

## COMPLETE DIVERSITY AND THE CLOSING OF THE FEDERAL COURTS

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Article III of the Constitution was designed to establish a federal judiciary, in the words of *Federalist No. 81*, “competent to the determination of matters of national jurisdiction.”<sup>1</sup> The Framers were unwilling to rely on the state courts for this purpose, as the Antifederalists preferred, largely because “the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes.”<sup>2</sup> Indeed, the Framers were so apprehensive of state court bias, or the perception of bias, in favor of local interests that they considered a neutral federal tribunal necessary in some cases for the peace and harmony of the union.<sup>3</sup> They took care, accordingly, to extend federal jurisdiction to “cases in which the State tribunals cannot be supposed to be impartial.”<sup>4</sup> In particular, Article III, Section 2 provides that “[t]he judicial Power shall extend to,” among other things, “Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>5</sup>

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1. THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. *Id.* at 486.

3. THE FEDERALIST NO. 80, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

4. *Id.* at 478.

5. U.S. CONST. art. III, § 2 (emphasis added). Article III, section 2 provides in pertinent part as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of

Thus, although the Framers generally left undisturbed the exclusive jurisdiction of state courts over cases arising under state law, they established concurrent jurisdiction in federal courts over cases in which the impartiality of state courts would be tested most directly: those cases in which the interests of the state itself, or of its citizens, were adverse to the interests of other states, foreign countries, or their citizens. Of particular concern to the Framers in establishing federal jurisdiction over disputes “between citizens of different states” was the crippling effect that judicial bias favoring in-state interests, whether real or perceived, would have on interstate commerce. By ensuring that a neutral federal court—the “tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens”<sup>6</sup>—was available to adjudicate disputes between parties of diverse state citizenship, the Framers were animated by much the same spirit that resulted in the various substantive constitutional protections against state interference with interstate and foreign commerce.<sup>7</sup> As Justice Joseph Story explained in his classic *Commentaries on the Constitution*, the grant of federal jurisdiction over interstate disputes was intended “to increase the confidence and credit between the commercial and agricultural states,” for “[n]o man can be insensible to the value, in promoting credit, of the belief of there being a prompt, efficient, and impartial administration of justice in enforcing contracts.”<sup>8</sup>

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admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

*Id.*

6. THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

7. See U.S. CONST. art. I, § 8, cl. 3 (Interstate Commerce Clause); *id.* at § 10 (powers prohibited to the States); *id.* art. IV, § 2, cl. 1 (Privileges and Immunities Clause).

8. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1685 (1833). According to many observers, diversity jurisdiction has served these vital national interests well. Again, Justice Story: “Probably no part of the judicial power of the Union has been of

The value of diversity jurisdiction in promoting interstate commerce, however, depends largely on the equal availability of the federal forum to both sides of an interstate dispute. It follows, as Justice Story explained for the Supreme Court in the landmark case of *Martin v. Hunter's Lessee*,<sup>9</sup> that diversity jurisdiction was not intended by the Framers “to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.”<sup>10</sup> The federal courts have nevertheless narrowed federal jurisdiction over cases involving citizens of different States by imposing a number of doctrines—including, most notably the requirement of complete diversity between all plaintiffs and all defendants—that restrict access to the federal courts, especially by defendants. After discussing these judicially imposed limitations on the diversity jurisdiction, we demonstrate in this Article: that the requirement of complete

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more practical benefit, or has given more lasting satisfaction to the people.” *Id.* at § 1686. A century later, Judge John J. Parker was equally effusive in a famous article:

No power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union; and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.

John J. Parker, Judge, U.S. Circuit Court of Appeals, *The Federal Jurisdiction and Recent Attacks Upon It*, Address Before the Georgia Bar Association (June 3, 1932), in 18 A.B.A. J. 433, 437 (1932). Likewise, Chief Justice Taft, in a 1922 speech to the ABA, offered “a strong dissent from the view that danger of local prejudice in state courts against non-residents is at an end.” As he explained:

Litigants from the eastern part of the country who are expected to invest their capital in the West or South will hardly concede the proposition that their interests as creditors will be as sure of impartial judicial consideration in a western or southern state court as in a federal court. The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress. No single element . . . in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases.

William Howard Taft, Chief Justice, U.S. Supreme Court, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, Address Before the American Bar Association (Aug. 10, 1922), in 8 A.B.A. J. 601, 604 (1922).

9. 14 U.S. (1 Wheat.) 304 (1816).

10. *Id.* at 348.

diversity is inconsistent with the history and purposes of the diversity clause of Article III; that it is not required by, and may well contravene, that provision of the Constitution; and that it rests on a construction of the diversity statute that the Supreme Court has acknowledged was erroneous.

I.

A.

Despite the even-handed access to the federal courts intended by the Framers,<sup>11</sup> in the modern era forum selection is controlled by plaintiffs. The plaintiffs' bar, of course, rationally will choose the forum in which the likelihood of success is greatest. It is no accident, then, that large mass tort suits and class actions cluster in certain notoriously plaintiff-friendly state jurisdictions.<sup>12</sup> The proliferation of such complex interstate disputes in state courts has imposed massive, often bankrupting, costs on major American manufacturing corporations and has placed great burdens on the national economy.<sup>13</sup> Not surprisingly, the emergence of plaintiff-friendly state courts

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11. See *supra* notes 6–8 and accompanying text.

12. In addition, state court judges often must confront a variety of systemic pressures to stimulate the flow of plaintiffs to their courts and the flow of damages awards and attorneys' fees to their constituents. In Philadelphia, for example, judges of the Complex Litigation Center, which handles only mass torts, have advertised their intent to attract "business away from other courts." JOSHUA D. WRIGHT, INT'L CTR. FOR LAW & ECON., ARE PLAINTIFFS DRAWN TO PHILADELPHIA'S COURTS? AN EMPIRICAL EXAMINATION 1 (2011), [http://laweconcenter.org/images/articles/philadelphia\\_courts.pdf](http://laweconcenter.org/images/articles/philadelphia_courts.pdf) (quoting Amaris Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, LAW.COM, (Mar. 16, 2009), <http://www.law.com/jsp/article.jsp?id=1202429078888&slreturn=20131011222208>). And they have succeeded. Through the adoption of plaintiff-friendly procedural rules, the court has amassed a disproportionately heavy docket of cases brought by plaintiffs without any apparent connection to Philadelphia or even to Pennsylvania. *Id.* at app. A, 2 & n.56 (finding 67.2% of pending cases were brought by out-of-state plaintiffs who were not injured in Pennsylvania, based on a sample of about 20% of the pending cases in 2012—the cases for which either the plaintiff's home address or injury location were available).

