Civil Procedure II
Course Materials Handout

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David F. Herr & Michael C. McCarthy, *The Class Action Fairness Act of 2005—Congress Again Wades Into Complex Litigation Management Issues,* 228 F.R.D. 673 (2005) (excerpt).

Introduction

On February 18, 2005, President Bush signed into law the Class Action Fairness Act of 2005 ("Act"). The new law became effective at that moment, applying to all actions filed thereafter. The law will have immediate and salutary impact on abuse of the class action device, although limitations in the Act's scope may reduce its overall impact and certain shortcomings in its drafting have left a number of significant issues to be resolved by the courts.

I. Overview of the Class Action Fairness Act of 2005

The Act is made up of a number of discrete components, most of which will function essentially in isolation from one another. Apart from the expansion of federal court jurisdiction, which will result in a greater proportion of class actions being adjudicated in federal rather than state court, the Act's provisions apply only to class actions filed in, or removed to, federal court.

The major sections and a brief description of the change they will bring are:

A. Section 3, a self-described "Consumer Class Action Bill of Rights," establishes four specific reforms applicable in all class actions, each directed to specific shortcomings of current practice. This section regulates coupon settlements, so-called "zero-value" settlements, and discrimination among class members based on where they reside, and it creates a new notice mechanism requiring notice to state and federal officials before approval of a settlement.

B. Section 4 of the Act creates jurisdiction in federal court over some interstate class actions involving at least $5,000,000 in claims. In many ways, this is the most far-reaching change in the new law.

C. Section 5 creates a mechanism for removing class actions filed in state court to federal court, including extending the time during which removal can be sought.

D. Section 6 requires that, by February 18, 2006, the federal courts' administrative body (the Judicial Conference) report to Congress on class action settlements and recommend "best practices" for handling class actions.

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III. The Major Impact of the Act: Federalization of Class Actions

Although the Act has not federalized all class actions, it has eliminated the most significant barrier faced by defendants who sought to remove such actions to federal court. In the context of class actions or mass actions, the long-standing requirement of complete diversity between plaintiffs and defendants is a thing of the past. Unfortunately, in an attempt to balance the competing interests between actions that largely involve a single state (and should therefore be litigated in that state's courts) and actions that involve multiple states, the Act introduces significant gray areas that may only be made black and white after the various courts of appeals have imposed their own interpretive glosses on the Act's somewhat opaque commands. If the courts follow their traditional approach of declining jurisdiction whenever possible (an approach that some say is the only permissible approach for courts of limited jurisdiction), then it is likely that the Act will not have quite as expansive an effect as Congress may have envisioned.

A. Federal Court Jurisdiction

As a threshold matter, the Act permits class actions to be brought in or removed to federal court if two requirements are met: (1) at least $5 million must be in controversy, exclusive of interest and costs; and (2) at least one plaintiff and one defendant must be citizens of different states or of a state and a foreign country.[12]

1. Amount in controversy

In one respect, the issues surrounding the amount-in-controversy requirement should pose no difficulties in application, for it will be presumably treated consistently with the courts' existing treatment of the $75,000 amount-in-controversy requirement found in § 1332(a). The Act also makes clear that for purposes of satisfying the $5

[12] *See* 28 U.S.C. § 1332(d).

million threshold, all of the individual class members' claims are to be aggregated.[13]

The difficulty that courts will likely face in determining whether the jurisdictional amount is satisfied relates to the size of the plaintiff class. In the abstract, aggregation is simple enough to apply, but in practice, it only works if there is some means by which to determine both the size of the claims and the number of claimants. Although there certainly are cases in which the parties may be able to determine with some ease (very likely from records in the defendant's possession) how many members are likely in a putative plaintiff class, there are many other cases in which the parties have no way of making any sound estimate of the number of potential class members. The Act provides no guidance on how these determinations are to be made, and this uncertainty will affect not only how courts rule on motions to remand or to dismiss for lack of subject matter jurisdiction but also the timing of removal decisions by defendants, which are discussed in more detail below.

