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The Late, Great Diversity Jurisdiction

James M. Underwood
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I. INTRODUCTION

"Every dream is a prophecy . . . ."1

Sometimes the best and even most popular predictions come up short, particularly when founded on desire rather than observation. A somewhat notorious recent example concerned the 1970 publication of Hal Lindsey's apocalyptic work entitled "The Late, Great Planet Earth." Dubbed by the New York Times as the "non-fiction bestseller of the decade,"2 and with sales of over fifteen million copies, this book generally viewed the Bible's book of Revelation as literally true and asserted that the world might come to an end in 1988—forty years from the creation of the modern State of Israel.3 To the relief of the majority of the world’s citizens, this time of judgment did not come to pass, although such prognostications certainly added drama to that decade.

Prophecies exist in the legal world, too. In the area of federal courts, the last few decades witnessed an escalating call for the abolition of diversity jurisdiction along with predictions of its impending demise.4 Diversity jurisdiction, of course, generally permits civil litigants having different citizenships to have their disputes adjudicated in federal court so long as the claims are big enough—even in the absence of any federal cause of action.5 This form of subject matter

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1 Assistant Professor, Baylor University Law School.
5 See infra Part II.C.

28 U.S.C. § 1332(a) (2000) provides that federal courts have subject matter jurisdiction
jurisdiction has been around since the first Judiciary Act of 1789 and has seen its popularity, among federal judges and other members of the legal profession, wax and wane over the last two centuries. Since the inception of the twentieth century, however, diversity jurisdiction has increasingly come under attack. In general, its critics have urged that diversity jurisdiction is an anachronistic enemy of federalism that fills the increasingly crowded federal courts with state law claims that are not tremendously important. This assault reached a climax in 1990 when the important Federal Courts Study Committee released its report concluding that diversity jurisdiction should generally be eliminated. Despite such apocalyptic-like calls for the legislative abandonment of any federal court role in state law civil disputes, the demise of this doctrine—much like Lindsey’s prediction for the imminent end of the world—has been erroneously forecast. Almost as soon as the report came out, Congress ignored the primary recommendation and, in three respects, began to legislatively expand diversity jurisdiction in unprecedented ways. These last two decades—in particular, the last few years—have thus witnessed not only a rejection by Congress of the calls for limiting diversity jurisdiction but an unprecedented expansion of the tenet. Most importantly, Congress has legislated in a way that should remove from the diversity jurisdiction debate the shackles of concern over the framers’ original intentions in crafting this form of jurisdiction for the federal courts.

This article offers an overview of the historical views of diversity jurisdiction, an exploration of the last two volatile decades in which diversity jurisdiction has once again risen to potent new heights, and a consideration of the implications of this fundamental shift for future possible advances in federal court adjudication of certain state law claims. The three areas in which Congress has seen fit to not only reaffirm the viability of diversity but to actually expand its use are (i) supplemental jurisdiction, (ii) certain mass torts, and (iii) class action reform. By ignoring the “prophetic” calls for the demise of

over civil claims exceeding the “sum or value of $75,000 . . . and is between (1) citizens of different States . . .”

6 Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–79 (1789).
7 See infra Part II.B.2.
9 Report of the Federal Courts Study Committee 39–40 (1990) (concluding that “[i]n most diversity cases . . . there is no substantial need for a federal forum”) [hereinafter Study Committee Report].
diversity, Congress has taken seriously some of the pitfalls of modern day, state court litigation and opted for a federal forum for many state law disputes where federal jurisdiction arguably makes more sense than ever before. This article does not attempt as its primary goal to editorialize on whether Congress should, or should not, exercise its political and legislative prerogative to shift certain cases from state to federal courts. Even so, this article observes that Congress' actions do constitute an appropriate use of the broad grant of diversity litigation contemplated by the U.S. Constitution, regardless of whether such measures have any relation to the original founders' motivations. Accordingly, other possibilities exist for Congress to continue to flex its legislative muscle and bestow federal courts with increased diversity powers in the future.

II. THE HISTORY OF DIVERSITY JURISDICTION

A. The Origin of Species

One cannot appreciate diversity's present nor contemplate its future without understanding its past. Diversity jurisdiction was the subject of vigorous debates at the inception of the federal court system:13 "The diversity jurisdiction was the object of attack during the ratification debates, and, in the view of one historian, 'the most astounding thing . . . is not the vigor of the attack but the apathy of the defense.'" 14 Diversity jurisdiction was contained in the "Virginia Plan" advocated by the Federalists and ultimately incorporated into Article III of the Constitution ratified by the states.15 Because Article III only permitted Congress to create "inferior" federal courts, the grant of diversity jurisdiction in Article III required congressional action to be implemented. After continued haggling between the Federalists and the Anti-Federalists,16 the First Congress finally acted in 1789 with the creation of federal trial courts and the authorization of those courts to exercise general diversity jurisdiction in civil suits

15 See generally Scott R. Haiber, Removing the Bias Against Removal, 53 CATH. U. L. REV. 609, 613–17 (2004). Haiber's article contains one of the best discussions concerning the history of this form of jurisdiction, particularly in the context of removal premised upon diversity of citizenship and noting the courts' growing reluctance to exercise jurisdiction in such cases liberally.
between citizens of different states. Some of the most cited justifications for the original grant of diversity jurisdiction included the concepts of (a) protecting, generally, out-of-state litigants from the bias of state court judges and juries and (b) protecting business and creditor interests:

Supporters of a strong federal judiciary . . . specifically supported the inclusion of diversity jurisdiction in Article III, as a means of addressing the problem of local prejudice. Madison, for example, argued that "a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them." Hamilton similarly argued that cases between citizens of different states should be assigned to a federal court "likely to be impartial between the different states and their citizens, and which, owing to its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded." Nor was it irrational for participants in pre-ratification debates to entertain fears regarding either the reliability or impartiality of state courts. Indeed, under the Articles of Confederation, some state courts simply declined to enforce federal admiralty decisions. State courts, particularly those in the South, were also notoriously hostile to out-of-state creditors.

While actual bias against non-local citizens or against creditors and other commercial interests may have supported diversity jurisdiction in the minds of some, Justice Marshall has provided the most defensible and enduring historical argument for this form of jurisdiction:

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 no less true that the constitution itself either entertains apprehensions on this subject, or

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17 Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–79 (1789).
19 Not all historical commentators are in agreement that bias against nonlocal citizens was important in the minds of the first Congress:

[Some commentators—most notably the late Judge Henry Friendly—challenged this rationale for diversity jurisdiction. . . . Judge Friendly offered an alternative explanation for the authorization for diversity jurisdiction. Judge Friendly argued that there was fear of populist state legislatures adopting antibusiness laws; federal court jurisdiction and the development of federal common law rules provided protection for interstate commerce and business . . . . Additionally, Friendly contended that there was fear that state judges who lacked life tenure would be more likely to be influenced by populist sentiments and be biased against merchants. Chemerinsky, supra note 8, at 286. ]
views with such indulgence the possible fears and apprehension of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Thus, for Justice Marshall, the most important rationale behind diversity jurisdiction was for creating the appearance of a rational and even-handed judicial decision-maker when civil disputes existed between citizens of different states or countries.

Of course, the only opinion regarding the purpose behind diversity jurisdiction that actually counts belongs to the Supreme Court. That Court has recently reaffirmed the traditional view of the primary, historical purpose underlying diversity jurisdiction. In *Exxon Mobil Corp. v. Allapattah Services Inc.*, a decision concerning the interpretation of the supplemental jurisdiction statute, the Court stated that the purpose behind the original grant of diversity jurisdiction was "to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." This picture painted by the Supreme Court for the role of diversity jurisdiction plays an important role in understanding the significance of events that have transpired during the last two decades.