13. See AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2011-2012, at 42 (2011), <http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf>. [hereinafter JUDICIAL HELLHOLES] ("Rulings in Judicial Hellholes often have national implications because they involve parties from across the country, can result in excessive awards that wrongfully bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry.").

has become a significant factor in the decision-making of interstate businesses.<sup>14</sup>

Congress recently addressed this problem in the class action context, as discussed more fully later in this Article, by providing for removal to federal district courts of large class action cases that previously had been concentrated in the courts of a few states.<sup>15</sup> Large mass tort cases likewise often are concentrated in select state court jurisdictions. Asbestos litigation is a well-known example.<sup>16</sup> According to one report, “Madison County[, Illinois] was and again has become the epicenter for national asbestos litigation.”<sup>17</sup> It has “the largest asbestos docket of any state court in the nation,”<sup>18</sup> even though “[o]nly about 1 in 10 asbestos claims [filed there has] any connection to the area.”<sup>19</sup> California has also seen a disproportionately high vol-

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14. J.J. LAUNIE ET AL., TEXAS PUB. POLICY FOUND., *The Economic Impact of Punitive Damages in Texas: Carpet-Bombing the State's Prosperity* 5 (1994) (finding that 29% of Texas firms in a randomized survey of 100 small business owners said punitive damages “had affected [their] plans to expand in Texas or relocate to another state”); Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 185–86 (1998) (quoting LAUNIE ET AL., *supra*); Adam Feit, Note, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 960 (2008) (“Being perceived as a plaintiff-friendly state is apparently bad for business. A state’s legal environment and friendliness to plaintiffs is one of several important criteria in the relocation of large companies.”); R. Harrison Smith, Note, *A Key Time for Qui Tam: The False Claims Act and Alabama*, 58 ALA. L. REV. 1199, 1213 (2007) (“[C]orporations are understandably hesitant to do business in an environment that is perceived as being overly litigious and unfair . . . .”); see also Mark A. Behrens & Cary Silverman, *The Constitutional Foundation for Federal Medical Liability Reform*, 15 J. HEALTH CARE L. & POL’Y 173, 190 n.129, 192 nn. 144–48 (2012) (citing several studies indicating that medical doctors consider likely medical malpractice damage awards when deciding where to relocate); Stephen Moore, *Cross Country: Mississippi’s Tort Reform Triumph*, WALL ST. J., May 10, 2008, at A9 (reporting that Mississippi’s tort reform legislation transformed the state “from judicial hell hole to job magnet”).

15. *Infra* notes 141–49 and accompany text.

16. See, e.g., LLOYD DIXON & GEOFFREY MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION 8 (2011), [http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND\\_MG1104.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1104.pdf) (“California, Illinois, New York, Pennsylvania, [and] Texas” have “historically been states with a large number of asbestos filings.”).

17. JUDICIAL HELLHOLES, *supra* note 13, at 21; see also Mark A. Behrens, *What’s New in Asbestos Litigation?*, 28 REV. LITIG. 501, 541 (2009) (“[T]here appears to be a resurgence in asbestos filings in Madison County, Illinois.”).

18. JUDICIAL HELLHOLES, *supra* note 13, at 21.

19. *Id.* at 4. “Neighboring St. Clair County has also emerged as a magnet for mesothelioma claims . . . .” *Id.* And McLean County, Illinois has become a “Judicial Hellhole due to its unique practice of allowing [‘civil conspiracy’] lawsuits that seek compensa-

ume of asbestos-related litigation.<sup>20</sup> Asbestos-related cases have imposed significant costs on the American economy. “Over the past 30 years, 56 asbestos personal injury trusts have been set up on behalf of companies that have filed for reorganization under U.S. bankruptcy law.”<sup>21</sup>

### B.

Mass tort cases brought in state court invariably involve adverse parties of diverse citizenship, yet the out-of-state defendants are locked in state court, unable to remove the cases to federal court. The cases cannot be heard in federal court because the Supreme Court early on interpreted the diversity jurisdiction statute, now codified at 28 U.S.C. § 1332,<sup>22</sup> to require “complete” diversity of citizenship. That is, the state citizenship of every plaintiff in the case must be different from that of every defendant.<sup>23</sup> Thus, the plaintiffs in mass tort actions arising out of the same or related activity can keep their out-of-state defendants in state court by the simple expedient of naming at least one in-state defendant.

In addition to the judge-made complete diversity rule, the federal courts have developed an entire framework of doctrines that seem designed largely and systematically to limit or defeat the text and purposes of Article III’s grant of diversity jurisdiction. Some prominent examples include the following:

1. Relying on dicta in *Shamrock Oil & Gas Corp. v. Sheets*,<sup>24</sup> lower courts have applied a strong presumption against removal, some holding that “all doubts about jurisdiction should be resolved in favor of remand to state court.”<sup>25</sup> The *Shamrock Oil* dicta, however, rested on inferences the Supreme Court

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tion for asbestos-related injuries, even when the plaintiff did not come in contact with the named defendant’s products.” *Id.*

20. Behrens, *supra* note 17, at 539–41. Tort reform has substantially decreased the number of asbestos suits in other states, such as Texas, Mississippi, Ohio, South Carolina, and Rhode Island. *See id.* at 535–38.

21. DIXON & MCGOVERN, *supra* note 16, at 1.

22. The origins of this statute can be traced to the Judiciary Act of 1789. *See* § 11, 1 Stat. at 178.

23. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

24. 313 U.S. 100 (1941); *see also* *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (quoting dicta from *Shamrock Oil*); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002) (same).

25. *E.g.*, *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999); *see also, e.g.*, *Barbour v. Int’l Union*, 640 F.3d 599, 605 (4th Cir. 2011).

drew from its contemporaneous understanding of the “Congressional purpose . . . [and] policy” reflected in the removal statutes as they existed at that time.<sup>26</sup> And as the Supreme Court has subsequently recognized, “whatever apparent force this [reasoning] might have claimed when *Shamrock* was handed down has been qualified by later statutory development.”<sup>27</sup> Although the Supreme Court has thus squarely rejected the *Shamrock Oil* dicta, holding instead that there is “no question that whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception,”<sup>28</sup> the lower courts have continued to rely on *Shamrock Oil* and apply a presumption against removal.

2. Relying on the Supreme Court’s decision in *Whitcomb v. Smithson*,<sup>29</sup> lower courts have applied the so-called “voluntary-involuntary rule,” whereby an out-of-state defendant is prohibited from removing a case where complete diversity results from the dismissal of non-diverse defendants without the plaintiffs’ assent.<sup>30</sup> This rule is based on the theory that, “in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case.”<sup>31</sup> The Supreme Court, however, has made clear that:

Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.<sup>32</sup>

Further, a presumption that plaintiffs are entitled to state court forums if they so choose is inconsistent not only with the removal statutes, but also with the diversity jurisdiction established by the Constitution. As the Committee on the Judiciary commented in passing the Class Action Fairness Act of 2005, “there is no such presumption. In fact, the whole purpose of

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26. *Shamrock Oil*, 313 U.S. at 108.

27. *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003).

28. *Id.* at 698; see also Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 630–33 (2004).

29. 175 U.S. 635 (1900).

30. *E.g.*, *Insinga v. LaBella*, 845 F.2d 249, 252 (11th Cir. 1988).

31. *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918).

32. *Wecker v. Nat’l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907).

diversity jurisdiction is to preclude any such presumption by allowing state-law based claims to be removed from local courts to federal courts, so as to ensure that all parties can litigate on a level playing field . . . .”<sup>33</sup>

3. Courts have properly recognized the fraudulent joinder doctrine as an exception to the voluntary-involuntary rule.<sup>34</sup> Under this doctrine, a case may be removed if the non-diverse defendant is dismissed because the plaintiff pleaded fraudulent jurisdictional facts or failed to state a case against the non-diverse defendant.<sup>35</sup> But courts have weakened this doctrine substantially by a series of rules designed to keep diversity cases out of federal court:

(a) Courts have held that “the test for [improper] joinder is whether the defendant has demonstrated that there is *no possibility* of recovery by the plaintiff against an in-state defendant.”<sup>36</sup> This standard is extremely difficult, and often impossible, to meet.

