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Catch and Kill Jurisdiction

Zachary D. Clopton
Northwestern Pritzker School of Law

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CATCH AND KILL JURISDICTION

Zachary D. Clopton[*]

In catch and kill journalism, a tabloid buys a story that could be published elsewhere and then deliberately declines to publish it. In catch and kill jurisdiction, a federal court assumes jurisdiction over a case that could be litigated in state court and then declines to hear the merits through a nonmerits dismissal. Catch and kill journalism undermines the free flow of information. Catch and kill jurisdiction undermines the enforcement of substantive rights. And, importantly, because catch and kill jurisdiction relies on jurisdictional and procedural law, it is often able to achieve ends that would be politically unpalatable by other means.

Catch and kill jurisdiction is a recurrent and growing phenomenon. This Article defines catch and kill jurisdiction and identifies areas where it can be found today, including in transnational and complex cases. This Article argues that catch and kill is likely to arise when federal judges are willing and able to expand federal jurisdiction and when federal courts are hostile to certain classes of claims or litigants. It also shows how catch and kill feeds back into more catch and kill—what I call the catch and kill ratchet.

On the normative side, this Article does not argue that catch and kill is inherently wrong—indeed, some examples of catch and kill are normatively preferable. Instead, this Article argues that catch and kill jurisdiction is problematic when it relies on seeming neutrality, obscurity, and delegation to achieve deregulatory ends that might not be possible through substantive lawmaking. These concerns are exacerbated because federal judges—not legislators—are the lawmakers in catch and kill. Federalism values also are at stake when catch and kill defeats claims arising under state law. This Article's analysis of catch and kill also helps clarify some of the issues raised by the Class Action Fairness Act, in which Congress employed a catch-and-kill-like strategy in service of deregulation.

Finally, this Article explains why it will be challenging to reverse catch and kill in gross, though there are strategies to resist catch and kill in individual cases.

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[*] Professor of Law, Northwestern Pritzker School of Law. Thank you to Rachel Bayefsky, Pamela Bookman, Aaron-Andrew Bruhl, Kathleen Claussen, Kevin Clermont, Allan Erbsen, Jill Fisch, Kellen Funk, Maggie Gardner, Martha Kiela, Bryan Lammon, David Noll, James Pfander, Aaron Simowitz, Mila Sohoni, and Nina Varsava.

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INTRODUCTION

As long as there have been courts, there have been fights about court access. Particularly in a country such as the United States that relies so heavily

on litigation to enforce important social policies,[1] fights about regulation and deregulation will play out in debates about court access.[2]

In the simplest form, those that seek deregulation or reduced enforcement will pursue policies to close courthouse doors, while those that seek regulation or increased enforcement will try to open them.[3] For example, proponents of climate change regulation have turned to the courts in scores of cases on myriad legal theories.[4] In response, defendants and defense-side interests have argued that federal courts lack jurisdiction over these claims, for example, for lack of standing or as political questions.[5] They seek to deny court access in order to stanch the regulation of climate change.

There is another, more subtle way to use court access to deregulate. Here, too, climate litigation provides a useful illustration. In 2017, the cities of Oakland and San Francisco sued the five largest fossil fuel producers for harms related to climate change.[6] The suits were originally filed in California state court, but defendants quickly removed to federal court. The federal district court denied plaintiffs' motion to remand, holding that even though the plaintiffs asserted public nuisance claims under state law, the federal court had "federal question" jurisdiction because federal common law should displace state law.[7] Less than four months later, the same district court granted a motion to dismiss the cities' claims because considerations of foreign policy and the separation of powers counseled against a federal court creating federal common law related to global warming.[8] There was federal common law for

1. *See generally*, *e.g.*, SEAN FARHANG, THE LITIGATION STATE (2010); CHARLES R. EPP, MAKING RIGHTS REAL (2009); ROBERT A. KAGAN, ADVERSARIAL LEGALISM (2001); Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS., Summer 1991, at 5.

2. *See generally*, *e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT (2017); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000).

3. *See, e.g.*, SARAH STASZAK, NO DAY IN COURT 5–6 (2015) ("Constricting access to the judiciary has no doubt been a goal of the Republican Party since their political reemergence in the 1970s, often taking form in campaigns to relocate matters of policy and political importance back to the realm of politics and out of the hands of 'activist judges.' ").

4. *See U.S. Climate Change Litigation*, CLIMATE CHANGE LITIGATION DATABASES, http://climatecasechart.com/climate-change-litigation/us-climate-change-litigation [perma.cc/86G6-8YU9] (collecting cases).

5. *See, e.g.*, Juliana v. United States, 217 F. Supp. 3d 1224, 1241–42 (D. Or. 2016) (finding that a lawsuit related to climate change filed by a group of young people did not present a political question); Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (finding that a climate-related lawsuit presented a nonjusticiable political question).

6. *See* California v. BP P.L.C., No. C 17-06011–12, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018).

7. *Id.*

8. *See* City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018).

purposes of taking jurisdiction, but not for purposes of adjudicating the merits.[9] Here, deregulation was achieved by first *expanding* court access and then dismissing without reaching the merits.

I call this phenomenon "catch and kill jurisdiction." In tabloid journalism, catch and kill refers to the practice of purchasing an exclusive story for the purpose of not publishing it—say a story about an extramarital affair between a presidential candidate and an adult film actress.[10] In litigation, catch and kill jurisdiction involves a judge-made expansion of court access in federal courts in order to "catch" more state court cases, followed by the use of federal-court doctrines to "kill" those cases with a dismissal.

Admittedly, whenever a federal court resolves a removed case against a plaintiff, it could be said that the federal court caught and killed the claim. But the exercises of catch and kill jurisdiction at issue in this Article involve something more. First, this Article is concerned with often-exorbitant expansions of federal jurisdiction—that is, the federal court (with the help of defendants) is "catching" cases that doctrinally or normatively should be in state court.[11] Second, this Article is concerned with dispositions that are based on a ground not available in state court, and that cut off relitigation—that is, the federal court (again with the help of defendants) is "killing" claims without reaching the merits, in ways that make refiling in state court impossible (through preclusion) or impractical (through other impediments to complete relief).[12] Thus, these decisions expand jurisdiction to bring cases in but then dispose of them using tools that shut both federal and state courthouse doors.

The definition of catch and kill does not require intent on the part of the judges. Judges developing new interpretations of federal subject matter jurisdiction, for example, may not have in mind a plan to resolve those cases with nonmerits dismissals. But once these doctrines are in place, defendants (and some judges) may intentionally pair the expansion of federal jurisdiction with nonmerits dismissals to deny adjudication formally or functionally on the merits anywhere in the country.

Having defined the category of catch and kill jurisdiction, this Article seeks to identify areas in which catch and kill jurisdiction is likely to be found. In transnational litigation, federal courts have expanded jurisdiction based on foreign affairs considerations but then killed cases using discretionary doctrines applicable only in federal court (such as federal forum non conveniens and international comity abstention).[13] In multidistrict litigation, some judges

9. The Ninth Circuit eventually overruled the jurisdictional analysis, City of Oakland v. BP PLC, 969 F.3d 895 (9th Cir. 2020), and that decision was recently denied certiorari by the Supreme Court. Petition for Writ of Certiorari, Chevron Corp., v. City of Oakland, No. 20-1089 (U.S. Jan. 8, 2021), available at http://climatecasechart.com/case/people-state-california-v-bp-plc-oakland [perma.cc/KJM2-A44R].

10. *See, e.g.*, RONAN FARROW, CATCH AND KILL (2019). I am no Ronan Farrow. He went to Yale Law School.

11. For further elaboration of "catch," see *infra* Part I.

12. For further elaboration of "kill," see *infra* Part I.

13. For more explanation of these doctrines, see *infra* Section II.A.

have functionally expanded jurisdiction by ignoring motions to remand in order to approve global settlements (and perhaps to dismiss cases altogether). The Supreme Court has sanctioned "hypothetical jurisdiction" doctrines, which allow federal courts to bypass considerations of subject matter jurisdiction in order to dismiss cases based on other, discretionary grounds.[14] And lower courts' willingness to take cases based on increasingly broad interpretations of federal statutes creates yet more opportunities for catch and kill.[15]

The definition and survey of catch and kill also permit this Article to offer a positive account of catch and kill.[16] In brief, although catch and kill could arise anywhere, I argue that catch and kill is most likely to take hold if two conditions are met. First, catch and kill is more likely to arise where federal judges are willing and able to expand federal jurisdiction. Second, catch and kill is more likely where the federal courts are hostile to a class of litigation or litigants. These conditions allow us to predict where catch and kill might come next. These conditions also help explain the catch and kill ratchet: As federal courts become more willing to kill cases (in ways that state courts would not), defendants will become more eager to get into federal court, asking for even broader bases of federal jurisdiction. Those broad bases increase incentives for more ways to kill cases in federal court.

The descriptive work of this Article also lends itself to normative analysis.[17] To begin with, there is nothing necessarily wrong with an expansion of federal jurisdiction followed by a disposition on some nonmerits basis not available in state court. But identifying the mechanism of catch and kill helps illuminate some of its tradeoffs, which in turn allows for normative and institutional assessments.

As we all know, Congress has the legal authority to pass a statute that defines federal law and preempts state law. Catch and kill can achieve the same results through procedure and jurisdiction.[18] Doing so obscures the stakes, blunts opposition, and makes it more difficult for nonexperts to engage. Moreover, because these doctrines delegate ultimate enforcement to individual judges in individual cases, it becomes even more difficult to identify the larger problem and to motivate reform. Catch and kill thus involves federal judges altering substantive rights without the input of the elected branches, and these results obtain in seemingly one-off disputes that can fly under the radar even for engaged observers.

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14. For more on hypothetical jurisdiction and multidistrict litigation, see *infra* Section II.B.

15. These include broad readings of the federal officer removal statute, of statutes purportedly supporting complete preemption, and of the removal statute to allow "snap removal." *See infra* Section II.C.

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See infra* Section IV.B.

Catch and kill presents a further federalism concern when these cases arise under state law.[19] In such cases, federal judges dispose of state law claims with no input from state actors. And because of how catch and kill works, states have little recourse to remedy these situations. They cannot, for example, simply expand state court jurisdiction or change state procedural law. Those efforts, which I have supported in other contexts,[20] are defeated by catch and kill when removal is available.

Although the definition of catch and kill used in this Article involves federal judges expanding jurisdiction and developing nonmerits tools to dismiss cases, the courts are not the only institution that could wield these tools. Congress could, rather than engaging in substantive lawmaking, expand federal jurisdiction in hopes of killing cases with federal procedure. Indeed, I think this fairly describes Congress's decision to enact the Class Action Fairness Act of 2005.[21] Perhaps there is a different paper to be written about catch and kill independent of its institutional source.[22] But this paper is about judge-made catch and kill, and for the reasons articulated throughout this Article, judge-made catch and kill has some peculiar (and peculiarly problematic) aspects not present in other institutional settings.[23] Still, I take up briefly below the related phenomenon of Congress engaging in catch and kill legislation.[24]

In any event, having identified the problem of judicial catch and kill, the Article engages with potential reforms. Because catch and kill flies under the radar, it would be unwise to assume that Congress or the states will respond to catch and kill. The Supreme Court is also unlikely to pull back on federal jurisdiction or on procedural dispositions. Indeed, in 2008, a law professor named Amy Coney Barrett wrote an article in the *Virginia Law Review* justifying the federal court's creation of federal procedural common law, binding only in federal courts, citing forum non conveniens as a prime example.[25] And in a recent decision on federal officer removal in a climate case, the Supreme

19. *See infra* Section IV.C.

20. *See generally* Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1 (2018) [hereinafter Clopton, *Making State Civil Procedure*] (examining the processes by which states make civil procedure); Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411 (2018) [hereinafter Clopton, *Procedural Retrenchment and the States*] (evaluating state court responses to the Roberts Court's procedural decisions).

21. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

22. Indeed, a few people listed in the star footnote read a draft version of such a paper that ultimately became this one.

23. These aspects are elaborated *infra* in Sections IV.B–C.

24. *See infra* Section IV.D.

25. *See generally* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008).

Court encouraged appellate courts to look for ways to keep such cases in federal court.[26] What is left are more local responses, such as persuading sympathetic lower court judges to stem the tide of some of these doctrines and an attention to individual cases by state, federal, and private parties. But even these efforts must swim decidedly upstream.[27]

The balance of this Article proceeds as follows. Part I describes the doctrinal background and offers a working definition of catch and kill jurisdiction. Part II discusses major categories in which we are likely to find catch and kill cases: transnational litigation, formal and informal jurisdictional sequencing, and expansive uses of removal and preemption. Part III offers a positive account of when catch and kill is likely to occur.

Turning to the normative, Part IV argues that catch and kill jurisdiction raises problems of democracy and political accountability because it uses seeming neutrality, obscurity, and delegation to change the substantive law. Catch and kill jurisdiction raises additional federalism problems when federal procedural doctrines are used to kill state law claims. Part IV ends with a discussion of a related phenomenon under the aforementioned Class Action Fairness Act of 2005 (CAFA). This Article's analysis of catch and kill helps clarify why CAFA—and congressional catch and kill more broadly—might be troubling.

Part V concludes with potential responses, exploring the limited tools available to respond to this deviously effective strategy. But while I mention these potential responses, that is not the goal of this Article. Instead, the point here is to identify a phenomenon, explain its function, and offer a framework for its assessment.

I. CATCHING AND KILLING

First, let's start with the basics. Federal courts are courts of limited jurisdiction.[28] The subject matter jurisdiction of federal courts is limited by Article III of the Constitution[29] and then by the bases of subject matter jurisdiction authorized by Congress.[30]

There is a presumption that federal jurisdiction is concurrent with state courts,[31] meaning that many federal court cases could have been filed in state court as well. Indeed, a substantial number of federal court cases were filed in

26. *See* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1542 (2021) ("[A]llowing a fuller form of appellate review may actually help expedite some appeals. Suppose a court of appeals finds the [federal officer removal] issue a difficult and close one, but believes removal is clearly and easily warranted on another basis. Allowing the court to address that easier question and avoid harder ones may facilitate a prompter resolution of the proceeding for all involved.").

27. *See infra* Part V.

28. *See, e.g.*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

29. U.S. CONST. art. III, §§ 1–2.

30. 28 U.S.C. §§ 1330–1369.

31. *E.g.*, Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 378 (2012); Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990).

state court first.[32] These cases end up in federal court through the process of removal, by which defendants seek to essentially transfer cases from a state court to the federal court encompassing that state court.[33] Once a case is removed, the federal court handles it as if it had been filed there in the first place—except that if the court ultimately finds it lacked jurisdiction, the proper disposition is remand to state court rather than dismissal.[34]

This brings us to catch and kill. In some sense, every federal case involving concurrent jurisdiction is "caught," and every case resolved against the plaintiff is "killed." This capacious definition of catch and kill jurisdiction is of little use, and it is not the definition adopted in this Article.

Although a crisp definition of catch and kill jurisdiction is not readily apparent, certain attributes help define what does or does not qualify.