Not only was diversity jurisdiction embraced from the inception of this country's founding, it was actually the primary form of federal trial court jurisdiction at the time because Congress had not authorized federal question jurisdiction. It was not until the post-Civil War world of 1875 that Congress first permitted federal trial courts to ex-

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21 Others' views do inform scholars on diversity debates, of course. For example, Professor Bassett challenges the traditional view of diversity's original purpose, contending that there is no adequate empirical evidence of what was on the founders' minds when they included a diversity provision in the Article III grant of jurisdiction. *See Debra Lyn Bassett, The Hidden Bias in Diversity Jurisdiction*, 81 Wash. U. L.Q. 119, 120-36 (2003). Professor Bassett does not really offer an alternative view of the founders' intent. The primary thrust of her article is to attack the continued viability of this type of jurisdiction based upon her belief that diversity jurisdiction expresses a bias against rural communities.
23 *Id.* at 2618. *See also* Bassett, supra note 21, at 123 (noting "[t]wo major theories occupy the consensus positions as to the historical purpose of diversity jurisdiction, both originating with the same general concept—that of local bias or prejudice").
24 *Exxon*'s articulation of diversity's purpose, while significant, is simply the most recent exposition by the Supreme Court on the topic. The Supreme Court has iterated a similar purpose for diversity in the past as well. *See, e.g.*, Dodge v. Woolsey, 59 U.S. (18 How.) 331, 354 (1855) (noting that diversity jurisdiction was intended "to make the people think and feel, though residing in different States of the Union, that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversy between the parties to a suit").
25 *See discussion infra Part III.*
exercise general federal question subject matter jurisdiction through the enactment of what is now 28 U.S.C. § 1331.26 The post-war era involved a time of significant congressional activity that cried out for jurisdiction in the federal courts:

With the enormous growth in federal law following the Civil War—a result both of the needs of a growing national economy and expanded conceptions of the power of the federal government vis-à-vis the states—the arrangements set as of 1789 were destined to change. A system of federal law adjudication lodged primarily in the state courts placed too great a supervisory responsibility on the Justices of the Supreme Court. Congress' decision in 1875 to vest the federal courts with original general federal question jurisdiction reduced the Court's task to somewhat more manageable proportions by ensuring that federal law would develop in tribunals accustomed to such questions and whose members would be particularly sensitive to supervisory signals from the Court.27

In any event, for this country's first century of existence, the federal courts' primary business was adjudication of state law claims involving diverse litigants. During that century, this situation created the historically ironic circumstance28 in which the federal trial courts "had jurisdiction—albeit concurrent—over state law claims when the parties held diverse citizenship whereas original jurisdiction over what we now refer to as federal question cases was vested exclusively in the state courts, subject to review by the Supreme Court."29

27 LINDA J. SILBERMAN & ALLAN R. STEIN, CIVIL PROCEDURE: THEORY AND PRACTICE 382 (2001) (citing Paul J. Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 158 (1953) ("The exercise of federal question jurisdiction by lower federal tribunals presumably permits the Supreme Court to confine itself (insofar as any such distinction can be drawn) to the solving of new problems rather than the policing of old solutions, without the loss that might otherwise be entailed in the effectuation of national rights.").
28 One scholar offered as a possible post hoc rationalizing principle behind the apparent irony that there was less concern over state court prejudice in resolving federal claims because of the belief that federal question cases were more likely to raise questions of law that could be dealt with on appeal to the Supreme Court whereas diversity cases involved important fact finding that might be undermined by trial court bias. See James H. Chadbourn & A. Leo Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 641 (1942). See also Sloviter, supra note 13, at 1672 n. 4.
29 Sloviter, supra note 13, at 1672. Judge Sloviter referred to this as a rather "unusual allocation of" federal resources. Id. at 1671.
B. The Rise and Fall of Diversity

1. Embrace of Diversity Removals

The reception of federal courts to exercising the diversity jurisdiction granted to them by Article III and the diversity statute during our country's first century was largely positive. This attitude is best illustrated by the federal courts' jurisprudence in two diversity-related areas: (1) cases removed from state to federal court based upon diversity jurisdiction,30 and (2) the court-created doctrine of fraudulent joinder as an exception to the complete diversity requirement.31 The removal context is a particularly good perspective to employ in taking a closer look at the attitude of federal courts toward diversity because it involves a situation where the litigants have manifested inconsistent and antagonistic preferences for forum choice.

One can witness a demonstration of the federal courts' historic embrace of their diversity jurisdiction in their liberal construction of the removal statutes. During the eighteenth and nineteenth centuries, federal courts construed a defendant's right to remove a case to federal court on diversity grounds in a way that resulted in a de facto enlargement of their exercise of diversity jurisdiction. As one legal historian has observed:

[F]or roughly a century after Martin v. Hunter's Lessee, most federal courts treated removal as a necessary procedural mechanism affording defendants an equal opportunity with plaintiffs to select a federal forum. Removal merely provided "an indirect mode" for a federal court to exercise diversity jurisdiction, thereby implementing the Constitution's vision of federal jurisdiction.

This is not to suggest that federal courts ignored the requirements of the removal statutes. But when applying those statutes, courts focused on fundamental questions of jurisdiction, not procedural niceties—substance, not form.

... Prior to the Civil War, neither Congress nor the federal courts treated removal as a pernicious or dangerous device that needed restraint. To the contrary, federal courts inter-

31 See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (holding that the diversity statute requires all plaintiffs to be diverse from each defendant).
preted removal statutes liberally, while Congress authorized the expanded use of removal for special cases.\textsuperscript{32}

Further demonstrating this pro-diversity attitude, the Supreme Court made it clear that a defendant's right to remove stood on par with a plaintiff's autonomy to make the initial forum selection:

One great object in the establishment of the Courts of the United States and regulating their jurisdiction was, to have a tribunal in each state, presumed to be free from local influence; and to which all who were nonresidents or aliens might resort for legal redress. But this object would be defeated, if a state judge, in the exercise of his discretion, may deny, to the party entitled to it, a removal of his cause.\textsuperscript{33}

Federal courts were not the only institution to display an eager attitude during the nineteenth century for exercising diversity jurisdiction. Congress also got into the act by experimenting for a short time with legislative changes to the removal statutes to increase removal jurisdiction. For example, during Reconstruction, Congress enacted the Removal Act of 1875 that, among other things, permitted plaintiffs (in addition to defendants) to remove cases and also permitted defendants sued in their home state to remove the case to federal court.\textsuperscript{34} The courts continued to embrace their diversity jurisdiction by tolerating defendants' mistakes in invoking the removal jurisdiction of the federal courts:

In interpreting the removal statutes as amended by these acts, federal courts continued to reflect Justice Story's view that removal was a procedural mechanism intended to ensure that plaintiffs and defendants had equal opportunities to invoke the original jurisdiction of the federal courts . . . . In keeping with the remedial purpose of removal statutes, courts often excused defects in technical matters of removal procedure,

\textsuperscript{32} Haiber, \textit{supra} note 15, at 618–20.

\textsuperscript{33} Gordon v. Longest, 41 U.S. (16 Pet.) 97, 104 (1842); \textit{See also e.g., Case of Sewing Machine Cos.,} 85 U.S. (18 Wall.) 553, 573 (1873) (holding that a defendant's right to remove is equivalent to that of the "plaintiff, when he institutes his suit, [and] may elect in which of the two concurrent jurisdictions he prefers to go to trial").

even when those [defects] went to matters arguably determinative of federal jurisdiction. This is demonstrated by a federal court's explanation of its decision allowing a defendant to amend a removal petition to add jurisdictional allegations.35

Another illustrative area, albeit also related to removal practice, where federal courts displayed their historic enthusiasm for diversity jurisdiction was in the creation of the "fraudulent joinder" doctrine. Fraudulent joinder is an exception to the complete diversity requirement of the diversity statute. In the very early nineteenth century, the Supreme Court had ruled that Congress intended for § 1332's grant of diversity jurisdiction to apply only when all of the plaintiffs were diverse from each and every defendant—a requirement of "complete diversity."36 Given the purpose behind this statute, such a rule of construction should neither be viewed as reflecting any anti-diversity attitude nor of recognizing any constitutional limit on Article III's diversity grant, but rather simply as a recognition of the limited extent of diversity Congress sought to bestow upon the federal trial courts.37 As a result of this interpretation of § 1332, however, shrewd plaintiffs' attorneys began to name as additional defendants in their lawsuits local citizens of the same state as the plaintiff in order to destroy complete diversity and eliminate the target defendant's right to otherwise remove the case to federal court.38 Recognizing that such a

35 Haiber, supra note 15, at 621 (citations omitted). Professor Haiber offers the following examples supporting his historical conclusion:

Ayers v. Watson, 113 U.S. 594, 598–99 (1885) (stating that the time limit on removal could be waived by the plaintiff because "it is not, in its nature, a jurisdictional matter, but a mere rule of limitation"); Removal Cases, 100 U.S. 457, 478 (1879) (unverified petition excused); Ins. Co. v. Dunn, 86 U.S. 214, 224 (1873) ("The [removal] statute is remedial, and must be construed liberally."); Harris v. Delaware & L. & W. R. Co., 18 F. 833, 836 (D. N.J. 1884) (finding that neither a "perfect" petition nor a bond is required for removal; such matters are only matters of practice, not jurisdictional requirements).

Id. at 621 n. 96.