(b) Courts disregard evidence that the plaintiff’s purpose in joining a non-diverse defendant was to thwart federal jurisdiction.<sup>37</sup>

(c) In analyzing fraudulent joinder, courts apply the “pleadings only” rule, under which, “[i]n evaluating the alleged fraud, the district court must focus on the plaintiff’s complaint at the time the petition for removal was filed.”<sup>38</sup> This rule is often fatal to removal because a plaintiff can simply avoid pleading facts that would establish the jurisdictional prerequisites for removal. In sharp contrast, to defeat jurisdiction in diversity actions filed originally in federal court, courts will “look beyond the pleadings,” realign the parties, focus exclusively on the “principal purpose of the suit,” and disregard allegations they consider mere “window-dressing designed to satisfy the requirements of diversity jurisdiction.”<sup>39</sup>

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33. S. REP. NO. 109-14, at 57 (2005).

34. See, e.g., *Insigna*, 845 F.2d at 254.

35. *Id.*

36. *In re 1994 Exxon Chem. Fire*, 558 F.3d 378, 385 (5th Cir. 2009) (alteration in original) (emphasis added) (quoting *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 574 (5th Cir. 2004)).

37. See *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1290–91 (11th Cir. 1998) (citing *Chicago, Rock Island & Pac. Ry. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913)).

38. *Brown v. Jevic*, 575 F.3d 322, 326 (3d Cir. 2009).

39. *Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63, 69, 72 (1941).

(d) Courts prohibit jurisdictional discovery to support removal or uncover fraudulent joinder. Indeed, they may regard any request for post-removal discovery as “tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists.”<sup>40</sup>

4. Courts ignore the juridical status of limited partnerships and LLCs under state law, treating these legal entities instead as collections of individuals, even while acknowledging that this rule “can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization.”<sup>41</sup> Thus, complete diversity is lacking if any plaintiff is a citizen of the same state as any one of the defendant’s partners.

5. Even though federal court plaintiffs are permitted to include the value of defendants’ counterclaims for purposes of satisfying the amount-in-controversy requirement,<sup>42</sup> courts prohibit defendants seeking removal from adding the value of their counterclaims to plaintiffs’ state court claims for this purpose.<sup>43</sup>

6. Courts have circumvented the Class Action Fairness Act’s grant of federal jurisdiction over “mass actions” involving “monetary relief claims of 100 or more persons”<sup>44</sup> by permitting the plaintiffs’ lawyers to simply file a series of identical suits with fewer than 100 plaintiffs each.<sup>45</sup>

“It is perhaps inevitable that courts will interpret jurisdictional statutes with attention to their own institutional interests.”<sup>46</sup> But the judicial resistance to diversity jurisdiction reflected in the complete diversity rule and the doctrines that followed on its heels gives rise to a jurisdictional paradox. On the one hand, for example, an ordinary slip-and-fall action involving a single plaintiff and single defendant of diverse citizenship can be heard in federal court, although it has no impact

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40. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1217 (11th Cir. 2007).

41. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990); see also James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 32–33 (1964).

42. See, e.g., *Spectacor Mgmt. Grp. v. Brown*, 131 F.3d 120, 121 (3d Cir. 1997).

43. See, e.g., *FLEXcon Co. v. Ramirez Commercial Arts, Inc.*, 190 F. Supp. 2d 185, 187 (D. Mass. 2002).

44. 28 U.S.C. § 1332(d)(11) (2006).

45. See *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 950 (9th Cir. 2009).

46. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1489 (2008).

on interstate commerce. On the other hand, federal jurisdiction does not extend to mass tort actions arising out of the same or a related series of activities, brought by myriad plaintiffs against multiple defendants from multiple jurisdictions, and seeking massive recoveries that could collectively have a serious adverse effect on interstate commerce. As the history and text of the diversity clause make clear, the requirement of complete diversity in this context is at war with the Framers' animating purpose in establishing diversity jurisdiction.

## II.

### A.

Under the Articles of Confederation, commerce between the States had been shackled by local prejudice and mutual distrust.<sup>47</sup> The Framers well understood that if the fledgling nation was to succeed, it would have to overcome these tendencies. The new national government was thus given ultimate legislative power over the regulation of interstate commerce, the citizens of each State were guaranteed all of the privileges and immunities of citizens in all of the States, and the States were expressly barred from enacting then-common discriminatory measures such as tender laws and laws impairing the obligation of debts and other contracts.<sup>48</sup> The new federal judiciary correspondingly was designed to provide a neutral tribunal, not beholden to local interests, in which interstate controversies could be adjudicated. Thus, by enabling investors and commercial enterprises to cross state lines with confidence that their legal disputes would be fairly adjudicated in new markets, diversity jurisdiction went hand-in-hand with other con-

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47. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) ("Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce . . ."); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) ("The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."); see also THE FEDERALIST NO. 7, at 62–63 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (warning that without union, "[e]ach State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent.").

48. See U.S. CONST. art. I, §§ 8, 10; *id.* art. IV, § 2.

stitutional provisions designed to foster development of a truly national economy and identity.

The call for federal diversity jurisdiction first appeared in the Constitutional Convention on May 29, 1787, in the Virginia Plan, designed by James Madison and proposed by Edmund Randolph.<sup>49</sup> The Virginia Plan's jurisdictional provision bears only a faint resemblance to the corresponding section of the Constitution that eventually was adopted and ratified. It lacked a grant of general subject matter jurisdiction over disputes arising under federal law, instead favoring specific grants of jurisdiction over the collection of national revenue, the impeachment of national officers, certain maritime criminal and property matters, and disputes involving "foreigners or citizens of other States."<sup>50</sup> The Virginia Plan also proposed to vest federal courts with jurisdiction generally over all "questions which may involve the national peace and harmony."<sup>51</sup>

Although the Virginia Plan's specific reference to "cases in which foreigners or citizens of other States . . . may be interested" preceded its reference to national harmony, Randolph later clarified that such cases were a species of those "questions which may involve the national peace and harmony."<sup>52</sup> On June 13, 1787, Randolph moved to boil down the resolution to its essence, leaving to a subcommittee "the business of . . . detail[ing] it" in specific terms.<sup>53</sup> Apart from revenue col-

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49. See Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 475–77 (2010).

50. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed. 1911) [hereinafter "FARRAND'S RECORDS"] ("[Resolved] . . . that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.").

51. *Id.*

52. *Id.* at 238.

53. According to the notes of Robert Yates,

Gov. Randolph observed the difficulty in establishing the powers of the judiciary—the object however at present is to establish this principle, to wit, the security of foreigners where treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof. This being once established, it will be the business of a sub-committee to detail it; and therefore moved to obliterate such parts of the resolve so as only to establish the principle, to wit, *that the jurisdiction of the national judiciary*

lection and impeachment, all of the Virginia Plan's other specific federal jurisdictional grants were subsumed, Randolph explained, in the "national harmony" provision at its conclusion.<sup>54</sup> Thus, the judiciary's function of protecting "the security of foreigners where treaties are in their favor" and "the harmony of states and that of the citizens thereof" would be preserved by this general provision.

Randolph's parallel treatment of "the security of foreigners" and the "harmony of states" further highlights the neutral forum rationale behind diversity jurisdiction. Just as foreigners would be reluctant to enter into political and economic relations without assurance that their agreements would be enforced by a national judiciary, interstate harmony would be at risk absent a national forum for resolving disputes in which the interests of two or more states, or their respective citizens, were adverse.

Not until July 18, well into the debate over the new judiciary, did the Convention take up and adopt a proposal extending federal jurisdiction to "cases arising under laws passed by the general Legislature."<sup>55</sup> This provision, combined with the provision concerning cases "involv[ing] the national Peace and Harmony," was then taken up by the Committee of Detail.<sup>56</sup> In keeping with Randolph's expectation, the Committee provided the "detail[s]" of federal jurisdiction, eliminating the general language regarding cases of "national peace and harmony" and replacing it with specific jurisdictional grants over particular types of cases, including "Controversies . . . between Citizens of different States."<sup>57</sup> This provision, which ultimately became the diversity clause, was apparently uncontroversial, for it attracted no attention as the Convention debated various amendments to the Committee of Detail's proposed judiciary article.