One requirement of catch and kill is some opportunity for concurrent state court jurisdiction, allowing us to say that the federal court "caught" the case.[35] While not every example of catch and kill involves removal—the case could have been filed directly in federal court—removed cases are particularly troubling. In removed cases, we do not need to hypothesize a state court case because the plaintiff filed one. And in removed cases, you might say the plaintiff's hands are clean with respect to the invocation of federal jurisdiction.

Not all assertions of concurrent federal jurisdiction should raise the red flags that I argue come with catch and kill jurisdiction. This Article is focused on cases brought into federal court based on expansive interpretations of federal jurisdiction offered by federal judges. What constitutes an expansive interpretation is a question on which reasonable minds can differ. When courts apply a clear congressional grant in an easily anticipated way, that is not a "catch." But when the courts take an unclear grant—or worse, a clear grant—

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32. *See, e.g.*, Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL L. STUD. 551 (2005) (collecting data on removal and remand); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1923–26 (2009) (same).

33. 28 U.S.C. §§ 1441–1455. *See generally* 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3721–3741 (rev. 4th ed. 2018). Among the limits on removal is that the federal court would have had jurisdiction had the case been filed there originally. 28 U.S.C. § 1441(a).

34. WRIGHT ET AL., *supra* note 33, at §§ 3738–3739.1. When the federal court resolves the case, the disposition receives full faith and credit in state and federal court. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506 n.4 (2001).

35. *See supra* notes 28–32 and accompanying text (discussing concurrent jurisdiction). I at least intend here to exclude situations where federal courts have long held exclusive jurisdiction. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76 (partially codified as amended at 28 U.S.C. § 1333 (1982)) (admiralty jurisdiction). *See generally* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984) (analyzing marine insurance cases to argue that prior to the Court's decision in Swift v. Tyson, 41 U.S. (16 Pet.) I (1842), there was a broad consensus that it was proper for federal courts sitting in diversity to apply the general common law in adjudicating commercial disputes). Were the Supreme Court to announce exclusive jurisdiction over a new category of cases for which a federal-only procedural defense existed, then perhaps I would include those cases within catch and kill.

and expand it, then we are moving closer to a "catch." Similarly, we might conclude that an interpretation is expansive when it is contrary to existing judicial precedent.[36]

Turning to the second half of the equation, one feature of a catch and kill dismissal is that the federal court is "killing" the case on a basis not applicable in state court. This definition rules out dismissals on the merits. The reason is that—for the most part[37]—a federal court dismissing a case on the merits should be applying the same substantive law as a forum state court would, following the guidance of *Erie v. Tompkins*[38] and *Klaxon. v. Stentor Electric*.[39] In these cases, the federal court is not killing a case that should have survived in state court. This definition also does not include cases dismissed by a federal court on a nonmerits basis that would result in dismissal in the state court as well. This could occur where federal and state courts apply the same law, either because they are required to do so (under *Erie* or preemption)[40] or because they independently follow the same doctrine (a type of "false conflict").[41]

An additional feature of catch and kill is that the dismissal must "kill" the case, in law or in fact. A federal court kills a case when its dismissal would be entitled to preclusive effect, such that the case refiled in state court would be dismissed on res judicata.[42] A federal court de facto kills a case when its decision makes it impractical to litigate the case in federal or state court.[43]

Finally, it is worth explaining in some detail why this Article addresses federal doctrines that "kill" cases but not federal doctrines that "wound" them. Why shouldn't we be worried about a doctrine that cuts in half the available

36. *See, e.g.*, *infra* Section II.B.2 (discussing willful blindness).

37. I say "for the most part" for two reasons. First, it is possible that even though federal and state courts should answer *Erie* questions in the same way, this symmetry is not assured, especially for questions of first impression. Second, under some heads of federal jurisdiction, some federal courts apply different horizontal choice of law rules than the forum state would. *See* Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 U. PA. L. REV. 2195 (2021) (documenting and criticizing this practice).

38. 304 U.S. 64 (1938) (explaining when federal courts should apply state law).

39. *See* 313 U.S. 487 (1941) (explaining that federal courts sitting in diversity should apply the forum state's horizontal choice of law approach).

40. *See generally* Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1 (2006).

41. *See, e.g.*, Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 290 (1966) ("[I]f the laws of [all involved] states, relevant to the set of facts, are the same . . . then there is no real conflict of laws at all, and the case ought to be decided under the law that is common to [the] states.").

42. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 19 (AM. L. INST. 1982). *See generally* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) (discussing the preclusion law applicable to federal judgments).

43. *See* Julie Fukes Stewart, Note, *"Litigation Is Not Ping-Pong," Except When It Is: Resolving the Westfall Act's Circularity Problem*, 95 CORNELL L. REV. 1021 (2010).

remedies[44] or the probability of success on the merits?[45] Perhaps most importantly, there is a fundamental difference between deciding a case on the merits and deciding the case on another basis.[46] This distinction implicates the day-in-court ideal,[47] the dignitary interests of the parties,[48] the accuracy of the adjudication,[49] and the community interests in a public hearing.[50] There is also the practical reason that it is easier to determine whether a case is alive or dead than it is to determine if the expected return is higher or lower. Even limiting the inquiry to those decisions that have a substantial impact on the outcome introduces difficult line-drawing problems,[51] and it does not respond to the earlier claim regarding the merits–nonmerits distinction. For these reasons, this Article is addressed to catch and kill alone.

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44. Many federal remedial doctrines apply only in federal court. *See* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4513 (3d ed. 2016) (discussing the "equitable remedial rights" doctrine and related practices).

45. The admissibility of certain scientific evidence might be an example here. *See* Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 473 (2005). Or the availability of a jury and the associated jury pool. *See generally* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2303 (4th ed. 2020).

46. The emphasis on resolving a case on the merits was central to modern, liberal notions of procedure. *See, e.g.*, FED. R. CIV. P. 1 (calling for the Federal Rules to be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986) (discussing the "liberal ethos" of modern procedure).

47. *See, e.g.*, Martin v. Wilks, 490 U.S. 755, 762 (1989) (referring to "our 'deep-rooted historic tradition that everyone should have his own day in court' ") (quoting 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)); Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 967 (1993).

48. *See, e.g.*, Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172–73 (discussing dignity, participation, effectuation, and deterrence values).

49. *See, e.g.*, Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

50. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564–75 (1980) (discussing at length the history and benefits of public access to courts); ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 56–83 (2017) (discussing the importance of information production in litigation).

51. *Cf.* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996) (characterizing a rule as "outcome determinat[ive]" only if "application of the [standard] . . . [has] so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court" (alterations in original) (quoting Hanna v. Plumer, 380 U.S. 460, 468, n.9 (1965)).

II. CATCH AND KILL CATEGORIES

This Part reviews potential categories of "catch and kill" cases that have arisen over recent decades: transnational litigation, jurisdictional sequencing, and statutory expansion. I take up in Part IV the related topic of dismissals under the Class Action Fairness Act.[52]

A. *Transnational Litigation*

Transnational litigation is ripe for catch and kill jurisdiction. The reason, in short, is that foreign affairs is an area in which federal courts have been known to extend federal jurisdiction, and it is also an area in which federal courts have relied on various nonmerits federal doctrines to dismiss cases.[53]

To unpack catch and kill jurisdiction in transnational cases, it helps to separate the tools of catch (jurisdiction) and kill (dismissal) available to federal courts. Having described those tools, this Section ends with some examples of catch and kill in action.

1. Expanding Jurisdiction

While much has been made about the federal courts' "xenophobia,"[54] a less noticed trend has been the expansions of federal jurisdiction (relative to state courts) in transnational cases.

a. Federal Common Law and Preemption

First, defendants in transnational cases have asked federal courts to expand jurisdiction through expansive interpretations of preemption by federal common law.

One strategy of climate activists has been to work with municipal plaintiffs to sue fossil fuel companies.[55] In many of these cases, the municipal plaintiffs sued in state court under state law.[56] Defendants frequently removed to

52. *See infra* Section IV.D.

53. *See infra* Part III (offering a positive account of catch and kill).

54. *See, e.g.*, Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015); John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433 (2015); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010). *But see* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996) (addressing win rates rather than jurisdiction).

55. *See, e.g.*, Dino Grandoni, *States and Cities Scramble to Sue Oil Companies over Climate Change*, WASH. POST (Sept. 14, 2020, 5:31 PM), https://www.washingtonpost.com/climate-environment/2020/09/14/states-cities-scramble-sue-oil-companies-over-climate-change [perma.cc/D3UC-HQQB]; *U.S. Climate Change Litigation*, *supra* note 4. One such case made it to the Supreme Court. BP P.L.C., v. Mayor of Balt., 141 S. Ct. 1532 (2021) (addressing federal officer removal, 28 U.S.C. § 1442).

56. *See U.S. Climate Change Litigation*, *supra* note 4.

federal court, raising any number of bases for removal.[57] Of interest here, some defendants argued that federal question jurisdiction attached to these state law actions.

Your 1L Civil Procedure professor probably explained that federal question jurisdiction was available for federal claims, so how could federal question jurisdiction attach to these state law actions?[58] The answer lies in an expansive interpretation of federal common law. Federal common law is preemptive judge-made law, often justified by an overriding federal interest. In some climate change cases, defendants argue that because federal interests in climate policy were strong, federal common law must preempt state law claims and convert them into federal claims, thus creating a basis for federal jurisdiction.[59]

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57. In the *Baltimore* case, defendants sought removal based on four theories of federal question jurisdiction as well as four other bases for jurisdiction or removal. Mayor of Balt. v. BP P.L.C., 952 F.3d 452, 458 (4th Cir. 2020) ("In this case, Chevron asserted eight grounds for removal. Four of those grounds were premised on federal-question jurisdiction under 28 U.S.C. § 1331. Chevron argued that Baltimore's claims arose under federal law within the meaning of § 1331 because they (1) were governed by federal common law, rather than state law; (2) raised disputed and substantial issues of federal law under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*; (3) were completely preempted by the Clean Air Act, 42 U.S.C. §§ 7401–7671q, as well as the foreign affairs doctrine; and (4) were based on conduct or injuries that occurred on federal enclaves. The remaining grounds relied on alternative jurisdictional and removal statutes, including: (1) the jurisdictional grant in the Outer Continental Shelf Lands Act ('OCSLA'), 43 U.S.C. § 1349(b); (2) the admiralty jurisdiction statute, 28 U.S.C. § 1333; (3) the bankruptcy removal statute, 28 U.S.C. § 1452; and (4) the federal officer removal statute, 28 U.S.C. § 1442." (internal citation omitted)).

58. The federal question statute provides for jurisdiction for claims "arising under" federal law, see 28 U.S.C. § 1331, but this phrase has been interpreted to include some state law claims where embedded federal law issues are disputed and substantial. *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 308–09 (2005). The statutory language does not, however, extend as broadly as the Constitution (which also says "arising under"). *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 757 (1824); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

59. *See, e.g.*, California v. BP P.L.C., No. C 17-06011–12, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018). None of these steps is problematic in its own right. Federal law may preempt state law. *See, e.g.*, U.S. CONST. art. VI, cl. 2 (Supremacy Clause); Altria Group, Inc. v. Good, 555 U.S. 70, 76 (2008) ("[W]e have long recognized that state laws that conflict with federal law are 'without effect.' "). Federal common law is federal law and thus may preempt state law. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) ("[W]e have held that a few areas, involving uniquely federal interests, are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called federal common law." (internal citation and quotation marks omitted)). And a federal common law cause of action would provide federal question jurisdiction. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("We . . . conclude that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.").

The Northern District of California accepted this basis for removal of climate change claims filed by the cities of Oakland and San Francisco.[60] The court explained its logic in this way:

> If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to stimulation of other greenhouse gases—and, most pertinent here, to the combustion of fossil fuels. . . . Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law.
>
> . . . .
>
> . . . [T]he well-pleaded complaint rule[61] does not bar removal of these actions. Federal jurisdiction exists in this case if the claims necessarily arise under federal common law. . . .
>
> Plaintiffs' claims for public nuisance, though pled as state-law claims, depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). It necessarily involves the relationships between the United States and all other nations. It demands to be governed by as universal a rule of apportioning responsibility as is available. This order does not address whether (or not) plaintiffs have stated claims for relief. But plaintiffs' claims, if any, are governed by federal common law. Federal jurisdiction is therefore proper.[62]

Importantly, the Ninth Circuit ultimately reversed this decision, concluding that the case should be remanded to state court.[63] A few other lower courts have reached similar conclusions.[64] But the Southern District of New York

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60. *California*, 2018 WL 1064293, at *1. For what it's worth, this decision was authored by a well-respected judge appointed by President Clinton. *Senior District Judge William Alsup*, U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, https://www.cand.uscourts.gov/judges/alsup-william-wha [perma.cc/JJT3-4XFF].

61. *See Louisville & Nashville R.R. Co.*, 211 U.S. 149.

62. *California*, 2018 WL 1064293, at *3–*5. This argument for jurisdiction builds on an earlier decision in the Ninth Circuit finding federal question jurisdiction based on federal common law, where plaintiffs' state law claims would be preempted. In *New SD v. Rockwell International*, the Ninth Circuit found that federal jurisdiction was proper in a case implicating a military contract based on federal common law's preemptive force. 79 F.3d 953 (9th Cir. 1996). This argument also connects with the Supreme Court's 1947 decision in *United States v. Standard Oil*, 332 U.S. 301 (1947). Briefly, this case involved claims by the United States on behalf of a soldier injured by an employee of Standard Oil. The Supreme Court conducted the *Erie* analysis to conclude that federal law (not state law) governed the issue of liability and then held that there was no federal common law cause of action on these facts. State law was preempted, it seemed, by the absence of federal common law.

63. City of Oakland v. BP PLC, 969 F.3d 895 (9th Cir. 2020).

64. *See, e.g.*, Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 574 (D. Md. 2019); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 152 (D.R.I. 2019); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 981 (D. Colo. 2019); Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 51 (D. Mass. 2020).

and the Second Circuit accepted this argument for jurisdiction in a case directly filed in federal court.[65] And climate change defendants and their *amici* routinely invoke this idea in ongoing litigation.[66] This jurisdictional argument, in other words, is still in play.[67]

b. Federal Common Law of Foreign Relations

Second, federal courts have developed an unusual version of federal question jurisdiction, often referred to as jurisdiction based on the "federal common law of foreign relations."[68] Courts in this category do not talk about federal law preempting state law—as in the previous discussion—but instead, they suggest that federal interests justify federal jurisdiction over concededly state law claims.

In *Republic of the Philippines v. Marcos*, the new government of the Philippines sued former President Ferdinand Marcos and others in New York state court, seeking to bar the transfer of real property out of New York as the properties were allegedly purchased with "ill-gotten wealth."[69] Defendants removed, alleging federal question jurisdiction even though none of the claims arose under federal law, and there was no preemptive federal common law.[70]

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65. City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 471–72 (S.D.N.Y. 2018); City of New York v. Chevron Corp., 993 F.3d 81, 94 (2d Cir. 2021).

