Testimony of Charles J. Cooper

on

"Exploring Federal Diversity Jurisdiction"

Before the

Subcommittee on the Constitution and Civil Justice

of

The House Committee on the Judiciary

September 13, 2016

Washington, DC

Good morning Mr. Chairman, and Members of the Subcommittee. Thank you for inviting me to participate in today's hearing entitled "Exploring Federal Diversity Jurisdiction." I am honored to share with you my thoughts on the important issues raised by this subject, especially the issues associated with the rule of complete diversity of citizenship.[1]

I. Introduction.

Article III of the Constitution was designed to establish a federal judiciary, in Alexander Hamilton's words, "competent to the determination of matters of national jurisdiction."[2] The Framers, apprehensive of actual or perceived state court bias in favor of local interests, considered a neutral federal tribunal a necessity – some thought it essential in some cases to the peace and harmony of the union – and they took care to extend federal jurisdiction to "cases in which the State tribunals cannot be supposed to be impartial."[3]

Thus, although the Framers generally left undisturbed the jurisdiction of state courts over cases arising under state law, they established concurrent

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[2] THE FEDERALIST No. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[3] THE FEDERALIST No. 80, at 478 (Hamilton).

jurisdiction in federal and state courts over cases in which the impartiality of state courts would be most directly tested: those cases in which the interests of the State itself, or 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 such disputes 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 forum was available in such cases, 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.[4]

Today, despite the Framers' intention to provide even-handed access to the courts, forum selection is controlled by plaintiffs. It is no accident that large mass tort suits and class actions cluster in certain notoriously plaintiff-friendly state jurisdictions. The proliferation of 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. Not surprisingly, the emergence of plaintiff-friendly state courts has become a significant factor in the decision-making of interstate business. According to one

[4] *See* U.S. CONST. art. I, § 8, cl. 3; *id.* § 10; art. IV, § 2, cl. 1.

report, Madison County, Illinois, has the largest asbestos docket of any state court in the nation even though only about one in ten asbestos claims filed there has any connection to the area.

Mass tort cases and other large interstate disputes almost always 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[5] to require "complete" diversity of citizenship – that is, to require that the state citizenship of every plaintiff in a case must be different from that of every defendant. Thus, the plaintiffs in mass tort actions and other interstate disputes arising out of the same or related activity can keep their out-of-state defendants in state court simply by naming at least one in-state defendant.

The complete diversity rule thus gives rise to a jurisdictional paradox. On the one hand, 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 on interstate commerce. On the other hand, federal jurisdiction does not extend to mass tort and other interstate actions arising out of the same or a related series of activities, brought by myriad plaintiffs against multiple defendants from

[5] Now codified at 28 U.S.C. § 1332.

multiple jurisdictions, and seeking massive recoveries that could collectively have a serious adverse effect on interstate commerce. This paradox is compounded by the rule's illegitimate provenance: The complete diversity requirement is inconsistent with the history and purposes of the diversity clause of Article III; it is not required by, and may well contravene, the Constitution; and it rests on a Supreme Court construction of the diversity statute that the Court itself has acknowledged was erroneous.

II. The Central Purpose of Article III's Diversity Provisions Was To Provide a Neutral Federal Tribunal for Resolving Interstate Disputes.

Article III, Section 2 provides that the federal "judicial Power shall extend … to Controversies … between a State and Citizens of another State [and] between Citizens of different States."[6] The history of the framing and ratification of these diversity clauses makes clear that they were designed to ensure that a case brought by a State or its citizens against a citizen of a different State could be litigated in a presumably neutral federal court rather than in a possibly biased state court.

1. Under the Articles of Confederation, commerce between the States had been shackled by local prejudice and corresponding distrust.[7] The Framers well understood that if the fledging nation was to succeed, it would have to

[6] U.S. CONST. art. III, § 2, cl. 1.

[7] *See, e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); THE FEDERALIST No. 7 (Hamilton). *See* U.S. CONST. art. I, §§ 8, 10; art. IV, § 2.

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 such then-common discriminatory measures as tender laws and laws impairing the obligation of debts and other contracts.[8] The new federal judiciary was correspondingly designed to provide a neutral tribunal, not beholden to local interests, in which interstate controversies could be adjudicated. By enabling individuals, investors, and commercial enterprises to cross state lines with confidence that their legal disputes would be fairly adjudicated, diversity jurisdiction went hand-in-hand with other constitutional 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 28, 1787, in the Virginia Plan, designed by James Madison and proposed by Edmund Randolph.[9] Questions concerning the jurisdiction of the federal judiciary were sent to the Committee of Detail, which proposed that the federal courts be given specific jurisdictional grants over particular types of cases, including "Controversies between … a State and a Citizen or Citizens of another

[8] *See* U.S. CONST. art. I, §§ 8, 10; art. IV, § 2.