### B.

When the Convention adjourned and sent the new Constitution to the States for ratification, the diversity clause did not go

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*shall extend to all cases of national revenue, impeachment of national officers, and questions which involve the national peace or harmony.*

*Id.*

54. *Id.*

55. 2 *id.* at 39.

56. *Id.* at 132–33.

57. *Id.* at 173.

unnoticed by the Antifederalists. They argued generally that the proposed federal judiciary would, in George Mason's words, "utterly annihilate . . . state courts."<sup>58</sup> They argued that the diversity clause would force ordinary citizens to endure the expense and inconvenience of litigating their disputes in distant federal courts, especially if appeals could be taken to the faraway Supreme Court.<sup>59</sup>

The leading advocates of diversity jurisdiction included some of the leading Framers: James Madison, Alexander Hamilton, and James Wilson. Madison, in the Virginia ratifying convention, defended diversity jurisdiction by succinctly stating its rationale:

It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective, administration of justice has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.<sup>60</sup>

Fellow Virginian, and future Chief Justice, John Marshall placed the point in its larger context, echoing Randolph's argument at the Constitutional Convention that a neutral federal forum for resolving interstate disputes was needed to preserve the peace and harmony of the union:

To preserve the peace of the Union only, its jurisdiction in this case ought to be recurred to. Let us consider that, when citizens of one state carry on trade in another state, much must be due to the one from the other, as is the case between North Carolina and Virginia. Would not the refusal of justice to our

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58. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed. 1901) [hereinafter ELLIOT'S DEBATES]; see also 3 *id.* at 527 (similar).

59. 3 *id.* at 526 (George Mason) ("Their *jurisdiction* further extends to controversies between citizens of different states. Can we not trust our state courts with the decision of these? . . . What! carry me a thousand miles from home—from my family and business—to where, perhaps, it will be impossible for me to prove that I paid it? Perhaps I have a respectable witness who saw me pay the money; but I must carry him one thousand miles to prove it, or be compelled to pay it again."); see also 4 *id.* at 138 (Samuel Spencer) ("Nothing can be more oppressive than the cognizance with respect to controversies between citizens of different states. In all cases of appeal, those persons who are able to pay had better pay down in the first instance, though it be unjust, than be at such a dreadful expense by going such a distance to the Supreme Federal Court.")

60. 3 *id.* at 533.

citizens, from the Courts of North Carolina, produce disputes between the states? Would the federal judiciary swerve from their duty in order to give partial and unjust decisions?<sup>61</sup>

In Pennsylvania's ratifying convention, James Wilson also defended the Constitution's grant of jurisdiction over interstate and international disputes as a means of securing protection from state court bias favoring local interests: "[I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort?"<sup>62</sup> Wilson saw diversity jurisdiction as necessary to achieve the "important [object] of extend[ing] our manufactures and our commerce[.] This cannot be done, unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained, unless we give the power of deciding upon those contracts to the general government."<sup>63</sup>

The most influential defense of the new federal judiciary, however, was provided by Alexander Hamilton in his classic series of essays on Article III in *The Federalist Papers*. In *Federalist No. 80*, Hamilton emphasized the critical importance of a neutral forum for resolving disputes "in which the State tribunals cannot be supposed to be impartial and unbiased."<sup>64</sup> As he explained:

No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.<sup>65</sup>

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61. *Id.* at 557.

62. 2 *id.* at 491.

63. *Id.* at 492. Less prominent supporters of the Constitution likewise defended the diversity jurisdiction. In the North Carolina convention, for example, William Davie, who had attended the Constitutional Convention, explained that "[t]he security of impartiality is the principal reason for giving up the ultimate decision of controversies between citizens of different states." 4 *id.* at 159. Davie maintained that diversity jurisdiction was "essential to the interest of agriculture and commerce." *Id.* Among other things, he argued that "tedious delays of judicial proceedings, at present, in some states, are ruinous to creditors," and that it was "necessary, therefore, in order to obtain justice, that we recur to the judiciary of the United States, where justice must be equally administered, and where a debt may be recovered from the citizen of one state as soon as from the citizen of another." *Id.*

64. THE FEDERALIST NO. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

65. *Id.* at 478.

As Hamilton further elaborated, “in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.”<sup>66</sup> He argued that such cases should be assigned to “that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.”<sup>67</sup> Like Marshall and Randolph, Hamilton also emphasized that the federal courts, by providing a neutral tribunal for resolving interstate disputes, would serve a critical role in preserving the peace and harmony of the Union: “The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is . . . essential to the peace of the Union . . . .”<sup>68</sup>

C.

The history of the framing and ratification of the diversity clause thus makes clear that it was designed to ensure that a party in a dispute with a citizen of a different state would be entitled to litigate that dispute in a presumably neutral federal court rather than in a possibly biased state court. The Supreme Court, in one of its earliest examinations of diversity jurisdiction, confirmed this understanding:

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the deci-

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66. *Id.*

67. *Id.*

68. *Id.* at 477.

sion of controversies between aliens and a citizen, or between citizens of different states.<sup>69</sup>

The language of the clause achieves that purpose plainly and economically, consuming but a scant six words in extending federal jurisdiction to “Controversies . . . between Citizens of different States.”<sup>70</sup> By its terms, the diversity clause is unqualified: any case in which a plaintiff sues a citizen of another state conforms to the literal language of Article III, Section 2—it is a “Controversy . . . between Citizens of different States”—even if the plaintiff also names a fellow-citizen as a defendant. And although the language of Section 2 may also be amenable to a construction calling for complete diversity, such a construction would constitute a restriction on the literal scope of federal diversity jurisdiction and would impede the Framers’ purpose of providing a federal judicial forum to genuinely diverse parties. Unsurprisingly, no support for restricting diversity jurisdiction to cases of complete diversity can be found anywhere in the history of the framing and ratification of Article III.

In keeping with the text and history of the diversity clause, the Supreme Court has interpreted that clause to require only *minimal diversity*. That is, federal jurisdiction over interstate disputes is authorized under the Constitution “so long as any

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69. *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled in part on other grounds*, *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844); *see also, e.g., Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1188 (2010) (stating that “diversity jurisdiction’s basic rationale” is “opening the federal courts’ doors to those who might otherwise suffer from local prejudice against out-of-state parties”); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (“The object of the provisions of the Constitution and statutes of the United States, in conferring upon the Circuit Courts of the United States jurisdiction of controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides.”); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855) (“The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different states, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners.”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) (“The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between . . . citizens of different states . . . it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts.”).

70. U.S. CONST. art. III, § 2.

two adverse parties are not co-citizens.”<sup>71</sup> In *State Farm Fire & Casualty Co. v. Tashire*,<sup>72</sup> the Court thus upheld the federal interpleader statute, which applies in any case in which any two adverse parties have diverse citizenship, even though other parties to the case destroy complete diversity.<sup>73</sup>

### III.

#### A.

Given that the grant of diversity jurisdiction in Article III is satisfied in any case where at least two adverse parties are citizens of different States, the question arises whether Congress has authority to narrow the scope of diversity jurisdiction by requiring complete diversity. Put differently, in light of Article III’s unequivocal language providing that the “judicial power shall be vested” in the Supreme Court and congressionally established lower courts, and that it “shall extend . . . to controversies . . . between citizens of different states,” can Congress constitutionally restrict the jurisdiction of federal courts to controversies involving “complete diversity”? The Supreme Court resolved this issue shortly after the federal judiciary was created in 1789.