2. Minimal diversity

Historically, the federal courts' diversity jurisdiction has only been available to litigants when the citizenship of all plaintiffs is diverse from that of all defendants.[14] [Congress's power to extend federal diversity jurisdiction even to cases where complete diversity of citizenship does not exist, however, has been recognized in other contexts. For example,] the interpleader statute (28 U.S.C. § 1335) also grants federal courts jurisdiction in cases of minimal diversity, and that statute has been upheld by the Supreme Court.[16]

For purposes of determining diversity of citizenship under the Act, the court is to consider whether the citizenship of "any member of a class of plaintiffs" is "different from" that of "any defendant."[17] This issue presents problems similar to those presented by the amount-in-controversy, for the identity (and therefore the citizenship) of putative class members is frequently not apparent at the time a lawsuit is filed. Plaintiffs' counsel may often avoid this problem by ensuring that the citizenship of at least one named class representative is diverse from that of at least one defendant, but, so long as the citizenship of a putative (but unnamed) class member is diverse from that of a defendant, it appears that the Act intends the minimal diversity requirement to be satisfied.

The Act also changes how unincorporated associations' citizenship is determined, but only for purposes of § 1332(d) and not, apparently, for purposes of diversity jurisdiction under § 1332(a).[18] Many courts have treated unincorporated associations—whether in the form of partnerships or limited liability corporations or other non-corporate forms—as possessing the citizenship of all of the entity's constituent members, but that is no longer the rule in cases governed by § 1332(d).

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C. Subject Matter Carve Outs

The Act contains additional jurisdictional limitations, or carve outs. It does not apply to any action in which (1) the potential number of plaintiff class members is less than 100 or (2) the primary defendants are states, state officials, or other governmental agencies "against whom the district court may be foreclosed from ordering relief" (presumably because of sovereign immunity and the Eleventh Amendment).[29]

The Act also does not apply to [certain claims arising under federal securities law or claims involving corporate governance or breaches of fiduciary duties].

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D. Removal

The new removal provisions are found in 28 U.S.C. § 1453, and there are three significant ways in which the procedures governing removal as it is available in ordinary diversity cases have been made more liberal. Removal of class actions

[13] *See id.* § 1332(d)(6). The aggregation issue has been frequently litigated prior to the passage of the Act, with a resulting circuit split on whether 28 U.S.C. § 1367 (the supplemental jurisdiction statute) overruled the holding in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that each class member must independently satisfy the amount-in-controversy requirement. The Supreme Court recently held that § 1367 effectively overruled *Zahn*. *See* Exxon Mobil Corp. v. Allapattah Svcs., Inc., 125 S. Ct. 2611 (2005).

[14] *See* 28 U.S.C. § 1332(a); *see also* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

[16] *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

[17] 28 U.S.C. § 1332(d)(2)(A).

[18] *See* 28 U.S.C. § 1332(d)(10) ("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.").

[29] 28 U.S.C. § 1332(d)(5).

is governed, as is removal of diversity actions generally, by § 1446, but § 1453 makes certain exceptions. First, where § 1446 requires that all defendants join in or consent to a notice of removal, § 1453 states that a class action "may be removed by any defendant without the consent of all defendants."[32] Second, where § 1441(b) precludes removal on diversity jurisdiction grounds of actions in which any defendant is a citizen of the state in which the action is pending, the Act states that class actions "may be removed . . . without regard to whether any defendant is a citizen of the State in which the action is brought."[33] Third, where § 1446(b) precludes removal on diversity jurisdiction grounds of an action more than one year after the action was commenced, the Act states that "the 1-year limitation . . . shall not apply" to class actions.[34]