[9] *See* Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 475, 477 (2010).

State, [and] between Citizens of different States."[10] These proposed jurisdictional grants over interstate disputes, with only slight stylistic modification, ultimately became the diversity clauses of Article III.

2. When the Convention adjourned and sent the new Constitution to the States for ratification, opposition to Article III from the Antifederalists was fierce. They argued that the proposed federal judiciary would "utterly annihilate … state courts."[11] The diversity clauses would result, they argued, in ordinary citizens being forced to endure the expense and inconvenience of litigating their disputes in distant federal courts, especially if appeals had to be taken to the faraway Supreme Court.[12]

The leading advocates of federal jurisdiction over interstate disputes included some of the leading Framers. James Madison defended diversity jurisdiction by succinctly stating its obvious rationale:

> It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. . . . A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.[13]

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[10] *Id*. at 173.

[11] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed., 1901) ("ELLIOT'S DEBATES") (George Mason); *see also id.* at 527.

[12] *See, e.g., id.* at 526 (Mason); 4 ELLIOT'S DEBATES 138-39 (Samuel Spencer).

[13] 3 ELLIOT'S DEBATES 533.

John Marshall placed these points in larger context, arguing 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 citizens, from the Courts of North Carolina, produce disputes between the states?[14]

James Wilson likewise defended the Constitution's grant of jurisdiction over interstate and international disputes: "[I]s it not necessary, if we mean to restore either public or private credit," asked Wilson, "that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort?"[15] Indeed, Wilson saw diversity jurisdiction as essential to the "important object [of] extend[ing] our manufactures and our commerce."[16]

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."[17] As he explained:

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[14] *Id*. at 557.

[15] 2 ELLIOT'S DEBATES 491.

[16] *Id.* at 492.

[17] *Id*. at 475.

> 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.[18]

As Hamilton further elaborated, "[T]he national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens."[19] As Hamilton explained, only "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."[20] Like Marshall and Randolph, Hamilton also emphasized that "[t]he 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."[21]

3. The Supreme Court has consistently confirmed this understanding of the purpose of the diversity clauses. In one of its earliest examinations of diversity jurisdiction, the Court stated:

> 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

[18] *Id*. at 478.

[19] *Id*.

[20] *Id*.

[21] *Id*. at 477; *see also id*. at 475, 480.

> 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 decision of controversies between aliens and a citizen, or between citizens of different states.[22]

II. The Complete Diversity Rule Is Difficult To Reconcile with Article III's Language Providing that Federal Jurisdiction "Shall Extend" to Controversies Between Citizens of Different States.

Article III, Section 1 provides that "[t]he 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."[23] Article III, Section 2 directs, in turn, that "[t]he judicial Power *shall extend*" to various enumerated categories of cases and controversies, including "Controversies . . . between Citizens of different States."[24] Any case involving diverse parties, including minimally diverse parties, falls squarely within the clear language of Article III.

1. In his landmark opinion in *Martin v. Hunter's Lessee*, Justice Joseph 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

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[22] *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.*, *Martin*, 14 U.S. (1 Wheat.) at 347 ("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."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1685 (1833) ("Nothing can conduce more to general harmony and confidence among all the states, than a consciousness, that controversies are not exclusively to be decided by the state tribunals; but may, at the election of the party, be brought before the national tribunals.").

[23] U.S. CONST. art. III, § 1 (emphasis added).

[24] *Id*. § 2, cl. 1 (emphasis added).

carry it into operation."[25] Just as Section 1 of Article III 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."[26] Justice Story argued that "[t]he language, if imperative as to one part, is imperative as to all."[27] 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."[28]

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[25] 14 U.S. (1 Wheat.) at 328; *see also* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 612-14 (1953).

[26] *Martin*, 14 U.S. (1 Wheat.) at 328.

[27] *Id*. at 330.

[28] *Id*. at 328-29. Justice Story also noted that the mandatory language of Article III vesting the judicial power 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?

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).

Justice Story then turned to the language of Section 2 providing that "the judicial power *shall extend*" to the enumerated cases and controversies,[29] including disputes between parties from different states. These words too, said Justice Story, are "used in an imperative sense," and "import an absolute grant of judicial power."[30] 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*," 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."[31]

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."[32]

2. While Justice Story's mandatory view of federal jurisdiction has not prevailed,[33] his textual analysis has great force and has never been satisfactorily

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[29] *Martin*, 14 U.S. (1 Wheat.) at 331.

[30] *Id.*

[31] *Id.* at 330.