66. *See, e.g.*, Appellants' Opening Brief, at 19–41, Rhode Island v. Shell Oil Products Co., 979 F.3d 50 (1st Cir. 2019) (No. 19-1818), 2019 WL 6463536, at *16–*26; Brief of Amicus Curiae Chamber of Com. of the United States of America in Support of Appellants and Reversal, at 11, Rhode Island v. Shell Oil Products Co., 979 F.3d 50 (1st Cir. 2019) (No. 19-1818), 2019 WL 7049052, at *11.

67. This approach also resonates with comments made by Professor Ernest Young in relation to protective jurisdiction. *See* Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775 (2007). More specifically, in his discussion of "foreign affairs removal," Young suggested that federal jurisdiction could exist over state law claims that would be subject to so-called dormant foreign affairs preemption. *Id.* at 1807–12. In *Zschernig v. Miller*, the Supreme Court held that an Oregon probate statute that required state judges to evaluate foreign legal systems was preempted by the federal government's general supervisory authority over foreign affairs. 389 U.S. 429, 440–41 (1968). Young suggests that this type of preemption could support federal question jurisdiction (and thus removal) without any other federal element. Young, *supra*, at 1809. Indeed, Young suggests that this might be a better approach to *Zschernig* than treating it as a merits defense. *Id.* at 1809 n.166.

68. *See, e.g.*, Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986); Torres v. Southern Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997); Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377 (11th Cir. 1998). For critical assessments of this doctrine, see generally Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Lumen N. Mulligan, Note, *No Longer Safe at Home: Preventing the Misuse of Federal Common Law of Foreign Relations as a Defense Tactic in Private Transnational Litigation*, 100 MICH. L. REV. 2408 (2002).

69. *Marcos*, 806 F.2d 344.

70. *Id.*; N.Y. Land Co. v. Republic of Philippines, 634 F. Supp. 279, 280 (S.D.N.Y. 1986). *See generally supra* notes 54–67 and accompanying text (discussing preemptive federal common law).

The district court accepted jurisdiction and the Second Circuit affirmed.[71] It explained:

> We hold that federal jurisdiction is present in any event because the claim raises, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future process in the foreign state. The question whether to honor such a request by a foreign government is itself a federal question to be decided with uniformity as a matter of federal law, and not separately in each state, regardless of whether the overall claim is viewed as one of federal or state common law.[72]

In other words, the court found federal question jurisdiction because the case implicated certain aspects of foreign relations.

Later, the Fifth and Eleventh Circuits expanded on this notion of jurisdiction in a series of cases exemplified by *Torres v. S. Peru Copper Corp.*[73] In this case, Peruvian citizens sued an American company on state law claims arising from their alleged exposure to toxic fumes during copper smelting in Peru.[74] Although federal law did not provide the causes of action or even an ingredient in the state law claims,[75] the court concluded that federal jurisdiction was justified because the suit "raise[d] substantial questions of federal common law by implicating important foreign policy concerns."[76]

The federal common law of foreign relations has not opened the floodgates. The Ninth Circuit rejected this category of jurisdiction in *Patrickson v. Dole Food Co.*,[77] and other courts have declined to apply this category without ruling it out completely.[78] Still, it remains a viable basis for removal in some courts, and it is one that may lend itself to catch and kill.[79]

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71. *Marcos*, 806 F.2d at 352–54.

72. *Id.* at 354 (citation omitted).

73. *Torres*, 113 F.3d 540.

74. *Id.* at 540–42.

75. *Cf.* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005) (providing for federal question jurisdiction for claims arising under state law with embedded federal issues).

76. *Torres*, 113 F.3d at 542–43; *see also* Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377 (11th Cir. 1998) ("Where a state law action has as a substantial element an issue involving foreign relations or foreign policy matters, federal jurisdiction is present.").

77. 251 F.3d 795, 803 (9th Cir. 2001); *see also* Provincial Gov't of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1089 (9th Cir. 2009).

78. *See, e.g.*, Abrahamsen v. ConocoPhillips, Co., 503 F. App'x 157, 160 (3d Cir. 2012); Al Gasim Obied Ibrahim Mohammad v. Airbus, S.A.S., No. 09 cv 1817, 2009 WL 3807090, at *2–5 (N.D. Ill. Nov. 10, 2009); O'Neill v. St. Jude Med., Inc., No. Civ. 04–1211(JRT), 2004 WL 1765335, at *2–5 (D. Minn. Aug. 5, 2004).

79. *See infra* notes 108–112 and accompanying text.

2. Nonmerits Dismissals

Having just shown how federal courts have expanded jurisdiction with respect to transnational cases, I turn now to the other half of catch and kill. Transnational cases are prime candidates for catch and kill jurisdiction because federal courts have increasingly turned to federal doctrines to dismiss cases once in federal courts—what Professor Bookman would call "litigation isolationism."[80] These doctrines purportedly serve the interests of international comity and the separation of powers by keeping federal courts out of foreign affairs. I survey here three doctrines of this type.

a. Forum Non Conveniens

First, the doctrine of forum non conveniens gives federal courts discretion to dismiss cases in favor of an adequate alternative forum.[81] While forum non conveniens retains a slim role in domestic cases,[82] it is an important aspect of transnational litigation.[83]

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80. *See* Bookman, *supra* note 54. Not all of Bookman's examples are relevant here. The presumption against extraterritoriality, for example, is a canon of statutory interpretation applicable to federal statutes. Its application may result in federal courts dismissing international claims on the merits, but it would (seemingly) apply equally in state courts hearing the same cases on the same federal statutes. *Compare* Clermont, *supra* note 40 (arguing that federal law will govern in state courts whenever that federal law preempts state law), *with* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651 (1995) (arguing that federal courts must predict how a state's highest court would resolve the issue in question).

81. *E.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). As the Court in *Piper* explained, an adequate alternative forum is one in which the defendant may be sued and the available remedy is not "so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper*, 454 U.S. at 254.

82. While some observers have suggested that forum non conveniens plays no role in domestic litigation in federal court after the adoption of 28 U.S.C. § 1404(a), the Supreme Court suggested that forum non conveniens is the appropriate tool for a federal court to dismiss a case in light of a valid forum selection clause selecting a state court. Atl. Marine Constr. Co., v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 60–61 (2013) ("[T]he appropriate way to enforce a forum-selection clause pointing to a state . . . forum is through the doctrine of *forum non conveniens*. Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer. For the remaining set of cases calling for a nonfederal forum, § 1404(a) has no application, but the residual doctrine of *forum non conveniens* has continuing application in federal courts.") (internal citations and quotation marks omitted).

83. *See generally, e.g.*, Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (presenting data on forum non conveniens); Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157 (2012) (same); Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390 (2017) (collecting sources and criticizing the doctrine).

Federal courts routinely entertain motions to dismiss based on forum non conveniens, including in cases that raise state law claims.[84] And it is well-understood that, in many cases dismissed on forum non conveniens, litigation in a foreign court is not going to happen.[85]

Importantly, federal forum non conveniens law is not binding on state courts,[86] so there may be state law cases that would be dismissed from federal court that would have been heard on the merits in state courts.[87] Although the federal forum non conveniens dismissal would not preclude the plaintiff from refilling the same case in state court,[88] presumably, such cases would be removed and dismissed again.[89] And, again, litigation on the merits in foreign courts is rarely forthcoming either.[90]

b. Abstention

Second, some federal courts have called for abstention in transnational cases that raise issues of international comity or foreign affairs.[91] The term, "international comity abstention," subsumes at least two categories of cases. One involves decisions to stay or dismiss in light of a parallel case pending in

84. *See* Whytock, *supra* note 83; Childress, *supra* note 83.

85. *See, e.g.*, Childress, *supra* note 83, at 161.

86. *See* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 148 (1988).

87. *See generally* William S. Dodge, Maggie Gardner & Christopher A. Whytock, The Many State Doctrines of Forum Non Conveniens (unpublished manuscript) (on file with author) (collecting sources on state forum non conveniens law).

88. *See Chick Kam Choo*, 486 U.S. at 149–50.

89. Of course, such an outcome would be obtained only if removal were proper. *Cf. id.* at 144 (noting that the state case in *Chick Kam Choo* lacked complete diversity so removal was not proper). But as this Article is focused on cases removed in the first instance, the possibility of re-removal seems more likely.

90. Relatedly, some federal courts require exhaustion of foreign options before proceeding in U.S. court. In *Sarei v. Rio Tinto*, 550 F.3d 822 (9th Cir. 2008), the Ninth Circuit suggested that international human rights plaintiffs may need to exhaust remedies where the relevant conduct occurred. *Id.* at 831 (en banc) (plurality opinion) (McKeown, J.) ("[I]n ATS cases where the United States 'nexus' is weak, courts should carefully consider the question of exhaustion . . . ."). And in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), the Seventh Circuit called for an exhaustion requirement for expropriation claims brought against foreign sovereigns. *Id.* at 684. The Supreme Court has since rejected an exhaustion requirement for domestic takings claims, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), but this argument remains viable for international ones. In any event, these prudential exhaustion dismissals sound in federal procedural law, which is not applicable in state courts.

91. *See generally* Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63 (2019) (arguing against "international comity abstention" both as a label and as a generic doctrine and urging federal judges to specify narrower grounds for abstention in transnational cases).

a foreign court.[92] This tool of judicial equilibration can "kill" cases if the foreign proceeding produces a judgment entitled to preclusive effect in the United States.[93]

The more aggressive form of international comity abstention is exemplified by the Ninth Circuit's decision in *Mujica v. AirScan Inc.*,[94] which built on earlier Eleventh Circuit precedent.[95] The *Mujica* case arose from the 1998 bombing of a Colombian village by the Colombian Air Force.[96] Plaintiffs filed suit in the United States against two U.S. companies for their alleged complicity in the bombing.[97] After a decade of litigation, the Ninth Circuit ordered the case dismissed based on "international comity."[98] Finding that Colombia's interests in hearing the dispute were strong and the United States's interests were weak, the court dismissed the case despite the fact that there was no Colombian litigation in process.[99]

The Ninth Circuit has since reaffirmed the vitality of this doctrine,[100] and the Second Circuit has indicated that it follows a version of international comity abstention as well.[101] The Supreme Court has, so far, ducked the opportunity to weigh in.[102] So as long as this doctrine remains a valid basis for dismissal, it may be used to kill cases in federal court.[103]

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92. Perhaps the most cited example of parallel proceedings abstention is *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680 (7th Cir. 1987). Briefly, the district court stayed proceedings in this employment dispute while a parallel case between the same parties was being appealed in Belgian courts. *Id.* at 683. Once the Belgian judgment became final, the district court gave its judgment preclusive effect. *Id.* The Seventh Circuit affirmed, and other federal courts have taken up this logic to stay or dismiss transnational parallel proceedings. *Id.* at 692.

93. *See id.*; *see also* Hilton v. Guyot, 159 U.S. 113 (1895) (describing the United States's liberal approach to enforcing foreign judgments).

94. 771 F.3d 580 (9th Cir. 2014).

95. *See* Ungaro–Benages v. Dresdner Bank AG, 379 F.3d 1227, 1238 (11th Cir. 2004).

96. *Mujica*, 771 F.3d at 584.

97. *Id.*

98. *Id.* at 586–615.

99. *Id.*

100. *See* Cooper v. Tokyo Electric Power Co. Holdings, Inc., 960 F.3d 549, 565–69 (9th Cir. 2020) (dismissing on these grounds); *see also* Juniper Networks, Inc. v. Andrade, No. 20-cv-02360, 2020 WL 5630023 at *9–*10 (N.D. Cal. Sept. 21, 2020) (deferring decision on international comity abstention in removed case).

101. *See In re* Vitamin C Antitrust Litig., 837 F.3d 175 (2d Cir. 2016); JP Morgan Chase Bank v. Altos Hornos de Mexico, 412 F.3d 418, 422 (2d Cir. 2005); Chigirinskiy v. Panchenkova, No. 14-CV-4410, 2015 WL 1454646 (SDNY Mar. 31, 2015) (declining to dismiss based on international comity in removed case); *see also* A.O.A. v. Rennert, 350 F. Supp. 3d 818 (E.D. Mo. 2018) (declining to dismiss based on international comity in removed case).

102. *See, e.g.*, Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 715 (2021).

103. Federal courts also have abstained in favor of foreign bankruptcy or insolvency proceedings, though those cases often are analyzed separately from district court litigation. *See, e.g.*, *JP Morgan Chase Bank*, 412 F.3d 418; Maggie Gardner, *Deferring to Foreign Courts*, 169 U. PA. L. REV. 2291 (2021). This practice would qualify as a kill strategy under my definition as well.

c. Federal Common Law Cases

Third and finally, federal courts may dismiss cases by combining certain forms of preemption with limitations on federal common law.

While preemption is often characterized as federal law preempting state law, some versions of preemption can occur without a federal enactment. As described above, for example, federal courts may find state law preempted under some version of foreign affairs preemption.[104] But once state law is preempted, some federal courts have declined to create federal common law based on foreign relations concerns.[105]

For example, the Second Circuit held that federal common law preempted New York City's state law claims against oil and gas companies related to climate change, but in the same opinion, held that there was no federal common law on which the city could sue.[106] In short, by preempting state law and declining to create federal common law, a federal court may end a case.[107]

3. Examples of Catch and Kill

Transnational cases are plausible candidates for catch and kill when one of the aforementioned bases of jurisdiction is paired with one of the aforementioned bases of dismissal.

The *Torres* case about the Peruvian mine provides a straightforward example.[108] Plaintiffs filed suit in state court on state law claims.[109] Defendants removed, and the district court took jurisdiction based on a broad theory of the federal common law of foreign relations.[110] The district court then dismissed the cases based on federal forum non conveniens and international

104. *See supra* notes 53–67 and accompanying text.

105. *See supra* notes 94–103 and accompanying text.

106. City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018).

107. This type of activity is akin to Jonathan Nash's "null preemption," though here the potential lawmaker is the courts rather than Congress or the executive branch. *See* Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1021 (2010) ("In essence, null preemption arises where two things happen: (1) the federal government establishes a 'zero level' of federal regulation, and (2) the federal government preempts the states from filling the regulatory void."). Nash's normative critique of null preemption parallels some of the federalism arguments taken up below. *See id.* at 1018 ("By depriving states of their ability to regulate and leaving a federal regulatory void as well, null preemption infringes upon states' sovereignty. It also impedes the ability of states to ensure the health and safety of their constituents.").

108. Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997).

109. *Id.* at 541.

110. *Id.* at 541–44 (affirming Torres v. S. Peru Copper Corp., 965 F. Supp. 895 (S.D. Tex. 1995)).

comity,[111] neither of which would have been applicable had the case remained in state court.[112]

The climate change litigation described in the introduction is another example. There, the district court engaged in catch and kill by asserting federal jurisdiction based on foreign relations and then declining to create federal common law, thus ending the case.[113]

Looking forward, we might expect more of these cases to arise, thanks to what I call the catch and kill ratchet. As discussed in more detail below,[114] as federal courts become more willing to dismiss cases on federal law bases, defendants will become more eager to get into federal court, arguing for even broader bases of jurisdiction. A defendant in a transnational case that knows a federal court will apply a strong form of international comity abstention and will have powerful incentives to argue for an expansive version of foreign relations jurisdiction. Indeed, as explained in the next section, sometimes defendants can achieve catch and kill without establishing federal jurisdiction in the first place.