The principal difficulty with removal of class actions will involve deciding at what point, in cases in which there is doubt about the existence of diversity or satisfaction of the jurisdictional amount, a defendant is on notice that jurisdiction under § 1332(d) exists. At that point—no matter how far the litigation has proceeded in state court—any defendant may remove the case to federal court. By removing the one-year limitation found in § 1446(b), and by expressly stating that the jurisdictional provision applies "to any class action before or after the entry of a class certification order by the court," the Act invites defendants to consider delaying removal of an action as long as possible. While there would be risks in delaying removal when it is apparent that federal jurisdiction exists, in cases in which the existence of jurisdiction is not certain, defendants may choose to have state courts handle the case to a certain point and then, if dissatisfied with the rulings to date (including, possibly, a ruling certifying a class), and if it is at that point apparent that federal jurisdiction exists (because either the citizenship of class members or amount in controversy has been clarified), then the Act seems to contemplate permitting defendants to remove actions to federal court, at which point the question of class certification (and perhaps other antecedent rulings) could be revisited. This sort of forum shopping may happen only in rare cases in which the citizenship of the class members or, more likely, the amount in controversy is difficult to determine at the outset, but when the facts permit it, nothing in the Act would appear to preclude it.

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F. The Benefit of Federalization

There appear to be two primary benefits in bringing interstate class actions to federal court. First, there are significant concerns about some state court judges' independence and the wisdom of having them decide cases involving national classes when they run for reelection and are possibly beholden to local attorneys. Some state court systems also have appellate systems that do not offer any appellate review as a matter of right, making these fora less acceptable for cases involving distant litigants. In this regard, the concern is essentially the same for all diversity cases, but the class action context raises the stakes, and justifies more ready access to federal courts. The second, and probably stronger, justification for allowing class cases to be brought in federal court relates to the efficient handling of the cases. By allowing the cases to be brought in or removed to federal court, the Act essentially puts them within the purview of the Judicial Panel on Multidistrict Litigation, and allows them to be transferred for centralized handling in a single district.

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Conclusion

Although hardly a model of legislative drafting, the Class Action Fairness Act of 2005 is generally a fair and effective attempt to deal with some of the issues confronting the court in connection with class actions. The majority of class actions will be heard in federal court, and because of the unlikelihood of remand, will be resolved there. Its provisions, coupled with the 2003 amendments to Fed. R. Civ. P. 23, should permit class actions to be handled fairly and more efficiently around the country, and should foster greater fairness to plaintiffs and defendants in these vexing cases. It could have accomplished more, and has a few glaring problems that should be fixed by Congress, but

[32] 28 U.S.C. § 1453(b).

[33] *Id.*

[34] *Id.* The Act also provides when citizenship is to be determined, both for purposes of jurisdiction and abstention: either "as of the date of the filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction." 28 U.S.C. § 1332(d)(7). This rule appears to be generally consistent with the traditional requirement under § 1441 that citizenship, and the existence of diversity, be determined at the time of removal. *See, e.g.*, Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567 (2004) (discussing Caterpillar Inc v. Lewis, 519 U.S. 61 (1996)).

on balance, it is probably legislation that will accomplish a little less than both its proponents and detractors claimed.

Swidler & Berlin v. United States,
524 U.S. 399 (1998) (excerpt).

REHNQUIST, C.J.

Petitioner, an attorney, made notes of an initial interview with a client shortly before the client's death. The Government, represented by the Office of Independent Counsel, now seeks his notes for use in a criminal investigation. We hold that the notes are protected by the attorney-client privilege.

This dispute arises out of an investigation conducted by the Office of the Independent Counsel into whether various individuals made false statements, obstructed justice, or committed other crimes during investigations of the 1993 dismissal of employees from the White House Travel Office. Vincent W. Foster, Jr., was Deputy White House Counsel when the firings occurred. In July, 1993, Foster met with petitioner James Hamilton, an attorney at petitioner Swidler & Berlin, to seek legal representation concerning possible congressional or other investigations of the firings. During a 2-hour meeting, Hamilton took three pages of handwritten notes. One of the first entries in the notes is the word "Privileged." Nine days later, Foster committed suicide.