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

37 In Exxon Mobil v. Allapattah Services, Inc., 1255 S. Ct. at 2618, the Supreme Court explained the analytical justification for the complete diversity requirement of § 1332 as follows: The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action.

Id. at 2617–18. The Court similarly remarked in the same opinion: "[T]he presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum." Id. at 2614.

38 For a more extensive discussion of the cases involving such instances of forum shopping giving rise to the fraudulent joinder doctrine, see James M. Underwood, From Proxy to
practice could thwart the principles of fair adjudication underlying the grant of diversity jurisdiction in § 1332, the Supreme Court articulated what has become known as the "fraudulent joinder" exception to complete diversity.

Beginning as early as 1886, the Supreme Court recognized that when the plaintiff demonstrated "no possible" claim against the local defendant, such defendant would be treated as a "sham" party and its citizenship disregarded. The Court even went so far as to adopt such an aggressive rule of fraudulent joinder that the actual motives for the plaintiff in joining the local defendant were held to be irrelevant: "The case falls clearly within the authorities announcing the principle that in a removal proceeding the motive of the plaintiff in joining defendants is immaterial . . . ."³⁹

Perhaps more telling to this discussion than the creation of the fraudulent joinder doctrine, however, is the judicial attitude articulated by the Supreme Court in applying the doctrine:

While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the 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.⁴¹

Between the vigilance the federal courts displayed in finding fraudulent joinder so as to permit diversity jurisdiction, when no complete diversity appeared on the face of the pleadings, and the courts' willingness to liberally construe removal's statutory procedures, even in instances where clearly the defendant had not satisfied the requirements for removal, the federal courts seemed to embrace their diversity jurisdiction during the eighteenth and nineteenth centuries. But a new attitude began to emerge in the next bend in the road.

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³⁹ Plymouth Consolidated Gold Min. Co. v. Amador & Sacramento Canal Co., 118 U.S. 264, 270–71 (1886) (finding no fraudulent joinder on the facts of the case). A clear instance of the court finding such fraudulent joinder occurred in Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176 (1907), where the Court found that the local defendant had been "joined for the purpose of defeating the right of the corporation to remove the case to the Federal court." Id. at 185.


2. From Vigilant Protection to Scrupulous Confinement

With the end of the Civil War, the federal courts began to experience increased case loads and the bloom seemed to be off of the diversity rose. This emergence of additional cases resulted from two phenomena: (1) beginning in 1875, Congress chose to legislate for the federal trial courts to exercise general federal question jurisdiction, and (2) the emerging economic growth of the late nineteenth century saw increasing interstate business transactions that, not surprisingly, led to more civil lawsuits between citizens of different states. As one contemporary legal scholar summarized the situation: "[T]he small tide of litigation that formerly flowed in Federal channels has swollen into a mighty stream."

While hardly immediate, this ever-swelling stream of cases into the federal courthouses seems to have had a gradual impact upon the prevailing judicial attitude toward diversity jurisdiction. Arguably some hints of at least a new judicial wavering for diversity are evident in some lower court opinions from as early as the late nineteenth century, as what developed among federal judges was an "uneasy tension in the federal courts [that] continued throughout the first few decades of the twentieth century." The culmination of this emerging negative attitude appeared in Shamrock Oil & Gas Corp. v. Sheets,

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42 See Haiber, supra note 15, at 622: Expanded removal opportunities and the creation of federal question jurisdiction greatly increased the reach of the federal courts. At the same time, commercial development following the Civil War increased the volume of litigation. This combination resulted in exploding federal dockets... Not everyone welcomed this development... The inevitable reaction was criticism of expanding federal jurisdiction... A more common reaction was to press for a curtailment of all federal jurisdiction, including removal jurisdiction.

Id. at 622–23. 43 Act of Mar. 3, 1875, § 1, 18 Stat. 470 (1875) (current version 28 U.S.C. § 1331 (2000)). 44 JOHN F. DILLON, REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS 2–3 (Henry Campbell Black ed., Cent. Law Journal Co., 5th ed. 1889). 45 Id. at 3. 46 Id. 47 Haiber, supra note 15, at 627–28 (referring to two lower federal decisions in 1886 and 1891 as "seeds of [a] doctrinal shift" against diversity removals): [W]hile the removal statutes themselves did not greatly change in the first half of the twentieth century, judicial attitudes towards those statutes underwent a transformation that was subtle yet radical. Gradually, almost imperceptibly, federal courts stopped treating removal as a procedural device that protected a defendant's equal and constitutionally-based right to a federal forum. Instead, in the eyes of many federal judges, removal degenerated into a procedural anomaly that deprived a plaintiff of his superior "right" to select the forum of his choice.

Id. at 627. 48 Haiber, supra note 15, at 630. 49 313 U.S. 100 (1941).
in which the Court made two related pronouncements concerning diversity removals.\textsuperscript{50} First, the Court observed that there was a congressional intention to "restrict the jurisdiction of the federal courts on removal, [and that] the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."\textsuperscript{51} Second, the Court opined that "[d]ue regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."\textsuperscript{52}

At least in hindsight, it seems that this apparent shift in judicial attitude against diversity might not have been so difficult to predict. In the few years preceding Shamrock, two other noteworthy decisions were rendered by the high court—one that had the effect of diluting federal courts' desire to handle diversity cases and the other signaling a new, overly restrictive attitude in interpreting the diversity statute. First, prior to 1938 federal courts hearing diversity cases had been free to create and apply federal common law in cases where no local statutes governed. According to the Swift doctrine,\textsuperscript{53} the Rules of Decision Act—which required federal courts to apply state "law" except in cases where federal statutes governed—had no application in cases where the claims were recognized only under the common law.\textsuperscript{54} Thus, the Swift doctrine served the purpose of allowing federal courts to divine the common law that ought to be followed by all courts in the United States. Unfortunately, the "[p]ersistence of state courts in their own opinions on questions of common law prevented [such] uniformity."\textsuperscript{55} For this, and other constitutional reasons,\textsuperscript{56} the Su-

\textsuperscript{50} The immediate question before the court was whether a right to remove was vested solely in a defendant. The court held that plaintiffs had no right to remove a case filed in state court. In response to a counterclaim, the original plaintiff attempted to remove the case to federal court. The specifics of this holding have been criticized "because its effect is to prevent removal in cases in which there would be no question of the opposing party's right to remove if the counterclaim were brought as a separate action." JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 57 (WestGroup 3d ed. 1999).

\textsuperscript{51} Shamrock, 313 U.S. at 108.

\textsuperscript{52} Id. at 109 (emphasis added).

\textsuperscript{53} Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

\textsuperscript{54} As the Court held in Swift:

[The] decisions of the local tribunals upon such subjects [as general principles of law and "doctrines of commercial jurisprudence"] are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde . . . to be in a great measure, not the law of a single country only, but of the commercial world . . .

Id. at 18.

\textsuperscript{55} Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938).

\textsuperscript{56} The Erie court also intimated that the Tenth Amendment reserved to the states the
The Supreme Court in the *Erie* case reversed *Swift* and held that federal courts had no business making up common law to govern in diversity cases but instead had to apply the common law as found by the applicable state’s highest court. As a result, there would be no “federal general common law” and the federal courts were out of the law-making business in exercising their diversity jurisdiction. The recognition of the limited function of federal courts sitting in diversity might have deflated the remaining interest of many federal judges in hearing such cases thereafter.

Second, two years prior to *Shamrock* the Supreme Court issued a jurisdictionally stifling opinion in *Clark v. Paul Gray, Inc.* That decision involved the amount-in-controversy requirement of the diversity statute which has been designed to ensure that only diversity cases that were relatively large would be on the federal courts’ dockets. The precise issue was, assuming the existence of complete diversity between the opposing litigants, whether it was sufficient if only one of two named plaintiffs independently possessed a claim valued at greater than the jurisdictional minimum. The court rejected any such tag-along diversity jurisdiction despite the fact that at least one of the claimants had a claim big enough to be worthy of federal court treatment and that permitting the other claimant to join in the federal court suit would not only further federal court efficiency but would also serve, in a very practical sense, to make the “amount in controversy” for the case larger rather than smaller. This holding power to create common law on issues of basic law. *Id.* at 78–80.