B. *Jurisdictional Sequencing*

The next category of cases in which catch and kill is possible involves those cases in which federal courts can alter the sequence or timing of motions in order to dismiss a case. This Section reviews two types of sequencing cases. First, the Supreme Court has allowed federal courts to assume subject matter jurisdiction in order to dismiss cases on certain grounds. Second, courts may willfully blind themselves to jurisdictional issues in order to allow cases to be resolved. I take up each of those in turn.

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111. *Id.* at 544 (affirming Torres v. S. Peru Copper Corp., 965 F. Supp. 899 (S.D. Tex. 1996)).

112. *See supra* notes 86–91 and accompanying text. The district court in *Torres* justified its decision in part by pointing to another catch and kill case, *Sequihua v. Texaco*, from the same district. Torres v. S. Peru Copper Corp., 965 F. Supp. 895, 898 (S.D. Tex. 1995) (citing 847 F. Supp. 61, 63 (S.D. Tex. 1994)). For a related but unsuccessful version of catch and kill, consider another Peruvian smelting case, this one filed in Missouri state court. When the case was originally filed, defendants sought removal based on the federal common law of foreign relations. The federal district court rejected that argument and remanded the case. A.A.Z.A. v. Doe Run Res. Corp., No. 07CV18474, 2008 WL 748328 at *2–*4 (E.D. Mo. Mar. 18, 2008). In a later iteration of the case, the federal court took jurisdiction on other bases, and the defendants presented similar arguments in support of a dismissal based on international comity abstention. The court rejected these as well. A.O.A. v. Rennert, 350 F. Supp. 3d 818, 848–53 (E.D. Mo. 2018). This case, though, is yet another illustration of how catch and kill might work in transnational litigation. Had the defendants gotten a different district judge on removal, this case easily could have been caught and killed.

113. *See supra* notes 6–9 and accompanying text (discussing California v. BP P.L.C., No. C 17-06011–12, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018)).

114. *See infra* Section III.B.

1. Lawful Sequencing

Federal subject matter jurisdiction is a necessary condition for any federal court action, except for when it is not.

In *Ruhrgas AG v. Marathon Oil*, the Supreme Court countenanced a practice known as hypothetical jurisdiction or jurisdictional sequencing.[115] In *Ruhrgas*, an oil company and its affiliates sued a German supplier in state court. Defendant removed on three bases, including the federal common law of foreign relations,[116] each of which required the district court to engage with difficult legal questions.[117] Rather than doing so, the district court dismissed for lack of personal jurisdiction, an issue that was relatively straightforward.[118] In a unanimous opinion authored by Justice Ginsburg, the Supreme Court affirmed. As the Court wrote, "[w]here . . . a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction."[119]

Ruhrgas itself is not catch and kill, as the federal court dismissed the case on a basis (personal jurisdiction) that should apply in the same fashion as it would in state court.[120] However, hypothetical jurisdiction has grown to encompass more than just dismissals based on personal jurisdiction. In another unanimous opinion by Justice Ginsburg, the Supreme Court in *Sinochem International Co. v. Malaysia International Shipping Corp.* held that a federal court may dismiss a case based on forum non conveniens without first deciding whether subject matter jurisdiction is proper.[121] Echoing *Ruhrgas*, the

115. 526 U.S. 574 (1999). *See generally* Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099 (2013); Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301 (2011); Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1 (2010); Joan Steinman, *After* Steel Co.*: "Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855 (2001); Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725 (2009). There is much to unpack in the application and proper scope of this doctrine, *see* Clermont, *supra*, most of which is not central to the argument here.

116. *See supra* notes 63–76 and accompanying text.

117. *Ruhrgas*, 526 U.S. at 580–81.

118. *Id.*

119. *Id.* at 588.

120. It appears that the Court considered the personal jurisdiction issue to be whether there were sufficient contacts with Texas to satisfy the Constitution. *Id.* at 580. The same rule should apply in a Texas state court. Indeed, as Justice Ginsburg wrote: "If a federal court dismisses a removed case for want of personal jurisdiction, that determination may preclude the parties from relitigating the very same personal jurisdiction issue in state court." *Id.* at 585. Although perhaps the federal courts will one day decide that the constitutional limits of the Fifth Amendment would allow more expansive personal jurisdiction than the Fourteenth Amendment in a case such as this one, *see* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703 (2020), even then the jurisdictional issue would be the same based on Federal Rule of Civil Procedure 4(k)(1)(A).

121. 549 U.S. 422 (2007).

Court explained that "where subject matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course."[122] Because federal forum non conveniens law does not apply in state court,[123] these cases may fall into catch and kill territory.

Later decisions have suggested that federal courts may assume subject matter jurisdiction in order to dismiss based on justiciability, abstention, exhaustion, and other grounds.[124] These decisions, too, often rely on grounds not applicable in state court. For example, in *In re Facebook*, the federal court in New York assumed subject matter jurisdiction over state law claims in order to dismiss for lack of "derivative standing" under Federal Rule 23.1, applicable only in federal court.[125] Similarly, were a federal court to assume jurisdiction in order to dismiss based on international comity abstention or exhaustion, it would have engaged in catch and kill.[126]

Notice, too, the dynamic effect of this type of resequencing. I mentioned above that defendants seeking to kill cases under federal procedural laws are essentially encouraged to offer ever more creative interpretations of federal subject matter jurisdiction—the catch and kill ratchet. Under the theory of hypothetical jurisdiction, removing defendants do not even need to succeed in establishing federal subject matter jurisdiction under those creative theories. They only must show enough to convince the federal court to exercise its discretion to assume jurisdiction and dismiss the case.[127]

2. Willful Blindness

A second category of sequencing is less formal but just as effective. Imagine a defendant removes a case, and a plaintiff files a motion to remand to state court for lack of subject matter jurisdiction. Everything we know about federal subject matter jurisdiction suggests that a federal court in this situation

122. *Id.* at 436.

123. *See supra* notes 86–89 and accompanying text (discussing forum non conveniens law in state courts).

124. *See* Clermont, *supra* note 115 (collecting cases); *see, e.g.*, Tenet v. Doe, 544 U.S. 1, 6 n.4 (2005) ("[T]he prudential standing doctrine[] represents the sort of threshold question we have recognized may be resolved before addressing jurisdiction." (internal quotation marks omitted)).

125. *In re* Facebook, Inc., Initial Pub. Offering Derivative Litig., 797 F.3d 148 (2d Cir. 2015).

126. *See supra* notes 90–103 and accompanying text.

127. *See, e.g.*, Ruhrgas v. AG v. Marathon Oil, 549 U.S. 574, 577–78, 586, 587, 588 (1999) (characterizing the decision to assume jurisdiction as within the discretion of the district court).

should move quickly to resolve its jurisdiction before taking any relevant action[128]—unless it fits within one of the prescribed areas of "hypothetical jurisdiction."[129] But what if the federal court simply decided not to respond to the motion to remand and instead waited for the case to resolve itself by other means?

This type of situation is not a mere hypothetical. In the opioid litigation, thousands of cases filed around the country were consolidated for pretrial purposes in a multidistrict litigation (MDL) in front of Judge Polster in the Northern District of Ohio.[130] As part of his management of the MDL, Judge Polster issued an order that he would hold in abeyance any substantive filings, including motions to remand to state court for lack of subject matter jurisdiction.[131] The goal of this decision was (presumably) to give parties the opportunity to reach a global settlement.[132] But in so doing, the judge "caught" cases that may have been outside of federal subject matter jurisdiction. There have been suggestions that this practice will catch on in complex litigation, especially in large MDLs, creating more opportunities for catch and kill.[133]

Critics of federal MDL might suggest that plaintiffs coerced into a federal settlement have their claims "killed" by the federal court.[134] I would not go that far, but even if we agreed that a federal settlement does not "kill" cases,

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128. *See, e.g.*, WRIGHT ET AL., *supra* note 33, at § 3739.1 ("[T]he district court must be certain that federal subject matter jurisdiction is proper before entertaining a defendant's motion to dismiss the plaintiff's complaint on other grounds.").

129. *See supra* Section II.B.1.

130. *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375 (J.P.M.L. 2017); *see also* United States District Court, Northern District of Ohio, *MDL2804, National Prescription Opiate Litigation*, https://www.ohnd.uscourts.gov/mdl-2804 [perma.cc/Q5S8-Q658].

131. *See* Minutes of Initial Pretrial Conference—1/9/2018, *In re* Nat'l Prescription Opiate Litig., No. 17-MD-2804 (N.D. Ohio Jan. 11, 2018) (moratorium on all substantive filing); Order Regarding Remands, *In re* Nat'l Prescription Opiate Litig., No. 17-MD-2804 (N.D. Ohio Feb. 16, 2018) (clarifying application of prior moratorium on motions to remand).

132. *See* Minutes of Initial Pretrial Conference—1/9/2018, *In re* Nat'l Prescription Opiate Litig., No. 17-MD-2804 (N.D. Ohio Jan. 11, 2018) ("As Counsel are to focus their efforts on resolution, the Court hereby continues the moratorium on all substantive filings." (emphasis omitted)). I credit Professor D. Theodore Rave for suggesting that, in such cases, it is better to conceive of the federal court as functionally enjoining state litigation until a settlement is reached. Conversation with author, Mar. 5, 2021. For more on the relationship between federal authority and global settlements in MDLs, see generally Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339 (2014).

133. *See* ADVISORY COMMITTEE ON CIVIL RULES, MEETING REPORT 206 (2018), http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf [perma.cc/N3LS-QCR4] (memorandum from the American Association for Justice's MDL Working Group).

134. *See, e.g.*, Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 73–74 (2017). For illuminating descriptions of the power of global settlement design, see generally D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175 (2017). And for more about the relationship between MDLs and satellite state cases, see generally Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649 (2021); Zachary D. Clopton & D. Theodore Rave, *Opioid Cases and State MDLs*, 70 DEPAUL L. REV. 245 (2020).

the strategy of willful blindness to subject matter jurisdiction might permit cases to be killed in other ways. Many MDLs are a mix of individual and class claims,[135] so what if a federal judge ignored subject matter jurisdiction in order to deny class certification when it would have been granted in state court?[136] This might de facto kill a class action, where individual litigation is not worth the candle.[137] Or, if federal courts are willing to ignore subject matter jurisdiction in order to allow cases to settle, is it that implausible that they would ignore subject matter jurisdiction to dismiss cases?

An increasingly common tool in managing complex litigation is the requirement that plaintiffs file "fact sheets," "profile forms," or other documents to help organize a case.[138] Some judges will require plaintiffs to file such documents or face dismissal. In the massive *Vioxx* MDL, for example, Judge Fallon required the filing of plaintiff profile forms,[139] and he entertained motions to dismiss by defendants on that basis. In at least one case, defendant sought dismissal at this stage even though the plaintiff was seeking remand to state court based on a lack of federal subject matter jurisdiction.[140] Although I cannot say with certainty how many (if any) cases in MDLs have been dismissed in such circumstances, it would not surprise me to learn that the number is greater than zero.[141]

In any event, the willingness to ignore concerns with subject matter jurisdiction to manage complex litigation is yet another area in which catch and kill might thrive. And, again, this practice will be self-reenforcing through the catch and kill ratchet—the more that federal judges are willing to resolve cases

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135. *See, e.g.*, Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297 (2020) (discussing class actions within MDLs and collecting sources).

136. *See generally* David Marcus, Erie*, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1282–86 (2007) (discussing state and federal law on class certification).

137. *See infra* Section IV.D (discussing this issue with respect to CAFA).

138. *See, e.g.*, MARGARET S. WILLIAMS, JASON A. CANTONE & EMERY G. LEE III, PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION PROCEEDINGS, A GUIDE FOR TRANSFEREE JUDGES (2019), https://www.fjc.gov/sites/default/files/materials/14/Plaintiff%20Fact%20Sheets%20in%20Multidistrict%20Litigation%20Proceedings.pdf [perma.cc/7WZX-YT7F].

139. *See, e.g.*, Pretrial Order No. 18C at 2, 9, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. June 29, 2006).

140. *See, e.g.*, Proceedings at 46–53, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Sept. 6, 2007).

141. For a *Lone Pine* order or other pretrial order to support catch and kill under my definition, it would have to be absent from a state court version of the case. There are multiple reasons this is likely to be true. The state might not permit such orders in the first place. Or the state judge might choose not to issue one, or the judge might issue one on different terms than the federal court. Because these orders are most common in very large mass litigations, it seems especially unlikely to find such an order if the case were to proceed as individual litigation in state court.

in this fashion, the more defendants will seek to remove cases without solid jurisdictional footing in order to take advantage of these opportunities.[142]

C. *Expansive Readings of Federal Statutes*

Finally, catch and kill may arise in (at least) three areas in which defendants seek to take advantage of federal courts' elastic interpretations of federal statutes: snap removal, federal officer removal, and complete preemption. In each of these categories, federal court jurisdiction has been expanded to catch claims that might otherwise have been in state court. While none of these areas guarantees a nonmerits dismissal in federal court, they create new opportunities for such dispositions. And given the seeming increase in their use, they merit attention here. These areas also follow nicely from the prior discussion of "willful blindness" as they seem to be on the rise in the kind of complex disputes that often end up in federal MDLs.

1. Snap Removal

It is frequently said that a forum-state defendant may not remove a case to federal court when the only potential basis for federal jurisdiction is diversity of citizenship.[143] This articulation of the "forum defendant rule"[144] is consistent with the idea that diversity of citizenship protects out-of-state defendants from the bias of state courts.[145] An in-state defendant should need no such protection.

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142. It is not surprising, for example, that many examples of what a coauthor and I call "fraudulent removal" arise in mass tort litigation. In prior work, Professor Lahav and I explain that "[f]raudulent removal occurs when a removing defendant's assertion of federal jurisdiction is made in bad faith or is wholly insubstantial." Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. FORUM 87, 88 (2021) (internal quotation marks omitted). Among others, we cite in that paper an example from the sprawling opioid litigation in which federal courts rejected the same argument for federal jurisdiction in 20 different cases across 19 different districts. *See id.* at 95 (citing Florida Health Sciences Center, Inc. v. Sackler, No. 19-62992-CIV-MARTINEZ, 2020 WL 1046601 (S.D. Fla. Jan. 24, 2020)).

143. *See, e.g.*, C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 662 (2004) (mentioning "the prohibition against removal by an in-state defendant, extant—with only a brief hiatus—since the enactment of the first Judiciary Act"); *see also* Peter Adomeit, *The Station Nightclub Fire and Federal Jurisdictional Reach: The Multidistrict, Multiparty, Multiforum Jurisdiction Act of 2002*, 25 W. NEW ENG. L. REV. 243, 251 (2003) (observing that the Multiparty, Multiforum Trial Jurisdiction Act of 2002 changed the requirements for removal such that "the in-state defendant, previously unable in ordinary diversity cases to remove, is specifically permitted to remove a mass disaster case to federal court.") (internal footnote omitted).