The First Congress, pursuant to its power under Article III, Section 1, to “ordain and establish” inferior federal courts,<sup>74</sup> immediately enacted the Judiciary Act of 1789, which established federal district and circuit courts.<sup>75</sup> That the 1789 Act vested circuit courts with original jurisdiction over any suit “between a citizen of the State where the suit is brought, and a citizen of another State” makes clear the importance to the founding generation of providing a neutral federal tribunal for resolving interstate disputes.<sup>76</sup> In contrast, the 1789 Act did not grant lower

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71. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967).

72. 28 U.S.C. § 1335 (2006).

73. *State Farm*, 386 U.S. at 537.

74. “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

75. 1 Stat. 73 (1789) (codified as amended in scattered sections of 28 U.S.C.).

76. § 11, 1 Stat. at 178 (codified as amended at 28 U.S.C. § 1332).

federal courts general federal question jurisdiction (so-called "arising under" jurisdiction).<sup>77</sup> Indeed, apart from the Federalists' short-lived attempt to confer such jurisdiction as part of the Midnight Judges Act in 1801,<sup>78</sup> it was not until the Judiciary Act of 1875, almost a century after the 1789 Act, that Congress conferred federal question jurisdiction on lower federal courts.<sup>79</sup>

The First Congress did not, however, vest in the federal courts the full scope of the diversity jurisdiction set forth in Article III. Instead, the Judiciary Act of 1789 limited the diversity jurisdiction to cases where the amount in controversy exceeded five hundred dollars.<sup>80</sup> The first Judiciary Act also limited diversity jurisdiction to controversies where one of the parties was a citizen of the State where the suit was brought and barred jurisdiction over suits brought by the assignee of "any promissory note or other chose in action," except "foreign bills of exchange" unless the federal courts would have had jurisdiction "if no assignment had been made."<sup>81</sup> Removal jurisdiction was likewise subject to a five hundred dollar amount-in-controversy requirement, and was limited to cases where the defendant was a citizen of a State other than that where the action was brought.<sup>82</sup>

In *Turner v. Bank of North America*,<sup>83</sup> the Bank brought suit in federal circuit court in North Carolina against the debtor, Turner (trustee of the estate of the deceased original debtor), on a promissory note that it had acquired by assignment from Biddle & Co.<sup>84</sup> The Bank's president and directors were all citizens of Pennsylvania and the debtor was a citizen of North Carolina, and so the case was "between citizens of different states" and thus satisfied the requirement for federal jurisdic-

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77. The Act did, however, provide for Supreme Court review of state high court decisions either invalidating federal statutes or treaties or rejecting claims or defenses based on federal laws, treaties, or the Constitution. See § 25, 1 Stat. 85–86.

78. See The Judiciary Act of 1801, ch. 4, § 11, 2 Stat. 89, 92, *repealed by* Act of 1802, ch. 31, 2 Stat. 156.

79. Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331).

80. See Judiciary Act of 1789 § 11.

81. *Id.*

82. *Id.* § 12.

83. 4 U.S. (4 Dall.) 8 (1799).

84. *Id.* at 8.

tion under Article III.<sup>85</sup> But the diversity jurisdiction provision of the Judiciary Act specifically excluded from federal court “any suit to recover the contents of any promissory note . . . in favour of an assignee, unless a suit might have been prosecuted in such Court” by the assignor.<sup>86</sup> In other words, the Act required that the citizenship of Biddle & Co., the assignor of the note and a *nonparty* to the suit, be diverse to the debtor for the suit to be heard in federal court. Because the assignor’s citizenship had not been alleged and did not otherwise appear in the record of the case, the debtor argued that the Bank had not carried its burden of establishing that the circuit court had jurisdiction over the suit.<sup>87</sup> The Bank responded by claiming that the requirement “imposed a limitation upon the judicial power, not warranted by the constitution.”<sup>88</sup> The Bank observed that its suit against the debtor was “between citizens of different states,” as prescribed by Article III, and argued that “congress can no more limit, than enlarge the constitutional grant.”<sup>89</sup>

Although the Court’s opinion did not address this argument, it relied on the statute in holding that the circuit court lacked jurisdiction over the case.<sup>90</sup> The Court thus implicitly held that this limitation on the jurisdiction prescribed by Article III was constitutional. The report of this decision, moreover, records the following statement by Justice Chase, a former Antifederalist, during oral argument:

The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.<sup>91</sup>

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85. *Id.* at 10–11.

86. *Id.* at 9 (quoting Judiciary Act of 1789).

87. *Id.* at 8–9.

88. *Id.* at 10.

89. *Id.*

90. *Id.* at 11.

91. *Id.* at 10 (Chase, J.).

A half century later, the Supreme Court relied on this comment in expressly upholding the constitutionality of the same statutory limitation.<sup>92</sup>

B.

The argument against the constitutionality of statutory restrictions on federal jurisdiction over the cases and controversies enumerated in Article III is far stronger than Justice Chase's dismissive footnote would suggest. No less a figure than Justice Joseph Story outlined the textual argument in *Martin v. Hunter's Lessee*, upholding the constitutionality of the Supreme Court's jurisdiction to review decisions of state courts in cases enumerated in Article III.

Justice Story forcefully argued that "[t]he language of [Article III] throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation."<sup>93</sup>

Just as Section 1 provides that the federal judicial power "*shall be vested* (not may be vested)" in a supreme court and congressionally established inferior courts, Justice Story noted, it also provides that "[t]he judges, both of the supreme and inferior courts, *shall hold* their offices during good behaviour, and *shall*, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office."<sup>94</sup> Justice Story argued that "[t]he language, if imperative as to one part, is imperative as to all."<sup>95</sup> Congress thus may no more refuse to vest the judicial power than it may "create or limit any other tenure of the judicial office" (besides tenure "during good behaviour") or "refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office[.]"<sup>96</sup>

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92. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850).

93. 14 U.S. (1 Wheat.) 304, 328 (1816); see also 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 612–15 (1953) (arguing that the language of Article III is mandatory and that the federal courts must be open to all the enumerated cases and controversies).

94. *Martin*, 14 U.S. (1 Wheat.) at 328.

95. *Id.* at 330.

96. *Id.* at 328–29.

Justice Story also noted that the language of Article III vesting the judicial power in a coequal branch of the government mirrors that of Articles I and II:

The first article declares that ‘all legislative powers herein granted *shall be vested* in a congress of the United States.’ Will it be contended that the legislative power is not absolutely vested? that the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that ‘the executive power *shall be vested* in a president of the United States of America.’ Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?<sup>97</sup>

Justice Story then turned to the language of Section 2 providing that “the judicial power *shall extend*” to the enumerated cases and controversies.<sup>98</sup> These words too, said Justice Story, are “used in an imperative sense,” and “import an absolute grant of judicial power.”<sup>99</sup> Thus, he urged, the “duty of congress to vest the judicial power of the United States” must be understood as “a duty to vest the *whole judicial power*,” or else “congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all.”<sup>100</sup> In short, the plain language of Article III, Justice Story concluded, makes clear that the federal “judicial power shall extend to all the cases enumerated in the constitution.”<sup>101</sup>

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97. *Id.* at 329–30; see also Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 842 (1984) (making a similar argument). James Madison likewise relied on the parallels between Articles I, II, and III in arguing that Congress lacked authority to restrict the President’s power to remove executive officers: “I therefore say it is incontrovertible, if neither the Legislative nor Judicial powers are subject to qualifications, other than those demanded in the Constitution, that the Executive powers are equally unabateable as either of the others.” 1 ANNALS OF CONG. 464 (1789) (Joseph Gales ed., 1834).