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57 *Id.*
58 *Id.* at 78.
60 The original amount-in-controversy—$500—has been raised over the years to its current level of $75,000. Setting the amount involves a balancing of interests with the goal being for the minimum amount to be set “not . . . so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies.” S. Rep. No. 1830, at 4 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099, 3101. See WRIGHT, supra note 14, at § 32 n. 4.
61 Arguably the *Clark* decision was a mere extension of the much older rule against aggregation that dictated that co-plaintiffs could not jointly satisfy the amount-in-controversy requirement of the diversity statute by pooling their respective small claims together. See Stewart v. Dunham, 115 U.S. 61, 64–65 (1885) (applying a non-aggregation rule in the context of federal appellate jurisdiction); Walter v. Northeastern R.R. Co., 147 U.S. 370, 373 (1893) (applying non-aggregation rule in context of federal trial court diversity jurisdiction). A prior classic statement of the rule against non-aggregation was provided in 1911 by the Supreme Court:

When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.
made little sense and has been harshly criticized by many commentators:

[I]n the situation now considered, the party with the claim for more than [the statutory minimum] has a statutory right to assert that claim in federal court and, if aggregation is not permitted, the party with the smaller claim must bring a wasteful independent suit in state court. The commentators have thought that in these circumstances the two parties should be permitted to join . . . .

The strained and illogical reading of the diversity statute by the Supreme Court in *Clark* led to the evolution of various rules concerning aggregation of damages that are described as "haphazard," "mystifying," and "unsatisfactory." Yet these rules continue today, at least insofar as the interpretation of § 1332 is concerned. By interpreting § 1332 in such a narrow and intellectually unsatisfying manner, the Supreme Court struck a harsh blow to the exercise of diversity jurisdiction by reducing the number of diversity cases that would be initially filed in federal court and by eliminating many other instances of removal from state courts. For these reasons, the Supreme Court's pronouncements in *Shamrock* Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40–41 (1911). But the difference is that the older rule against aggregation of small claims operated only to keep claims that, by themselves, were too small to permit any federal jurisdiction but the *Clark* decision would have the impact of preventing joinder of claims in a federal forum, appropriate for at least one of the claims, when logically the claims should be tried together under the liberal joinder provisions of the then-new Federal Rules of Civil Procedure.

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62 *Wright, supra* note 14, at 213.
63 *Id.* at 209. For example, while related claims held by two plaintiffs (say a husband and wife both hurt in the same automobile accident) cannot be aggregated, the completely unrelated claims of one claimant can be aggregated in order to satisfy § 1332. As Professor Wright notes, "[a] good argument could be made that in each of these situations the result should be precisely the opposite what it has traditionally been." *Id.* at 210.
65 *Wright, supra* note 14, at § 36.
66 As will be discussed in Part III, Congress' enactment of the Supplemental Jurisdiction Statute (28 U.S.C. § 1367) has changed the effect of *Clark*, at least in certain contexts, without impacting *Clark's* mandate for how § 1332 itself should be interpreted. See *Wright, supra* note 14, at 215 ("These rules about aggregation have not been changed by the 1990 statute codifying what previously had been known as 'ancillary jurisdiction' and 'pendent jurisdiction' under the name of 'supplemental jurisdiction.'").
67 Because the removal statutes require the federal court to have original jurisdiction over the entire case being removed from state court, the presence of even one claimant with too small a claim to satisfy § 1332 has consistently been held to preclude removal of all or any portion of the case to federal court. See 28 U.S.C. § 1441 (2000); see generally *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 822–30 (6th Cir. 2006) (discussing the impropriety of removal when plaintiffs' claims do not satisfy the amount-in-controversy requirements of the diversity statute).
DIVERSITY JURISDICTION

may be viewed as more descriptive of an anti-diversity attitude that had already been formed during the preceding decade than prescriptive of the ensuing decisions.

In any event, the lower federal courts took up the Shamrock court’s invitation to officially begin treating diversity as the unwelcome member of the jurisdictional family:

In subsequent years, federal courts (after dutifully referencing federalism and the alleged congressional hostility toward all federal jurisdiction) cited Shamrock Oil for the proposition that a plaintiff’s right to select a forum is more important than a defendant’s right to removal. Courts have also cited Shamrock Oil for the proposition that all doubts must be resolved in favor of remand.68

These multiple judicial statements invoking a “presumption” against a defendant’s right to remove stand on somewhat shaky analytical ground, apart from Shamrock’s dictate for courts to simply maintain such a position. Professor Marcus raises some difficult questions for proponents of this presumption:

Does that make any sense? Congress had made certain claims nonremovable in order to assure plaintiffs an absolute choice between state and federal courts. See e.g., 28 USCA § 1445 (precluding removal of certain actions against railroads or actions under workers’ compensation laws). If Congress has not done so more generally, should the courts nevertheless incline against exercising removal jurisdiction? Would it be proper to

68 Haiber, supra note 15, at 631–32 (citing, at various portions of the article, Marathon Oil Co. v. Ruhgas, 145 F.3d 211, 219 n. 11 (5th Cir. 1998) ("The defendant’s right to remove and the plaintiff’s right to choose the forum are not equal."); In re World Trade Center Disaster Site Litig., 270 F. Supp. 2d 357, 366 (S.D.N.Y. 2003) (referring to the “right of plaintiffs to choose the forum in which to bring suit” and holding that this called for strict construction of jurisdiction); Maloan v. BancorpSouth Bank, Inc., No. 01-1366, 2002 WL 1397266, at *3 (W.D. Tenn. Mar. 29, 2002) (stating that Shamrock requires strict construction of removal statutes “to protect the state courts from usurpation by federal courts”); City of Univ. City v. AT&T Wireless Servs., 229 F. Supp. 2d 927, 933 (E.D. Mo. 2002) (“there is a presumption in favor of remand”); Coca-Cola Bottling of Emporia, Inc. v. South Beach Beverage Co., 198 F. Supp. 2d 1280, 1285 (D. Kan. 2002) (using a reasonable certainty test to determine the amount in controversy under § 1332 due to the “presumption against removal”); Auchinleck v. Town of LaGrange, 167 F. Supp. 2d 1066, 1069 (E.D. Wis. 2001) (“[T]he plaintiff’s right to choose his forum is superior to the defendant’s right of removal.”); Harris Corp. v. Kollsman, Inc., 97 F. Supp. 2d 1148, 1150 (M.D. Fla. 2000) (“finding that” Shamrock requires strict construction to effectuate policy of favoring a “plaintiff’s right to choose its own forum”). See infra notes 180, 184, 236–37.
interpolate §§ 1331 and 1332 against exercise of federal jurisdiction when the plaintiff wants to be in federal court.\(^69\)

Such skepticism of the validity behind such an attitude from the bench is reminiscent of Justice Frankfurter's dissenting opinion in \textit{Burford v. Sun Oil Co.}, in which he argued that the courts must be careful not to impose limitations on jurisdictional statutes passed by Congress:

\begin{quote}
The opinion of the Court cuts deep into our judicial fabric. The duty of the judiciary is to exercise the jurisdiction which Congress has conferred. What the Court is doing today I might wholeheartedly approve if it were done by Congress. But I cannot justify translation of the circumstance of my membership on this Court into an opportunity of writing my private view of legislative policy into law and thereby effacing a far greater area of diversity jurisdiction than Senator Norris, as chairman of the Senate Judiciary Committee, was ever able to persuade Congress itself to do.\(^70\)
\end{quote}

While certain statements concerning interpreting jurisdictional statutes conservatively are, on their face, equally applicable to federal question removals as to diversity removals, in application the federal courts today seem to be particularly aggressive in ruling against removal in the diversity context:

Additionally, a relatively widespread perception exists that many federal judges consider removal inappropriate in cases involving diversity jurisdiction. It would be strange indeed if this judicial aversion to diversity jurisdiction did not lead to broader restrictions on the removal process. In fact, in several cases, courts have indicated that strict limitations upon the removal process serve as an indirect means of restricting diversity jurisdiction.