144. *See, e.g.*, WRIGHT ET AL., *supra* note 33, at § 3723.

145. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1460 (2008); Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 119–20 (2003). *But see* Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267 (2019) (suggesting other potential justifications for diversity); Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV.

But the text of the removal statute does not line up perfectly with this description. The statute provides: "A civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest *properly joined and served as defendants* is a citizen of the State in which such action is brought."[146] The language about defendants "properly joined and served" was seemingly included to stop plaintiffs from naming but not serving a straw defendant from the forum state in an effort to avoid removal.[147] Entrepreneurial defendants have found another use for this language—if a defendant learns about the case after it is filed, but before service is effected, then the defendant can avoid the forum defendant rule by removing before service.[148] This might happen if the plaintiff (or their attorney) collegially alerts the defendant that service is coming.[149] Or, more commonly, the defendant (or their attorney) electronically monitors state court dockets to be alerted when a case is filed in order to seek pre-service removal in federal court.[150]

This practice of so-called *snap removal* is growing in importance,[151] and despite strong criticisms from the academy, it has been endorsed by an increasing number of federal courts.[152] Some of those courts acknowledge that this interpretation of the removal statute seems inconsistent with the purposes of federal jurisdiction and is unfair to litigants, yet they feel compelled to permit it.[153] Whether these interpretations meet this Article's definition of "catch"—whether *courts* are the ones expanding federal jurisdiction—is up for debate, but it appears that the jurisdictional hook is broader than the framers of the statute intended.

While snap removal does not necessarily lead to catch and kill, when paired with a nonmerits dismissal, it can be used by clever defendants to catch and kill state law claims. A case that would be decided on the merits in state court, and for which post-service removal would be unavailable, could be snap removed and then subject to a motion to dismiss on a federal procedural basis. For example, in *Lothrop v. North American Air Charter, Inc.*, the defendant

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1847, 1888–89 (2017) ("The proposition that diversity was necessary to protect out-of-state litigants from bias in state courts emerged as a post-hoc explanation and has translated to only a few minor elements of the statutory framework over the years.").

146. 28 U.S.C. § 1441(b)(2) (emphasis added).

147. *See, e.g.*, Sullivan v. Novartis Pharm. Corp., 575 F. Supp. 2d 640, 645 (D.N.J. 2008).

148. *See generally, e.g.*, Adam Sopko, *Swift Removal*, 13 FED. CTS. L. REV. 1 (2021); Jeffrey W. Stempel, Thomas O. Main & David McClure, *Snap Removal: Concept; Cause; Cacophony; and Cure*, 72 BAYLOR L. REV. 423 (2020); Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. CIN. L. REV. 541 (2018); Arthur Hellman et al., *Neutralizing the Stratagem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103 (2016).

149. *See* Sopko, *supra* note 148, at 14 n.65 (collecting cases).

150. *Id.* at 13–15 (discussing practice and collecting cases).

151. *See* Sopko, *supra* note 148 (collecting data on the use of snap removal and comparing it to prior studies).

152. *E.g.*, Stempel et al., *supra* note 148, at 423–44.

153. *See* Sopko, *supra* note 148, at 13–14 nn.62–66 (collecting cases).

effected a snap removal from state court with the intention of filing a motion to dismiss based on federal forum non conveniens.[154] The federal court did not reach the motion because of a different jurisdictional defect, but it is clear that the defendant was seeking catch and kill.[155]

Note also, as will be discussed more below,[156] that snap removal invariably involves state law claims, as the forum defendant rule that snap removal seeks to avoid is applicable only to cases in which diversity of citizenship provides the sole basis of jurisdiction.[157] I would also observe that snap removal seems to be frequently invoked in large MDLs,[158] which are susceptible to other kill strategies described above.[159]

2. Federal Officer Removal

Lawsuits against federal officers also might invite catch and kill.[160] In 1815, Congress provided for federal officer removal primarily to permit federal customs officials to get out of state court.[161] During Reconstruction, Congress returned to federal officer removal as part of a wider set of responses to state court hostility to the federal government.[162] One problem facing Congress was that federal officers carrying out Reconstruction policies were being harassed by meritless lawsuits that state judges hostile to Reconstruction were willing to entertain. By allowing federal officers to remove, Congress invited federal courts to catch and kill those cases.[163]

You might think that "federal officer" removal would be the province of federal officers, but private defendants also have been granted access to federal

154. No. 13–10235–DPW, 2013 WL 3863917, at *5 n.3 (D. Mass. July 11, 2013).

155. *Id.*

156. *See infra* Section IV.D.

157. *See* 28 U.S.C. § 1441(b)(2).

158. *See, e.g.*, Nannery, *supra* note 148, at 562 ("A significant number of snap removed cases were cases that the defendant sought to have consolidated in MDL proceedings or in the district court where the cases were removed. . . . Overall, defendants sought to consolidate 72% of the snap removed cases between 2012 and 2014.").

159. *See supra* Sections II.A–C.

160. I am discussing here litigation against private defendants relying on federal officer removal. For an unusual type of catch and kill in litigation against federal employees, see Fukes, *supra* note 43.

161. *See* Willingham v. Morgan, 395 U.S. 402, 405–06 (1969) (discussing the history of federal officer removal).

162. *See, e.g.*, STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 149–50 (1968); WRIGHT ET AL., *supra* note 33, at § 3726. Frankfurter and Landes suggest that the increasing availability of removal in the late nineteenth century was connected to the economic interests of railroads and other national corporations, but even they seem to acknowledge that federal officer removal served a different purpose. *See* FELIX FRANKFURTER & JAMES M. LANDES, THE BUSINESS OF THE SUPREME COURT 60–61 (Transaction 2007).

163. KUTLER, *supra* note 162, at 149–50.

courts based on the federal officer removal statute. The current statute provides for removal where a person is "acting under" a federal officer,[164] and the Supreme Court repeatedly approved of federal officer removal by private parties assisting federal officers.[165] For example, the Supreme Court cited approvingly to a Fifth Circuit decision allowing Dow Chemical to remove a case under this statute arising from its performance of a government contract to provide Agent Orange to the United States military.[166]

Recently, private defendants have offered ever-expanding notions of federal officer removal to gain access to federal courts, often in hopes of federal courts killing cases. In climate change cases, private defendants invoked federal officer removal because some of their fuel-supply agreements and oil-and-gas leases are with federal actors.[167] In the opioid litigation, private defendants invoked federal officer removal on the theory that some opioid distribution was coordinated with the federal Department of Veterans Affairs.[168] And in tobacco cases, private defendants invoked federal officer removal based on federal agencies' regulation and monitoring of cigarette advertising—an argument the Supreme Court ultimately struck down in 2007.[169]

These federal officer removals do not guarantee that cases will be dismissed based on the application of federal procedural law, but they may easily be combined with such dismissals to create catch and kill. This would include straightforward applications of federal procedural doctrine, such as dismissals or forum non conveniens.[170] Federal officer removal also can be used to functionally kill class actions. Defendants might invoke federal officer removal to get class actions into federal court when no other basis of jurisdiction exists.[171] Once there, they could be subjected to a tougher class certification standard

164. 28 U.S.C. § 1442.

165. *See, e.g.*, WRIGHT ET AL., *supra* note 33, at § 3726 (collecting cases).

166. *See* Watson v. Philip Morris Cos., 551 U.S. 142, 153–54 (2007) (citing Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387 (5th Cir. 1998)).

167. *See* Mayor of Balt. v. BP P.L.C., 952 F.3d 452, 461 (4th Cir. 2020); County of San Mateo v. Chevron Corp., 960 F.3d 586, 602 (9th Cir. 2020).

168. *See In re* Nat'l Prescription Opiate Litig., 327 F. Supp. 3d 1064, 1070–71 (N.D. Ohio. 2018).

169. *See Watson*, 551 U.S. 142. *See generally* Lonny Hoffman & Erin Horan Mendez, *Wrongful Removals*, 71 FLA. L. REV. F. 220 (2020).

170. *See, e.g.*, Magnin v. Teledyne Cont'l Motors, 91 F.3d 1424 (11th Cir. 1996) (affirming a district court's decision to accept federal officer removal and dismiss based on forum non conveniens).

171. For more on jurisdiction over class actions, see *infra* Section IV.D (discussing the Class Action Fairness Act).

than they would have been in state court.[172] A denial of class certification might, for all practical purposes, kill the case.[173]

A recent decision of the Supreme Court might encourage more use of federal officer removal to catch (and kill) cases. Typically, decisions to remand removed cases are not appealable, but a small set of federal removal statutes permit appellate review.[174] The federal officer removal statute is one such statute.[175] In *BP P.L.C. v. Mayor of Baltimore*, a climate change case, the Supreme Court held that appellate review in a federal officer case could include appellate review of other bases of removal, even for which appellate review is not usually available.[176] Indeed, the Court encouraged courts reviewing such orders to consider other bases of removal.[177] The result is that there will be cases that would have been remanded prior to *BP*, but for which a court of appeals could now find jurisdiction on some other basis. In this way, federal officer removal functionally expands jurisdiction on other bases by making remand orders wholly reviewable—and it likely encourages defendants to include federal officer removal in order to obtain additional jurisdiction-expanding review.[178] More catch and kill likely will follow.

3. Complete Preemption Statutes

When defendants argue that a federal statute preempts state law claims,[179] typically, they do so as a defense. Defendants argue that the federal statute preempts the state law on which the plaintiff is suing. Under the well-pleaded complaint rule, this defensive preemption is not a basis for federal subject matter jurisdiction.[180]

In a small number of areas, however, federal courts apply a doctrine called "complete preemption," under which a federal statute essentially converts

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172. *See, e.g.*, Crutchfield v. Sewerage & Water Bd. of New Orleans, 829 F.3d 370 (5th Cir. 2016) (affirming a district court's decision to accept federal officer removal and to deny class certification).

173. *See generally* Marcus, *supra* note 136, at 1282–86 (discussing state and federal standards for class certification).

174. *See* 28 U.S.C. § 1447(d) (referring to sections 1442 and 1443).

175. 28 U.S.C. § 1442(a)(1).

176. 141 S. Ct. 1532 (2021).

177. *Id.* at 1542 (quoted *supra* note 26).

178. The Supreme Court conceded as much, but essentially left it to lower courts to police this behavior. *See id.* But as explained elsewhere, current tools seem insufficient to deter fraudulent removals. Clopton & Lahav, *supra* note 142, at 88.

179. *See generally* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 677–86 (7th ed. 2015); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994).

180. *See, e.g.*, WRIGHT ET AL., *supra* note 33, at § 3722.2 ("If the plaintiff chooses to assert a claim based solely on state law, . . . preemption can be only a defense. . . . Even if the defense of federal preemption is anticipated by the plaintiff and negated in the complaint, the complaint would not be well-pleaded.") (internal footnotes omitted).

state law claims into federal law claims, thereby providing for federal question jurisdiction.[181] As the Tenth Circuit explained:

> We read the term [complete preemption] not as a crude measure of the breadth of the preemption (in the ordinary sense) of a state law by a federal law, but rather as a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's intent to permit removal.[182]

The Supreme Court has found complete preemption of some claims covered by the Labor Management Relations Act (LMRA), Employee Retirement Income Security Act (ERISA), and the National Bank Act.[183] Defendants in COVID-related cases have attempted to remove state law claims to federal court under the theory that they are completely preempted by the Public Readiness and Emergency Preparedness (PREP) Act.[184] And according to Wright & Miller, lower court decisions have found some claims to be completely preempted by "the Air Transportation Safety and System Stabilization Act, the Bankruptcy Code, the Carmack Amendment to the Interstate Commerce Act, the Interstate Commerce Commission Termination Act, the Copyright Act, the Federal Communications Act, the Federal Deposit Insurance Act, the Federal Railroad Safety Act, the National Labor Relations Act, and the Securities Litigation Uniform Standards Act (SLUSA)."[185]

Here, too, catch and kill is not required, but it is an option. Defendants, for example, have attempted to invoke complete preemption removal alongside motions to dismiss based on forum non conveniens.[186] Had they succeeded, the cases would have been caught and killed. Federal courts also have relied on complete preemption to hear state law cases related to ERISA and then dismissed based on an administrative exhaustion requirement specific to ERISA claims.[187] In these situations, complete preemption facilitates catch and kill.

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181. *See generally* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781 (1998); Young, *supra* note 67; Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537 (2007); WRIGHT ET AL., *supra* note 33, at § 3722.2.

182. Schmeling v. Nordham, 97 F.3d 1336, 1342 (10th Cir. 1996).

183. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9–10 (2003); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–65 (1987); Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557, 559–62 (1968).

184. *See, e.g.*, Estate of Maglioli v. Andover Subacute Rehabilitation Ctr. I, 478 F. Supp. 3d 518 (D.N.J. 2020).

185. WRIGHT ET AL., *supra* note 33, at § 3722.2.

186. *See, e.g.*, Stephenson v. Ctr. For Learning Tree Inst., No. 09-0712-CV-W-FJG, 2009 WL 4057150 (W.D. Mo. Nov. 23, 2009) (finding no jurisdiction); Zemp v. Boeing Vertol Co., No. 87-1884, 1987 WL 14851 (W.D. Penn. July 28, 1987) (same).

187. Sarasota Cnty. Pub. Hosp. Bd. v. Blue Cross & Blue Shield of Fla., Inc., No. 18-cv-2873-T-23SPF, 2020 WL 5898978 (M.D. Fla. Apr. 7, 2020).

III. A POSITIVE ACCOUNT

The foregoing was my attempt to define catch and kill and to describe areas in which catch and kill cases may be found. Putting together the definition and lived experience of catch and kill allows for both positive and normative analysis. This Part takes on the positive question—under what conditions is catch and kill likely to occur?—and the next Part offers a normative assessment of the practice of catch and kill.

A. *Conditions for Catch and Kill*

Turning to the positive account, two conditions seem likely to support catch and kill, tracking the division between catching and killing.

First, catch and kill jurisdiction needs a federal judiciary willing to expand federal jurisdiction. In other words, we should expect catch and kill to arise during periods when the federal courts are willing to expand their own jurisdiction. Assuming the courts mean what they say, then we should be surprised to find jurisdictional expansion during eras of real or perceived litigation booms because courts in those periods should be loath to expand jurisdiction (even if they will ultimately kill cases).[188] When such arguments recede, and federal courts are willing to expand their jurisdiction in service of other values, then catch and kill should be more common. Today's stable or declining dockets,[189] and a federal bench not shy about judicial power, are fertile ground for this aspect of catch and kill.

This willingness to expand federal jurisdiction need not be transsubstantive. The courts frequently invoke specific categories of federal interests to justify the jurisdictional expansion that is an ingredient of catch and kill. Transnational litigation is the obvious example, where calls for "one voice" might support federal jurisdiction.[190] Highly regulated areas (complete

188. *See generally* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013) (cataloging and critiquing "floodgates" arguments). *See also* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 717–19, 734–37 (1998) (critiquing oft-cited claims of a litigation explosion); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5–6 (1986) (same).

