 121 U.S. at 427).

131. S. Pac. Co. v. Stewart, 245 U.S. 359, 365 (1917) ("It may be conceded, for the sake of the argument, that the grounds of removal might have been amended by including in the petition the federal ground of action set up in the complaint, but no attempt at amendment was made, and the removal to the District Court of the United States was upon a petition resting solely on the ground of diverse citizenship.").

132. *See* 28 U.S.C. § 1446(d) (2000) ("Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded."); Medrano v. Texas, 580 F.2d 803, 804 (5th Cir. 1978) ("28 U.S.C. § 1446(e) [sic] clearly requires that the state stop all proceedings, once notice is given, until a determination on the merits of the petition for removal is made in federal court.").

allow the defendant to cure facially inadequate allegations of federal subject matter jurisdiction.[133]

In light of the change in removal procedure in 1948, current courts' prohibition on grounds-changing amendments is difficult to justify. Now that defendants may amend inadequate jurisdictional allegations, little justification exists for forbidding amendments that change the jurisdictional ground on which the removal notice rests. Courts have not explained the justification for the current expansion of the amendment limitation beyond its historical parameters.

Furthermore, as previously discussed, the prohibition on amendments that change jurisdictional grounds creates an unjustified disparity between plaintiffs' and defendants' abilities to amend their jurisdictional allegations.[134] This disparity makes the mandatory retention doctrine more attractive. Some federal courts may be inclined to retain a case based on jurisdictional grounds the defendant did not invoke in order to counteract the disparity between plaintiffs' and defendants' abilities to amend their jurisdictional allegations.

IV. MANDATORY RETENTION AND AMENDMENT COMPARED

Rather than circumventing the lack of parity between plaintiffs and defendants via the mandatory retention doctrine, the better response would be to equalize plaintiffs' and defendants' abilities to amend their jurisdictional allegations. By grossly overcompensating for this disparity, mandatory retention threatens to undermine the important comity and federalism policies served by the party-invocation rule.

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133. *See* Va. *ex rel.* Kilgore v. Bulgartabac Holding Group, 360 F. Supp. 2d 791, 797 (E.D. Va. 2005) ("[O]nce the notice of removal is filed, the state court is divested of any jurisdiction over the action."); Evans-Hailey Co. v. Crane Co., 207 F. Supp. 193, 200 (M.D. Tenn. 1962) ("Under the new procedure the state court is given no opportunity to judge the sufficiency of the petition to oust it of jurisdiction. A mere notice to the state court clerk of the filing of the petition and bond in the federal court removes the case until remanded by the federal court . . . ."). Some courts reached this conclusion even before the 1948 amendments. *See, e.g.*, La Belle Box Co. v. Stricklin, 218 F. 529, 533–34 (6th Cir. 1914) ("[A] petition for removal which seems to intend to state good cause, but which is merely imperfect in reaching one of the necessary facts, does give jurisdiction to the federal court and does remove the case.").

134. Courts have noted with concern the lack of parity in the rules governing amendments to plaintiffs' and defendants' jurisdictional allegations since the nineteenth century. *See, e.g.*, Deford, Hinkle & Co. v. Mehaffy, 13 F. 481, 487–88 (C.C.W.D. Tenn. 1882) ("The rule that the record must show the jurisdictional facts is very strict; but if they can be made to appear, by amendment, in cases brought by original process, I see no reason why they may not be made to appear by amendment in removal causes . . . ." (emphasis omitted)); Woolridge v. McKenna 8 F. 650, 679 (C.C.W.D. Tenn. 1881) ("The requirement that the record shall show jurisdiction is no more imperative in removed than original causes; and in the latter, under the statutes authorizing the courts to permit amendments, they are very liberal in allowing the jurisdictional facts to be shown by amendment of the declaration or other pleading.").

First, mandatory retention's reading of the remand statute threatens to erode the basic rationale behind the party-invocation requirement: preventing courts from exceeding the congressionally authorized bounds of their jurisdiction. Absent a party-invocation requirement that forces courts to focus on the parties' jurisdictional contentions, courts may be less watchful of whether a case contains all the congressionally mandated precursors for federal court adjudication.[135]

Second, mandatory retention also poses a more proximate danger: it threatens to erode the deference federal courts have historically shown state courts in the area of concurrent state-federal jurisdiction. In essence, mandatory retention creates a default rule that removed cases stay in

