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National Banks and Diversity Jurisdiction

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NATIONAL BANKS AND DIVERSITY JURISDICTION

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I. INTRODUCTION

National banks¹ are different. They are one of only a select group of privately-owned, for-profit corporations to be incorporated under federal rather than state law.² They are governed by federal statutes and regulations that apply only to them.³ And unlike state-chartered corporate entities, which fall

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¹ As used in this Article, the phrase “national bank” refers only to banks chartered under the authority of the National Bank Act. *See infra* Part II. It does not include other federally-chartered savings banks or savings and loan associations, which occasionally are referred to later in this Article under the collective term “federally-chartered savings associations.” *See infra* Part V.B; *see also* 12 U.S.C. § 1813(b) (2000) (defining “savings associations”).

² *See generally* 36 AM. JUR. 2D *Foreign Corporations* §§ 93–109 (2001) (discussing federal corporations); 1A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 69.10, 92 (perm. ed. rev. vol. 2002) (same). The United States Constitution does not expressly grant Congress the power to create corporations; however, under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, Congress “has power to create a corporation whenever this is an appropriate means of carrying into execution any of the powers conferred by the Constitution upon Congress or upon the general government or any department or officer thereof.” 18 C.J.S. *Corporations* § 45, at 320 (2007); *see also* 1A FLETCHER, *supra*, § 121 (discussing Congress’s power to create federal corporations). A number of federal corporations are wholly or partially owned by the government. *See* 31 U.S.C. § 9101 (2000) (listing “wholly owned Government corporations” and “mixed-ownership Government corporations”); *see also* 91 C.J.S. *United States* §§ 83–95 (2000) (discussing government owned or controlled corporations). Although national banks perform a mix of governmental and private purposes, they are “organized by private persons and operated for private gain.” 9 C.J.S. *Banks and Banking* § 483, at 460 (1996).

For discussion of the academic debate over whether Congress should charter *all* corporations that do business in interstate commerce, *see* 1 JAMES D. COX & THOMAS LEE HAZEN, *CORPORATIONS* § 2.11 (2d ed. 2003).

³ *See infra* notes 32–33 and accompanying text (discussion of National Bank Act and OCC regulations). As discussed *infra* at notes 34 to 35 and accompanying text, however, national

within the general diversity jurisdiction statute,⁴ a special federal statute, 28 U.S.C. § 1348, addresses the ability of national banks to sue and be sued in federal court.⁵

In *Wachovia Bank, N.A. v. Schmidt*,⁶ however, the Supreme Court determined that, for purposes of federal court jurisdiction, national banks are no different than state banks or other state-chartered corporations. The Court's decision turned on the interpretation of the word "located." Section 1348 provides that, for purposes of federal diversity jurisdiction, national banks will "be deemed citizens of the States in which they are located." The Fourth Circuit had interpreted this statute to mean that a national bank is a citizen of every state in which a branch of the bank is physically located.⁷ The Supreme Court took a narrower view of the term, holding that the word "located" encompasses only the state designated in the bank's articles of incorporation as the location of its main office.⁸

On the surface, the Supreme Court's interpretation of the statute produces a sensible result.⁹ A state bank or any other state-chartered corporation is considered, at most, a citizen of two states—the state where it is incorporated, and, if different, the state where it maintains its principal place of business.¹⁰

banks largely remain subject to state law. See generally Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895 (1996) (discussing Supreme Court's reluctance to create rules of federal common law to displace state law).

⁴ See 28 U.S.C. § 1332 (2000).

⁵ See *infra* at text accompanying note 50 for the complete text of section 1348.

⁶ 126 S. Ct. 941 (2006). Justice Ginsburg authored the opinion for the unanimous court. Justice Thomas did not take part in the proceedings or the decision.

⁷ *Wachovia Bank, N.A. v. Schmidt*, 388 F.3d 414, 416 (4th Cir. 2004), *rev'd*, 126 S. Ct. 941 (2006).

⁸ *Wachovia Bank*, 126 S. Ct. at 945.

⁹ For articles that generally are supportive of the Court's holding in *Wachovia Bank*, see Michelle E. O'Leary, Note, *The Preservation of Diversity Jurisdiction for National Banks*, 10 N.C. BANKING INST. 133 (2006); Collette N. Ross, Comment, *Around the Corner But Still Out-of-State? Whether National Banks' Branches Destroy Diversity Jurisdiction*, 52 LOY. L. REV. 195 (2006).

¹⁰ See 28 U.S.C. § 1332(c)(1) (2000) (defining corporate citizenship for purposes of diversity jurisdiction). Prior to 1958, corporate citizenship was defined by case law, and a corporation was conclusively presumed to be a citizen only of its state of incorporation. See 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3623 (2d ed. 1984) (discussing historic treatment of corporate citizenship). When Congress enacted subsection (c) of section 1332 in 1958, it provided that a corporation would be deemed to be a citizen of both its state of incorporation and the state where it has its principal place of business. See WRIGHT ET AL., *supra*, § 3624 (discussing history and effect of 1958 amendment); see also *id.* § 3625 (discussing interpretation of "principal place of business").

Diversity jurisdiction exists as long as no opposing party is a citizen of either of those two states.¹¹ The Fourth Circuit's interpretation of section 1348 would have given national banks much more restrictive access to federal courts by deeming them citizens of every state where they operated even a single branch. The Supreme Court therefore reasoned that Congress would not have intended to create such an "incongruous outcome" that "rendered national banks singularly disfavored corporate bodies with regard to their access to federal courts."¹²

Under close scrutiny, though, the Court's reasoning proves to be un-compelling. The reasons the Court gave for rejecting the Fourth Circuit's construction of the statute are unpersuasive, and national banks are not, in fact, "singularly disfavored" corporate bodies. Moreover, although the case is one that turned on statutory construction, the opinion did not cite a single precedent or rule of statutory construction to support the Court's interpretation. And the Court gave no consideration to the appropriate role it should be playing when it is called upon to interpret statutory language dealing with the scope of diversity jurisdiction.

This Article takes a critical look at the *Wachovia Bank* decision. Part II gives a brief summary of the creation and growth of national banks and the statutory framework that governs them, with particular focus on the laws governing branch banking and on section 1348 and its statutory predecessors. Part III examines how the lower federal courts interpreted section 1348 prior to the *Wachovia Bank* decision. Part IV then focuses on the Supreme Court's decision and on the Court's rationale—such as it was—for its reading of section 1348. Part V offers a critique of the rationale used by the Supreme Court and by other courts that have read section 1348 to encompass only the state where the bank maintains its home office.

The Article concludes that the Supreme Court's construction of section 1348 is not supported by the language of the statute, by its legislative history, or by principles of statutory interpretation. Absent a clear statutory indication that diversity jurisdiction should exist under particular circumstances, the Court

¹¹ Although the Constitution does not require complete diversity of citizenship, the Supreme Court long ago interpreted 28 U.S.C. § 1332 and its predecessors to require complete diversity. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). For the complete diversity requirement to be satisfied, no plaintiff may be a citizen of the same state as any defendant.

¹² *Wachovia Bank*, 126 S. Ct. at 952. I will point out *infra* at Part V.B, however, that the Fourth Circuit's construction of section 1348 would not have led to an "incongruous" outcome at all, at least when national banks are compared with other *federally*-chartered corporations.

should adopt the more limited view of the scope of federal jurisdiction. By exercising a more “judicially conservative” role—rather than speculating on what Congress would have intended—the Court accords Congress its proper role in determining whether the arguments in favor of diversity jurisdiction outweigh the rights of the states.

II. THE RISE OF NATIONAL BANKS

A. National Banks and Their Governing Law

Congress first authorized the creation of national banks in 1863, at the height of the Civil War.¹³ However, national banks were, to a degree, successors to two Banks of the United States that had operated at earlier points of the nation’s history.¹⁴ The first Bank of the United States had been created in 1791 at the urging of Treasury Secretary Alexander Hamilton for the purpose of establishing credit and to assist in the country’s economic development.¹⁵ It existed until 1811, when its charter was not renewed.¹⁶ The second Bank was created in 1816,¹⁷ but it immediately was opposed by state banks, agrarian interests, and others, and the second Bank also was not renewed when its

¹³ Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, *amended by* Act of June 3, 1864, ch. 106, 13 Stat. 99. The Supreme Court upheld the constitutionality of the National Bank Act in *Farmers' & Mechanics' National Bank v. Dearing*, 91 U.S. 29, 33–34 (1875). See 9 C.J.S. *Banks and Banking* § 484 (1996) (discussing Congress’s constitutional power to create national banks); 1 MICHAEL P. MALLOY, *BANKING LAW AND REGULATION* § 1.3.1, at 1.37 n.18 (1994 & Supp. 2007) (same).

¹⁴ For general discussion of the history of banking and banking regulation in the United States, see WILLIAM A. LOVETT, *BANKING AND FINANCIAL INSTITUTIONS LAW* 1–29 (6th ed. 2005); MICHAEL P. MALLOY, *PRINCIPLES OF BANK REGULATION* 2–14 (2d ed. 2003).

¹⁵ See MALLOY, *supra* note 14, at 2–3. The legislation was enacted over the opposition of agrarian interests and the constitutional objections of then-Secretary of State Thomas Jefferson. See *id.* at 3–4.

¹⁶ By the time the first Bank’s initial 20-year charter expired in 1811, “Jefferson’s party was in power, and there was no hope for renewal of the charter.” *Id.* at 4.

¹⁷ The number of state-chartered banks had grown substantially during the existence of the first Bank of the United States. At first, the state banks were relatively stable, with few failures. But “[f]rom 1809 through the War of 1812, state banks—overextended, inexperienced and undercapitalized—frequently failed. The war left U.S. commercial and financial sectors in disarray. Even within Jefferson’s party, support emerged for a central bank to stabilize the economy.” *Id.* at 4–5. The constitutionality of the second Bank was upheld in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

charter expired in 1836.¹⁸ The expiration of the second Bank was followed by “a long period of state primacy[.]”¹⁹ by 1861, there were about 1,600 state-chartered banks.²⁰

The demands of prosecuting the Civil War created a great need for money or credit to finance the war.²¹ The federal government first tried to finance the war through U.S. notes that were issued without the benefit of a national banking mechanism.²² But Congress soon acted to adopt the recommendation of Treasury Secretary Samuel P. Chase, who had proposed the creation of a national banking system under which commercial banks chartered by the federal government would be authorized to issue federal bank notes secured by government bonds.²³ The 1863 Act created the position of Comptroller of the Currency within the Department of the Treasury, and authorized the Comptroller to issue national bank charters to groups of incorporators of five or more persons.²⁴ Each new national bank was required to deliver a certain amount of government bonds to the Comptroller, thereby “foster[ing] a captive market for U.S. bonds.”²⁵

Federal chartering of banks thus came into being as “a matter of expediency.”²⁶ The immediate justifications for national banks eventually evaporated, however, and national banks no longer are responsible for issuing United States currency.²⁷ But the federal-state dual banking system, born in a time of national crisis, remains a central feature of commercial banking in the United States to this day.²⁸

¹⁸ See MALLOY, *supra* note 14, at 5, 7–8 (describing opposition to second Bank and President Andrew Jackson’s veto of rechartering bill).

¹⁹ *Id.*; see also *id.* at 8–9 (discussing problems experienced during this time period, including over-issuance of state bank notes, and early attempts at state and federal regulation).

²⁰ See *id.* at 9–10.

²¹ See 1 MALLOY, *supra* note 13, § 1.3.1, at 1.35.

²² See *id.* at 1.36.

²³ See *id.* at 1.35–1.36.

²⁴ See *id.* at 1.36.

²⁵ *Id.*

²⁶ *Id.* at 1.37.

²⁷ The Comptroller’s role also has changed. “In contemporary practice, the Comptroller, no longer concerned with the issuance of currency through national banks, now functions as the administrator of those banks chartered by him under the National Bank Act.” *Id.* at 1.40.