In December 1995, a federal grand jury, at the request of the Independent Counsel, issued subpoenas to petitioners Hamilton and Swidler & Berlin for, *inter alia*, Hamilton's handwritten notes of his meeting with Foster. Petitioners filed a motion to quash, arguing that the notes were protected by the attorney client privilege and by the work product privilege. [The district court upheld the claim of attorney-client and work product privilege. The Court of Appeals reversed and ordered the notes disclosed, and the Supreme Court granted certiorari.] We now reverse.

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The Independent Counsel argues that the attorney-client privilege should not prevent disclosure of confidential communications where the client has died and the information is relevant to a criminal proceeding. There is some authority for this position. One state appellate court, *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. 1976), and the Court of Appeals below have held the privilege may be subject to posthumous exceptions in certain circumstances. In *Cohen*, a civil case, the court recognized that the privilege generally survives death, but concluded that it could make an exception where the interest of justice was compelling and the interest of the client in preserving the confidence was insignificant. *Id.*, 357 A.2d, at 692–693.

But other than these two decisions, cases addressing the existence of the privilege after death—most involving the testamentary exception—uniformly presume the privilege survives, even if they do not so hold. . . .

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Commentators on the law also recognize that the general rule is that the attorney-client privilege continues after death. *See, e.g.*, 8 Wigmore, Evidence § 2323 (McNaughton rev. 1961); Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics 45, 78–79 (1992); 1 J. Strong, *McCormick on Evidence* § 94, p. 348 (4th ed. 1992). Undoubtedly, as the Independent Counsel emphasizes, various commentators have criticized this rule, urging that the privilege should be abrogated after the client's death where extreme injustice would result, as long as disclosure would not seriously undermine the privilege by deterring client communication. *See, e.g.*, C. Mueller & L. Kirkpatrick, 2 *Federal Evidence* § 199, at 380–381 (2d ed. 1994); *Restatement (Third) of the Law Governing Lawyers* § 127, Comment d (Proposed Final Draft No. 1, Mar. 29, 1996). But even these critics clearly recognize that established law supports the continuation of the privilege and that a contrary rule would be a modification of the common law. *See, e.g.*, Mueller & Kirkpatrick, *supra*, at 379; *Restatement of the Law Governing Lawyers*, *supra*, § 127, Comment c; 24 C. Wright & K. Graham, *Federal Practice and Procedure* § 5498, p. 483 (1986).

Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a crimi-

nal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

The Independent Counsel suggests, however, that his proposed exception would have little to no effect on the client's willingness to confide in his attorney. He reasons that only clients intending to perjure themselves will be chilled by a rule of disclosure after death, as opposed to truthful clients or those asserting their Fifth Amendment privilege. This is because for the latter group, communications disclosed by the attorney after the client's death purportedly will reveal only information that the client himself would have revealed if alive.

The Independent Counsel assumes, incorrectly we believe, that the privilege is analogous to the Fifth Amendment's protection against self-incrimination. But as suggested above, the privilege serves much broader purposes. Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. *See Jaffe*, 518 U.S., at 12; *Fisher v. United States*, 425 U.S. 391, 403 (1976). This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.

The Independent Counsel additionally suggests that his proposed exception would have minimal impact if confined to criminal cases, or, as the Court of Appeals suggests, if it is limited to information of substantial importance to a particular criminal case.

However, there is no case authority for the proposition that the privilege applies differently in criminal and civil cases, and only one commentator ventures such a suggestion, *see* Mueller & Kirkpatrick, *supra*, at 380–381. In any event, a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege. *See Upjohn*, 449 U.S., at 393; *Jaffee*, *supra*, at 17–18.

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Finally, the Independent Counsel, relying on cases such as *United States v. Nixon*, 418 U.S. 683, 710 (1974), and *Branzburg v. Hayes*, 408 U.S. 665 (1972), urges that privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking. But both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to "construe" the privilege, but to narrow it, contrary to the weight of the existing body of caselaw.