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135. For example, a court that, like the Fifth Circuit in *Buchner v. FDIC*, 981 F.2d 816, 818 (5th Cir. 1993), views the defendants' actions or inactions regarding jurisdictional allegations as "irrelevant," might overlook the statutory "forum defendant rule" which prevents forum defendants from removing cases on diversity grounds. *See* 28 U.S.C. § 1441(b) (2000). Because the court's focus would be on the existence of uninvoked jurisdictional grounds rather than on the party in a position to invoke such grounds, such a court might retain a case on diversity grounds when the defendant is a citizen of the forum state. *Cf.* Sabater v. Lead Indus. Ass'n, No. 00-8026, 2001 WL 1111505, at *7 (S.D.N.Y. Sept. 21, 2001) (indicating a willingness to retain a case on diversity grounds had the parties been diverse, even though at least one of the defendants was a citizen of the forum state). Defendants have already attempted to use the mandatory retention courts' reading of 28 U.S.C. § 1447(c) in this manner. *See* Woolf v. Mary Kay Inc., 176 F. Supp. 2d 654, 660 (N.D. Tex. 2001) (contending that when § 1447(c)'s thirty-day period for remands for procedural defects expires, a federal court must retain jurisdiction on uninvoked diversity jurisdiction grounds even though the defendant could not have removed on that basis).

Although courts so far have rejected defendants' attempts to use a mandatory retention reading of 28 U.S.C. § 1447(c) to circumvent the forum defendant rule, increased spread of the mandatory retention doctrine could change the direction of these decisions. *See Woolf*, 176 F. Supp. 2d at 659 n.13 ("[T]he court does not believe Congress intended that the procedural bar against removal by an in-state defendant could be so ingeniously circumvented .... To hold otherwise would eviscerate the meaning of § 1441(b) and allow in-state defendants back door access to the federal courts."); *see also* Rampersad v. Deutsche Bank Sec., Inc., No. 02-7311, 2004 WL 616132, at *9 (S.D.N.Y. Mar. 30, 2004) (remanding state claims after dismissing federal claim which served as sole basis for the forum defendant's removal while assuming that the parties were diverse); *In re* Kevin Adell's Petition, 294 F. Supp. 2d 917, 919 (E.D. Mich. 2003) (same); Trask v. Kasenetz, 818 F. Supp. 39, 44–45 (E.D.N.Y. 1993) (same).

Most of the courts that have confronted the forum defendants' § 1447(c) argument clearly also followed the traditional approach to uninvoked jurisdictional grounds and based their refusal to retain the case not only on the defendant's citizenship, but also on the defendant's failure to invoke diversity in its removal petition. *See, e.g., In re Kevin Adell's Petition*, 294 F. Supp. 2d at 919 (" '[T]his action was not removed based upon diversity jurisdiction' [so] subject matter jurisdiction in the action cannot and is not premised on diversity jurisdiction." (citation omitted) (quoting Respondent's Brief at 3–4)).

A related danger is that a court might retain a case based on diversity grounds more than a year after the case commenced, which would, in at least some cases, compromise application of the statutory rule that defendants cannot remove cases on the basis of diversity jurisdiction more than a year after the action commences. *See* 28 U.S.C. § 1446(b) (2000); *cf.* Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 (1996) (allowing a federal judgment to stand even though the defendant could never have removed the case had he followed the one-year rule for removal of diversity cases).

federal court until the district court concludes that no grounds of federal subject matter jurisdiction exist. In this manner, mandatory retention decreases the number of concurrent jurisdiction cases that state courts hear by keeping cases in federal court that otherwise would have been heard, if at all, in state court.

In evaluating the emerging mandatory retention doctrine, modern courts would do well to remember nineteenth-century federal courts' deference for state courts' power to hear cases falling within concurrent state-federal jurisdiction. Although changed removal procedure suggests that federal courts now have jurisdiction over removed cases for purposes of allowing amendments to deficient jurisdictional allegations, nineteenth-century practice suggests that courts should continue to regard power to adjudicate a case as in some sense remaining with the state court if no party invokes an adequate ground of federal jurisdiction. It further suggests that federal courts should be neutral as to their own jurisdiction, reacting to the parties' jurisdictional allegations rather than establishing the existence of jurisdiction on their own initiative. A party—not the federal court—should be the actor that denies a state court the opportunity to adjudicate a case.

CONCLUSION

Although modern litigation has in many respects shifted power from litigants to judges and cases from state courts to federal courts, no modern litigation trends justify mandatory retention, which requires the retention of removed cases in federal court based on uninvoked jurisdictional grounds. The traditional rule that parties must invoke the jurisdictional grounds on which a federal court bases its adjudication reflects two fundamental policies: that federal jurisdiction is limited and that parties—not federal courts—are responsible for determining whether a case that falls within state-federal concurrent jurisdiction will be heard by a state or federal court.

In contrast to the traditional rule that parties must invoke jurisdiction, which reflects the federalist nature of the American judicial system, the rule that defendants cannot amend their removal notices to add previously uninvoked jurisdictional grounds appears to lack a continuing justification now that the partial rationale provided by nineteenth-century removal procedure has abated. Hopefully, discarding this unjustified rule will facilitate retention of the justified rule that parties, not courts, must invoke the jurisdictional grounds on which a federal court exercises authority.