²⁸ See *id.* at 1.36. For academic discussion of the dual banking system, see, e.g., Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677 (1988); Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1 (1977). For historical discussion of the

Authority to charter national banks still resides in the Comptroller of the Currency.²⁹ At the time a national bank is created, its organization certificate and articles of incorporation must designate "the place where its operations of discount and deposit are to be carried on."³⁰ If the bank wishes to change the location of its main office to a different town or city, it must amend its articles of incorporation and obtain approval from the Comptroller.³¹

The federal laws governing national banks are set forth in the National Bank Act³² and in regulations adopted by the Comptroller of the Currency under the authority of that Act.³³ These federal laws, however, primarily "define[] the rights and obligations of national banks as corporate entities."³⁴ In many other aspects of their daily operations, national banks remain subject to state law,³⁵ and state law therefore governs much of the litigation in which national banks become involved.

competition between state and national banks, and of the evolution of the state and federal regulatory structures, see LOVETT, *supra* note 14, at 11–29; MALLOY, *supra* note 14, at 11–14.

²⁹ See 12 U.S.C. § 26 (2000); see also *McCormick v. Mkt. Nat'l Bank*, 165 U.S. 538 (1897).

³⁰ 12 U.S.C. § 22 (Second) (2000) (requiring that organization certificate "designat[e] the State, Territory, or District, and the particular county and city, town, or village"); see also *id.* § 21 (requirements for articles of incorporation).

³¹ 12 C.F.R. § 5.40(d)(2) (2007); see also 12 U.S.C. § 21a (2000) (specifying general requirements for amendments to national bank's articles of incorporation). Federal law generally restricts relocation of the home office to a place no more than 30 miles outside the limits of the city, town, or village of the original location. See *id.* § 30(b). But see *id.* § 1831u(d)(1) (Banks formed as the result of a merger may "retain and operate, as a main office or a branch, any office that any bank involved in an interstate merger transaction was operating as a main office or a branch immediately before the merger transaction.").

One court has pointed out that the statutory language is inconsistent; section 22 (the organization certificate section; see *supra* note 30) refers to "the place where [the bank's] operations of discount and deposit are to be carried on," while section 30(b) (the relocation provision) refers to the bank's "main office." See *Evergreen Forest Prods., LLC v. Bank of Am.*, 262 F. Supp. 2d 1297, 1306 n.13 (N.D. Ala. 2003). Courts have interpreted these sections as referring to the same place, however. See *id.*

³² 12 U.S.C. §§ 21–216d (2000).

³³ See 12 C.F.R. §§ 5.1–5.70 (2007) (primary regulations of Office of Comptroller of the Currency relating to corporate activities and transactions of national banks). Although the OCC is the primary regulatory authority for national banks, the Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve System also perform significant regulatory roles. See MALLOY, *supra* note 14, at 27–36 (discussing regulatory role of FDIC and the Fed).

³⁴ 1 MALLOY, *supra* note 13, § 1.3.1, at 1.39 n.19.

³⁵ See *Atherton v. FDIC*, 519 U.S. 213, 222–23 (1997) (discussing past decisions by Supreme Court that had found that "numerous" state laws apply to national banks); 1 MALLOY,

B. Branch Banking by National Banks

When Congress first authorized the creation of national banks, they were not allowed to operate any branch offices.³⁶ This law remained in effect for nearly seventy years, with only a limited exception that a state bank that converted to a national bank could retain any branches it operated at the time of its conversion.³⁷ Congress finally acted in 1927 and 1933 to authorize branch banking by national banks.³⁸ This new authority was, for the most part, limited to the operation of branches in the national bank's home state.³⁹

As branch banking by state banks exploded during the second half of the twentieth century, concern grew that national banks had been placed at a competitive disadvantage to their state counterparts by their inability to expand into

supra note 13, § 1.3.1, at 1.39 n.19 (“As a practical matter, national banks appear to be entirely subject to state laws governing, e.g., collection of debts, transactions in commercial paper, bank deposits, contracts, and the like.”). In *Atherton*, the Court quoted from its opinion in *First National Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870), where the Court had stated that national banks

are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.

For discussion of the extent to which the NBA preempts “unduly burdensome and duplicative” state regulation, see *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007) (holding that NBA preempts state regulation of mortgage lending activities by operating subsidiaries of national banks); see also 7A MICHIE ON BANKS AND BANKING ch. 15, § 5, at 12–19 (1999 repl. vol.) (discussing “doctrine of noninterference”).

³⁶ Act of Feb. 25, 1863, ch. 58, § 11, 12 Stat. 665, 668.

³⁷ This exception was created by the Act of Mar. 3, 1865, ch. 78, § 7, 13 Stat. 469, 484.

³⁸ McFadden Act, ch. 191, § 7(c), 44 Stat. 1224, 1228 (1927); Glass-Steagall Act, ch. 89, § 23, 48 Stat. 162, 189–90 (1933). These acts were intended to bring about a “policy of competitive equality” between national and state banks. See 2 MALLOY, *supra* note 13, § 2A.2.1. The ability of national banks to operate intrastate branches is determined by “reference over” to state law. See 12 U.S.C. § 36(c) (2000).

³⁹ See *Wachovia Bank, N.A. v. Schmidt*, 126 S. Ct. 941, 945 n.2 (2006) (noting that these Acts allowed branch banking in other states under only limited “grandfather” provisions, and citing *Girard Bank v. Board of Governors of Federal Reserve System*, 748 F.2d 838, 840 (3d Cir. 1984), for proposition that only two national banks operated “grandfathered” branches in other states).

other states.⁴⁰ In 1994, Congress acted to correct this perceived imbalance, authorizing national banks to open or acquire branch offices in other states.⁴¹

C. Federal Court Jurisdiction Over Suits Involving National Banks

State banks have always enjoyed limited access to federal court. A state bank seeking federal court jurisdiction would have to demonstrate that diversity of jurisdiction existed or (after 1875, when general federal question jurisdiction was authorized) that the particular suit arose under federal law.

When Congress first authorized the creation of national banks in 1863, however, national banks enjoyed unrestricted access to federal court.⁴² A national bank could sue or be sued in federal court simply by virtue of its status as a national bank, irrespective of the subject matter involved in the suit and irrespective of diversity of citizenship.⁴³ This was similar to the broad jurisdiction that previously had existed over suits involving the Bank of the United States.⁴⁴

This largess did not last for long, however, and in 1882 Congress acted to restrict national banks' access to federal court. The 1882 Act provided that federal court jurisdiction over suits involving national banks was to "be the same

⁴⁰ See, e.g., *Fin. Software Sys., Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594, 601 (E.D. Pa. 1999) (discussing changes in federal law regarding branch banking and asserting that these amendments were intended "to make national banks competitive with state banks").

⁴¹ Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101, 108 Stat. 2338, 2339-43. See generally 2 MALLOY, *supra* note 13, § 2A.7 (discussing interstate branching).

⁴² Section 11 of the 1863 Act provided that national banks could "sue and be sued, complain and defend in any court of law or equity as fully as natural persons." Act of Feb. 25, 1863, ch. 58, § 11, 12 Stat. 665, 668. Section 58 provided that "suits, actions, and proceedings by and against [national banks] may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established." *Id.* § 59, 12 Stat. at 681. The 1863 Act did not address state court venue.

The 1864 Act contained the same "sue and be sued" language found in section 11 of the 1863 Act. See Act of June 3, 1864, ch. 106, § 8, 13 Stat. 99, 101. The 1864 Act also carried over the language from the 1863 Act regarding federal court venue, but provided for state court venue as well. *Id.* § 57, 13 Stat. at 116-17 (providing that action against national bank may be brought "in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases").

⁴³ See *Petri v. Commercial Nat'l Bank*, 142 U.S. 644, 648 (1892).

⁴⁴ See *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738 (1824) (holding that all suits involving Bank of United States as party arose under federal law by virtue of Bank's federal charter).

as, and not other than” suits involving a state bank,⁴⁵ thereby eliminating automatic federal question jurisdiction over all cases to which a national bank was a party.⁴⁶

Congress revised this language five years later. The 1887 Act provided that, for purposes of federal diversity jurisdiction, national banks were to “be deemed citizens of the States in which they are respectively located.”⁴⁷

Thus, the key language currently found in section 1348 originated in 1887—over 100 years before Congress first authorized interstate branch banking by national banks—and the substance of the statutory language has remained unmodified since then. The language remained unaltered when, in the Judicial Code of 1911, Congress acted to combine the 1887 provision with another prior provision relating to other types of proceedings involving national

⁴⁵ Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163. That Act provided, in relevant part: [T]he jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun

Id. The Supreme Court stated that this Act placed national banks “on the same footing as the banks of the state where they were located for all purposes of the jurisdiction of the courts of the United States.” *Leather Mfrs’ Nat’l Bank v. Cooper*, 120 U.S. 778, 780 (1887).

⁴⁶ The 1882 Act and its successors, however, did not affect the ability of a national bank to invoke federal question jurisdiction—just as any other party could invoke federal question jurisdiction—when the particular lawsuit involves a claim or claims that arise under federal law. *See Cont’l Nat’l Bank v. Buford*, 191 U.S. 119, 124 (1903).

⁴⁷ Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 552, 554–55. The 1887 Act provided, in relevant part:

[A]ll national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

Id. As it had with the 1882 Act, the Supreme Court stated that the 1887 Act “sought to limit . . . the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited.” *Mercantile Nat’l Bank v. Langdeau*, 371 U.S. 555, 566 (1963).

In 1888, Congress enacted a caveat to the 1887 Act, providing: “The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.” Act of Aug. 13, 1888, ch. 866, § 4, 25 Stat. 433, 436.

banks.⁴⁸ It also remained unchanged when Congress, in the 1948 Judicial Code, enacted section 1348 as it currently exists.⁴⁹ In its current form, section 1348 provides:

The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.⁵⁰

III. THE JURISDICTIONAL ISSUE IN THE LOWER FEDERAL COURTS

A. *Early Interpretations and the Effect of Bougas*

Because the ability of national banks to branch into other states was severely limited until the passage of the 1994 Act, only a couple of decisions prior to that date addressed the issue of whether a bank was "located" in every state where it operated a branch office. The first case to confront this issue was

⁴⁸ See Act of Mar. 3, 1911, ch. 231, § 24 (Sixteenth), 36 Stat. 1087, 1092-93. The new law provided district courts were to have original jurisdiction over all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

Id. The second sentence of the 1911 Act closely paralleled the language from the 1887 enactment; the first combined the 1888 caveat (see *supra* note 47) with language originally contained in a section of the 1873 Revised Statutes. See *Wachovia Bank, N.A. v. Schmidt*, 126 S. Ct. 941, 947 n.6 (2006). The 1911 Act was intended "to make the purpose of the re-enacted statute clearer," but not to make any substantive changes. *Herrmann v. Edwards*, 238 U.S. 107, 117-18 (1915).

⁴⁹ Act of June 25, 1948, ch. 646, § 1348, 62 Stat. 869, 933.

⁵⁰ 28 U.S.C. § 1348 (2000).

a 1941 opinion originating in Oregon, *American Surety Co. v. Bank of California*.⁵¹ The national bank involved in that case had its principal place of business in San Francisco, California, but also operated branches in Portland, Oregon.⁵² The court determined that, for purposes of diversity jurisdiction, the bank would be considered a citizen only of the State of California.⁵³ The court's reasoning was sparse, and the court never squarely focused upon the meaning of the word "located." Rather, the court simply noted that corporations formed under state law had only one state of citizenship for purposes of diversity jurisdiction—the state of incorporation—and then boldly claimed that "Congress intended that analogous tests should be applied in cases of entities endowed with existence by federal power."⁵⁴

For more than fifty years, *American Surety Co.* stood as the only opinion interpreting the language of section 1348 or its predecessors. In the meantime, though, the Supreme Court issued a 1977 decision, *Citizens & Southern National Bank v. Bougas*,⁵⁵ which required the Court to interpret the meaning of the word "located" in a different federal statute, the statute that provided for state and federal court venue over cases involving national banks. The version of the venue statute in effect at the time of the *Bougas* decision provided that an

⁵¹ 44 F. Supp. 81 (D. Or. 1941), *aff'd*, 133 F.2d 160 (9th Cir. 1943). *American Surety Co.* actually involved the statutory predecessor to section 1348, which then was codified at 28 U.S.C. § 41(16) (1940); however, as discussed *supra* at Part II.C, the language of this predecessor statute was identical to the current language of section 1348 in every relevant respect.