98. *Martin*, 14 U.S. (1 Wheat.) at 331 (citing U.S. CONST. art. III, § 2).

99. *Id.*

100. *Id.* at 330.

101. *Id.* at 333; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) (“The constitution vests the *whole* judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish.” (emphasis added)).

While Justice Story's view of federal jurisdiction as mandatory has not prevailed, his textual analysis has great force and has never been satisfactorily answered. To be sure, after identifying the classes of cases and controversies to which the judicial power shall extend and prescribing the Supreme Court's original jurisdiction, Article III, Section 2 provides that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*"<sup>102</sup> Given that Article III on its face commits the creation of inferior federal courts to Congress's discretion,<sup>103</sup> the Exceptions Clause could be understood to permit Congress to avoid vesting some of the judicial power simply by excepting certain cases or controversies from the Supreme Court's appellate jurisdiction and then declining to create inferior courts with jurisdiction over those matters. Taken to its logical end point, this reading would permit Congress to avoid vesting any of the judicial power apart from the narrow category of cases over which original jurisdiction explicitly is assigned to the Supreme Court by Article III.

Whatever force this reading might have if the Exceptions Clause is viewed only in conjunction with Congress's discretion regarding the creation of inferior federal courts, it is in undeniable tension with Article III's dual commands that the judicial power "shall be vested" in the Supreme Court and congressionally created inferior courts, and that this power "shall extend" to the cases and controversies identified in Section 2. Like any other legal text, Article III should of course be read as a whole in a manner that gives effect to all of its provisions and any reading of some of those provisions that would render others meaningless should be avoided if reasonably possible.

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102. U.S. CONST. art. III, § 2 (emphasis added).

103. The language of Article III vesting the federal judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" resulted from a compromise at the Constitutional Convention between those who wished to mandate the creation of federal courts and those who wished to vest judicial power only in a Supreme Court. *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 50, at 124–25. The language ultimately adopted reflects a "distinction," urged at the Convention by James Madison and James Wilson, "between establishing such [inferior] tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them." *Id.* at 125.

Such a reading is clearly possible: Although the mandatory provisions of Article III vesting and extending the federal judicial power require that the *entire* judicial power be vested *somewhere* in the federal judiciary, Congress's authority over the inferior Courts and its ability to make exceptions to the Supreme Court's appellate jurisdiction give Congress substantial discretion over *where* in the federal judiciary that power is vested. Thus, Congress may choose not to grant inferior federal courts jurisdiction over certain cases or controversies enumerated in Article III (or may even choose not to create inferior federal courts at all), so long as the Supreme Court retains appellate jurisdiction over any cases or controversies not cognizable in the inferior federal courts. Alternatively, Congress may except certain enumerated cases or controversies from the Supreme Court's appellate jurisdiction, so long as it creates inferior federal courts with jurisdiction over those matters. Congress may not, however, remove any of the enumerated cases or controversies from the federal judiciary entirely, *both* by excepting it from the Supreme Court's appellate jurisdiction *and* by declining to create an inferior federal court with jurisdiction to consider it. As summarized by Alexander Hamilton in *Federalist No. 82*, "[t]he evident aim of the plan of the convention is that *all* the causes of the specified classes shall, for weighty public reasons, receive their *original or final* determination in the courts of the Union."<sup>104</sup>

This reading of Article III both respects its mandatory language vesting and extending the federal judicial power, and serves its central purposes, including providing a neutral tribunal for resolving "cases in which the State tribunals cannot be supposed to be impartial."<sup>105</sup> Additionally, it still accords Congress substantial control over the *allocation* of federal judicial power, consistent with Congress's express control over the existence of inferior federal tribunals and with the plain terms

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104. THE FEDERALIST NO. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added); *see also, e.g., Martin*, 14 U.S. (1 Wheat.) at 333 ("The judicial power shall extend to all the cases enumerated in the constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.").

105. THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

of the Exceptions Clause. Further, this reading is completely consistent with the justification for the constitutional provisions regarding inferior federal courts advanced by leading Framers of the Constitution.<sup>106</sup> Finally, it is truer to the plain language of the Exceptions Clause—which by its terms grants Congress power to make exceptions only to the “supreme Court[’s] appellate Jurisdiction,” not to “[t]he judicial Power of the United States”—than is the alternative reading, which would allow Congress to use the clause to remove broad classes of cases and controversies (potentially including all but those expressly assigned to the Supreme Court’s original jurisdiction) from the federal judicial power entirely.<sup>107</sup>

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106. See, e.g., THE FEDERALIST NO. 81, AT 485 (Alexander Hamilton) (“The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance.”); 1 FARRAND’S RECORDS, *supra* note 50, at 124 (Madison) (“[U]nless inferior tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to a most oppressive degree.”).

107. See, e.g., CROSSKEY, *supra* note 93, at 616. Some have argued that Article III establishes mandatory federal jurisdiction over some of the classes of cases and controversies it identifies (such as cases arising under the Constitution, laws, and treaties of the United States), but not over others (such as controversies between citizens of different States). See, e.g., Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990). Indeed, Justice Story suggested such a distinction in *Martin* itself, albeit in dicta upon which he did not “place any implicit reliance.” 14 U.S. (1 Wheat.) at 336. As Justice Story noted, by its terms Section 2 extends some heads of federal judicial power to “all cases,” but extends others only to “controversies,” not “all controversies.” *Id.* at 334. “From this difference of phraseology,” he surmised, “perhaps, a difference of constitutional intention may, with propriety, be inferred.” *Id.* “In respect to the first class,” Justice Story suggested, “it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to all cases; and in the latter class to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.” *Id.* Justice Johnson, in a separate opinion, answered this argument:

‘Shall extend to controversies,’ appears to me as comprehensive in effect, as ‘shall extend to all cases.’ For, if the judicial power extend ‘to controversies between citizen and alien,’ &c., to what controversies of that description does it not extend? If no case can be pointed out which is excepted, it then extends to all controversies.

*Id.* at 375.

Furthermore, it appears that at the time the Constitution was drafted and ratified, the term “cases” was understood to include both criminal and civil cases, while the term “controversies” was understood to denote civil cases only. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431–32 (1793) (Fredell, J.); 1 WILLIAM BLACKSTONE, COM-

## IV.

Justice Story's conclusion—that the plain text of Article III mandates federal court jurisdiction in all enumerated cases or controversies—is also supported by the historical evidence from the Constitutional Convention and the ratification debates.

## A.

As discussed above,<sup>108</sup> the Committee of Detail developed much of the specific language of Article III. Accordingly, it bears emphasis that this committee specifically considered and rejected a draft proposal that would have extended federal jurisdiction “1. to all cases, arising under laws passed by the general Legislature[,] 2. to impeachment of officers, and 3. to *such other cases, as the national legislature may assign, as involving the national peace and harmony, [inter alia] in disputes between citizens of different states . . .*”<sup>109</sup> The committee thus “considered and then rejected a proposal which would have given Congress power to particularize the jurisdiction” of the federal courts.<sup>110</sup>

On August 6, 1787, the Committee of Detail reported a draft constitution to the Convention. After providing in its first sec-

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MENTARIES app. at 420 (St. George Tucker ed., 1803). Accordingly, it seems likely that Article III uses the term “cases” to refer to both civil and criminal judicial proceedings, but uses the term “controversies” to refer more narrowly only to civil proceedings. Thus, as Professor Crosskey explained,

[I]n section 2 of the Judiciary Article, the omission of “all” from the categories in which the word “Controversies” was used, arose from the contrast, in the minds of the framers, between covering only *some* of the “Cases” to which “the United States” or “a State” might be “a Party”—namely, those which were “Controversies,” or civil suits—and covering “all Cases,” whether civil or criminal, in the categories preceding these in the section. Nothing else was involved; certainly nothing else was expressed . . . .