In addition to a particular distaste for diversity jurisdiction, some decisions suggest that judicial hostility toward removal results more from a practical desire to relieve


\(^{70}\) 319 U.S. 315, 348 (1943) (Frankfurter, J., dissenting).
overburdened federal dockets than from lofty concerns regarding federalism or the institutional role of the courts.\textsuperscript{71}

The result of this mindset, particularly in the case of attempted diversity removals, is a body of case law from the various circuits imposing many restrictive interpretations on the procedures required to properly remove a case from state court.\textsuperscript{72} Indeed, it is not hyperbole to characterize removal procedure as a trap for the unwary litigator where form is elevated over substance and the purposes behind diversity are too frequently left behind in the analysis.\textsuperscript{73}

During the last half of the twentieth century, judicial disparagement of diversity jurisdiction became even more transparent. During the 1940s and 50s, as the Supreme Court continued to advocate within its opinions for a restrictive interpretation of the diversity statute,\textsuperscript{74} several Supreme Court Justices lobbied for congressional abolishment of diversity jurisdiction. While recognizing that such lobbying should occur in scholarly writings rather than judicial opinions, Justice Frankfurter

\textsuperscript{71} Haiber, supra note 15, at 639–40. A good example frequently cited of this federal court fixation with docket reduction is Thermon Products, Inc. v. Hermansdorfer, 423 U.S. 336, 344 (1976), where the district court remanded the case to state court solely because the federal judge believed that his docket was too crowded. The Supreme Court found that such an unauthorized rationale for remand actually justified a rare right to challenge the remand in the appellate courts. Id. Some judges have explained that the strict construction applied to the diversity statute was appropriate because such jurisdiction infringes upon states' rights: "A second, more subtle, but equally important reason for strict construction of removal statutes is that the exercise of removal jurisdiction—particularly when based on diversity—is in derogation of State sovereignty . . . . A federal judge, sensitive to the delicate nature of federal-State relations, must take care not to assume jurisdiction of a case or controversy that belongs exclusively before a State tribunal." Thompson v. Gillen, 491 F. Supp. 24, 26–27 (E.D. Va. 1980).

\textsuperscript{72} Reflecting a similar attitude, a plurality of the federal circuits today employ an extremely conservative standard for analyzing fraudulent joinder that essentially applies a Fed. R. Civ. P. 12(b)(6) inquiry where the plaintiff's factual allegations concerning the local defendant in question are all presumed to be true and may not be negated by a removing party's use of extra-pleading factual submission. This results in fraudulent joinder diversity removals to federal courts, in those circuits, to be a nearly insurmountable burden. See Underwood, supra note 38, at *38–46.

\textsuperscript{73} According to Professor Haiber, "federal courts [have] littered the removal landscape with a daunting array of procedural landmines for the litigator to navigate. These judicially created landmines have kept a large number of cases off the federal docket." Haiber, supra note 15, at 609. Professor Haiber does an excellent and thorough job discussing, and criticizing, these various court-invoked procedural limitations on the right to remove. See generally Haiber, supra note 15, at 641–56. See also Derek S. Hollingsworth, Comment, Section 1446: Remedying the Fifth Circuit's Removal Trap, 49 BAYLOR L. REV. 157, 158 (1997) (discussing one example of removal procedure involving a "precarious trap" for litigants, concerning the timing of removal in relation to service of a defendant in a multiple defendant lawsuit).

nevertheless voiced his personal objection to such jurisdiction in some of his judicial opinions:

[W]hether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity litigation—these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine. I speak as one who has long favored the entire abolition of diversity jurisdiction. But I must decide this case as a judge and not as a legislative reformer. 75

Justice Jackson similarly stated in 1955 that "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." 76 Similar sentiments were expressed by Chief Justice Warren 77 and, later, by Chief Justice Burger. 78 The subsequent dramatic rise in civil rights cases beginning in the early 1960s, filed in federal courts under the federal judiciary's federal question jurisdiction, doubtlessly added further grist to those critics of diversity that believed the federal courts were becoming too congested. 79

C. Apocalypse Now?

The antagonism for diversity jurisdiction, which had its roots in the post-Civil War years and that grew during the first half of the

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75 Burford v. Sun Oil Co., 319 U.S. 315, 337 (1943) (Frankfurter, J., dissenting) (citation omitted).
79 Professor Wright indicates that there was a dramatic rise in civil rights lawsuits filed in federal courts beginning with the early 1960s:
Although the principal civil-rights statutes go back to the Reconstruction period, for many years they were rarely used. This situation has changed dramatically in the last three decades. In 1961 there were 296 civil-rights cases filed in federal courts, or barely half of one percent of all the civil cases commenced in that year. In the year ended September 30, 1992, by contrast, there were 30,556 civil-rights cases filed by federal and state prisoners . . . and 24,233 civil-rights cases by persons other than prisoners. Taken together these were nearly 24% of the civil cases commenced in that year.
WRIGHT, supra note 14, at § 22A.
twentieth century, gathered tremendous momentum during the 1970s. This growing cloud over the head of diversity culminated with at least one house of Congress finally passing legislation to abolish diversity jurisdiction and with a bipartisan federal court review committee advocating for the demise of the doctrine. It appeared that diversity might not be around for much longer.

Following the lead of the Supreme Court, many lower federal judges exhibited an increasing antipathy toward diversity jurisdiction. Good examples of this attitude are rampant in the published opinions of many federal, and state, judges:

When Congress chooses to abolish diversity jurisdiction, as I hope it will, the federal courts will be spared the burdensome task of divining state law in cases like this one. . . . I deeply deplore the burden placed upon us by the no-longer-warranted or necessary imposition of diversity jurisdiction upon federal courts . . . .

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This case could be a poster child for the movement to abolish diversity jurisdiction . . . . Certainly this is not the type of case that would excite the courts of one state to exhibit prejudice against litigants from another . . . . [I]t is worthwhile for Congress to consider whether the rationale that justified the creation of diversity jurisdiction is any longer valid and whether it is applicable to litigation such as this.

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To the extent that diversity jurisdiction continues to exist in federal district courts, the potential for state-federal friction will continue. That is inherent in the exercise of diversity jurisdiction. Many federal judges today are convinced that the time has come to abolish or severely restrict diversity juris-

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80 See infra note 89.
81 See infra note 101.
82 Smith v. Metro. Prop. & Liab. Ins. Co., 629 F.2d 757, 761 (2nd Cir. 1980) (Mansfield, J., dissenting). The placement of this editorial in an Erie context underscores the possibility that at least one reason for federal disdain for diversity took on increased momentum following Erie's renunciation of the Swift doctrine (permitting federal common law in diversity cases).
diction and thus allow the state courts exclusive jurisdiction over state law issues.84

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This Court will not conceal its disaffection for the notion that federal jurisdiction over disputes between citizens of different States is necessary to protect out-of-State parties from local prejudice. State judges, no less than federal judges are obligated to provide a neutral forum. Moreover, State judges, in comparison to federal judges, are more likely to have competence, experience, and expertise in tort, contract, and real estate litigation; suits of this nature, which often are removable due to diversity, are ordinary grist for the mill of State courts.85

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As an epilogue to this judicial merry-go-round, it should be noted that efforts have been made over the past years to have the Congress abolish the diversity jurisdiction of the Federal courts in cases involving State created rights . . . . But alas, this solution may be said to be too simple, too easy—too intelligent.86

Judges have not been alone in bemoaning diversity jurisdiction. Legal scholars have continued to sneer at diversity jurisdiction as well. Echoing the sentiments of Professor Rowe from twenty years earlier, Professor Chemerinsky fairly recently stated, “The primary argument for the abolition of diversity jurisdiction is that it is unnecessary and costly. Diversity jurisdiction is perceived as an anachronistic relic by those who believe that its original justifications are no longer valid.”87 According to another observer, “Every administration since President Carter’s, the Judicial Conference, the American Law Institute, state courts, numerous public interest and legal aid organizations, and most legal scholars support the abolition or curtailment of diversity.”88 The number of law review articles attacking diversity jurisdiction has continued to blossom.89

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87 CHEMERINSKY, supra note 8, at 288.
89 Professor Bassett offers a good recapitulation of the scholarly attacks on diversity jurisdiction, as well as her own able assault on the doctrine, in her recent article on the subject. See
Doubtlessly spurred by such academic, judicial and special interest group attacks, Congress gave diversity jurisdiction a serious scare. Beginning in the 1970s, about the same time that our planet's fate was still in doubt according to Hal Lindsey, Congress undertook consideration of the elimination of the diversity statute. In 1978, the House of Representatives twice overwhelmingly passed a bill that would have eliminated the diversity jurisdiction statute. Although this was never even voted upon in the Senate, Congress did agree on two less severe approaches to limiting diversity cases a few years later. In 1988, Congress increased § 1332's amount-in-controversy requirement to fifty thousand dollars. During the same session, Congress added a one-year absolute time limit on removals based "solely upon" diversity of citizenship. This was an arbitrary limit applied only to diversity cases and has led to what even the Commentary to the 1988 amendments characterizes as "tactical chicanery" by the plaintiffs' bar. Such counsel have proven to be able to avoid removal fairly easily by either initially limiting the damages claimed, or adding non-diverse parties to the case, and then restructuring the suit after one year when the case is no longer removable.

generally Bassett, supra note 21. Another good listing of such academic input on the issue was collected by Professor Wright. WRIGHT, supra note 14, at 141–52.