⁵² The bank previously had been a state bank of California, and it therefore was allowed to retain its branch offices when it converted to a federal bank. *See Am. Sur. Co.*, 44 F. Supp. at 83 (citing Act of Mar. 3, 1865, ch. 78, § 7, 13 Stat. 469, 484).

⁵³ *Id.*

⁵⁴ *Id.* The court cited no authority for this bold assertion. The court did cite two statutes, 12 U.S.C. §§ 22 & 81 (1940), for the proposition that "[t]he history of legislation relating to national banks indicates that the statutes contemplate that such an institution shall have situs in one state," *Am. Sur. Co.*, 44 F. Supp. at 83, but the court did not explain how these statutes supposedly supported this proposition.

The Ninth Circuit's affirming opinion is similarly sparse in its rationale. Like the district court, the Ninth Circuit noted that corporations generally were regarded only as citizens of their state of incorporation; construing the national bank statute otherwise, the court said, "would be a noteworthy departure from the general rule, and more likely than not Congress would have plainly stated such intent." *Am. Sur. Co. v. Bank of Cal.*, 133 F.2d 160, 162 (9th Cir. 1943). The appellate court also made the curious assertion that interpreting the statute to include states where the bank had branch offices might "impl[y] constitutional questions of great academic interest." *Id.* The court, however, shared no hint as to what those constitutional concerns might be, and no other court has ever suggested that limiting national banks' access to federal court would create any constitutional issues.

⁵⁵ 434 U.S. 35 (1977).

action brought against a national banking association would lie in any *federal* district "in which such association may be established" or in any *state* court in a county or city "in which said association is located."⁵⁶

The Court in *Bougas* held that state-court venue was proper in any city or county in which the bank maintained a branch.⁵⁷ The Court first noted that the lower federal courts had uniformly interpreted the word "established" to refer only to the federal district that encompassed the place specified in the national bank's charter.⁵⁸ The Court further noted that at the time the venue statute first was enacted, a national bank could operate at only one particular location.⁵⁹ As a result, during these early years, "the words 'established' and 'located' led to the same ultimate venue result."⁶⁰ Despite this,

the two words are different. One must concede that a federal judicial district, which the statute associates with the word "established," is not the same as the geographical area that delineates the jurisdiction of a state court, which the statute associates with "located." Whatever the reason behind the distinction in the words, it does exist, and we recognize it.⁶¹

⁵⁶ 12 U.S.C. § 94 (1982). The full text of that statute provided:

Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

As discussed *infra* at notes 65 to 66 and accompanying text, Congress amended the venue statute in 1988, effectively overriding the *Bougas* decision.

⁵⁷ *Bougas*, 434 U.S. at 38.

⁵⁸ *See id.* at 39. The Court noted, though, that there had been scholarly criticism of this restrictive interpretation of "established," and the Court stated that it was unnecessary for it to weigh in on that issue. *See id.*; *see also id.* at 46 (Stewart, J., concurring) (emphasizing that case did not require Court to determine meaning of word "established").

⁵⁹ *See id.* at 42-43 (majority opinion). The Court made clear that congressional intent provided no aid to interpreting the statute:

It suffices to stress that Congress did not contemplate today's national banking system, replete with branches, when it formulated the 1864 Act; that there are no sure indicators of 1864 congressional intent with respect to a banking system that did not then exist; and that prior to 1927, and, indeed, prior to 1933, Congress had no occasion whatsoever to be concerned with state-court venue other than at the place designated in the bank's charter.

Id. at 43.

⁶⁰ *Id.* at 43-44.

⁶¹ *Id.* at 44.

Noting that “[t]here is no enduring rigidity about the word ‘located,’”⁶² the Court stated that Congress’s concern in enacting the venue statute—“the untoward interruption of a national bank’s business that might result from compelled production of bank records for distant litigation”—“largely evaporates” when the statute was interpreted to allow for venue in a county in which the bank operated a branch office.⁶³

B. The District Court Split After Bougas

The *Bougas* Court’s interpretation of the venue statute initially had a heavy impact on the federal district courts as they interpreted the identical language found in section 1348. For the first several years following *Bougas*, every federal court that considered the issue interpreted the statutory language of section 1348 to include every state in which a national bank operated a branch office. It was not until several years later that court decisions started going in the opposite direction.

The first court to consider this issue after *Bougas* relied heavily upon that opinion and held that the term “located” in section 1348 should be read to include any state in which a national bank operated a branch office.⁶⁴ The court’s rationale in *Connecticut National Bank v. Iacono* essentially was threefold. The court first noted that after the Court’s ruling in *Bougas*, Congress had amended the venue statute to provide that venue would lie where the bank’s “principal place of business is located.”⁶⁵ The court believed that the addition

⁶² *Id.*

⁶³ *See id.* The Court also stated that this interpretation would not result in unfair burden on the parties. *See id.* at 44 n.10.

⁶⁴ *Conn. Nat’l Bank v. Iacono*, 785 F. Supp. 30, 34 (D.R.I. 1992). Several years earlier, the state court in South Carolina also had interpreted section 1348 to provide that a national bank was a citizen of any state in which it had a branch. *See Southland Mobile Homes, Inc. v. Assocs. Fin. Servs. Co.*, 244 S.E.2d 212, 213–14 (S.C. 1978).

⁶⁵ *See Iacono*, 785 F. Supp. at 33 (quoting 28 U.S.C. § 94 (1988)). The revised version of section 94 provided:

Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association, shall be brought in the district or territorial court of the United States held within the district in which that association’s principal place of business is located, or, in the event any State, county, or municipal court has jurisdiction over such an action or proceeding, in such court of the county or city in which the association’s principal place of business is located.

of this “principal place of business” qualifier in the venue statute illustrated that “Congress clearly intended to limit venue in this situation without raising any doubt as to where a national bank is ‘located,’” while the fact that Congress had not also added this qualifier to section 1348 “indicates that in enacting § 1348 Congress did not intend to limit the citizenship of a national banking association to only the state in which a bank maintains its principal place of business.”⁶⁶ Second, the court noted that section 1348, like the venue statute interpreted in *Bougas*, used both the words “established” and “located” within the same statute. The Supreme Court in *Bougas* had indicated that the word “established” had been generally accepted as the place where the bank had its principal place of business, whereas “‘located’ in its most ordinary sense refers to those places where the bank maintains branch offices[.]”⁶⁷ likewise, by using both terms in section 1348, “Congress clearly intended to designate two different meanings.”⁶⁸ Third, the court believed that “practical considerations” supported interpreting the word “located” in section 1348 to include states in which a national bank maintains branch offices; the court noted that the “immense press of cases flooding the federal court system” had led to an “increasing interest in limiting federal jurisdiction.”⁶⁹

For the next several years, every reported district court decision that considered the meaning of “located” in section 1348 arrived at the same result as *Iacono*, usually on very similar rationale.⁷⁰ A 1999 ruling from a federal

The amendment apparently was enacted in response both to *Bougas* and to the Court’s resolution of a separate interpretive question in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963). See *Iacono*, 785 F. Supp. at 33.

⁶⁶ *Iacono*, 785 F. Supp. at 33.

⁶⁷ *Id.* (citing *Bougas*, 434 U.S. at 39, 44).

⁶⁸ *Id.*

⁶⁹ *Id.*; see also *Norwest Bank Minn., N.A. v. Patton*, 924 F. Supp. 114, 115 (D. Colo. 1996) (interpreting “located” to include every state in which national banking association maintains substantial presence “is consistent with the modern trend of construing diversity jurisdiction narrowly to relieve congestion in the federal courts as well as the specific purpose of section 1348 to restrict national banking associations’ access to federal courts”). *Id.* Although ultimately I will argue that prudential considerations support the same interpretation of section 1348 that the court adopted in *Iacono*, my reasons are somewhat different. See *infra* Part V.C.

⁷⁰ For reported district court decisions that have followed *Iacono*, see *Century Bankcard Services, Inc. v. U.S. Bancorp*, 318 F. Supp. 2d 983, 986–87 (C.D. Cal. 2004) (national banking association is “located” in any state in which it maintains branch office); *First Union Corp. v. American Casualty Co.*, 222 F. Supp. 2d 767, 768–70 (W.D.N.C. 2001) (national bank is “located” in state in which it operates branches); *Frontier Insurance Co. v. MTN Owner Trust*, 111 F. Supp. 376, 379–81 (S.D.N.Y. 2000) (national banking association is “located” where it has branch banks or other “substantial presence”); *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 354–55 (S.D.N.Y. 1998) (national bank is “located” in every state in which it maintains branch offices); *Ferrailo Construction, Inc. v. Keybank, N.A.*, 978 F. Supp. 23, 24–27 (D. Me. 1997)

district court in Pennsylvania, *Financial Software Systems, Inc. v. First Union National Bank*,⁷¹ became the first reported post-*Bougas* decision to construe section 1348 to find that a national bank is a citizen only of the state in which it maintains its principal place of business.⁷²

The court in *Financial Software Systems* first attempted to determine whether section 1348 had a plain meaning, but stated that the word “located” is “not a term of art in the law.”⁷³ The court therefore believed that its construction of this “ambiguous” language “should be informed by the history and purpose of the legislation.”⁷⁴ The court then exhaustively reviewed the history of section 1348 and its statutory predecessors.⁷⁵ Citing two Supreme Court opinions from the nineteenth century that had addressed various aspects of the predecessor statutes,⁷⁶ the court claimed that these precedents stood as “authoritative construction” that federal court jurisdiction was to extend to national banks “on like terms” as to state banks and other state corporations.⁷⁷ The court also discussed how Congress had liberalized the laws relating to branch banking by national banks, evidencing that Congress intended to assure “competitive equality” between state and national banks.⁷⁸ Finally, the court pointed out that at the time the word “located” was first used in the jurisdictional statute in 1882, national banks were not allowed to have interstate

(“located” includes state in which national bank maintains branch office); *Norwest Bank Minnesota, N.A. v. Patton*, 924 F. Supp. 114, 115 (D. Colo. 1996) (“located” includes every state in which national bank maintains substantial presence, such as branch banks); and *Bank of New York v. Bank of America*, 861 F. Supp. 225, 228–31 (S.D.N.Y. 1994) (“located” includes any state in which national bank has branch or other office).

⁷¹ 84 F. Supp. 2d 594 (E.D. Pa. 1999).

⁷² An earlier unreported opinion had reached this same result. See *Berkowitz v. Midlantic Corp.*, No. CIV. A. 90-1811 AMW, 1997 WL 452206, at *4 (D.N.J. July 18, 1997). In reaching this result, however, the court inexplicably relied solely upon the general diversity statute, section 1332, and did not acknowledge the existence or effect of section 1348.

⁷³ *Fin. Software Sys., Inc. v. First Union Nat’l Bank*, 84 F. Supp. 2d 594, 598 (E.D. Pa. 1999).

⁷⁴ *Id.* at 599 (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 642 (1990)).

⁷⁵ See *id.* at 599–601.

⁷⁶ See *id.* at 599–600 (discussing and quoting *Leather Mfrs’ Nat’l Bank v. Cooper*, 120 U.S. 778, 780 (1887) (stating that the 1882 Act “was evidently intended to put national banks on the same footing as the banks of the state where they were located for all of the purposes of jurisdiction in the courts of the United States”), and *Petri v. Commercial Nat’l Bank*, 142 U.S. 644, 651 (1892) (stating that the 1887 Act clarified “that the Federal courts should not have jurisdiction by reason of the subject matter other than they would have in cases between individual citizens of the same state, and so not have jurisdiction because of the federal origin of the bank”)).