CROSSKEY, *supra* note 93, at 614; see also John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 220–21 (1997) (explaining that the Framers included the term “all” simply to make unmistakably clear that federal jurisdiction extended to both civil and criminal proceedings in such “cases”); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1575 (1990) (similar). Indeed, as discussed below, during the Constitutional Convention, the Committee on Detail rejected a proposal that would have made federal question jurisdiction mandatory, but diversity jurisdiction subject to congressional regulation. See *infra* notes 111–116 and accompanying text.

108. See *supra* notes 55–57 and accompanying text.

109. 2 FARRAND'S RECORDS, *supra* note 50, at 146–47 (emphasis added).

110. Clinton, *supra* note 97, at 773.

tion that “[t]he Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States,” and providing in its second section for tenure “during good behavior” and undiminished compensation, this draft identified the scope of the federal jurisdiction in a third section as follows:

The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.<sup>111</sup>

It is unclear whether this draft section of what ultimately became Article III—and in particular its last sentence—was intended to allow Congress to eliminate certain types of cases and controversies from the jurisdiction of the federal courts entirely, or simply to allow Congress to allocate federal jurisdiction between the Supreme Court and any inferior courts that Congress might establish.<sup>112</sup>

On August 27, the Convention made a number of important amendments to this draft provision, three of which strongly suggest that although Congress could allocate the judicial power between the Supreme Court and any inferior federal courts it chose to create, it could not eliminate all federal jurisdiction over any of the specified cases and controversies. Per-

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111. 2 FARRAND'S RECORDS, *supra* note 50, at 186–87.

112. See Clinton, *supra* note 97, at 791 (suggesting the latter interpretation).

haps most importantly, the Convention considered and rejected a motion to insert, after the specification of the Supreme Court's original jurisdiction, language providing that "[i]n all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct."<sup>113</sup> Thus, the delegates clearly considered but rejected a proposal that would have explicitly permitted broad legislative control over federal court jurisdiction. As one commentator has observed, "A clearer rejection of congressional authority over judicial powers is hard to imagine."<sup>114</sup>

The Convention next voted unanimously to strike the entire last sentence of this section, which would have authorized Congress to "assign any part of the jurisdiction above mentioned . . . in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time."<sup>115</sup> Any inference that this language may have granted Congress plenary authority to curtail federal jurisdiction was thus eliminated.

To be sure, the Convention did not eliminate the provision authorizing Congress to make exceptions to the Supreme Court's appellate jurisdiction. It did, however, change the draft language extending "*the jurisdiction of the Supreme Court*" to the enumerated cases and controversies to provide instead that "[*t*]he *Judicial Power*" shall extend to these cases and controversies.<sup>116</sup> This amendment strongly suggests that the Exceptions Clause was understood by its framers to authorize exceptions only to the Supreme Court's appellate jurisdiction, not to the federal judicial power as a whole.

#### B.

The state ratification debates likewise support a mandatory reading of Article III. Indeed, "the antifederalist attacks on the breadth of the judicial power of the United States prescribed by the Constitution and on the costs, inconvenience, and potential threat to state courts posed by article III produced almost no suggestions by federalists that Congress could delimit the sphere

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113. 2 FARRAND'S RECORDS, *supra* note 50, at 425, 431.

114. Clinton, *supra* note 97, at 791.

115. See 2 FARRAND'S RECORDS, *supra* note 50, at 425, 431.

116. *Id.* (emphasis added).

of federal court jurisdiction."<sup>117</sup> To the contrary, as discussed above,<sup>118</sup> leading Framers and supporters of the proposed Constitution, including Alexander Hamilton, acknowledged that the federal jurisdiction set forth in Article III was mandatory.<sup>119</sup>

Furthermore, the Antifederalists proposed amendments in the state ratifying conventions that ranged from abolishing diversity jurisdiction altogether, to eliminating original diversity jurisdiction in cases at common law, to restricting it to cases involving a minimum amount in controversy.<sup>120</sup> That the Antifederalists in the various states uniformly sought to achieve these goals by constitutional amendment suggests a common understanding that such restrictions could not be enacted by statute. None of the amendments designed to restrict the scope of federal jurisdiction, including diversity jurisdiction, succeeded in the First Congress. To the contrary, "the Federalists won a complete victory."<sup>121</sup>

### C.

As noted earlier, the First Congress did not fully vest in the federal courts jurisdiction over all of the cases and controversies enumerated in Article III. To the contrary, it enacted explicit limitations on the scope of diversity jurisdiction and other constitutional heads of jurisdiction in the Judiciary Act of 1789.<sup>122</sup> While these actions by the First Congress constitute "weighty evidence of [the] true meaning" of Article III and, therefore, of congressional authority to control the jurisdiction of the federal courts,<sup>123</sup> they are hardly dispositive. There is substantial evidence that "in the First Congress, certain of the Constitutional provisions relating to these matters [federal courts] were not scrupulously regarded."<sup>124</sup> Indeed, the First

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117. Clinton, *supra* note 97, at 810.

118. See *supra* notes 106–07 and accompanying text.

119. See, e.g., THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 82, at 494 (Alexander Hamilton).

120. See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 499 (1928).

121. *Id.* at 503.

122. See *supra* notes 80–92 and accompanying text.

123. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

124. CROSSKEY, *supra* note 93, at 618. See generally Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures From the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986).

Congress's compliance with Article III was demonstrably imperfect in at least some respects. For example, that Congress plainly exceeded its constitutional authority, perhaps inadvertently, in purporting to extend federal jurisdiction to all cases, subject to a jurisdictional minimum, in which "an alien is a party."<sup>125</sup> The Supreme Court had to interpret this provision narrowly to apply only "to suits *between citizens and foreigners*" to reconcile it with the plain language of Article III.<sup>126</sup> In addition, as the Supreme Court concluded in *Marbury v. Madison*, the First Congress improperly attempted to expand the original jurisdiction of the Supreme Court.<sup>127</sup>

## V.

Although Justice Story's conclusion—that Article III mandates federal court jurisdiction in all enumerated cases or controversies—is supported by the text of the Constitution and by the historical evidence from the Constitutional Convention and the ratification debates, the Supreme Court has, as discussed above,<sup>128</sup> nonetheless adhered to the view that Congress's power under Section 1 to "ordain and establish" inferior federal courts includes the plenary power to control the scope of jurisdiction expressly "extend[ed]" to them under Section 2.<sup>129</sup> In other words, Congress has power, according to the Court, to vest inferior Federal courts with original jurisdiction over all, any, or none of the cases and controversies specifically enumerated in Article III, Section 2.<sup>130</sup> And given that Congress can, in Story's words, "defeat the jurisdiction as to all" cases enumerated in Section 2, including diversity of citizenship cases, it follows that Congress has the lesser power to restrict federal jurisdiction to cases of complete diversity.

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125. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

126. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800); *see also* *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809).

127. *See* 5 U.S. (1 Cranch) at 137, 173–76 (1803).

128. *See supra* notes 93–101 and accompanying text.

129. *See, e.g., Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("[H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.").

130. *See supra* note 5.