[32] *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)).

[33] The Supreme Court has held 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. *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."). 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. 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.

answered. Some have argued that the Exceptions Clause, combined with Congress' constitutional power over the establishment of inferior federal courts, authorizes Congress to regulate the jurisdiction of the federal courts, save for the Supreme Court's original jurisdiction. Article III 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.*"[34] Given that Article III commits the creation of inferior federal courts to Congress's discretion, the Exceptions Clause could be understood to permit Congress to eliminate the judicial power over certain cases or controversies simply by excepting them from the Supreme Court's appellate jurisdiction and then declining to create inferior courts with jurisdiction over those matters.

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. Article III should be read as a whole in a manner that gives

[34] *Id*. § 2, cl. 2 (emphasis added).

effect to all of its provisions, and any reading of some of its provisions that would render others meaningless should be avoided if reasonably possible.

Such a reading is clearly possible: although the mandatory language 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. But Congress may not, consistent with this reading of Article III, 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."[35]

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."[36] And it still accords Congress substantial control over the *allocation* of federal judicial power, consistent with Congress's control over the existence of inferior federal tribunals and with the express terms 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.[37] And 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

[35] THE FEDERALIST No. 82, at 494 (Hamilton) (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.").

[36] THE FEDERALIST No. 80, at 478 (Hamilton).

[37] *See, e.g.*, THE FEDERALIST No. 81, at 485 (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 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.").

would allow Congress to remove broad classes of cases and controversies from the federal judicial power entirely.[38]

III. The Complete Diversity Rule Rests on an Erroneous Construction of the Judiciary Act of 1789.

The language of Article III, Section 2 consumes but a scant six words in extending federal jurisdiction to "controversies . . . between citizens of different States." 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 – it is a "Controversy . . . between Citizens of different States" – even if the plaintiff also names a fellow-citizen as a defendant.

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 two adverse parties are not co citizens."[39] In *State Farm Fire & Casualty Co. v. Tashire*, the Court 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.

[38] Justice Story's conclusion—that the plain text of Article III mandates jurisdiction in federal courts in all enumerated cases or controversies—is also supported by the historical evidence from the Constitutional Convention and the ratification debates. *See* Charles J. Cooper & Howard C. Nielson, Jr., "Complete Diversity and the Closing of the Federal Courts," 37 Harvard Journal of Law & Public Policy 319-323 (2014).

[39] *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967).

The language of the original diversity statute in the 1789 Judiciary Act does not differ materially from that of the citizenship diversity clause in Article III, Section 2, and like that clause, appears by its literal terms to extend to cases of minimal diversity. Unlike the diversity clause in Article III, however, this statutory language was construed by the Supreme Court in 1806 to require complete diversity of citizenship in the case of *Strawbridge v. Curtiss*.[40] 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."[41]

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*,[42] the Court acknowledged that the *Strawbridge* case was not "maintainable upon the true principles of interpretation of the Constitution and the laws of the United States."[43] In a remarkable passage reflecting upon the Court's internal deliberations under the

[40] 7 U.S. (3 Cranch) 267 (1806).

[41] *Id.* at 267-268.

[42] 43 U.S. (2 How.) 497 (1844).

[43] 43 U.S. (2 How.) at 555.

late Chief Justice Marshall, who had passed away nine years earlier, the Court noted:

> "By no one was the correctness of [Strawbridge] more questioned than by the late chief justice who gave [it]. It is within the knowledge of several of us, that he repeatedly expressed regret that [that] decision[ ] 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 . . ."[44]

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.

IV. Congress Should Consider Amending the Diversity Statute To Eliminate the Complete Diversity Statute.

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

[44] *Id.* at 555-56.

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 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.

Congress recognized in 2005 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."[45] 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,"[46] Congress enacted the Class Action Fairness Act of 2005[47] (CAFA), which amended the diversity statute 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."[48] 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."[49] 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."[50] But massive interstate class actions are kept out of federal court, the report noted, by

[45] S. Rep. No. 109-14, at 6 (2005).

[46] *Id.*

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

[48] 28 U.S.C. § 1332(d)(2) (2006); *see also id.* at § 1453 (permitting removal of qualifying interstate class actions to federal court).

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

[50] S. REP. NO. 109-14, at 10, 27.

plaintiffs' lawyers "adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity."[51]

The Conference Committee's complaint about lawyers "gaming" the complete diversity requirement to "avoid removal of large interstate class actions to federal court"[52] is no less true, as previously noted,[53] of mass tort suits involving many plaintiffs seeking large damages awards against multiple out-of-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."[54]

[51] *Id.* at 10.

[52] *Id.*

[53] *See supra* Part 1.B.

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