⁷⁷ *Id.* at 599.

⁷⁸ *Id.* at 601.

branches;⁷⁹ therefore, the court believed, it was “untenable” that the “original meaning” of the statute contemplated anything other than the state in which the bank maintained its principal place of business.⁸⁰

The holding and rationale of *Financial Software Systems* subsequently were adopted by several other district courts.⁸¹ The district courts therefore

⁷⁹ *Id.* at 601–02. The court’s factual observation is not entirely accurate, however, because, as noted *supra* at note 37 and accompanying text, a state bank that converted to a national bank could retain any branches it had in other states. Moreover, branch banking by national banks also was not allowed at the time the word “located” was first used in the venue statute construed in *Bougas*, and yet the Court there nevertheless did not limit its construction of the statute based on any supposed “original meaning” of that statute.

⁸⁰ *Id.* at 602. The court also spent a significant portion of its opinion responding to the rationale of *Iacono* and its successors. See *id.* at 603–07.

⁸¹ Reported district court decisions adopting the narrower construction of “located” include *Adams v. Bank of America, N.A.*, 317 F. Supp. 2d 935, 940–42 (S.D. Iowa 2004) (national bank is not “located” in states in which it maintains branch offices); *MBIA Insurance Corp. v. Royal Indemnity Co.*, 294 F. Supp. 2d 606, 610–11 (D. Del. 2003) (national bank is located only where it has its principal place of business and in state designated in its organization certificate); *Carl v. Republic Security Bank*, 282 F. Supp. 2d 1358, 1364 n.1 (S.D. Fla. 2003) (national bank is not “located” in states in which it maintains branch offices); *Evergreen Forest Products, LLC v. Bank of America, N.A.*, 262 F. Supp. 2d 1297, 1301–07 (M.D. Ala. 2003) (national bank is located only in state in which it has its principal place of business and state designated in its most recent articles of incorporation); *Pitts v. First Union National Bank*, 217 F. Supp. 2d 629, 630–31 (D. Md. 2002) (national bank is located in state of its principal place of business and state listed in its organization certificate); *Bank One, N.A. v. Euro-Alamo Investments, Inc.*, 211 F. Supp. 2d 808, 810 (N.D. Tex. 2002) (adopting “well-reasoned,” “narrower view that a national banking association is located only in the state of its principal place of business”); *Bank of America, N.A. v. Johnson*, 186 F. Supp. 2d 1182, 1183–84 (W.D. Okla. 2001) (national bank is located only where it has its principal place of business and in state listed in its incorporation certificate; “had Congress intended to alter the interpretation given to the 1882 and 1887 Acts which provided national banks with the same access to federal courts that state banks and corporations have, it would have used different language when it enacted section 1348 to expressly provide that national banking associations would be deemed citizens of all states in which they have, e.g., a branch office”); and *Baker v. First American National Bank*, 111 F. Supp. 2d 799, 800–01 (W.D. La. 2000) (adopting “traditional view” that term “located” applies only to bank’s principal place of business; this interpretation “takes into consideration that when section 1348 was written national banks could not have interstate branches, avoids creating problems in the application of other banking laws that use the word ‘located,’ and is consistent with the Congressional intent that national banks be on the same jurisdictional playing field as state banks”).

As the citations in the preceding paragraph demonstrate, the district courts that adopted the view that “located” referred to only a single place were nevertheless split as to where that specific place might be. Some of the courts construed “located” as referring to the bank’s principal place of business, others interpreted it as referring to the place listed in the

were approximately evenly split on this issue prior to the Supreme Court's ruling in *Wachovia Bank*. The federal circuit courts of appeals that had addressed the interpretation of section 1348 also reached divided results.

C. The Circuit Split Leading to Wachovia Bank

The issue regarding the proper interpretation of section 1348 took several years to work its way to the appellate level. The federal circuits that ultimately addressed the issue were evenly split prior to the Supreme Court's ruling in *Wachovia Bank*.

The first federal appellate court to squarely confront this issue was the Seventh Circuit, in *Firststar Bank, N.A. v. Faul*.⁸² *Faul* rejected the view that a national bank is "located" in every state in which it maintains a branch office, holding instead that a national bank is located in the state where the bank's principal place of business is found and in the state listed in the bank's organization certificate.⁸³

The *Faul* court first examined the language of the statute to determine whether the language could be interpreted in light of its ordinary meaning.⁸⁴ The court looked to dictionary definitions of the word "locate" but found that these did not provide a clear answer.⁸⁵ The court also noted that the Supreme Court in *Bougas* had said that the word "located," as used in the venue statute, had "no enduring rigidity" or plain meaning.⁸⁶

organization certificate, others read it to mean the place designated in the most recent articles of incorporation, and still others used some combination of these. See *Evergreen Forest Prods.*, 262 F. Supp. 2d at 1301–03 (discussing differing interpretations given to "located"). The Supreme Court resolved this split in *Wachovia Bank* by endorsing the view that the term refers to the state designated in the bank's articles of incorporation as the location of its main office. See *Wachovia Bank, N.A. v. Schmidt*, 126 S. Ct. 941, 945 (2006).

⁸² 253 F.3d 982 (7th Cir. 2001). *Faul* involved a breach of contract action filed by Firststar Bank in the United States District Court for the Northern District of Illinois. The defendants were citizens of Illinois; Firststar Bank maintained its principal place of business in Ohio but also maintained forty-five branch offices in Illinois. See *id.* at 985.

⁸³ *Id.* at 994.

⁸⁴ See *id.* at 987 (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)).

⁸⁵ See *id.* The court noted that some dictionaries defined "locate" as "to determine or indicate the place of" and that others defined it as "to fix or establish in a place." See *id.* The court stated that to the extent these definitions suggest that "locate" refers to a *particular* or *specific* location, they "do not provide much aid in our inquiry—what we are trying to determine is the number or scope of places where a national bank is fixed or established." *Id.*

⁸⁶ See *id.* (quoting *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 44 (1977)).

The *Faul* court next looked to see whether the subject matter of the statute helped in giving meaning to the statutory language.⁸⁷ The court asserted that, in the specific context of jurisdiction, when the word "located" is used to discuss a corporation it "likely refers to the state where the principal place of business is located or perhaps where the company is incorporated."⁸⁸ Although some other types of business organizations, such as partnerships, may be located in "a long list of states" for jurisdictional purposes,⁸⁹ the court believed that national banks are "analogous in most respects to a corporation rather than some other kind of business organization."⁹⁰

The court in *Faul* also believed that the statutory language had achieved a "settled meaning through judicial interpretation" prior to its 1948 recodification in section 1348.⁹¹ The court believed that a number of Supreme Court opinions had interpreted the 1882 and 1887 Acts as "placing national banks in the same position regarding federal jurisdiction as corporations."⁹² When Congress readopted the same language in the 1948 Act, "we assume that Congress

⁸⁷ See *id.* ("A word can have a specific, clear meaning when used in discussing a particular subject, even though its general definition is vague.").

⁸⁸ *Id.* The court asserted that:

[I]f in the course of discussing jurisdictional motions a federal judge asks a lawyer representing a corporation "where is your client located?," the judge likely expects to hear the lawyer respond by naming the state containing the corporation's principal place of business and probably the state of incorporation as well. The judge does not expect for the lawyer to rattle off every state where the corporation has facilities or a presence.

Id. I find this argument to be incredibly circular, however. An attorney would respond to the judge's question in this manner only because the attorney has known since law school that 28 U.S.C. § 1332(c)(1) specifically states that most business corporations will be considered citizens of only those two states. There is nothing inherent in the nature of a corporation that limits it to being "located" in just those two states for jurisdictional purposes.

⁸⁹ *Id.* at 987-88. For further discussion of partnerships and other business entities that may be citizens of many states, see *infra* at note 171.

⁹⁰ *Id.* at 988. The court, however, gave no reasons why national banks were more analogous to corporations than to other forms of businesses. More importantly, the court did not explain why national banks should be considered more analogous to corporations *for purposes of jurisdiction*. Also, the court failed to consider whether national banks should be considered *most* analogous to other *federally*-chartered corporations, which typically do not qualify for diversity jurisdiction. See *infra* notes 171-76 and accompanying text.

⁹¹ See *id.* at 988-89.

⁹² *Id.* at 988; see also *id.* at 986 (further discussing cases that had interpreted the 1882 and 1887 Acts). As I will discuss fully *infra* at notes 181 to 185 and accompanying text, however, these cases do not support the precedential weight that *Faul* and other courts attempted to place on them.

intended these words to have the same meaning as was given to them in [the earlier cases that] provided that national banks were to be treated the same as any other corporation for diversity purposes.”⁹³

Faul next rejected the defendant’s argument that interpretation of the word “located” in section 1348 should be controlled by the Supreme Court’s interpretation of that same word in the venue statute in *Bougas*.⁹⁴ The court first noted (correctly) that *Bougas* addressed only the meaning of the venue statute; as for section 1348, the Supreme Court in *Bougas* had done “nothing more than quote the statute and point out that the word ‘located’ is used in it.”⁹⁵ The court also found unhelpful the canon of statutory construction that “identical words used in different parts of the same act are intended to have the same meaning.”⁹⁶ According to the court, this interpretive principle did not apply because the venue statute involved in *Bougas* appears in the National Banking Act (in title 12 of the United States Code) while section 1348 appears in the Judicial Code and Judiciary Act (in title 28).⁹⁷ The court also rejected use of the interpretive canon of *in pari materia*—that is, the principle that when two or more statutes address similar subject matter, ambiguities in one of the statutes can be resolved in reference to the other—stating that this canon often is not applied when laws “superficially” relating to similar subjects actually have different underlying purposes.⁹⁸ Here, the court felt that the purpose of venue statutes, to protect parties and witnesses from the burdens of inconvenient litigation, was markedly different from the “traditional justification” for diversity jurisdiction—that of minimizing potential bias against out-of-state parties;⁹⁹ “[d]iversity jurisdiction does not address mere inconvenience or a

⁹³ *Id.*

⁹⁴ *See id.* at 989–91.

⁹⁵ *Id.* at 989.

⁹⁶ *Id.* at 990 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995)).

⁹⁷ *Id.* As I will discuss more fully *infra* at note 156 and accompanying text, however, both the venue statute and the predecessor to section 1348 originated in roughly the same time period.

The court also found unhelpful the interpretive canon that when “a word is given a consistent meaning throughout the United States Code, . . . the courts assume that it has the same meaning in any particular instance of that word”; the court noted that no one had suggested “that ‘located’ is used consistently throughout federal statutes to refer to any place where part of an entity is located.” *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 990–91.

marginal increase in costs, but rather the substance of the decisionmaking process."¹⁰⁰

Lastly, *Faul* rejected an argument premised on the general rule that different words in the same statute should be given different meanings.¹⁰¹ The defendant in *Faul* had argued that the word "located" in section 1348 must be interpreted to include every state in which the state maintains a branch in order to give separate meaning to the word "established," which also appears in the same statute.¹⁰² The court, though, noted that it was possible to give different meanings to these terms by interpreting "established" to refer only to the place specified in the bank's charter but interpreting "located" also to include the bank's principal place of business.¹⁰³

The *Faul* court concluded by stating that in order to "maintain jurisdictional equality" between national and state banks, it would construe the word "located" in section 1348 to include two different states: the state designated as the bank's home office in the organization certificate, and the state of the bank's principal place of business.¹⁰⁴ The court conceded, though, that "as a practical matter" these usually would be the same state.¹⁰⁵

¹⁰⁰ *Id.* at 991 ("That is, while venue provisions minimize the cost of obtaining a court's judgment without regard to what that judgment might be, diversity jurisdiction seeks to ensure a correct decision, in the sense of being rendered on the merits of the parties' case rather than because of prejudice against a foreigner."). The court also stated that even if the *in pari materia* canon had "some minimal persuasive value" in the interpretation of section 1348, that canon would be trumped by "the principle that a vague statutory text is to be given its established background meaning unless Congress clearly indicates to the contrary." *Id.*

¹⁰¹ *See id.* at 991-92.