And this is precisely what the First Congress did, according to the Supreme Court, when it vested federal circuit courts with jurisdiction over any suit “between a citizen of a State where the suit is brought, and a citizen of another State.”<sup>131</sup> This language of the 1789 Act does not differ materially from that of the diversity clause itself, and like that clause, appears by its literal terms to extend to cases of minimal diversity. This language nonetheless was construed by the Supreme Court in 1806 to require complete diversity of citizenship in the case of *Strawbridge v. Curtiss*.<sup>132</sup> In a perfunctory six-sentence opinion, Chief Justice John Marshall wrote that the “court understands these expressions to mean, that each distinct interest” in a diversity case must be “represented by persons, *all* of whom are entitled to sue, or may be sued, in the federal courts,” at least if their interest in the outcome is “joint.”<sup>133</sup>

The *Strawbridge* opinion offered no textual analysis, or any other reasoning, in support of the Court’s “understand[ing]” of the meaning of the diversity statute, and Chief Justice Marshall later came to regret the decision as wrongly decided. In *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*,<sup>134</sup> the Court acknowledged that neither *Strawbridge* nor the *Deveaux*<sup>135</sup> case were “maintainable upon the true principles of interpretation of the Constitution and the laws of the United States.”<sup>136</sup> In a remarkable passage reflecting upon the Court’s internal deliberations under the late Chief Justice Marshall, who had passed away nine years earlier, the Court noted:

By no one was the correctness of [*Strawbridge* and *Deveaux*] more questioned than by the late chief justice who gave them. It is within the knowledge of several of us, that he re-

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131. Judiciary Act of 1789, ch. 20, § 11 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332) (2006)).

132. 7 U.S. (3 Cranch) 267 (1806).

133. *Id.* at 267–68 (emphasis added).

134. 43 U.S. (2 How.) 497 (1844).

135. See *supra* note 69. In *Deveaux*, the Court had held that a corporation is not itself a citizen of any state for purposes of diversity jurisdiction, but that the “members” of the corporation can sue and be sued in the corporate name in federal court under diversity jurisdiction if the members are citizens of different states than the adverse parties. 9 U.S. (5 Cranch.) 61, 86–87 (1809). The rule that a corporation is not a citizen of any state for purposes of diversity jurisdiction was overruled in *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844). See also *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 325–29 (1853).

136. 43 U.S. (2 How.) at 555.

peatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert, that a majority of the members of this court have at all times partaken of the same regret . . .<sup>137</sup>

Notwithstanding this remarkable confession of error, *Strawbridge* has never been overruled, and Congress has never amended the diversity statute to eliminate altogether the requirement of complete diversity.

## VI.

A candid survey of the history of the doctrine of complete diversity thus brings one inevitably to the conclusion that both its constitutional and statutory pedigrees are highly questionable:

- The Supreme Court has interpreted Article III's grant of federal jurisdiction over "controversies . . . between citizens of different states," consistent with the literal scope of its plain language and with its purpose of providing a neutral judicial forum for interstate litigants, to require only minimal diversity of citizenship. It is therefore quite clear that the requirement of complete diversity is not constitutionally *compelled*.
- It is not at all clear, however, whether the statutory requirement of complete diversity is constitutionally *permissible*. The Supreme Court's decisions holding that Congress has discretionary authority to vest inferior federal courts with original jurisdiction over any, or none, of the cases and controversies enumerated in Article III, Section 2, are very difficult to square with the plain language of Article III providing that "[t]he judicial power *shall extend to*" the enumerated cases and controversies and that it "*shall be vested in*" the Supreme Court and congressionally established inferior courts.
- Quite apart from the difficult question whether Congress has constitutional authority, as a matter of original meaning, to require complete diversity, the Supreme Court's decision in *Strawbridge* interpreting the 1789 Judiciary Act to require complete diversity was itself wrong as a matter

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137. *Id.* at 555–56.

of statutory interpretation, as the Court has acknowledged.

In sum, then, the statutory requirement of complete diversity of citizenship is not one that the First Congress truly intended to impose on federal jurisdiction in the first place, and it very well may be a requirement that Congress lacked constitutional authority to impose in any event. Yet, the requirement has governed diversity jurisdiction throughout our nation's history, and in recent times it has been used by plaintiffs as an instrument to close the federal courts to the very types of interstate disputes for which the Founders intended to provide a neutral federal forum.

As a whole, federal courts have never been enthusiastic about their diversity jurisdiction,<sup>138</sup> an understandable sentiment given the generally crowded nature of federal dockets and the often more interesting and important nature of federal statutory and constitutional cases. Judicial resistance to diversity cases is manifested, as detailed earlier, in a variety of doctrines.<sup>139</sup> The doctrine of complete diversity, however, is singularly at odds with one of the Founders' key purposes in establishing the federal judiciary: to facilitate national trade and commerce by providing a neutral federal tribunal for resolving disputes between interstate litigants. Given the highly questionable statutory and constitutional *bona fides* of the complete diversity requirement, courts adjudicating removal issues in cases involving minimally diverse parties should reverse the presumption against jurisdiction and resolve statutory ambiguities and other doubts in favor of removal to federal court. For example, courts should reexamine the rule that the removing defendant bears the burden of showing that "there is no possibility the plaintiff can establish a cause of action against the resident defendant."<sup>140</sup> Rather, the burden in such cases should be on the plaintiff to establish a reasonable likelihood of recovery against the in-state defendant, and the removing defendant

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138. Justice Robert Jackson, for example, declared that "[i]n my judgment the greatest contribution that Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the federal courts which is based solely on the ground that the litigants are citizens of different states." ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 37 (1955).

139. See *infra* Part II.

140. *Florence v. Crescent Res., LLC*, 484 F.3d 1293, 1297 (11th Cir. 2007) (internal quotation marks omitted).

should be permitted to take thorough discovery into the possibility of collusion or other improper joinder.

Congress, to its credit, has recently recognized that “the Framers established diversity jurisdiction to ensure fairness for all parties in litigation involving persons from multiple jurisdictions, particularly cases in which defendants from one state are sued in the local courts of another state.”<sup>141</sup> Finding that the requirement of complete diversity in large interstate class actions had given rise to “the precise concerns that diversity jurisdiction was designed to prevent,”<sup>142</sup> Congress enacted the Class Action Fairness Act of 2005<sup>143</sup> (CAFA), which amended section 1332 to extend original federal jurisdiction over certain large class actions in which “any member of a class of plaintiffs is a citizen of a State different from any defendant.”<sup>144</sup> Among other things, Congress intended this statute to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”<sup>145</sup> The Conference Report on CAFA emphasized that “most class actions are precisely the type of case for which diversity jurisdiction was created” because they “usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy.”<sup>146</sup> But massive interstate class actions are kept out of federal court, the report noted, by plaintiffs’ lawyers “adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity.”<sup>147</sup>

The Conference Committee’s complaint about lawyers “gaming” the complete diversity requirement to “avoid removal of large interstate class actions to federal court”<sup>148</sup> is no less true, as previously noted,<sup>149</sup> of mass tort suits involving many plaintiffs seeking large damages awards against multiple out-of-

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141. S. REP. NO. 109-14, at 6 (2005).

142. *Id.*

143. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat 4.

144. 28 U.S.C. § 1332(d)(2) (2006); *see also id.* at § 1453 (permitting removal of qualifying interstate class actions to federal court).

145. Class Action Fairness Act of 2005, § 2(b)(2), 118 Stat. at 5.

146. S. REP. NO. 109-14, at 10, 27.

147. *Id.* at 10.

148. *Id.*

149. *See supra* Part I.B.

state defendants. Such mass tort suits have equally significant implications for interstate commerce and national policy and are, therefore, also precisely the type of case for which the federal judiciary was created to provide a neutral forum. The doctrine of complete diversity, however, enables plaintiffs to close the doors of federal courts to out-of-state defendants in such interstate disputes and thus is at war with a central purpose of Article III. In the words of Chief Justice Marshall, the federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."<sup>150</sup>

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150. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).