189. *See* Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177. This is true if you exclude a few massive multidistrict litigations (MDLs) that account for a substantial share of the federal civil docket. *See, e.g.*, *id.* at 1202 ("In addition, changes in the overall median time can be misleading. Like the moon's gravitational pull on the tides, cases consolidated in MDL litigations exert a massive influence on terminations and disposition times each year."); *see also* Clopton, *supra* note 135 (suggesting caution with respect to MDL statistics).

190. *See generally, e.g.*, Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001); David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953 (2014); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004).

preemption[191]), mass torts (some MDLs[192]), and the protection of federal officials (federal officer removal[193]) also might fit the bill. More on this point is below.[194]

Second, because catch and kill requires a federal nonmerits dismissal, it is more likely to arise in areas in which the federal courts are hostile (consciously or not) to a class of claims or litigants.[195] In these areas, we should expect that federal courts might develop and deploy their own methods to dispose of cases even if they could be adjudicated on the merits in state courts.

This condition is consistent with the practice of catch and kill. For example, during Reconstruction, federal courts were "hostile" to suits against federal officers, consistent with catching and killing federal officer cases in that era.[196] That hostility may have been justified, suggesting that not all catching and killing is normatively problematic. More recently, federal court hostility to transnational litigation[197] and private enforcement[198] is consistent with catch and kill in those areas. We also might find that some federal judges are hostile to litigation that appears to intrude on the separation of powers.[199]

One potential convergence of these conditions is when proponents of catch and kill can frame cases as implicating the authority of the federal political branches. Foreign affairs and complete preemption are the obvious examples. In these areas, it is easy to imagine arguments for expanding federal jurisdiction (to protect federal interests) and then abstaining in particular cases (out of deference to the political branches).[200]

B. *The Catch and Kill Ratchet*

The positive account of catch and kill also connects to the catch and kill ratchet hinted at in earlier sections.

The ratchet works this way. When federal courts are more hostile to a class of litigation than state courts, then we should expect defendants in that class of cases to have greater incentives to get into federal court. Responding to those incentives, defendants will try to get into federal court under current

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191. *See supra* Section II.C.3.

192. *See supra* Sections II.A and B.2.

193. *See supra* Section II.C.2.

194. *See infra* note 197 and accompanying text.

195. For the argument that at least the Rehnquist Court was hostile to all litigation, see Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006). *See also* Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 328–32 (2012) (connecting issues of civil procedure in the Roberts Court to corporate interests).

196. *See supra* note 162 and accompanying text.

197. *See, e.g.*, Bookman, *supra* note 54.

198. *See, e.g.*, BURBANK & FARHANG, *supra* note 2.

199. *See supra* Section II.A.2.

200. I take up the connection between this aspect of the positive account and federalism *infra* note 251 and accompanying text.

doctrine. They also will try to get congenial policymakers to expand federal jurisdiction. They will push for broader interpretations of existing jurisdictional grants when they find sympathetic judges—and, in all likelihood, they will lobby Congress for the same.[201] It is even possible that federal courts, seeing an influx of cases to which they are hostile, might be more willing to develop and deploy tools to kill such cases without reaching the merits.

It should not be surprising that defendants have pushed for courts to adopt broad interpretations of federal jurisdiction in transnational cases in light of federal procedural doctrines that allow nonmerits dismissals.[202] And perhaps it makes sense that federal courts hostile to transnational litigation developed procedural doctrines to kill transnational cases as they seemingly saw more of them.[203]

Nor should it be surprising defendants hoping for global resolution in an MDL have been pushing somewhat dubious bases for removal.[204] Similarly, as described in more detail below, defendant-side interests lobbied Congress to expand federal jurisdiction over class actions (in what became CAFA) only after federal courts had evinced a hostility to class action claims.[205] This would not be catch and kill per se, but it tracks catch and kill's logic. Taken together, the increasing presence of catch and kill in complex cases (MDLs and CAFA) further attracts national repeat players to the federal courts.[206]

The prediction, in other words, is that catch and kill encourages more catch and kill.

IV. A NORMATIVE ACCOUNT

What, then, should we make of catch and kill? It is easy to make arguments about particular catch and kill doctrines, and indeed many of the specific doctrines described above have been the subject of scholarly criticism.[207] But even if we could agree on the normative merits of these doctrines, simply pointing out a bad doctrine (or a pair of bad doctrines) does not doom the whole category. Complaints about snap removal are complaints about snap

201. As noted below, intervention from Congress differentiates this from "pure" catch and kill, but it is notable nonetheless.

202. *See, e.g.*, Hoffman & Mendez, *supra* note 169, at 221 (defining wrongful removal as cases "in which defendants have invoked arguments to gain access to the federal forum that were—or, still are—highly questionable").

203. *See supra* Section II.A.

204. *See supra* Sections II.C.2.

205. *See infra* Section IV.D.

206. *See, e.g.*, Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 149–51 (2009) (making this observation about federal procedure and jurisdiction); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016) (making this observation about the Federal Rules).

207. *See, e.g.*, Gardner, *supra* note 83 (forum non conveniens); Gardner, *supra* note 91 (international comity abstention); Bookman, *supra* note 54 (litigation isolationism); Sopko, *supra* note 148 (snap removal).

removal; they are not necessarily complaints about the broader practice of federal courts taking jurisdiction and then dismissing cases.

This Part considers arguments about the broader practice of catch and kill. It first raises and then dispenses with an argument that the act of taking jurisdiction and dismissing on procedural grounds is inherently flawed. It then turns to three aspects of catch and kill that might raise normative concerns, focusing on catch and kill's institutions and functions. This Part concludes by applying some of these lessons to the oft-studied, and oft-criticized, Class Action Fairness Act—and to Congress's role in catch and kill more generally.

A. *Inherent Tension?*

When reading catch and kill cases, one often gets the feeling that there is something uneasy about the fit between expanding jurisdiction and dispensing with cases based on abstention-like doctrines.[208] Federal jurisdiction is—or should be—about providing a federal forum to resolve disputes.[209] Expanding federal jurisdiction, then, should be used to allow federal courts to hear more cases. "Kill" doctrines such as abstention point the other direction, staying federal judges' hands despite their newfound jurisdiction.

A related critique connects the expansion of federal jurisdiction to the oft-repeated assertion that federal courts are courts of limited jurisdiction.[210] Importantly, the limited jurisdiction of federal courts operates against the backdrop of state courts of general jurisdiction, so that limited federal jurisdiction supplements general state jurisdiction.[211] Catch and kill turns this arrangement on its head. Instead of asserting federal jurisdiction might be necessary

208. Here, and elsewhere, I use abstention functionally, not formally. Forum non conveniens is a form of abstention even though federal courts do not label it as such. *Compare* Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430 (2007) ("*[F]orum non conveniens* 'involves a deliberate abstention from the exercise of jurisdiction.' "), *with* Quackenbush v. Allstate Ins., 517 U.S. 706, 722–23 (1996) ("[O]ur abstention doctrine is of a distinct historical pedigree [from *forum non conveniens*], and the traditional considerations behind dismissal for *forum non conveniens* differ markedly from those informing the decision to abstain.").

209. *See generally, e.g.*, Marcus, *supra* note 136; Seinfeld, *supra* note 206.

210. *E.g.*, Kokkonen v. Guardian Life Ins. of Am., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction."). According to Westlaw, the exact phrase "federal courts are courts of limited jurisdiction" appears in more than 10,000 federal cases. Thomson Reuters, WESTLAW EDGE, https://legal.thomsonreuters.com/en/westlaw [perma.cc/6VUZ-YU8E].

211. *See, e.g.*,13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3522 (3d ed. 2008) ("It is a principle of first importance that the federal courts are tribunals of limited subject matter jurisdiction. Most state courts are courts of general jurisdiction, and the presumption is that they have subject matter jurisdiction over any controversy unless a showing is made to the contrary. The federal courts, on the other hand, cannot be courts of general jurisdiction."); *see also* Claflin v. Houseman, 93 U.S. 130, 137 (1876) ("[Federal and state law] together form one system of jurisprudence, which constitute the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.").

to ensure a fair hearing on the merits,[212] catch and kill seems to expand federal jurisdiction precisely *because* there is another court open for business.

The problem with these critiques is that they sweep too broadly. There is no ideal distribution of business between federal and state courts.[213] The line must be drawn somewhere. Once cases cross the line into federal jurisdiction, then federal courts must be able to dispose of cases, including through "nonmerits" determinations.[214] Federal courts have long exercised their discretion to decline jurisdiction, as famously documented by Professor David Shapiro.[215] Unless federal jurisdiction was zeroed out or nonmerits dispositions were eliminated entirely, then some cases will be caught and killed. Catch and kill, in other words, is baked in the cake of federal jurisdiction.

Indeed, under some circumstances, catch and kill may be normatively preferable. If state courts and their procedures truly were biased—if the "correct" outcome were a nonmerits dismissal—then federal courts catching and killing is the right decision.

B. *Functional Concerns*

A more persuasive set of concerns focuses on the relationship between what catch and kill achieves and how it does so.

While those dubious of catch and kill might connect it to well-worn concerns with judicial lawmaking,[216] this Article's critique of catch and kill is more specific. Catch and kill is not only judge-made law, but it is a particular version of judge-made law. Catch and kill defeats substantive claims by judicial decree—first by judicially expanding federal jurisdiction and then by judicially resolving the cases without reaching the merits, all without resorting to any legislative process. More precisely, catch and kill is judge-made law that achieves substantive results using a method that undercuts oversight and

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212. *See, e.g.*, *supra* note 145 (discussing the antibias rationale of diversity); *see also* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555 (1994) (suggesting that Supreme Court original jurisdiction over state party cases was necessary to ensure a hearing on claims that states violated federal law).

213. *See generally*, *e.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

214. *See, e.g.*, David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

215. *Id.* Even during the era of the Conformity Act, when federal courts were to conform their procedures to state courts, federal courts might have applied those procedures in ways that departed from what the state court would have done. *See, e.g.*, Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 82 (1997) ("Under the Conformity Act of 1872, federal trial judges used the as 'near as may be' escape hatch as a means to avoid applying state procedures that they considered unwise.").

216. *See generally*, *e.g.*, Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986).

democratic accountability through diffusion, obscurity, and seeming neutrality.[217]

First, catch and kill involves nested delegations that diffuse responsibility. The initial lawmaking—the creation of a catch or kill doctrine—is spread out among judges across the country and among cases those judges hear over time. Congress passes every federal statute, but any one of a thousand federal judges in any one of a hundred thousand cases might write the opinion adopting a particular catch and kill doctrine. The application of catch and kill doctrines is then further diffused across judges and cases.[218] The catch doctrine might be created in one case, the kill in another, and then they are brought together for the first time in a third. This also means that the judge applying the doctrine is often different from the judge creating it, allowing the "applying" judges to seek the cover of "precedent,"[219] even if such precedent is not binding.[220] And because each of these decisions is case-by-case, catch and kill spreads accountability across many individual judges and down the judicial hierarchy, often with the added protection of deferential standards of review.[221]

Second, judge-made procedural and jurisdictional doctrines are further insulated from oversight because they rely on technical and legalist language. Procedure and jurisdiction are technical and opaque.[222] The jurisdictional and procedural doctrines comprising catch and kill are almost invariably more

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217. This analysis tracks much of what Professor Lind said about CAFA, quoted at length below. *See* JoEllen Lind, *"Procedural Swift": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717 (2004); *see also infra* note 265 (quoting Lind).

218. *See* BURBANK & FARHANG, *supra* note 2, at 219 ("[T]he ostensibly technical and legalistic qualities of [judicial] decisions on issues affecting private enforcement, and the gradual, evolutionary nature of case-by-case decision-making, opened a pathway of judicial retrenchment that was remote from public view . . . .").

219. Precedent as window-dressing is a key aspect of the "attitudinal model" of judicial decisionmaking. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 48 (1993) ("[P]recedent as a legal model provides no guide to the justices' decisions."); *see also* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL (1999); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

220. *See generally* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619 (2020) (discussing problematic district court citations of district court decisions).

221. A dismissal for forum non conveniens, for example, may be overturned only for an abuse of discretion. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). Deferential review further empowers lower court judges to operationalize catch and kill because their decisions are harder to overturn on appeal.

222. *See* Any Student of 1L Civil Procedure; *see also* George Rutherglen, *The Problem with Procedure: Some Inconvenient Truths About Aspirational Goals*, 56 SAN DIEGO L. REV. 1, 1–2 (2019) ("The dark side of due process has cast a long shadow over civil procedure, hiding technical legal doctrine within a forbidding aura of obscurity. . . . [P]rocedure can complicate and confuse enforcement of the law. This observation would come as no surprise to generations of law students, who confronted unfamiliar and esoteric issues of procedure just as they began law school.").

technical and obscure than the substantive claims at issue. Try explaining hypothetical jurisdiction to your nonlawyer friends and family.[223] These features limit access by the public and press, making political accountability more difficult.[224]

Courts are especially able to take advantage of complexity and technicality because they have no democratic imperative to explain their work to the public at large, and the media is unlikely to fix the problem. Professors Burbank and Farhang, for example, find that the media coverage of Supreme Court decisions about the procedures affecting substantive rights is much less intense than the media coverage of decisions about the substantive rights themselves.[225] Many of the decisions creating catch and kill doctrine are made at levels below the Supreme Court,[226] where oversight is even less extensive.

Third, making substantive law through seemingly "neutral" issues of procedure changes the rhetorical terrain and, as a result, may obscure the substantive stakes.[227] As Professor Ed Purcell explained, one advantage of making

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223. *See* Conversation with Spouse, Apr. 26, 2021 (on file with author).

224. *See, e.g.*, Lind, *supra* note 217, at 720 ("[P]rocedural principles are technical and arcane; by their nature they limit the information to people to make good decisions about the policy issues that are at stake. This acts as a barrier to political participation and impedes transparency.").

225. *See, e.g.*, BURBANK & FARHANG, *supra* note 2, at 225 ("As contrasted with substantive merits decisions (where the court may feel constrained by public opinion), decisions focused on private enforcement issues in general, and procedural issues in particular, offer justices more opportunities for technical and legalistic forms of legal justification. They therefore allow justices more effectively to harness beliefs about the objectivity and neutrality of courts, and to deflect attention from substantive policy consequences, minimizing press interest and public attention, and helping to forestall public perceptions that justices are legislators in black robes."); *id.* at 197 ("[Judges] concerned about institutional legitimacy and institutional maintenance benefit—and know that they benefit—from doing the work of retrenchment on apparently technical and legalistic terrain, where the public tends to regard decisions as more objective and neutral, if it learns of the decisions at all."). Burbank and Farhang compare these results to the work of Professor Jacob Hacker and others about the "subterranean" ways that bureaucracies can undermine substantive programs. *Id.* at 225–26 (discussing Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243 (2004); Paul Pierson, *The Rise and Reconfiguration of Activist Government*, in THE TRANSFORMATION OF AMERICAN POLITICS 19–38 (Paul Pierson & Theda Skocpol eds. 2007); STASZAK, supra note 3.