¹⁰² *See id.*

¹⁰³ *See id.* at 992. Of course, this interpretation overlooks the fact—pointed out at later in note six of the court's opinion—that the bank's principal place of business and the place specified as the bank's main office in its charter usually will be the same.

The court in *Faul* also rejected arguments that diversity jurisdiction should be narrowly construed. *See id.* at 993. "The courts should not use our own judgments about when the purposes of diversity jurisdiction are served or our guesses about what Congress will do in the future to constrict our congressionally mandated jurisdiction in the here and now." *Id.* This would be a good point—if, in fact, the statutory language clearly provided for jurisdiction. But it does not, and, as I will argue *infra* at Part V.C, more weight should have been given to the prudential concerns created by giving an expansive construction to that language.

¹⁰⁴ *See id.* at 993-94.

¹⁰⁵ *See id.* at 994 n.6 ("[A] national bank denominating a state other than its principal place of business in its organization certificate apparently either never occurs or is exceedingly rare.").

The Fifth Circuit later became the second court of appeals to hold, in *Horton v. Bank One, N.A.*,¹⁰⁶ that the word “located” in section 1348 should not be construed to include every state in which a national bank operates a branch office.¹⁰⁷ The Fifth Circuit largely followed the reasoning employed by the Seventh Circuit in *Faul*, placing particular emphasis on that court’s reasoning that section 1348 was enacted “against a backdrop of equal access to the federal courts for national banks, state banks, and corporations.”¹⁰⁸

The Second Circuit, in *World Trade Center Properties, L.L.C. v. Hartford Fire Insurance Co.*,¹⁰⁹ became the first court of appeals to directly state that the word “located” in section 1348 includes “every state in which [the national bank] has offices.”¹¹⁰ However, the court provided no supporting rationale for this assertion, and the statement appeared as dicta.¹¹¹

The Fourth Circuit, however, more directly and fully addressed the issue in *Wachovia Bank, N.A. v. Schmidt*.¹¹² The Fourth Circuit’s extended and well-reasoned opinion gave three main reasons for reading the word “located” to include any state in which a national bank maintained a branch office: “the

¹⁰⁶ 387 F.3d 426 (5th Cir. 2004). *Horton* involved an action filed in Texas state court by the debtor under a retail installment contract for the purchase of a vehicle. *Id.* The debtor alleged violations of Texas state consumer protection statutes and state common law claims. *Id.* Bank One removed the action to federal court on the basis of diversity of jurisdiction. *Id.* Bank One had its principal place of business in Illinois but operated an unspecified number of branch offices in Texas. *Id.*

¹⁰⁷ *See id.* at 429.

¹⁰⁸ *Id.* at 431. The Fifth Circuit also adopted the rationale of *Faul* in distinguishing the purpose of section 1348 from the purpose of the venue statute interpreted in *Bougas*. *See id.* at 433–34.

¹⁰⁹ 345 F.3d 154 (2d Cir. 2003). This case arose out of the September 11th attacks on the World Trade Center. One of the World Trade Center’s insurers, SR International Business Insurance, filed suit seeking a declaratory judgment that the damage to the Center amounted to only a single “loss” or “occurrence” under the insurance policy it had provided. *See id.* at 158.

¹¹⁰ *Id.* at 161.

¹¹¹ The statement was dicta because the opposing party in the case was a citizen of a foreign country; therefore, no matter whether the bank was found to be a citizen of only one state or of multiple states, this would have had no effect on the existence of diversity jurisdiction. *See id.*

¹¹² 388 F.3d 414 (4th Cir. 2004), *rev’d*, 126 S. Ct. 941 (2006). *Schmidt* and several other plaintiffs had filed a South Carolina state court action against Wachovia and other defendants, accusing the defendants of having fraudulently induced the plaintiffs to enter into a risky tax-motivated investment scheme. Wachovia then filed a separate federal court action, seeking to compel arbitration of the state claims. *Id.* at 415. Wachovia premised federal court jurisdiction on diversity of jurisdiction. *Id.* Wachovia’s principal place of business was in Charlotte, North Carolina, but the bank also operated branches in South Carolina and other states. *Id.*

ordinary meaning of located, its use in juxtaposition with the contrasting term established in the immediately preceding sentence in section 1348, and the Supreme Court's construction of located in the parallel venue statute in . . . *Bougas*."¹¹³

The Fourth Circuit first noted the general rule that statutory terms are, when possible, accorded their "ordinary or natural meaning."¹¹⁴ Referring to various dictionary definitions of the word "located,"¹¹⁵ the court noted that the word, in "ordinary parlance," connotes "physical presence in a place."¹¹⁶ The court noted that a bank undoubtedly has physical presence in a state in which it operates a branch office.¹¹⁷ The court also asserted that although some of the dictionary definitions refer to a "particular or specific location" or other words denoting a specific place or position, this did not suggest that the particular location had to be a unique one; "an extended entity like a national banking association [can] occupy, and thus be 'located,' in multiple 'particular or specific locations' at once."¹¹⁸

The Fourth Circuit also relied, as the Supreme Court had done in *Bougas*, on the interpretive canon that different words used in the same statute should be given "different meanings whenever possible."¹¹⁹ The court stated that the "most reasonable" way to give these terms separate meanings was to construe "established" as referring to the bank's charter location, while construing "located" to include "the place or places where it has a physical presence."¹²⁰ The court noted that these definitions comported with the definitions that the

¹¹³ *Id.* at 416 (citation omitted). The Fourth Circuit's decision was a 2-1 ruling, with an opinion for the majority written by Judge Luttig; Judge King, in dissent, would have followed the rationale of *Faul* and *Horton*. See *id.* at 432 (King, J., dissenting).

¹¹⁴ *Id.* at 416 (majority opinion) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)).

¹¹⁵ See *id.* at 416-17. The court noted that most of the definitions it had found actually were definitions of the words "locate" or "location," and that relatively few sources provide a separate definition for the word "located." *Id.* at 417. But the court noted that *Black's Law Dictionary*, "one of the few sources to consider the past participle 'located' separately as a general legal term, [also] emphasized the connotation of physical presence." *Id.* (emphasis in original) (citing *BLACK'S LAW DICTIONARY* 940 (6th ed. 1990), and quoting *Black's* definition of "located" as "[h]aving physical presence or existence in a place").

¹¹⁶ *Id.* at 417.

¹¹⁷ See *id.*

¹¹⁸ *Id.* at 417-18; see also *id.* at 418 ("[B]ranch offices plainly have a 'specific place or position,' are clearly located in a 'particular spot or position,' and are certainly 'fixed or established in a site or place.'").

¹¹⁹ *Id.* at 418-19.

¹²⁰ *Id.* at 419.

Supreme Court had given in *Bougas* to identical words found in the former venue statute.¹²¹ The Fourth Circuit also rejected the Seventh Circuit's conclusion that the two terms could be given distinct meanings by construing "located" to refer to the bank's principal place of business.¹²² Limiting the word "located" to the bank's principal place of business, the Fourth Circuit believed, was an "utterly implausible construction" that could not be achieved "without specialized definition (express or contextual)."¹²³

The Fourth Circuit also concluded that the *in pari materia* canon supported its interpretation of section 1348.¹²⁴ The court noted that this principle is "especially applicable" when the same vocabulary is used in two statutes that address the same subject matter.¹²⁵ The court pointed out that section 1348 employs exactly the same terminology as the former venue statute interpreted in *Bougas*, where the Supreme Court interpreted the word "located" to include branch locations.¹²⁶ The *in pari materia* rule should be employed, the Fourth Circuit said, because both the venue statute and section 1348 address the same subject matter—"the location of national banking associations in relation to their capacity for suit."¹²⁷ The Fourth Circuit also rejected the argument that

¹²¹ See *id.* at 419–20. The court also noted that the two statutes—section 1348 and the former venue statute at issue in *Bougas*—were "syntactically nearly identical." *Id.* at 420 n.1.

¹²² See *id.* at 420–21. The court noted that the "practical effect" of such an interpretation would fail to give separate meaning to the two terms, since a bank's charter location and its principal place of business "almost invariably" are the same. See *id.* at 421.

¹²³ *Id.* at 421.

[I]f a bank is said to be "located" *only* in the place in which it primarily conducts its business, and in no other place in which it is physically located—as the Seventh Circuit has held—then we are certain that words have little if any meaning beyond that which the particular speaker employing them says they do.

Id. (emphasis in original).

¹²⁴ See *id.* at 421–24.

¹²⁵ *Id.* at 422.

¹²⁶ See *id.*

¹²⁷ *Id.* The court also rejected the Seventh Circuit's conclusion that the *in pari materia* doctrine should not apply because the two statutes served distinct legislative purposes. See *id.* at 422–23. The Fourth Circuit first noted that the cases that the Seventh Circuit had relied upon "did not address *identical terms* applied in *similar statutes* to the *same very specific subject matter*; instead, they addressed the interpretation of wholly distinct terms applied to distinctly different subjects." *Id.* (emphasis in original). "[A]pplication of the *in pari materia* canon reflects the judgment that Congress, like other rational speakers, uses words consistently when speaking about similar subjects, *regardless* of its generalized purposes." *Id.* at 423 (emphasis in original). Moreover, to adopt the Seventh Circuit's view that the venue and jurisdiction statutes embody differing purposes "would be to insist upon far too specific a congruity of purpose; no

the “historical purpose” of diversity jurisdiction—that of preventing bias against out-of-state parties—should lead the court to adopt the Seventh Circuit’s construction of “located.”¹²⁸ The court noted that there was “not a shred of evidence” that Congress intended section 1348 to shield national banks from the possibility of bias in courts located in states where the bank operates branch offices.¹²⁹ Moreover,

[t]he notion that Congress believed that national banks that actively conduct business in a state cannot get a fair adjudication of state-law claims in that state’s courts is rank speculation In fact, if one were to engage in surmise, it would be just as defensible to conclude that Congress believed it entirely reasonable in such circumstances to deny national banking associations resort to the federal courts, over the courts of the states in which the banks have chosen to locate branch offices; for it might have appeared unseemly to permit the national banks to seek and receive the trust and business of a state’s citizens, but at the same time to permit them to refuse, out of distrust of those citizen-customers, to subject themselves to the courts created by those citizens to protect their rights against those who seek, receive, and breach their trust reposed. In all events, we certainly would not indulge the former inference as to congressional belief where there is absolutely no evidence of such belief and the language chosen by Congress all but confirms the contrary.¹³⁰

two statutes would ever be sufficiently similar to warrant application of the canon. And courts have never insisted on such absolute identity of purpose.” *Id.*

The Fourth Circuit noted that even in circumstances in which the *in pari materia* doctrine does not apply, the Supreme Court has “whenever reasonably possible” given identical meanings to *identical* words, even when those words appear in unrelated statutes. *Id.* at 424 (citing *Overstreet v. N. Shore Corp.*, 318 U.S. 125, 129–30 (1943)).

¹²⁸ See *id.* at 424–25.

¹²⁹ *Id.* at 424. The court also stated that not even 28 U.S.C. § 1332(c)(1) (2000), which expressly limits corporate citizenship to the state of incorporation and the state of the corporation’s principal place of business, evidences any

universal concern with potential state-court bias against entities with a substantial business presence in a given state. [That statute] is more naturally viewed as evidence of Congress’ desire to adopt a bright-line rule to govern the citizenship of corporations—or perhaps more appropriately, as evidence merely of corporations’ lobbying clout.

Id.

¹³⁰ *Id.* at 424–25. The Fourth Circuit also rejected the argument that there was a “settled background meaning” of the word “located.” *Id.* at 425–26. It also rejected the argument that section 1348 should be interpreted in light of a “broad historical purpose” of granting national banks equal access to federal courts as state banks enjoy. *Id.* at 426–31. For further discussion of these arguments, see *infra* at notes 178 to 185 and accompanying text.