90 To be fair, there are obviously special interest groups on both sides of the diversity debate. As Professor Wright has observed "[a]ny proposal to modify diversity meets immediate organized opposition from those who believe that they have a vested interest in preserving, for their own advantage, the widest possible choice of forum." WRIGHT, supra note 14, at 151–52.


92 See WRIGHT, supra note 14, at 152.


94 Act of Nov. 19, 1988, § 1016.

95 The Commentary to the 1988 revisions candidly admits that this one-year limit on diversity removals would be used to the tactical advantage of plaintiffs:

The amendment may sometimes give too much control to the state court plaintiff who wants to resist a removal to the federal court at all costs. It can invite tactical chicanery. A plaintiff with the motive of defeating removal, for example, may be able to join as a defendant, in a case in which there is genuine diversity between the plaintiff and the other defendants, someone of nondiverse citizenship whom the plaintiff does not really intend to sue but who is arguably liable on the claim and hence properly joined under state law. The plaintiff can then just wait a year and drop that party, polishing the action to just the point desired and at the same time dissolving the threat of federal jurisdiction. The one-year cutoff therefore has an anti-diversity ring to it. Congress acknowledged this, but called it a "modest curtailment." Commentary to 1988 Revisions to 28 U.S.C. § 1446 (emphasis added).

96 The American Trial Lawyers Association, in one of their official publications, offers a candid bit of advice to its members concerning how to avoid a federal forum:
Two years after Congress nipped at the feet of diversity jurisdiction, and close to diversity's bicentennial, the most serious threat to diversity jurisdiction in its history arose. In 1988 Congress had commissioned a "distinguished body" of prominent judges, academics, and legislators in order to

make a complete study of the courts of the United States and of the several states and transmit a report to the President, the Chief Justice of the United States, the Congress, the Judicial Conference of the United States, the Conference of Chief Justices, and the State Justice Institute on such study.  

The resulting blue ribbon Study Committee was created by Congress in response to "mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion." The Study Committee embarked on what it considered the "most comprehensive examination of the federal court system in the last half century—a period of unprecedented growth and change in federal law and federal courts." After fifteen months of study, the committee released its official report in the spring of 1990. Among its other recommendations, the Study Committee made the historic proposal to eliminate generally any diversity jurisdiction in the federal trial courts:

After extensive discussion, a substantial majority of the committee strongly recommends that Congress eliminate this basis of federal jurisdiction, subject to certain narrowly defined exceptions . . . . We believe that diversity jurisdiction should be virtually eliminated for two simple reasons: On the one hand, no other class of cases has a weaker claim on fed-

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[To avoid removal to federal court in cases where it is deemed advisable to do so, a wise strategy for a plaintiff in a personal injury case is to look for a valid claim against a local party in the forum in which the plaintiff seeks to file the claim. To remove a case, all defendants must consent to removal [except in the case of fraudulent joinder that would defeat diversity jurisdiction], but if there is a local defendant, removal is not an option despite consent.  


97 WRIGHT, supra note 14, at 152.  

98 101ST CONG. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, 31 (1990) [hereinafter REPORT].  

99 Id. at 3.  

100 Id.  

101 The Study Committee recognized that there might still be a few niche areas where specialized diversity jurisdiction might make sense, such as suits involving aliens, interpleader suits, and certain complex cases involving mass accidents. Id. at 40.
eral judicial resources. On the other hand, no other step will do anywhere nearly as much to reduce federal case load pressures and contain the growth of the federal judiciary. Given all the demands on the federal courts, there is little reason to use them for contract disputes or automobile accident suits simply because the parties live across state boundaries—especially when litigants who do not live in different states must bring otherwise identical suits in state courts.102

Given the widespread—though not unanimous103—support on the committee for this elimination proposal and the fact that Congress acted positively with respect to other proposals made in the same report by the Study Committee,104 there was every reason to support prognostications that diversity jurisdiction was in its last days.105 Was diversity—the original bulwark of federal trial courts' jurisdictional existence—about to finally meet its doom?

III. REBIRTH OF THE PHOENIX AND ABANDONMENT OF ORIGINAL MOTIVES

Faced with the invitation to virtually eliminate diversity jurisdiction for the federal trial courts in the spring of 1990, Congress chose a different path. Congress has taken three distinctive legislative steps toward realizing the potential that Article III diversity jurisdiction affords, with each step illustrating an increasingly bold utilization of this power. First, Congress codified the twin doctrines

102 Id. at 39.

103 For example, Judge Diana Gribbon Motz, a sitting judge on the Fourth Circuit Court of Appeals and a former member of the Federal Courts Study Committee, stated in one judicial opinion that she had voted against the Committee’s recommendation to abolish diversity because she had no animus against jurisdiction over such claims. See Rosner v. Pfizer Inc., 272 F.3d 243, 253 (4th Cir. 2001) (Motz, J., dissenting from denial of rehearing en banc in case involving the interpretation of § 1367). The Report itself notes dissenting statements from Senator Grassley, Morris Harrell, and now-judge Motz—who all objected to the virtual abolition of diversity jurisdiction. See REPORT, supra note 98, at 42-43.


of ancillary and pendent jurisdiction through enactment of the Supplemental Jurisdiction Statute in 1990.\textsuperscript{106} Whether intentional or not, the way Congress codified these doctrines has served to reinforce federal courts' flexibility to entertain as one constitutional "case" a broader range of claims and parties than it would have been otherwise able to accomplish using the diversity statute alone. Further, this enactment has had the impact of overruling established anti-diversity precedent that previously helped to usher in the federal hostility toward entertaining diversity cases. Second, Congress enacted the Multiparty, Multiforum Jurisdiction Statute, effective in January of 2003,\textsuperscript{107} permitting federal courts to exercise diversity jurisdiction over certain mass tort claims even in the absence of complete diversity of citizenship. Third, Congress finally passed the Class Action Fairness Act in January 2005,\textsuperscript{108} after more than a decade of serious debate and legislative wrangling. Among its other reform features, the Class Action Fairness Act modified the diversity statute to set forth special rules for diversity jurisdiction over putative class actions. The statute now provides for federal jurisdiction over class actions with an aggregate amount in controversy of only $5 million and with the barest minimal diversity that the Constitution might be willing to tolerate. By legislating in these three ways, Congress has chosen a path that will lead to a resurgence in the importance of diversity jurisdiction, and which may be a harbinger for additional aggressive exercises of this Article III grant in the future.

\textit{A. Section 1367: Keeping the Federal Courts Relevant}

Although the Supplemental Jurisdiction Statute did not generate much hoopla at the time of its passage in late 1990,\textsuperscript{109} the act became a lightning rod for much of the anti-diversity sentiments of many judges and legal scholars for the next fifteen years.\textsuperscript{110} The ensuing debate included a significant circuit split, with courts dividing over whether to interpret the act literally even if this led to the repudiation of such jurisdictional juggernauts as \textit{Clark},\textsuperscript{111} \textit{Zahn},\textsuperscript{112} and possibly even \textit{Strawbridge}.\textsuperscript{113} The debate boiled until the summer of 2005,

\begin{itemize}
  \item \textsuperscript{106} 28 U.S.C. § 1367 (2000).
  \item \textsuperscript{107} 28 U.S.C. § 1369 (Supp. 2002).
  \item \textsuperscript{110} Id. at 671–72.
  \item \textsuperscript{111} 306 U.S. 583 (1939).
  \item \textsuperscript{112} 414 U.S. 291 (1973).
  \item \textsuperscript{113} 7 U.S. (3 Cranch) 267 (1806).
\end{itemize}
when the Supreme Court finally resolved the principal interpretational
dilemma by holding that the federal courts must honor the letter of the
law and permit a broad exercise of supplemental jurisdiction in divers-
ity cases.\textsuperscript{114}

The primary purpose of the act was simple enough—to codify,\textsuperscript{115}
and thereby give a firm statutory foundation to the preexisting doc-
trines of ancillary\textsuperscript{116} and pendent jurisdiction.\textsuperscript{117} These doctrines were
judicial creations designed to permit federal courts to exercise their
jurisdictional powers so that they could decide an entire constitutional
“case,” even if a portion of the case lacked its own jurisdictional
legs.\textsuperscript{118} The concept underlying the doctrines is pragmatic:

[T]he rules developed to control the exercise of that jurisdic-
tion cannot be explained by any “single rationalizing prin-
ciple.” They are instead accommodations that take into account
the impact of the adjudication on parties and third persons,
the susceptibility of the dispute or disputes in the case to reso-
lution in a single adjudication, and the structure of the litiga-
tion as governed by the Federal Rules of Civil Procedure.\textsuperscript{119}