226. *See, e.g.*, *supra* notes 55–79 and accompanying text (discussing federal common law jurisdiction); *supra* notes 91–103 and accompanying text (discussing international comity abstention); *supra* Section II.B.2 (discussing willful blindness in MDLs); *supra* Section II.C.1 (discussing snap removal).

227. As Professors Bierschbach and Stein observed, "[f]acially neutral procedural and evidentiary rules that make liability more difficult to prove minimize the appearance of overt tradeoffs between instrumental (optimal deterrence) and non-instrumental (moral condemnation) concerns in a way that outright setoff or declination decisions for clearly liable defendants do not." Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1779 (2005). Analogously, discussing legislation on foreign affairs, Professor Ingber observed, "process controls may appear more 'neutral' than substantive legislation. Whereas a substantive provision may engender sufficient support to compel members to vote against it, a process control will be

substantive changes through jurisdictional law is that "almost any reform proposal . . . could and would be robed in eminently plausible and seemingly public-oriented raiments."[228] Judicial doctrine is especially likely to speak in the language of neutrality.[229] Catch and kill decisions are routinely cloaked in neutral or impersonal language. They do not address human rights or climate change but instead airy values such as "comity,"[230] "judicial economy,"[231] or "institutional competence."[232] This type of language further insulates judicial decisions from popular criticism.[233]

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less likely to be a make-or-break component of the bill." Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395, 440 (2020).

228. Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1840 (2008).

229. *See, e.g.*, Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 896 (1989) ("To keep its operation fair in appearance, which it must if people are to trust resorting to the legal method for resolving competing claims, the law strives for rules that are universal, objective, and neutral. The language of individuality and neutrality keeps law from talking about values, structures, and institutions, and about how they construct knowledge, choice, and apparent possibilities for conducting the world. Also submerged is a critical awareness of systematic, systemic, or institutional power and domination. There are few ways to express within the language of law and legal reasoning the complex relationship between power, gender, and knowledge."); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 345 (1998) ("Perhaps citizens adopt an uncritical and unrealistic view [of judges] because it is the view that judges themselves promulgate. Courts and judges in civil law nations seek to appear to render formalistic opinions, relying heavily on symbols. Judges in the United States take great pains, at least in constitutional law, to frame decision making as a process of deducing outcomes from first principles—original intent, literal words, legal precedent, and so on.").

230. *See, e.g.*, Mujica v. AirScan Inc., 771 F.3d 580, 598 (9th Cir. 2014) ("International comity is a doctrine of prudential abstention, one that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law. The doctrine has never been well-defined, but comity is clearly concerned with maintaining amicable working relationships between nations, a shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.") (citation and internal quotation marks omitted) (quoting United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997)); JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005).

231. *See, e.g.*, Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432 (2007) ("A district court therefore may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.").

232. *See, e.g.*, City of New York v. Chevron Corp., 993 F.3d 81, 102 (2d Cir. 2021) ("[F]ederal courts must proceed cautiously when venturing into the international arena so as to avoid unintentionally stepping on the toes of the political branches.").

233. BURBANK & FARHANG, *supra* note 2, at 223 ("Courts benefit from popular 'belief . . . that cases are decided by application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning' . . . . Political scientists call these beliefs 'the myth of legality.' ") (quoting John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928 (2000)); *see also* Carolyn

Taken together, these features of catch and kill make it a deviously effective way to make substantive policy. In these ways, catch and kill calls to mind what Professor Martin Redish and Christopher Pudelski called "legislative deception."[234] As Redish and Pudelski explained:

> When a legislative body uses evidentiary or procedural mechanisms . . . to indirectly alter the "DNA" of its substantive law, a significant danger exists that the legislative body is misleading the electorate into believing that the law remains unchanged. In such a situation, the electorate is unable to judge its legislators on the basis of their support for or opposition to proposed legislative change, because it has been confused as to whether any such change has actually been implemented.
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> . . .
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> . . . . Like the deceptively small print alteration in a consumer contract, a procedural or evidentiary rule that alters the essence of underlying substantive law implements its change in a manner not likely to be recognized by most political consumers. The important functions of electoral checking and accountability are thereby significantly undermined.[235]

Catch and kill is not legislative deception. For one thing, it does not involve the legislature.[236] The comparison is more conceptual: Catch and kill, like legislative deception, has consequences for our democratic commitments.[237] It "alters the essence of underlying substantive law . . . in a manner not likely to be recognized by most political consumers."[238] Even if that does not make it unconstitutional, it makes this practice worth noting and criticizing.

The legislative deception comparison also sharpens the critique of catch and kill. Redish and Pudelski are concerned when legislative deception changes the outcomes of cases by essentially changing the substantive law. A similar thought applies to catch and kill. Merely moving cases into federal

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Shapiro, *The Language of Neutrality in Supreme Court Confirmation Hearings*, 122 DICK. L. REV. 585 (2018).

234. Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 NW. U. L. REV. 437 (2006).

235. *Id.* at 451, 458. For an application of this view to national security cases, see Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. NAT'L SEC. L. & POL'Y 251 (2011). And for more on *Klein*, the impetus of Redish and Pudelski's article, see Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, *in* FEDERAL COURTS STORIES 87 (Vicki C. Jackson & Judith Resnik eds., 2010).

236. Redish and Pudelski view the judiciary as a (perhaps unwilling) accomplice in legislative deception. Redish & Pudelski, *supra* note 234, at 451 (noting that the "overriding constitutional concern" with legislative deception is "the fear that Congress will undermine the sound operation of the representative democratic process by enlisting the judiciary in a plan to deceive the electorate").

237. *Id.* at 451–61 (connecting legislative deception to democratic theory).

238. *Id.* at 458.

court leaves the substantive law intact; merely changing federal procedure does not change outcomes if state courts remain open (or if state courts would apply the same rules). But it is a different matter to take cases and then procedurally dismiss them when a state court would decide them on the merits. Or, to say it another way, procedural and jurisdictional changes that rely on diffusion, obscurity, and seeming neutrality are most problematic when they change the essence of the substantive law by changing substantive outcomes. Catch and kill, by definition, does just that.

C. *Federalism Concerns*

Catch and kill also has implications for federalism.[239] When state law claims are brought into federal court and dismissed on federal-only grounds, the functional effect of state law is changed. A state law enforced at level X is now being enforced at lower level Y. This change in enforcement levels happens without the input of any state-level actor. It is preemption through the backdoor.[240] Because catch and kill operates through judicial lawmaking, it also skirts the "political safeguards of federalism" that attach to federal legislation.[241]

Of course, some judge-made expansions of federal jurisdiction are appropriate. It may be that these judicial creations bring us closer to the ideal distribution of cases.[242] But this is why it matters when attempts to "catch" cases are paired with certain methods of "killing" them. When expansions of jurisdiction are paired with federal-only procedural dismissals, the expansion of federal jurisdiction is not about providing a fairer adjudication on the merits or even a neutral "change in courtrooms."[243] Instead, the outcome is different because of some nonmerits rule that does not apply in state court. Thus, these judge-made doctrines undermine state-created rights without any state actor weighing in. These intrusions also cut out the people—no *elected* branch of federal or state government is involved at any stage.[244]

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239. For related analysis of federalism and "protective jurisdiction," see generally Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542 (1983).

240. *Cf.* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (discussing how decisions on preemption and federal jurisdiction have the effect of replacing state law with uniform national law).

241. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

242. *See supra* note 208 and accompanying text.

243. *See* Seinfeld, *supra* note 206. The "change in courtrooms" language comes from *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964), addressing federal venue transfer.

244. There may be indirect ways in which public opinion affects judicial decisionmaking, but as described above, these pathways are likely less effective when dealing with diffuse procedural and jurisdictional decisionmaking. *See supra* Section IV.B.

Federalism considerations also undermine the idea that judge-made catch and kill is justified by strong federal interests.[245] Federal judges make law only when the issue has not been answered by the Constitution or Congress, suggesting that these areas have not risen to the level of constitutional or congressional concern.[246] Moreover, these judge-made rules are not the usual form of federal common law that applies in state and federal court.[247] If they were, then they would not meet the definition of "kill."[248] Instead, these rules are what some have called "procedural common law," created by federal judges and applicable in federal court alone.[249] These rules, therefore, do not even invoke a sufficient federal interest such that a uniform rule is required in state and federal court; otherwise, they would be the traditional type of federal common law.[250] In other words, the fact that these cases involve judge-made rules that do not apply in state court is, in itself, evidence that they are supported by weak federal interests.

Finally, a focus on federalism casts doubt on catch and kill doctrines that rely on deference to the political branches.[251] While federal courts are proper subjects of federal separation of powers law, the states need not, and often do not, mirror the federal system with respect to these questions.[252] States can and do permit their courts to hear a wider set of disputes than in the federal system.[253] This makes it particularly galling when a federal court expands its jurisdiction (at the expense of state courts) only to dismiss a case because the federal court (but not the state court) is the wrong institution. For example, in

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245. *See supra* notes 190–199 and accompanying text (identifying invocations of strong federal interests as part of the positive account of catch and kill).

246. *See, e.g.*, U.S. CONST. art. VI, cl. 2 (Supremacy Clause); City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.").

247. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964) ("[T]here are enclaves of federal judge-made law which bind the States."); Field, *supra* note 216, at 897 ("[A] federal common law rule, once made, has precisely the same force and effect as any other federal rule.").

248. *See supra* Part I (defining "kill").

249. Barrett, *supra* note 25, at 814–15 (defining procedural common law as "common law that is concerned primarily with the regulation of internal court processes rather than substantive rights and obligations" and observing that "[p]rocedural common law does not generally bind state courts").

250. *Cf.* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (announcing a uniform rule of federal common law); United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (describing the circumstances that justify a uniform rule of federal common law).

251. *See supra* notes 199–200 and accompanying text (discussing how this type of deference may predict where catch and kill will be successful).

252. *See generally, e.g.*, Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79 (1998); Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017); Katherine Shaw, *State Administrative Constitutionalism*, 69 ARK. L. REV. 527 (2016).

253. *See, e.g.*, Hershkoff, *supra* note 252, at Part I (collecting examples).

Hill v. Warsewa, a federal district court used hypothetical subject matter jurisdiction to catch a state law claim, only to kill the case based on federal prudential standing law not applicable in state court.[254] It is hard to justify taking such a case away from a state court that, under state law, is willing and able to hear the dispute.

In summary, catch and kill is concerning when it essentially changes the substantive law through diffusion, obscurity, and seeming neutrality. The results are potentially more troubling when the claims arise under state law, especially when the federal procedural doctrines reflect federal arrangements inapplicable to the states.

D. *CAFA and Congressional Catch and Kill*

Before leaving this normative analysis, it is worth pausing to discuss its connection to the Class Action Fairness Act of 2005 (CAFA).[255] In short, CAFA is an example of Congress using the technique of catch and kill instead of (unpopular) substantive lawmaking.

CAFA arose from the ashes of failed efforts at more direct federal tort reform,[256] including the Common Sense Product Liability Legal Reform Act (PLLRA), which was vetoed by President Clinton.[257] CAFA's backers had similar goals[258] but pursued them by less direct means—that is, by expanding federal jurisdiction.[259]

As proponents of CAFA told it, plaintiffs' lawyers were taking advantage of loose standards for class certification and overly generous jury pools in

254. Hill v. Warsewa, No. 18-cv-01710, 2019 WL 8223291 (D. Colo. Jan. 8, 2019). The Tenth Circuit eventually reversed, finding that the plaintiff did not lack prudential standing, but it seemed to take no issue with the idea that the court could have caught and killed the case. *See* Hill v. Warsewa, 947 F.3d 1305 (10th Cir. 2020).

255. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in various sections of 28 U.S.C.).

256. For examples of the many sources surveying the history of CAFA, see generally Marcus, *supra* note 136; Purcell, *supra* note 228; Burbank, *supra* note 145; Suzanna Sherry, *Overruling* Erie*: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135 (2008); Patricia Hatamyar Moore, *Confronting the Myth of "State Court Class Action Abuses" Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. REV. 133 (2013).

257. *See* H.R. 956, 104th Cong. (1996); *see also* Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475 (2002). The PLLRA included caps on punitive damages and limits on strict liability. H.R. 956, 104th Cong. (1996).

258. *See, e.g.*, Marcus, *supra* note 136, at 1252. The Senate Report accompanying the legislation said that CAFA "is court reform—not tort reform." S. REP. NO. 109-14, at 56 (2005). I agree that CAFA is not tort reform only to the extent that it reforms nontort laws too.

259. Among other things, CAFA gave district courts original jurisdiction for most state law class actions that exceeded $5 million in amount in controversy. 28 U.S.C. § 1332(d)(2). It permitted removal based on "minimal diversity"—only one plaintiff needed to be diverse from one defendant—and it permitted removal by forum state defendants except in limited circumstances. *See* 28 U.S.C. §§ 1332(d)(2)(A), 1441(b) (limiting the forum defendant rule to cases based on 1332(a) only).

some state courts to extract unfair settlements from innocent corporate defendants.[260] Proponents of CAFA sought to expand federal jurisdiction over putative class actions so that defendants could remove to federal court and obtain the benefit of the stricter federal standard for class certification.[261] Importantly, the denial of class certification in federal court would not mean sending the case back to state court; under CAFA, the federal court would retain jurisdiction over the action on behalf of named plaintiffs only.[262] In practice, the denial of class certification would be the death knell to the case, as individual litigation would not be cost-effective to maintain.[263] CAFA thus expanded jurisdiction (the "catch") in order to kill cases with procedure.[264]

CAFA is catch and kill at the direction of Congress. That institutional difference is important: CAFA was adopted through an open and notorious legislative process rather than a collection of seemingly one-off judicial decisions. Still, the functional analysis of catch and kill has something to say about

260. *See, e.g.*, John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 HARV. J.L. & PUB. POL'Y 143 (2001); *see also* Am. Tort Reform Found., *About*, JUDICIAL HELLHOLES, https://www.judicialhellholes.org/about [perma.cc/SRE4-F37M] (maintained by the American Tort Reform Association). Not everyone thought that plaintiffs opting for state courts was a problem. *See, e.g.*, Elizabeth J. Cabraser, *Life After* Amchem*: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 292 (1998) ("Perhaps it is most fitting that plaintiffs increasingly resort to state courts as their battlegrounds of choice for their claims against corporate defendants.").

261. *See, e.g.*, Marcus, *supra* note 136, at 1282–1304 (describing trends and collecting cases).

262. *See, e.g.*, Wright Transp., Inc. v. Pilot Corp., 841 F.3d 1266, 1271 (11th Cir. 2016) (retaining jurisdiction and collecting other cases doing the same); *see also* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1015–17 (2006) (presaging this result). A plaintiff refiling in state court would not change the result, as defendants can just remove again under CAFA. If a plaintiff were able to file a case for which removal would not be possible, though, then the federal decision to deny class certification would not be preclusive on the state court. *See* Smith v. Bayer Corp, 564 U.S. 299 (2011).

263. *See, e.g.*, David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923–24 (1998); Fed. R. Civ. P. 23(b)(3) Advisory Committee's note (note to Subdivision (b)(3)) (noting that class actions may be appropriate when "the amounts at stake for individuals may be so small that separate suits would be impracticable.").