IV. THE SUPREME COURT'S DECISION IN *WACHOVIA BANK, N.A. v. SCHMIDT*

Despite the Fourth Circuit's compelling rationale, the Supreme Court unanimously reversed, holding that "a national bank, for § 1348 purposes, is a citizen of the State in which its main office, as set forth in its articles of association, is located."¹³¹ In an opinion authored by Justice Ginsburg, the court separately addressed each of the Fourth Circuit's three "principal reasons" for interpreting section 1348 as it had and found each of these reasons to be unpersuasive.¹³²

The Court first rejected the Fourth Circuit's reasoning that in "ordinary parlance" the word "located" refers to any place in which the bank has a physical presence in the form of a branch office.¹³³ Quoting its earlier statement from *Bogas* that the word "located" has "no enduring rigidity,"¹³⁴ the Court stated that the word has "no fixed, plain meaning" in its uses in various places in the National Bank Act.¹³⁵ The Court noted that although some uses of the word "located" in the Act seem to include branch offices,¹³⁶ others seem to refer only to a single place.¹³⁷

The Court next rejected the Fourth Circuit's conclusion that "located" must be read to include states in which branch offices are maintained in order to give

¹³¹ 126 S. Ct. 941, 945 (2006). The Court's vote was 8–0 because Justice Thomas did not participate in the consideration or decision of the case. *See id.* at 944.

¹³² *See id.* at 948.

¹³³ *See id.* at 948–49.

¹³⁴ *See id.* at 949 (quoting *Citizens & S. Nat'l Bank v. Bogas*, 434 U.S. 35, 44 (1977)). The Court claimed that *Bogas* recognized "the controlling significance of context" when interpreting the meaning of the word in a particular statute. *See id.*

¹³⁵ *See id.* at 948–49; *see also id.* at 951 ("[L]ocated" is "a chameleon word; its meaning depends on the context in and purpose for which it is used.").

¹³⁶ *See id.* at 949 (citing 12 U.S.C. § 36(j) (2000) (defining "branch" to include "any branch place of business located in any State"), § 85 (limiting interest rate charged by national bank to "rate allowed by the laws of the State, Territory, or District where the bank is located"), and § 92 (permitting national banks to act as insurance agents in certain circumstances when bank is "located and doing business in any place the population of which does not exceed five thousand inhabitants")).

¹³⁷ *See id.* (citing 12 U.S.C. § 52 (2000) (national bank's capital stock certificate must state "the name and location of the association"), § 55 (requiring notice of sale of capital stock "in a newspaper of the city or town in which the bank is located"), § 75 (bank's regular annual shareholders' meeting shall be rescheduled when it "falls on a legal holiday in the State in which the bank is located"), and § 182 (requiring publication of notice of dissolution [in a newspaper published] "in the city or town in which the association is located"))).

"independent meaning" to the words "established" and "located."¹³⁸ The Court claimed that because national banks generally were not allowed to operate interstate branches at the time this statutory language originated, Congress "may well" have viewed the two words "not as contrasting, but as synonymous or alternative terms."¹³⁹ The Court also pointed out that the two terms originated in separate enactments that later were combined into a single statute, and argued from this that the "use of the two terms may be best explained as a coincidence of statutory codification."¹⁴⁰

The Court also found the Fourth Circuit's reliance on *Bougas* and the *in pari materia* doctrine to be unpersuasive.¹⁴¹ The Court acknowledged that this canon generally is applied to statutes that address the same subject matter, but the Court believed that venue and subject-matter jurisdiction were "not concepts of the same order."¹⁴² Venue, the Court said, is "largely a matter of litigational convenience," while subject-matter jurisdiction, which "concerns a court's competence to adjudicate a particular category of cases," is "far weightier."¹⁴³ Therefore, the Court said, "the considerations that account for our decision in *Bougas* are inapplicable to § 1348."¹⁴⁴

Remarkably, after offering its reasons for finding the three prongs of the Fourth Circuit's rationale unpersuasive, the Court offered little rationale of its own to support its contrary reading of the statute. The Court noted only that under the Fourth Circuit's reading, "the access of a federally chartered bank to a federal forum would be drastically curtailed in comparison to the access afforded state banks and other state-incorporated entities. Congress, we are satisfied, created no such anomaly."¹⁴⁵ Along the same lines, the Court asserted:

¹³⁸ See *id.* at 948-50.

¹³⁹ See *id.* at 949.

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 950-51.

¹⁴² *Id.* at 950.

¹⁴³ *Id.* ("Subject-matter jurisdiction . . . does not entail an assessment of convenience. It poses a 'whether,' not a 'where' question: Has the Legislature empowered the court to hear cases of a certain genre?").

¹⁴⁴ *Id.* The Court further noted that the reading given to the venue statute in *Bougas* "effectively aligned" national banks with the treatment given to state banks and other state corporations under the venue statutes, while the reading given to section 1348 by the Fourth Circuit would have "severely constrict[ed]" national banks' access to federal courts vis-à-vis state banks or corporations. *Id.* at 951.

¹⁴⁵ *Id.* at 945.

There is no reason to suppose Congress used [the words found in section 1348] to effect a radical departure from the norm. An individual who resides in more than one State is regarded, for purposes of federal subject-matter (diversity) jurisdiction, as a citizen of but one State. Similarly, a corporation's citizenship derives, for diversity jurisdiction purposes, from its State of incorporation and principal place of business. It is not deemed a citizen of every State in which it conducts business or is otherwise amenable to personal jurisdiction. Reading § 1348 in this context, one would sensibly "locate" a national bank for the very same purpose, i.e., qualification for diversity jurisdiction, in the State designated in its articles of association as its main office.¹⁴⁶

The Court claimed that neither precedent nor the language of the statute mandated the "incongruous outcome" of making "national banks singularly disfavored corporate bodies with regard to their access to federal courts."¹⁴⁷ Surprisingly, though, the Court cited *no* precedent to support its own construction of the statute, nor any general principles of statutory construction.

V. CRITIQUE AND ANALYSIS

Although the Supreme Court found each of the Fourth Circuit's three "principal reasons" to be unpersuasive, its reasons for rejecting the Fourth Circuit's rationale also prove unpersuasive. The Court offered no compelling reasons of its own for adopting its expansive view of the jurisdiction authorized under section 1348, and it overlooked the disparity that its interpretation of the statute creates between national banks and other federally-chartered corporations. Moreover, the Court ignored prudential concerns that should have led it to a more restrictive view in the absence of a clear statutory directive.

A. The Supreme Court's Reasons for Rejecting the Fourth Circuit's Rationale Prove Unpersuasive

Although the Supreme Court rejected each of the main strands of the Fourth Circuit's reasoning, the Court's rationale for doing so is not compelling either. First, the Court offered no persuasive reasons for rejecting the Fourth Circuit's conclusion that the ordinary meaning of the word "located" most naturally extends to any place where the bank has physical presence—in this case,

¹⁴⁶ *Id.* at 951–52 (citations omitted).

¹⁴⁷ *Id.* at 952.

any state in which it operates at least one branch. The Court's reliance on its prior observation in *Bougas* that "[t]here is no enduring rigidity about the word 'located'"¹⁴⁸ is inapposite and takes that quote entirely out of context. The Court in *Bougas* was merely trying to say that the fact that a national bank could only be "located" in one state at the time the word "located" was first used in the venue statute because the law at the time forbade branch banking did not prevent the Court from later saying that such a bank was "located" anywhere it operated a branch once branching was allowed.¹⁴⁹ *Bougas* did not mean to suggest that the word had no natural or ordinary meaning, or that the word is so chameleon-like that it will take on whatever meaning a court chooses to ascribe to it. As the Court itself found in *Bougas*, a national bank is most naturally "located" wherever it operates branch offices.

Moreover, the Court's observation that certain other uses of the word "located" in the National Banking Act "unquestionably refer[] to a single place"¹⁵⁰ is unpersuasive as a reason for concluding that the meaning of "located" as used in section 1348 is ambiguous. In each of the specific statutes referenced by the Court, it is clear from *other language contained within the same statutory provision* that the statute could only sensibly be interpreted to refer to a single location.¹⁵¹ But there is no similar limiting language in section 1348, and there is nothing nonsensical about saying that a national bank is "located" in any state in which it maintains branches for purposes of diversity jurisdiction.¹⁵² Indeed, Congress could very sensibly have determined that a

¹⁴⁸ *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 44 (1977).

¹⁴⁹ The quote follows immediately on the heels of the Court's discussion of the history of the venue statute, in which the Court pointed out that a national bank could only have been "located" in one place at the time the language first appeared because branch banking had not yet been authorized. *See id.* at 42-44.

¹⁵⁰ *Wachovia Bank*, 126 S. Ct. at 949.

¹⁵¹ 12 U.S.C. § 52 (2000) (national bank's capital stock certificate must state "the name and location of the association") uses the singular word "location" rather than the plural "locations," clearly denoting a single location; moreover, that statute also uses the word "the," denoting a single location. Similarly, section 55 (requiring notice of sale of capital stock "in a newspaper of the city or town in which the bank is located") also refers to "the" city or town, thus clearly denoting a single city or town, as does section 182 (requiring publication of notice of dissolution in "a newspaper published in the city or town in which the association is located"). Section 75 (bank's regular annual shareholders' meeting shall be rescheduled when it "falls on a legal holiday in the State in which the bank is located") also refers to "the State," denoting a single state. Moreover, in each of these four specific provisions, the statute would not make sense if it were read to refer to more than one location.

¹⁵² At one point, the American Law Institute proposed that the general diversity jurisdiction statute be amended to provide that a corporation would be deemed to be a citizen of every state

national bank that operates branches in a particular state would not face a high likelihood of experiencing prejudice against it in the courts of that state.

The Court also was unpersuasive in rejecting the Fourth Circuit's reasoning that the words "established" and "located" should be read so as to give each term independent meaning. The Court did not even acknowledge the general principle of statutory construction that "different words used in the same statute should be assigned different meanings whenever possible."¹⁵³ There are compelling reasons that this principle should govern here. The Court's assertion that two different yet like-meaning words may have ended up in the same statute "as a coincidence of statutory codification"¹⁵⁴ requires us to assume that Congress showed an inexcusable lack of care in its drafting of the current statutory language—that Congress simply "cut and pasted" the two former provisions without considering the significance of the language used in each. The presumption should be that Congress had a reason for using different terms, other than mere slipshod drafting.¹⁵⁵

Finally, the Court's attempt to distinguish *Bougas* also rings false, as does its rejection of the use of the *in pari materia* canon. There really is no basis for distinguishing *Bougas*. The terms used in the venue statute construed in that case are identical to those used in section 1348. The venue statute and section 1348's predecessors originated in roughly the same part of the nineteenth

in which it maintained a local establishment of business. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 301 (5th ed. 2007) (summarizing ALI proposal); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 147–48 (6th ed. 2002) (same). Although Congress did not adopt this proposal, it helps give weight to the conclusion that Congress sensibly could have viewed a national bank as being "located" in any state in which it operated a branch.

¹⁵³ *Wachovia Bank, N.A. v. Schmidt*, 388 F.3d 414, 418–19 (4th Cir. 2004) (discussing application of this interpretive principle), *rev'd*, 126 S. Ct. 941 (2006).

¹⁵⁴ *Wachovia Bank*, 126 S. Ct. at 949.

¹⁵⁵ Slipshod drafting seems unlikely when one considers the history of section 1348. The two formerly-separate provisions now found in section 1348 were first combined under the Judicial Code of 1911; see *supra* note 48 and accompanying text. The 1911 Judicial Code was adopted after 12 years of drafting efforts. See WRIGHT & KANE, *supra* note 152, at 21. The most recent recodification of the statute occurred in 1948, as part of the Judicial Code of 1948; see *supra* note 49 and accompanying text. Regarding the 1948 Judicial Code in general, the Supreme Court has noted that it "was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study." *Ex parte Collett*, 337 U.S. 55, 65–66 (1949) (describing efforts by staffs of two legal publishing firms, by the Advisory Committee, and by separate advisory committee consisting of Chief Justice Stone and Justices Frankfurter and Douglas).

century,¹⁵⁶ and both originated at a time when a national bank could not have been “located” in more than one place.