Thus, supplemental jurisdiction historically permitted a federal court
to hear a case asserting a federal cause of action as well as a state law
claim arising out of the same transaction or occurrence.\textsuperscript{120}
Supplemental jurisdiction allows a court, in a diversity lawsuit, to

\textsuperscript{114}Exxon Mobil v. Allapattah Servs., Inc., 125 S. Ct. 2611 (2005).
\textsuperscript{115}Professors Mengler, Rowe and Burbank, who helped to draft § 1367 for Congress,
stated that the act represented an attempt at “codification” of ancillary and pendent jurisdiction,
under the umbrella of “supplemental” jurisdiction, and that it was “framed to restore and regu-
larize supplemental jurisdiction.” Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M.
Mengler, Congress Accepts Supreme Court’s Invitation To Codify Supplemental Jurisdiction,
\textsuperscript{116}While the terms have sometimes caused confusion, as a general proposition ancillary
jurisdiction has been understood to refer to the power of federal courts to hear additional claims
added by other litigants that lack their own independent basis in subject matter jurisdiction, such
as claims by defendants or third-party claims. See Report of the Subcomm. on the Federal
Courts and Their Relation to the States, 546 (Mar. 12, 1990), reprinted in 1 FEDERAL COURTS
STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS (July 1, 1990) (“Ancil-
lar jurisdiction refers to additional claims that are joined after the complaint is filed.”) [herein-
after STUDY COMM. REPORT].
\textsuperscript{117}Id. (“Pendent jurisdiction refers to additional claims that are joined after the complaint is filed.”).
\textsuperscript{118}See Rowe et al., supra note 115, at 213 (The twin doctrines of pendent and ancillary ju-
risdiction “permit parties in many circumstances to litigate an entire controversy, typically all
transactionally-related claims, as long as the district court has a statutory basis for asserting
subject-matter jurisdiction over a claim raised in plaintiff’s complaint.”).
\textsuperscript{119}Zahn v. Int’l Paper Co., 414 U.S. 291, 305 (1973) (Brennan, J., dissenting) (citation re-
moved); see also RICHARD H. FALLON ET AL., HART AND WECHSLER’S THE FEDERAL COURTS
also entertain a related third-party claim for contribution between two non-diverse litigants.¹²¹

In 1989, however, the Supreme Court "struck a near death-blow to pendent party jurisdiction and threatened to topple the pillars underlying all forms of pendent and ancillary jurisdiction."¹²² In Finley v. United States,¹²³ the Supreme Court rejected pendent party jurisdiction over a widow's tort claim against a local utility company even though it arose out of the same event as her Federal Tort Claims Act claim against the FAA¹²⁴—one that was required to be filed in federal court.¹²⁵ In the opinion, authored by Justice Scalia, the Court found that there was no congressional authorization for such exercise of pendent party jurisdiction and, in so doing, raised a serious concern about the continued validity of all exercises of the court-created concepts of pendent and ancillary jurisdiction.¹²⁶ One way to view Finley is as a judicial acknowledgment that Congress alone dictates the jurisdiction of the federal courts and that federal district courts cannot hear a case unless Congress has expressly authorized it. This acknowledgment is implicit in the Supreme Court's invitation to Congress to bolster the foundationally challenged doctrines of pendent and ancillary jurisdiction:

Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.¹²⁷

¹²⁴ Id. at 555-56.
¹²⁵ Congress has required that all FTCA claims be filed in federal court. See 28 U.S.C. § 1346(b) (2000).
¹²⁷ Finley, 490 U.S. at 556.
Upon the urging of the Federal Courts Study Committee and with the assistance of legal scholars, Congress quickly accepted this invitation and reaffirmed the validity of pendent and ancillary jurisdiction under the new nomenclature of supplemental jurisdiction by enacting § 1367 late in 1990. Everyone agrees that Congress achieved its primary objective—legislatively overruling Finley by providing, for the first time, a statutory foundation for the historic usages of pendent and ancillary jurisdiction. As a part of the codification of the general power to exercise supplemental jurisdiction—reflected by subpart (a) of the statute—Congress also inserted subpart (b) in an apparent effort to also codify some of the historic court-created limitations on the exercise of supplemental jurisdiction in diversity cases. However, in crafting subsection (b) of that statute, Congress accomplished more than a simple codification of these limitations. It did not take too long after the adoption of the statute before scholars reading its text carefully came to the conclusion that certain “unforeseen consequences” might be realized.

Due to the failure of subsection (b) to list among its exceptions the joinder of co-plaintiffs under Rule 20 or Rule 23, federal circuit courts obliged to follow the text of the new statute determined that Congress—perhaps unwittingly—had overruled both Clark and Zahn’s requirements for each plaintiff (or class member) to independently satisfy § 1332’s amount-in-controversy requirement. The Fifth

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128 The Study Committee recommended that Congress “should expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base.” STUDY COMM. REPORT, supra note 116, at 47. The Study Committee was concerned about Finley’s apparent retreatment on the doctrines of pendent and ancillary jurisdiction: “[T]he Court’s rationale may prohibit any exercise of pendent party jurisdiction and threatens to eliminate pendent claim and ancillary jurisdiction as well. We recommend that Congress overrule Finley by codifying the doctrines of pendent and ancillary jurisdiction.” Id. at 547.

129 See Rowe et al., supra note 115, at 213 (“The authors participated in the drafting of the legislation codifying supplemental jurisdiction at 28 U.S.C. § 1367.”).

130 Exxon Mobil v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2620 (2005) (“All parties to this litigation and all courts to consider the question agree that § 1367 overturned the result in Finley.”).

131 Subpart (b) of § 1367 provides the following carve-out from the broad grant in subpart (a):

[In diversity cases] the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.


Circuit was one of the first circuits to confront the significance of the omission of these references from the text of § 1367(b). The Fifth Circuit acknowledged that "[o]mitting the class action from the exception [in subpart (b)] may have been a clerical error." Nevertheless, the Fifth Circuit felt compelled by historic concepts of statutory interpretation to follow the express language of the statute regardless of any potentially conflicting legislative history. Certain other circuits disagreed and held that the legislative history demonstrated that Congress never intended to overrule Clark and Zahn, with a significant resulting split in the circuits.

The interpretative controversy was finally resolved in the summer of 2005 by the Supreme Court's decision in Exxon Mobil Corp. v. Allapattah Services, Inc. In that decision, a triumph for historic textualism, the Supreme Court held that it must abide by the explicit text of the statute regardless of whether the text accurately reflected congressional intent:

It is not immediately obvious why Congress would withhold supplemental jurisdiction over plaintiffs joined as parties "needed for just adjudication" under Rule 19 but would allow supplemental jurisdiction over plaintiffs permissively joined under Rule 20 [or Rule 23]. The omission of Rule 20 plaintiffs from the list of exceptions in § 1367(b) may have been an "unintentional drafting gap" ... If that is the case, it is up

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134 Id. at 528–29 ("[The] statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result.").
136 Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) (holding that each member of a class, whether named or not, must independently possess a claim in excess of the minimum amount-in-controversy requirement of § 1332).
137 The majority of circuits agreed that the statute must be applied in a way that expands diversity jurisdiction. See Allapattah Services, Inc. v. Exxon Corp., 333 F.3d 1248 (11th Cir. 2003); Gibson v. Chrysler Corp., 261 F.3d 927 (9th Cir. 2001); Rosmer v. Pfizer Inc., 263 F.3d 110 (4th Cir. 2001); Stromberg Metal Works v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996); In re Abbott Labs., 51 F.3d 524 (5th Cir. 1995), aff'd by an equally divided court sub nom., Free v. Abbott Labs., 529 U.S. 333 (2000). The minority of circuits took the view that the statute's legislative history demonstrates no intention by Congress to alter Clark or Zahn's limitations on the breadth of diversity jurisdiction. See Ortega v. Star-Kist Foods, Inc., 370 F.3d 124 (1st Cir. 2004); Trimble v. Asarco, Inc., 232 F.3d 946 (8th Cir. 2000); Mericcare v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999); Leonhardt v. Western Sugar Co., 160 F.3d 631 (10th Cir. 1998).
to Congress rather than the courts to fix it. The omission may seem odd, but it is not absurd.\textsuperscript{139}

As a result of this holding, federal district courts may now hear, under their diversity jurisdiction, claims between diverse citizens even when not all of the claimants possess claims that are large enough to satisfy § 1332 on their own.