It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this. . . . Here the Independent Counsel has simply not made a sufficient showing to overturn the common law rule embodied in the prevailing caselaw. Interpreted in the light of reason and experience, that body of law requires that the attorney client privilege prevent disclosure of the notes at issue in this case. The judgment of the Court of Appeals is Reversed.

O'Connor, J., with whom Scalia and Thomas, JJ., join, dissenting.

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I agree that a deceased client may retain a personal, reputational, and economic interest in

confidentiality. But, after death, the potential that disclosure will harm the client's interests has been greatly diminished, and the risk that the client will be held criminally liable has abated altogether. Thus, some commentators suggest that terminating the privilege upon the client's death "could not to any substantial degree lessen the encouragement for free disclosure which is [its] purpose." 1 J. Strong, *McCormick on Evidence* § 94, p. 350 (4th ed. 1992); *see also Restatement (Third) of the Law Governing Lawyers* § 127, Comment d (Proposed Final Draft No. 1, Mar. 29, 1996). This diminished risk is coupled with a heightened urgency for discovery of a deceased client's communications in the criminal context. The privilege does not "protect[ ] disclosure of the underlying facts by those who communicated with the attorney," *Upjohn*, *supra*, at 395, and were the client living, prosecutors could grant immunity and compel the relevant testimony. After a client's death, however, if the privilege precludes an attorney from testifying in the client's stead, a complete "loss of crucial information" will often result, *see* 24 C. Wright & K. Graham, *Federal Practice and Procedure* § 5498, p. 484 (1986).

As the Court of Appeals observed, the costs of recognizing an absolute posthumous privilege can be inordinately high. *See In re Sealed Case*, 124 F.3d 230, 233–234 (CADC 1997). Extreme injustice may occur, for example, where a criminal defendant seeks disclosure of a deceased client's confession to the offense. *See State v. Macumber*, 544 P. 2d 1084, 1086 (Ariz. 1976); *cf. In the Matter of a John Doe Grand Jury Investigation*, 562 N.E.2d 69, 72 (Mass. 1990) (Nolan, J., dissenting). In my view, the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences. *See, e.g.*, *Schlup v. Delo*, 513 U.S. 298, 324–325 (1995); *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). Indeed, even petitioner acknowledges that an exception may be appropriate where the constitutional rights of a criminal defendant are at stake. An exception may likewise be warranted in the face of a compelling law enforcement need for the information. "[O]ur historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." *Nixon*, *supra*, at 709 (internal quotation marks omitted); *see also Herrera v. Collins*, 506 U.S. 390, 398 (1993). Given that the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts, I do not be lieve that the attorney-client privilege should act as an absolute bar to the disclosure of a deceased client's communications. When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.

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El Paso Natural Gas Co. v. Neztsosie,
526 U.S. 473 (1999) (excerpt).

SOUTER, J.

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In 1995, respondents Laura and Arlinda Neztsosie, two members of the Navajo Nation, filed suit in the District Court of the Navajo Nation, Tuba City District, against petitioner El Paso Natural Gas Corporation and one of its subsidiaries, Rare Metals Corporation. The Neztsosies alleged that on the Navajo Nation Reservation, from 1950 to 1965, El Paso and Rare Metals operated open pit uranium mines, which collected water then used by the Neztsosies for a number of things, including drinking. The Neztsosies claimed that, as a result, they suffered severe injuries from exposure to radioactive and other hazardous materials, for which they sought compensatory and punitive damages under Navajo tort law. App. 18a–27a. [Another plaintiff, Richards, also brought a similar tort suit in Navajo tribal courts against Cypress Foote Mineral Company] arising from uranium mining and processing on the Navajo Nation Reservation by . . . defendants from the 1940's through the 1960's. 136 F.3d 610, 613 (C.A.9 1998); App. 39a–60a.