The Court’s argument that venue and subject-matter jurisdiction are “not concepts of the same order”¹⁵⁷ proves nothing. It is undoubtedly true that subject-matter jurisdiction is “far weightier” than venue,¹⁵⁸ but this provides no principled reason why section 1348 should be construed differently, and it does nothing to change the fact that both section 1348 and the venue statute deal with the same fundamental issue of where a national bank can sue and be sued.¹⁵⁹ This was not a case in which, for instance, one statute dealt with an issue of where a bank could sue or be sued, while another dealt with a wholly different issue such as where a bank was “located” for tax purposes.¹⁶⁰

In rejecting the use of the *in pari materia* canon, the Court did not cite any precedent in which it had addressed the application of the canon, nor did it attempt to distinguish the cases the Fourth Circuit cited. Unfortunately, the Court gave no guidance as to when the *in pari materia* canon should apply and when it should not. If the canon always were to be invoked this restrictively, the Court never could have used interpretations of Title VII as a basis for construing the ADEA¹⁶¹ or provisions of the patent law to interpret the antitrust law.¹⁶² None of these cases required the exact identity of statutory purpose that the Court seems to be demanding in *Wachovia Bank*.

¹⁵⁶ As discussed *supra* at note 42, the “located” terminology first appeared in the venue statute in 1864. The language temporarily disappeared from the venue provisions found in the 1873 Revised Statutes, but the language was reinstated to the venue statute in 1875 by the Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 316, 320. See generally *Mercantile Nat’l Bank v. Langdeau*, 371 U.S. 555 (1963) (discussing history of venue statute).

The “located” terminology first appeared in the diversity statute 12 years later, in 1887. See *supra* note 47 and accompanying text.

¹⁵⁷ *Wachovia Bank*, 126 S. Ct. at 950.

¹⁵⁸ *Id.*

¹⁵⁹ See *Wachovia Bank, N.A. v. Schmidt*, 388 F.3d 414, 422 (4th Cir. 2004), *rev’d*, 126 S. Ct. 941 (2006).

¹⁶⁰ See 12 U.S.C. § 548 (2000) (providing that for purposes of state taxation, “a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located”).

¹⁶¹ See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

¹⁶² See *Simpson v. Union Oil Co.*, 377 U.S. 13, 23–24 (1964).

B. The Court Provided No Compelling Rationale for Equating National Banks With State Corporations Rather Than With Other Federally-Chartered Corporations

Remarkably, the Supreme Court's *Wachovia Bank* opinion is written almost entirely in the form of a rebuttal of the Fourth Circuit's rationale. The Supreme Court offers little rationale of its own to support the contrary interpretation of the statute. Indeed, it is curious that the Court's opinion—addressing an issue of statutory construction—does not cite a single precedent or interpretive principle to support the Court's construction of the statute.

To the extent that the Court provides any rationale, it is that Congress would not have intended to give national banks “anomalous” access to federal courts in comparison to state-chartered corporations.¹⁶³ The Fourth Circuit's interpretation of section 1348, the Court said, would make national banks “singularly disfavored corporate bodies.”¹⁶⁴

There are several holes in this reasoning, however. For starters, the “anomaly” will exist only in a limited range of cases. A state-chartered corporation, after all, will enjoy access to federal court only when complete diversity of citizenship exists—that is, when none of the opposing parties is a citizen of the state in which the corporation is chartered *or* the state where it maintains its principal place of business. In the majority of cases, therefore, state banks and national banks likely will be equally “disfavored” in their access to federal court.

Second, the Court's reasoning is based on the questionable assumption that Congress would have viewed national banks' more limited access to diversity jurisdiction as a “competitive disadvantage” vis-à-vis state banks. It seems doubtful that Congress would have believed that a bank like Wachovia, which is based in North Carolina but operates numerous branches in South Carolina and many other states, faces a substantial likelihood of prejudice if forced to litigate its disputes in the state courts of South Carolina. This seems especially the case when one considers that federal *savings* banks with branches in multiple states also usually are denied access to federal court, a point I will address more fully later in this section. And there is no reason to believe that Congress feared that banks would avoid federal charters due to more limited

¹⁶³ See *supra* notes 145 to 147 and accompanying text.

¹⁶⁴ *Wachovia Bank, N.A. v. Schmidt*, 126 S. Ct. 941, 952 (2006).

access to federal court.¹⁶⁵ There are many factors that influence the choice between a federal and state charter.¹⁶⁶

Third, rather than doing away with any jurisdictional anomaly between state and national banks, the Court's construction of section 1348 actually creates a *new* anomaly, under which certain large national banks will be treated *more* favorably than their state-chartered counterparts. The Court itself recognized that a state-chartered corporation may be a citizen of two states—the state in which it incorporated and the state in which it maintains its principal place of business—while the Court's interpretation of section 1348 would result in a national bank being a citizen of only a single state.¹⁶⁷ The Court believed, however, that this difference would “be of scant practical significance for in almost every case . . . the location of a bank's main office and its principal place of business coincide.”¹⁶⁸ Unfortunately, it appears that the Court simply was wrong about this. Two of the country's largest national banks—JP Morgan Chase and Wells Fargo—have their principal places of business in states other than the places designated as their main offices in their articles of incorporation.¹⁶⁹ The Southern District of New York recently held that under the Court's holding in *Wachovia Bank*, JP Morgan Chase would not be considered a citizen of the state in which it maintains its principal place of business, New York; it would only be considered a citizen of Ohio, the location of the bank's main office.¹⁷⁰ These large national banks thus now enjoy greater access to federal diversity jurisdiction than comparable state-chartered banks.

¹⁶⁵ There is no data to support any hypothesis that individuals seeking to form banks avoided a federal charter due to concern that they would enjoy regarding more limited ability to invoke federal diversity jurisdiction. Between 1995 (the year after interstate branching by national banks was first authorized) and 2003, the number of national banks actually decreased by 32% (from 2,942 to 2,000), but the number of state-chartered banks also decreased by 21% (from 7,236 to 5,713). See LOVETT, *supra* note 14, at 33 (chart compiling Federal Reserve data). More tellingly, however, the deposits held by both national banks and state banks increased dramatically during this same period; national bank deposits increased by over 44%, while state bank deposits increased by nearly 46%. See *id.* The combination of declining number of charters but significant increases in deposits reflects the increasing mergers and consolidations among both state and national banks. See *id.* at 21, 129.

¹⁶⁶ For discussion of some of the factors that may influence the choice between a federal or state charter, see 1 MALLOY, *supra* note 13, § 2.1.1.

¹⁶⁷ See *Wachovia Bank*, 126 S. Ct. at 951 & n.9.

¹⁶⁸ See *id.* at 951 n.9.

¹⁶⁹ See *Excelsior Funds, Inc. v. JP Morgan Chase Bank, N.A.*, 470 F. Supp. 2d 312, 317 n.6 (S.D.N.Y. 2006).

¹⁷⁰ *Id.* at 317–22.

Finally, the Court's assertion that the Fourth Circuit's interpretation of section 1348 would have made national banks "singularly disfavored corporate parties"¹⁷¹ is also false for another reason. The Court completely overlooks the fact that other *federally*-chartered corporations enjoy very limited access to federal court. The Court's interpretation thus results in national banks being uniquely *favored* federal corporations.

Congress has expressly provided by statute that most federally-chartered corporations may not invoke federal jurisdiction simply on the basis of their federal charters.¹⁷² Moreover, courts long have held that federally-chartered

¹⁷¹ The Court's use of the phrase "singularly disfavored *corporate parties*," *Wachovia Bank*, 126 S. Ct. at 952 (emphasis added), may well have been intentional. *Unincorporated* business entities—such as partnerships (general and limited), limited liability companies, joint stock companies, joint ventures, business trusts, and labor unions—long have enjoyed very limited access to federal diversity jurisdiction. In determining whether suits involving these types of associations qualify for diversity jurisdiction, courts have examined the citizenship of *each* of the members of the association. As a result, it has been hard for these entities to qualify for diversity jurisdiction. See 13B WRIGHT ET AL., *supra* note 10, § 3630, at 681–708 (discussing citizenship of unincorporated associations); WRIGHT & KANE, *supra* note 152, at 171–73 (citing and discussing Supreme Court cases).

As part of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C.A. § 1332(d) (West Supp. 2006)), Congress created a new provision in section 1332(d)(10) that provides: "For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." This new provision was intended to address the different treatment that corporations and unincorporated associations received for purposes of diversity jurisdiction, which Congress viewed as an "anomaly" in light of the fact that "often . . . an unincorporated association is, as a practical matter, indistinguishable from a corporation in the same business." S. REP. NO. 109-14, at 46 (2005) (quoting Walter W. Jones, Jr., Annotation, *Determination of Citizenship of Unincorporated Associations, for Federal Diversity of Citizenship Purposes, in Actions By or Against Such Associations*, 14 A.L.R. Fed. 849 (2004)), as reprinted in 2005 U.S.C.C.A.N. 3, 45. This new provision applies only to class actions covered by the Act, however; the language provides that it applies only "[f]or purposes of this subsection." Therefore, for most diversity jurisdiction cases, Congress has preserved the "anomaly" that exists between corporations and unincorporated associations.

¹⁷² 28 U.S.C. § 1349 (2000) ("The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock."). This statute was intended to stem the large number of federal court filings that resulted from the Supreme Court's rulings in cases such as *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), and *Union Pacific Railway v. Myers*, 115 U.S. 1 (1885). Those cases had held that federally-chartered corporations were able to invoke federal question jurisdiction simply by virtue of their federal incorporation. See 13B WRIGHT ET AL., *supra* note 10, § 3571, at 176–78 (discussing history of statute).

corporations—including federal savings banks and other federally-chartered thrifts—generally are *ineligible* for diversity jurisdiction.¹⁷³ Under this line of cases, federally-chartered companies are seen as having no citizenship for diversity of citizenship purposes.¹⁷⁴ There are a couple of limited exceptions to this rule,¹⁷⁵ but these exceptions would not apply to most federally-chartered corporations that operate in more than one state. Thus, the Eastern District of Virginia, in a post-*Wachovia* decision, recently reaffirmed that a federal savings bank operating branches in several states was *ineligible* to invoke diversity jurisdiction.¹⁷⁶

Thus, the Supreme Court's interpretation of section 1348, rather than eliminating any anomalies, creates an even *bigger* anomaly between how national banks and other *federally*-chartered corporations are treated. Although Congress certainly intended for national banks to have access to diversity jurisdiction in some circumstances, there is no reason to believe that Congress intended for national banks and other federally-chartered savings associations to receive the widely disparate treatment that the Supreme Court's ruling in *Wachovia Bank* creates. As the Eastern District of Virginia recently noted, any original distinctions between the functions of national banks and other federally-chartered institutions have "largely disappeared" over time.¹⁷⁷

¹⁷³ See *Lehman Bros. Bank, FSB v. Frank T. Yoder Mortgage*, 415 F. Supp. 2d 636, 639 & n.7 (E.D. Va. 2006) (citing cases); see also 13B WRIGHT ET AL., *supra* note 10, § 3627 (discussing citizenship of federally-chartered corporations for purposes of diversity jurisdiction).

¹⁷⁴ See *Lehman Bros. Bank*, 415 F. Supp. 2d at 639 (discussing holding and effect of *Bankers Trust Co. v. Texas & Pac. Ry.*, 241 U.S. 295 (1916)).

¹⁷⁵ The first exception applies when Congress has expressly provided that the federally-chartered corporation is a citizen of a particular state. See *id.* at 640. The second—the so-called "localization" exception—applies if the court determines that the federally-chartered corporation has "only a limited geographical presence, and therefore should be afforded the same opportunity to invoke diversity jurisdiction as entities incorporated under state law." See *id.* (discussing factors that courts examine in determining whether "localization" exception applies, and concluding that *Lehman Bros. Bank* did not fall within this exception because its activities "are national in scope"); see also 13B WRIGHT ET AL., *supra* note 10, § 3627.