264. To give just one example, employees of a microwave popcorn packaging plant sued owner and operator Gilster-Mary Lee Corporation in Missouri state court. Hood v. Gilster-Mary Lee Corp. No. 14-cv-05012, 2016 WL 5852866 at *1 (W.D. Mo. Sept. 30, 2016). The suit was filed as a class action under state law seeking medical monitoring for injuries that might arise from the plant's use of various chemicals to make butter flavor. *Id.* Defendant removed the case under CAFA, and then opposed class certification. *Id.* The district court begrudgingly denied class certification, and in so doing, acknowledged the key features of catch and kill. *Id.* at *8. The case was not removable under the old diversity statute, only under the Eighth Circuit's strict reading of CAFA. *Id.* Class certification would have been proper in Missouri state court for claims under Missouri law. *Id.* at *2. ("[I]t is clear to this Court that Plaintiff would prevail in her request for class certification of a medical monitoring claim under the Missouri Supreme Court's analysis."). And without class certification, individual litigation would not be viable. Indeed, the plaintiff voluntarily dismissed her case after class certification was denied. Stipulation of Dismissal with Prejudice, Hood v. Gilster-Mary Lee Corp., No. 14-cv-05012, 2016 WL 5852866 (W.D. Mo. Sept. 30, 2016) (Doc. 153).

CAFA. The choice in CAFA to engage in law reform via jurisdiction and procedure implicates this Article's concern with seeming neutrality, obscurity, and diffusion.[265] CAFA was sold as being about judicial hellholes, runaway juries, and the expertise of federal courts, not the substantive law of products liability.[266] Its jurisdictional nature made CAFA more difficult to criticize, undercutting some of the transparency that should come from the legislative process.[267] And CAFA essentially "delegated" the work of catching and killing to individual judges in individual cases.[268] As Professor Vairo put it, "Congress appear[ed] to be seeking to dump its dirty work, disempowering plaintiffs' attorneys and protecting its corporate constituents, on the federal courts."[269]

Also, like catch and kill, CAFA has implications for federalism. CAFA is a statute that affects state law claims.[270] But CAFA does not attempt to change the substantive law being applied.[271] Cases removed under CAFA apply the same substantive law that would apply in state court.[272] Instead, using the tools of catch and kill, CAFA is Congress essentially altering state substantive law

265. Professor JoEllen Lind was early to this assessment of CAFA, writing before the statute was adopted that a "technical and arcane" procedural focus "impedes transparency" and democratic participation, and highlighting the pitfalls of delegating this work to judges. Lind, *supra* note 217, at 720.

266. *See, e.g.*, Purcell, *supra* note 228, at 1872 (explaining that CAFA proponents viewed state courts as lax, inconsistent, inefficient, provincial, insufficiently careful, and to some, so incompetent as to warrant the label "judicial hellholes").

267. *See, e.g.*, BURBANK & FARHANG, *supra* note 2, at 140–41 ("CAFA showed how useful 'procedural' legislation could be to furthering the strategy, traceable to the Reagan Administration, of laying the foundation to retrench private enforcement by empowering federal judges to accomplish what could not be effectuated in other, more democratic, institutional sites.").

268. *See, e.g.*, Purcell, *supra* note 228, at 1878–79. This delegation made sense because CAFA's drafters were confident that the federal court delegates shared their normative preferences. *See, e.g.*, BURBANK & FARHANG, *supra* note 2, at 140–41; *see also* Marcus, *supra* note 136. This observation—that Congress uses catch and kill when the federal courts would be reliable delegates—would be part of the positive account of congressional catch and kill. *Cf. supra* Part III.

269. Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1610 (2000); *see also, e.g.*, BURBANK & FARHANG, *supra* note 2, at 140 ("CAFA channeled class action retrenchment into the federal courts, an institutional environment in which more aggressive retrenchment was possible under a transsubstantive Federal Rule.").

270. *See supra* notes 255–264 and accompanying text (describing CAFA).

271. *See* Clopton, *supra* note 37 (discussing horizontal choice of law in CAFA cases). Indeed, Congress defeated a proposal to include choice of law in CAFA. *See* S. Amend. 4 to S. 5, 109th Cong., 151 CONG. REC. S1215 (2005).

272. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487 (1941) (calling for federal courts to apply the horizontal choice-of-law rule of the forum state).

via jurisdiction and procedure—taking laws that could be enforced in the aggregate and converting them to laws that are impractical to enforce in individual actions.[273]

CAFA thus uses jurisdictional law to delegate responsibility and undercut accountability while achieving the same substantive ends as more direct—but unsuccessful—law reform efforts. More generally, CAFA shows that the roadmap of catch and kill can be deployed by Congress to similar ends. Congressional catch and kill is not always normatively problematic—think labor injunction cases[274]—but it merits our attention because it presents many of the same risks as when judges engage in catch and kill.

V. RESPONSES, IF ANY

Returning to (judge-made) catch and kill, this Article's institutional analysis can help to identify where potential responses might be effective (or not). In short, the same concerns that attach to catch and kill also make it difficult to thwart across the board, though they leave open some options in individual cases.

A. *Wholesale Responses*

Many of the functional attributes of catch and kill mean that calls for wholesale renovations of these doctrines likely will fail in Congress, the Supreme Court, and the states.

Congress seems like an unlikely ally. The same features that make catch and kill strategies attractive to policymakers also make them hard to mobilize

273. The Supreme Court effectively endorsed this outcome in *Shady Grove v. Allstate*. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2015). Writing for the majority, Justice Scalia explained that Federal Rule 23 provided the appropriate standard for class certification in federal court regardless of the New York law. *See, e.g.*, Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 76 (2010) ("[CAFA and *Shady Grove*] have deprived the states of power to pursue visions of the class action that differ from the federal vision."). For empirical evidence that parties responded accordingly, see William H.J. Hubbard, *An Empirical Study of the Effect of* Shady Grove *v.* Allstate *on Forum Shopping in the New York Courts*, 10 J.L. ECON. & POL'Y 151 (2013) (documenting an increase in federal court filings and decrease in removals of putative class actions seeking statutory damages under New York law).

274. *See generally* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991) (detailing labor law and labor history to challenge the notion of American "individualism"). For example, Congress functionally killed cases seeking labor injunctions that would be available in state court because, once removed, the Norris-LaGuardia Act prohibits federal courts from providing such relief. *See, e.g.*, Dillon Cos., Inc. v. Teamsters Union Loc. No. 795, 3 F. Supp. 2d 1193 (D. Kan. 1998). This result is based on the Supreme Court's broad interpretation of federal jurisdiction under the LMRA, *see* Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557 (1968), and the text of the Norris-LaGuardia Act's bar on labor injunction providing that it applies only to federal courts. *See* 29 U.S.C. § 104 (1932) ("No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute . . . ."); *cf.* Boys Mkts., Inc. v. Retail Clerks Union, 398 U.S. 235 (1970).

against.[275] It is hard to imagine a public groundswell against neutral-sounding and technical doctrines such as hypothetical jurisdiction and forum non conveniens.[276] And even if a movement could coalesce, those same features make it hard to get Congress to act. Diffusion, obscurity, and seeming neutrality not only facilitate the creation of catch and kill but also insulate it from reform.[277]

The Supreme Court is another option. The Court could revise some of the catch or kill doctrines addressed in this Article or could suggest that remand rather than dismissal be the appropriate disposition in a removed case. Professor Redish called for the Supreme Court to police legislative deception,[278] which at least has the allure of interbranch competition.[279] But asking the Supreme Court to cut back on the judiciary's power seems less likely to succeed.[280] This is especially true given that the current Supreme Court seems congenial to the deregulatory results of catch and kill.[281] While the Supreme Court sometimes cuts back on the power of federal courts,[282] it would be surprising if the Court did so in a way that contradicted the (seeming) substantive preferences of the justices.

Relying on the states to alter catch and kill is also likely to be unproductive. Although the federalism effects of catch and kill might motivate states to reassert their sovereign prerogatives,[283] the nature of catch and kill makes responses difficult. In other work, I have emphasized how states can respond to federal procedural decisions that cut back on court access by expanding state jurisdiction and resisting the temptation to mirror federal procedure.[284] These strategies are much less useful here: Catch and kill jurisdiction takes cases

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275. *See supra* Section IV.B.

276. *See supra* notes 81–89 and accompanying text; *supra* Section II.C.1.

277. *See supra* Section IV.B.

278. *See supra* note 236 and accompanying text (discussing Redish & Pudelski).

279. *Cf.* THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) ("Ambition must be made to counteract ambition.").

280. *See generally, e.g.*, Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137 (2011); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829 (2018).

281. *See generally, e.g.*, Jeffrey Rosen, *Keynote Address, Santa Clara Law Review Symposium: Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929 (2009); Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637 (2012); Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

282. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.").

283. *See supra* Section IV.D.

284. *See generally* Clopton, *Making State Civil Procedure*, supra note 20; Clopton, *Procedural Retrenchment and the States*, supra note 20.

away from the states, so state court jurisdiction and procedure have no bearing.

It is possible that state officials asserting state interests will have a slightly better chance of motivating Congress. States seemingly have privileged access to Congress relative to the public at large.[285] But as described above, catch and kill strategies are low salience, so I think it is unlikely that state actors would be sufficiently interested in mounting a lobbying campaign and unlikely that Congress would listen. And, of course, it is possible that those state actors with such access are on board with the substantive agenda of catch and kill so that they benefit from passing the buck.[286]

B. *Retail Responses*

More promising alternatives focus on individual cases, though of course these responses do not even aspire to universality.

Some options arise in the lower federal courts. Many of the doctrines described above have developed without the express approval of the Supreme Court.[287] That path has shielded these doctrines from scrutiny,[288] but it also leaves lower courts as potential policy reformers. For example, the Supreme Court has ducked opportunities to address international comity abstention.[289] A couple of circuits have endorsed it, but many have not yet weighed in.[290] Perhaps presenting arguments about the role of this doctrine in catch and kill cases might persuade those undecided courts to think twice. If there is variation among the circuits or districts, then we should expect litigants (and their lawyers) to shop among state courts in light of the federal law to be applied if their cases were removed.[291]

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285. *See, e.g.*, Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014); Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443 (2014).

286. *Cf.* Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1863–65 (2018) (observing partisan effects in state attorney general amicus briefs on federal class action issues in the Supreme Court).

287. *See, e.g.*, *supra* notes 93–101 and accompanying text (discussing international comity abstention); *supra* Section II.B.2 (discussing MDL practice); *supra* Section II.C.2 (discussing federal officer removal).

288. *See supra* Sections IV.B–C.

289. *See, e.g.*, Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 715 (2021).

290. *See, e.g.*, *supra* notes 91–103 and accompanying text (discussing international comity abstention).

291. Cause lawyers pursuing cases about climate change, for example, have essentially unlimited ability to choose among courts by choosing among potential plaintiffs, claims, and sources of law. For examples, see *U.S. Climate Change Litigation*, *supra* note 4. *See also* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 457–61 (2017) (criticizing forum shopping for "national injunctions" in public law cases); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1104–06 (2018) (responding to this critique). This technique would be less effective in cases eventually consolidated in an MDL because the MDL judge is permitted to apply the transferee court's interpretation of federal

The lower courts also play a role in the *application* of catch and kill. Many of the doctrines described in this Article entail substantial discretion in their application.[292] Indeed, this discretion contributes to the "delegation" that obscures how catch and kill works.[293] But this delegation also means that individual trial judges must participate in each exercise of catch and kill. Therefore, there will be opportunities to influence the application of catch and kill in specific cases. Arguments about democracy, federalism, and the judicial role might persuade some judges to stay their hands.

There also may be a role for the federal executive branch in the application of catch and kill in individual cases. Specifically, at least for those doctrines that purport to effectuate federal interests, the executive branch could appear in court to disclaim those interests. For example, various jurisdictional doctrines are grounded in the notion that foreign affairs are a peculiarly federal subject,[294] while various abstention and abstention-like doctrines are grounded in the notion that foreign affairs disputes are unfit for judicial resolution.[295] But were the federal executive, through the State or Justice Department, able to tell the court that no such interests were implicated by the particular case, then perhaps lower court judges might decline to catch or kill.

This type of executive intervention is not a fantasy. In a case concerning the Fukushima disaster, for example, the Ninth Circuit invited the United States government to weigh in on the application of international comity abstention and forum non conveniens.[296] The United States took the position that the district court did not abuse its discretion in declining to dismiss on those grounds.[297] This is not, to be clear, an argument that courts should defer to the executive branch.[298] But if the United States government expressly disclaims an interest in the litigation, that is pretty good evidence that deference to the political branches is not required.[299]

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law (even though it is supposed to apply the state law that would have been applied in the transferor court). *See, e.g.*, Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 684–85 (1984).

292. *See, e.g.*, *supra* notes 91–103 and accompanying text (discussing international comity abstention); *supra* notes 81–90 and accompanying text (discussing forum non conveniens).

293. *See supra* Section IV.B (discussing delegation).

294. *See supra* Section II.A.1.

295. *See supra* Section II.A.2.

296. Cooper v. Tokyo Elec. Power Co., 860 F.3d 1193, 1199 (9th Cir. 2017).

297. Brief for the United States in Support of Neither Party and in Support of Affirmance of the Order Below, Cooper v. Tokyo Elec. Power Co., 860 F.3d 1193 (9th Cir. 2017) (No. 15-56424). The court ultimately dismissed based on international comity abstention despite this intervention. Cooper v. Tokyo Electric Power Co. Holdings, Inc., 960 F.3d 549 (9th Cir. 2020).

298. For an example of that argument, see Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170 (2007).

299. For another example, the D.C. Circuit held that the "comfort women" litigation presented a nonjusticiable political question based in large part on the intervention of the State Department. Hwang Geum Joo v. Japan, 413 F.3d 45, 52 (D.C. Cir. 2005) ("The Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests

Notably, relying on retail strategies in individual cases has distributional consequences. Presumably, not all parties will be equally successful at persuading lower court judges to reject catch and kill. Unsophisticated parties, nonrepeat players, and perhaps foreign plaintiffs may face stronger headwinds with these retail strategies.[300] A similar idea applies to executive branch intervention. It seems likely that those who are able to get the attention of the federal executive are not otherwise powerless.[301] Still, to the extent that catch and kill is a problem, these interventions can cut back on it.

CONCLUSION

A federal court asserts jurisdiction on a somewhat dubious theory, and then dismisses the case on a federal procedural doctrine that would not apply in state court. The outcome of any such case likely will not make headlines. But when added together, the repeated use of catch and kill by federal courts works a change in the substantive law—often state substantive law—without going through the rigors of a legislative or electoral process. Even if the outcome in any such case is correct, the overall practice should raise red flags.

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of the United States is compelling and renders this case nonjusticiable under the political question doctrine."); *see also* Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 62–63 (2d Cir. 2005) (describing the Department of State's letter urging the court to dismiss the litigation out of deference to the foreign policy interests of the United States).

300. *See generally, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Resnik, *supra* note 2; Coleman, *supra* note 206; *supra* note 54 (collecting sources on "xenophobia").

301. *See generally, e.g.*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010).