El Paso and Cyprus Foote each filed suit in the United States District Court for the District of Arizona, seeking to enjoin the Neztsosies and

Richards from pursuing their claims in the Tribal Courts. [The companies argued that a federal statute, the Price-Anderson Act of 1957, required lawsuits arising out of the nation's atomic energy program to be filed in federal court. The district court agreed that, to the extent that plaintiffs sought relief under the Price-Anderson Act, they must proceed in federal court rather than tribal court. Accordingly, the district court entered an injunction against the Navajo individuals forbidding them from litigating any Price-Anderson Act claims against the companies in tribal courts. The district court refused, however, to enjoin the individual plaintiffs from proceeding with their cases arising under Navajo tort law in tribal court.] Both El Paso and Cyprus Foote appealed.

On the companies' consolidated appeals, the Ninth Circuit affirmed the District Court's decisions declining to enjoin the Neztsosies and Richards from pursuing non-Price-Anderson Act claims, as well as the decisions to allow the Tribal Courts to decide in the first instance whether the Neztsosies' and Richards's tribal claims fell within the ambit of the Price-Anderson Act. 136 F.3d, at 617, n.4, 620. But the Court of Appeals did not rest there. Although neither the Neztsosies nor Richards had appealed the partial injunctions against them, the Ninth Circuit *sua sponte* addressed those District Court rulings, citing "important comity considerations involved." *Id.*, at 615. The court reversed as to the injunctions, holding that the Act contains no "express jurisdictional prohibition" barring the tribal court from determining its jurisdiction over Price-Anderson Act claims. *Id.*, at 617–620. Judge Kleinfeld dissented, concluding that the unappealed partial injunctions against litigating Price-Anderson Act claims in tribal court should be treated as law of the case, that all of the tribal-law claims were actually Price-Anderson Act claims, and that exhaustion was not required. *Id.*, at 620–622. We granted certiorari, 525 U.S. 928 (1998), and now vacate and remand.

II

There is one matter preliminary to the principal issue. Because respondents did not appeal those portions of the District Court's orders enjoining them from pursuing Price-Anderson Act claims in Tribal Court, those injunctions were not properly before the Court of Appeals, which consequently erred in addressing them. We have repeatedly affirmed two linked principles governing the consequences of an appellee's failure to cross-appeal. Absent a cross-appeal, an appellee may "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court," but may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924); *see also Union Tool Co. v. Wilson*, 259 U.S. 107, 111 (1922). We recognized the latter limitation as early as 1796, *see McDonough v. Dannery*, 3 Dall. 188, 198, and more than 60 years ago we spoke of it as "inveterate and certain," *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937).

The Court of Appeals acknowledged the rule, but, in light of the natural temptation to dispose of the related questions of jurisdiction and exhaustion at one blow, still thought it could take up the unappealed portions of the District Court's orders *sua sponte* because "important comity considerations" were involved. 136 F.3d, at 615. The Court of Appeals apparently took the view, shared by a number of courts over the years, that the prohibition on modifying judgments in favor of a nonappealing party is a "rule of practice," subject to exceptions, not an unqualified limit on the power of appellate courts. Petitioners and the Government say the Court of Appeals was mistaken, seeing the rule as an unqualified bound on the jurisdiction of the courts of appeals. We need not decide the theoretical status of such a firmly entrenched rule,[2] however, for even if it is not strictly jurisdictional (a point we do not resolve) the "comity considerations" invoked by the Court of Appeals to justify relaxing it are clearly inadequate to defeat the institutional interests in fair notice and repose that the rule advances. Indeed, in more than two