¹⁷⁶ *Lehman Bros. Bank*, 415 F. Supp. 2d at 642; see also *id.* at 638 n.2, 640 n.11 (discussing branches operated by bank). The court discussed the Court's holding in *Wachovia Bank* and concluded that it did not effect a change in the law relating to federally-chartered savings banks. See *id.* at 641–42.

¹⁷⁷ *Id.* at 642 n.13; see 1 MALLOY, *supra* note 13, §§ 1.2–1.2.4 (discussing distinctions and similarities between commercial banks, savings banks, and savings and loan associations); see also *id.* § 1.2.1, at 1.6 (noting "blurring of distinctions" between various types of entities).

Moreover, there is nothing in the history of section 1348 from which a reasonable inference can be drawn that Congress intended, or would have intended, for precise jurisdictional parity between national banks and state-chartered corporations. Authorization of interstate branch banking by national banks was still many years in the future at the time the statutory language now found in section 1348 originated or even at the time of its most recent recodification.¹⁷⁸ Thus, the effect that branch banking would create on national banks' access to diversity jurisdiction could not possibly have crossed Congress's mind.

Indeed, the only clear conclusion that can be drawn from the history of section 1348 is that Congress did not intend for national banks to have *more* favorable access to federal court than a state-chartered corporation would enjoy.¹⁷⁹ Any argument that Congress would not have wished to give national banks *less* access to diversity jurisdiction than their state counterparts enjoy can only be based on *post-hoc* rationalizations that could not have been on Congress's mind at the time it enacted this statute.¹⁸⁰

Although the Seventh Circuit and other lower federal courts have asserted otherwise,¹⁸¹ none of the Supreme Court's past interpretations of section 1348 or its predecessors stand as authority that Congress intended for national banks and state banks to be placed on equal jurisdictional footing in all cases.¹⁸² At the time these cases arose, the Court was addressing arguments that national banks enjoyed *greater* access to federal courts than state banks¹⁸³ or,

¹⁷⁸ See *supra* Part II.

¹⁷⁹ This conclusion can be drawn from the fact that Congress, early in the history of national banks, acted to strip national banks of their short-lived ability to gain access to federal court simply on the basis of their federal charter. See *supra* notes 42–46 and accompanying text.

¹⁸⁰ Cf. *Continental Nat'l Bank v. Buford*, 191 U.S. 119, 123–24 (1903) (emphasis added): The necessary effect of this legislation was to make national banks . . . citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply on the ground that they were created by, and exercised their power under, acts of Congress. *No other purpose can be imputed to Congress other than to effect that result.*

¹⁸¹ See *supra* notes 76–77, 91–93 and accompanying text.

¹⁸² It is perhaps telling that the Supreme Court itself, in its *Wachovia Bank* opinion, did not cite to or rely upon any prior cases to support its interpretation of section 1348.

¹⁸³ In *Leather Manufacturers' National Bank v. Cooper*, 120 U.S. 778 (1887), the Court rejected a national bank's attempt to remove a state court lawsuit to federal court solely on the basis of the bank's federal charter, finding that the 1882 Act (see *supra* note 45 and accompanying text) had repealed this basis for federal court jurisdiction. The Court's statement that the 1882 Act "was evidently intended to put national banks on the same footing as the banks of

conversely, that national banks could *never* invoke diversity jurisdiction.¹⁸⁴ Any statements made in these specific contexts regarding section 1348's predecessors placing national banks on "the same footing" as state corporations¹⁸⁵ cannot be read as making general pronouncements about other issues that were not, and could not, have been before the Court at the time.

C. *For Prudential Reasons, the Court Should Have Given a Restrictive Reading to the Jurisdiction Created by Section 1348*

The foregoing leads to an essential point, which the Supreme Court overlooked in *Wachovia Bank*. Because it is not clear from the statutory language whether Congress intended to give national banks broad access to federal court, the Court should have given a more restrictive interpretation to that language, in order to avoid the collision with state interests that a broad construction of federal diversity jurisdiction creates.

The reasons diversity jurisdiction was created have never been entirely clear. The conventional theory is that diversity jurisdiction "was intended to

the state where they were located," *id.* at 780, merely indicated that a national bank would be limited to the same bases for federal jurisdiction as its state counterpart. The Court's statement should not be read as a broader declaration that national banks and state banks *always* would be treated the same for purposes of diversity jurisdiction; indeed, no issue regarding the scope of diversity jurisdiction was even before the Court in that case.

The Court later relied upon *Leather Manufacturers' v. Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), in which the Court rejected an argument that section 1348 and its predecessors impliedly repealed the federal statute that governed venue over suits involving national banks. The Court concluded that section 1348 addressed only federal subject-matter jurisdiction and thus did not affect the venue provisions. *Id.* at 565-67. The Court's general statement that section 1348 and its predecessors "apparently sought to limit, with exceptions, the access of national banks to . . . the federal courts to the same extent to which non-national banks are so limited," *id.* at 566, thus again was not made in a context in which the Court actually was called upon to construe the scope of diversity jurisdiction available to national banks under section 1348.

¹⁸⁴ In *Petri v. Commercial National Bank*, 142 U.S. 644 (1892), the Court rejected an argument that a national bank could not invoke diversity of citizenship as a basis for federal court jurisdiction; the Court concluded that the 1887 Act (see *supra* note 47 and accompanying text) authorized this basis for jurisdiction in cases to which a national bank was a party. The Court's statement that "[n]o reason is perceived why it should be held that Congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might," *id.* at 650-51, simply serves as a recognition that national banks could, as a general manner, qualify for diversity jurisdiction; the Court was not faced with the issue of whether the scope of national banks' access to diversity jurisdiction would *always* parallel that of national banks.

¹⁸⁵ *Leather Mfrs' Nat'l Bank*, 120 U.S. at 780.

protect out-of-state residents from the bias that they might experience, or at least fear that they might face, in state courts.”¹⁸⁶ But others have argued that diversity jurisdiction was created with a view towards protecting business interests from “populist” state legislatures and courts.¹⁸⁷ Whatever the original justifications for diversity jurisdiction may have been, many commentators now argue that these justifications no longer exist.¹⁸⁸ Others argue, however, that diversity jurisdiction should be retained.¹⁸⁹ Thus far, Congress has resisted efforts to eliminate diversity jurisdiction, instead adopting only incremental restrictions, primarily through increases to the amount in controversy requirement.¹⁹⁰

Article III of the Constitution, which authorizes the creation of diversity jurisdiction, is not self-actuating; it is left to Congress to determine whether diversity jurisdiction should be granted to the federal courts and, if so, what limitations should be placed on that jurisdiction.¹⁹¹ Moreover, there is a presumption against federal-court jurisdiction,¹⁹² and a party who wishes to invoke diversity jurisdiction has the burden of showing that it is authorized under the circumstances of the particular case.¹⁹³

¹⁸⁶ CHEMERINSKY, *supra* note 152, at 296 (summarizing theories regarding initial justifications for diversity jurisdiction); *see also* 13B WRIGHT ET AL., *supra* note 10, § 3601, at 337–43 (same).

¹⁸⁷ *See* CHEMERINSKY, *supra* note 152, at 297–98 (summarizing theories of Judge Henry Friendly and others).

¹⁸⁸ *See id.* at 298–99 (summarizing arguments for abolishing diversity jurisdiction); 13B WRIGHT ET AL., *supra* note 10, § 3601, at 352–54 (same).

¹⁸⁹ *See* CHEMERINSKY, *supra* note 152, at 299–302 (summarizing arguments why diversity jurisdiction should be retained); 13B WRIGHT ET AL., *supra* note 10, § 3601, at 354–63 (same).

¹⁹⁰ *See* CHEMERINSKY, *supra* note 152, at 297 (summarizing unsuccessful attempt to repeal diversity jurisdiction), 301 (discussing changes in amount in controversy requirement); 13B WRIGHT ET AL., *supra* note 10, § 3601, at 351 (discussing proposed legislation). The addition of the “principal place of business” restriction to corporate citizenship was a similar incremental change. *See supra* note 10.

¹⁹¹ *See* CHEMERINSKY, *supra* note 152, at 197–98, 266–67; 13B WRIGHT ET AL., *supra* note 10, § 3601, at 343.

¹⁹² *See* CHEMERINSKY, *supra* note 152, at 267.

¹⁹³ *See id.* at 309; *see also* WRIGHT & KANE, *supra* note 152, at 27. Because federal courts have only limited jurisdiction,

and because it would be not simply wrong but indeed an unconstitutional invasion of the powers reserved to the states if those courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of the federal court.

State courts have the primary responsibility and competence to interpret the state's statutes and to develop the state's common law. Granting federal courts concurrent jurisdiction over a state law dispute arguably interferes with the state court's role.¹⁹⁴ Congress undoubtedly has the constitutional authority under Article III to determine that considerations such as fairness sufficiently outweigh the interests of federalism. But that authority is solely for Congress, the politically-accountable branch, to exercise, and the federal courts have no authority to expand their own jurisdiction.

When faced with a clear statutory directive that Congress intended for diversity jurisdiction to exist, the courts must heed that directive. But when the statute is not clear—when it arguably is subject to one interpretation that would confer federal jurisdiction, but is equally open to another interpretation that would lead to the opposite conclusion—the federal court should be self-denying.

The Supreme Court has long recognized that the “constitutional policy of limited jurisdiction” requires the federal courts to strictly construe diversity jurisdiction statutes.¹⁹⁵ As future Chief Justice Stone stated in one such case involving the interpretation of the amount in controversy requirement, “[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”¹⁹⁶ This rule of strict construction has often been invoked by federal courts when they have been called upon to construe congressional grants of diversity jurisdiction.¹⁹⁷ It is unclear why the Court in *Wachovia Bank* ignored this long-standing interpretive rule, but ignore it the Court did.

Id.

¹⁹⁴ See CHEMERINSKY, *supra* note 152, at 267–68 (“[R]estrictions on federal court jurisdiction advance the important values of federalism and separation of powers. For example, limiting federal court authority preserves the role of state courts. Also, constraining federal judicial power helps to limit the role of the judiciary in the federal system.”); see also WRIGHT & KANE, *supra* note 152, at 2 (“[E]xpansion of the jurisdiction of the federal courts diminishes the power of the states.”).

¹⁹⁵ 13B WRIGHT ET AL., *supra* note 10, § 3602, at 376.

¹⁹⁶ *Healy v. Ratta*, 292 U.S. 263, 270 (1934); see also, e.g., *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *City of Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63, 76–77 (1941) (per Frankfurter, J.) (“These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts . . .”).

¹⁹⁷ 13B WRIGHT ET AL., *supra* note 10, § 3602, at 376 n.29 (2d ed. 1984 & Supp. 2006) (citing cases).

In *Wachovia Bank* the more judicially “conservative” approach would have been to adopt the Fourth Circuit’s reading of the statute (to be self-denying), and to allow Congress to override that reading if it disagreed. The Supreme Court’s more expansive interpretation of jurisdiction infringes upon the rights of the states without clear indication that this is what Congress would have intended.

VI. CONCLUSION

It is quite possible that the present-day Congress, were it to expressly consider the issue addressed in *Wachovia Bank*, would draft statutory language reflecting the Court’s result. It is not the Court’s role, however, to draft legislation for Congress, particularly when the effect of that legislation is to expand the federal courts’ jurisdiction at the expense of the state courts. The Fourth Circuit persuasively demonstrated that the most natural reading of section 1348 would have led to a finding of no federal jurisdiction. Even if it could be said that the language of the statute was ambiguous and equally open to two interpretations, the Supreme Court should have adopted the construction that had the result of limiting the scope of federal jurisdiction created under the statute. The Court’s construction of section 1348 also creates a great jurisdictional disparity between national banks and other federally-chartered institutions, which Congress likely will be called upon to correct.