[2]The issue has caused much disagreement among the Courts of Appeals and even inconsistency within particular Circuits for more than 50 years. For a survey of many of the cases, *see Marts v. Hines*, 117 F.3d 1504, 1507–1511 (C.A.5 1997) (Garwood, J., dissenting), *cert. denied*, 522 U.S. 1058 (1998). For recent cases taking opposing positions, compare, *e.g.*, *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1416 (C.A.7 1989) (jurisdictional), *with United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342–344 (C.A.3 1991) (rule of practice), *cert. denied sub nom.*, *Linde v. Carrier Coal Enterprises, Inc.*, 502 U.S. 1093 (1992). For a discussion of the issue among the members of a distinguished panel of the Second Circuit, though without any reference to *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937), see *In re Barnett*, 124 F.2d 1005, 1008–1013 (C.A.2 1942) (Frank, J., joined by Clark, J.); *id.*, at 1013–1014 (L. Hand, J., dissenting).

[3]On three occasions since *Morley Constr. Co.*, we have made statements in dictum that might be taken to suggest the pos-

centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule.[3]

On the assumption that comity is not enough, respondents offer one additional justification for an exception to the cross-appeal requirement here. They point out that the District Court orders appealed from were preliminary injunctions and thus interlocutory, not final, decrees. Respondents contend that because they knew they could challenge the substance of those orders on appeal from a final judgment, they should not be penalized for failing to cross-appeal at this preliminary stage of the suit. But this argument misconceives the nature of the cross-appeal requirement. It is not there to penalize parties who fail to assert their rights, but is meant to protect institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not. Fairness of notice does not turn on the interlocutory character of the orders at issue here, and while the interest in repose is somewhat diminished when a final appeal may yet raise the issue, it is still considerable owing to the indefinite duration of the injunctions. Preliminary injunctions are, after all, appealable as of right, see 28 U.S.C. § 1292(a)(1), and the timely filing requirements of Federal Rules of Appellate Procedure 4 and 26(b) squarely cover such appeals. Neither those Rules nor the interests animating the cross-appeal requirement offer any leeway for such an exception.

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sibility of exceptions to the rule. Only one of those statements concerned the power of the courts of appeals. *See Bowen v. Postal Service*, 459 U.S. 212, 217–218, n.7 (1983); *id.*, at 244 (WHITE, J., concurring in judgment in part and dissenting in part); *id.*, at 246–247 (REHNQUIST, J., dissenting). In *Strunk v. United States*, 412 U.S. 434, 437 (1973), we suggested in passing that there might be occasions when, in a criminal case, the Court might address a constitutional issue resolved in favor of a petitioner and not raised in a cross-petition for certiorari. In *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226, n.2 (1975), we suggested that the cross-petition requirement might be a "matter of practice and control of our docket" rather than of "our power." Although some might see *Berkemer v. McCarty*, 468 U.S. 420, 435, n.23 (1984), as countenancing exceptions to the cross-petition requirement, see R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 364 (7th ed. 1993); *see also Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485–486 (1989), we have made clear that such a view of *Berkemer* is mistaken. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365, n.8 (1994).

We have repeatedly expressed the rule in emphatic terms, see, *e.g.*, *Helvering v. Pfeiffer*, 302 U.S. 247, 250–251 (1937) ("[A]n appellee cannot without a cross-appeal attack a judgment entered below"), though admittedly we have normally had occasion to do so in reference to our own certiorari jurisdiction rather than to the appellate jurisdiction of the courts of appeals, see, *e.g.*, *LeTulle v. Scofield*, 308 U.S. 415, 421–422 (1940) ("[W]e cannot afford [the nonpetitioning party] relief"); *NLRB v. Express Publishing Co.*, 312 U.S. 426, 431–432 (1941) ("[O]ur review is limited"; "that question is not open here"); *Alaska Industrial Bd. v. Chugach Elec. Assn., Inc.*, 356 U.S. 320, 325 (1958) (those questions are "not open"); *NLRB v. International Van Lines*, 409 U.S. 48, 52, n.4 (1972) ("not before us"); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119, n.14 (1985) ("An argument that would modify the judgment ... cannot be presented unless a cross-petition has been filed"). ...