The supplemental jurisdiction story is filled with significant themes concerning federal court exercise of diversity jurisdiction. Perhaps chief among these is the Supreme Court's continuing recognition of Congress' predominant role in setting the jurisdictional agenda of the lower federal courts even where the courts cannot either discern or agree with that agenda. Further, the enactment of § 1367 demonstrates Congress' desire to maintain the federal courts as a viable place where diversity claimants can continue to bring their entire controversy for resolution, even where some claims would not satisfy § 1332 on their own. As one scholar summarized the impact of § 1367:

> By swiftly supplying comprehensive statutory authority for the exercise of supplemental jurisdiction, present § 1367 prevented the seepage of authority to adjudicate supplemental state-law claims in the pendent-party, exclusive-federal-jurisdiction context of \textit{Finley} from becoming a ruinous flood, depleting a reservoir of long-accumulated precedent permitting federal courts to achieve the fair and efficient, holistic disposition of complex, multi-claim and multi-party litigation.\textsuperscript{140}

And while Congress may very well have had no predilection that § 1367 would result in the overruling of \textit{Clark} and \textit{Zahn}—a conclusion that is not universally shared\textsuperscript{141}—Congress has ignored calls to recodify supplemental jurisdiction to restore those jurisdiction-

\textsuperscript{139} Id. at 2624.


\textsuperscript{141} There is actually some conflict in the legislative history concerning the possible overruling of \textit{Clark} and \textit{Zahn}. \textit{See}, e.g., Exxon Mobil, 125 S. Ct. at 2625–27 (discussing the fact that, even if the Court were to peek at the statute's legislative history, there is ambiguity in that history concerning whether Congress intended to expand the doctrines of pendent and ancillary jurisdiction rather than simply codify them).
limiting holdings. To this extent, Congress has effectively ratified this expansion of diversity jurisdiction.

B. Section 1369: A New Frontier

Late in 2002, Congress finally enacted 28 U.S.C. § 1369—the Multiparty, Multiforum Act, following consideration of related proposals dating back several decades. This statute was designed to "achieve judicial and litigant economy, as well as fairness to litigants, by preventing repetitive litigation and inconsistent outcomes resulting from multiple federal and state proceedings arising out of the same transactions or events." The mechanism for achieving this goal was jurisdictional—the creation of a special, minimal diversity statute to allow federal courts to preside over any cases arising from certain mass tort situations, as follows:

142 See, e.g., Thomas C. Arthur & Richard D. Freer, Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute, 40 EMORY L.J. 963, 989 (1991) (calling on Congress to "immediately repeal section 1367 or adopt a simple amendment which restores" the holdings of Clark and Zahn); Thomas D. Rowe, Jr., 1367 and All That: Recodifying Federal Supplemental Jurisdiction, 74 IND. L.J. 53 (1998) (one of the statute's authors concluding that the statute needs to be fixed to achieve its original purpose).

143 As both Clark and Zahn were both harshly, albeit fairly, criticized, it is hard to lament their passing. See, e.g., 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 0.97[5], at 928 (arguing the courts should consider Zahn overruled); Thomas C. Arthur & Richard D. Freer, Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job, 40 EMORY L.J. 1007, 1008 n.6 (1991) ("Abrogating Zahn would hardly be absurd."); HOWARD P. FINK, ET AL., FEDERAL COURTS IN THE 21ST CENTURY 434 (2d ed. 2002) ("Those requirements schizophrenically look to the citizenship of only the named class representatives for purposes of determining diversity of citizenship . . . but require that each class member with a legally separate claim independently satisfy the amount-in-controversy requirement."). Further, despite Congress' abolition of Clark and Zahn, the republic still stands. See Lloyd C. Anderson, The American Law Institute Proposal To Bring Small-Claim State-Law Class Actions Within Federal Jurisdiction: An Affront to Federalism That Should Be Rejected, 35 CREIGHTON L. REV. 325, 342 (2002) ("In the years since § 1367 was enacted, it has, for the most part, worked well.").

144 For a discussion of prior proposals, see C. Douglas Floyd, The Limits of Minimal Diversity, 55 HASTINGS L.J. 613, 613, 624–28 (2004). Commencing in the late 1970s, repeated bills were introduced in Congress providing for the maintenance in federal court of any civil action comprising multiple claims arising from the same transaction, occurrence, or course of conduct (or, in later versions, accident), provided that "minimal diversity" of citizenship existed between any two adverse parties in the action and certain other requirements were met. These proposals culminated in the passage of the Multiparty, Multiforum Trial Jurisdiction Act of 2002. For example, one prior related bill proposed federal jurisdiction in cases with only minimal diversity of citizenship arising from accidents involving more than twenty-five people, each of whom suffered injuries of more than $50,000. See H.R. Res. 1252, 105th Cong. (1998), which was adopted by the House but not the Senate.

145 Floyd, supra note 144, at 614. See also Laura Offenbacher, Note, The Multiparty, Multiforum Trial Jurisdiction Act: Opening the Door to Class Action Reform, 23 REV. LITIG. 177, 184 (2004) ("Because serious accidents inherently involve numerous plaintiffs, claims, and defendants, overlapping class actions are likely to result. Eliminating this sort of duplicative litigation is among the goals discussed in the legislative history of § 1369.").
The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—

(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

(3) substantial parts of the accident took place in different States.146

According to the terms of this act, “minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State . . . .”147 Thus, when the other conditions of this statute are satisfied—chiefly, when seventy-five or more people die in a single-location accident—§1369 abrogates the complete diversity holding of Strawbridge applicable to cases under the general diversity statute and also eliminates any amount-in-controversy requirement.148 No longer can plaintiffs filing any case subject to the provisions of this act force a state court forum on a defendant by including a non-diverse litigant in the mix.149 By permitting the filing in, or, more importantly, the removal to, a federal forum, this act provides a mechanism for all such cases arising from the “single accident” to then be consolidated under the Federal Multidistrict Litigation statute.150 In this way, the opening of the

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147 28 U.S.C. § 1369(c)(1).
148 The elimination of the amount-in-controversy requirement does not appear to be significant since the act primarily grants federal jurisdiction to cases having inherently large damage demands (i.e., wrongful death).
149 See supra Part II.B. i. for a discussion concerning fraudulent joinder. Because most federal circuits assume the truth of the allegations of the plaintiff’s complaint in determining whether there has been fraudulent joinder—thus, allowing the court to disregard the party against whom the questionable claim is asserted—it is fairly easy for a plaintiff to destroy complete diversity by naming a local defendant whether or not a serious claim against that party exists.
150 28 U.S.C. § 1407 (2000). For transfer and possible consolidation, the Multidistrict Litigation statute generally only requires that two or more cases involving “one or more
federal courts to such cases lacking complete diversity facilitates coordinated litigation that would not be available if any of the cases remained in state courts.\textsuperscript{151}

This statute has significant inherent limitations on its applicability. First, the Act only creates federal court jurisdiction with minimal diversity when there is a single occurrence in one discrete location that results in the deaths of at least seventy-five persons.\textsuperscript{152} Accordingly, it would not be too misleading to refer to this Act as the airplane crash litigation statute.\textsuperscript{153} Second, the Act contains a fairly ambiguously\textsuperscript{154} worded local controversy exception that may swallow a good portion of the Act's application. The Act expressly requires federal district courts to "abstain" from hearing cases otherwise subject to the Act where a "substantial majority" of the plaintiffs and the "primary defendants" are all citizens of the same state and in which the claims will be governed by the laws of that same state.\textsuperscript{155} Because of the Act's "stringent limitations,"\textsuperscript{156} it is not likely that the Act will create any litigation run on the federal courthouses.

Even if relatively few cases will be taken to federal court under the provisions of § 1369, however, Congress' enactment of this statute is of tremendous importance as both a philosophical movement and a bellwether of other exercises of diversity jurisdiction. Not only did Congress make a rare use of its power to bestow upon the federal trial
courts minimal diversity power, but it did so in a context having nothing to do with the historical perception of diversity’s purpose—avoiding local bias: “The Act itself . . . is not aimed at preventing local bias against out-of-state litigants or even at promoting ‘nationalization’ by assuring a competent and neutral federal forum for multistate business enterprises conducting business away from home. Rather, the Act has been justified on the grounds of judicial efficiency.”

The Act’s lack of concern for local bias is clear when one takes account of the rationale behind the complete diversity requirement of § 1332:

The Court . . . has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action.

Because § 1369 affords diversity jurisdiction even if there are adverse litigants from the same state, the grant of jurisdiction cannot be on account of local bias. As will be discussed below, such a movement by Congress to bestow diversity jurisdiction for reasons unrelated to the prevention of local bias represents a dramatic step by Congress, which has “broad implications” for issues of federalism.

C. Class Action Fairness Act: The Return of the King

The most recent and practically significant advance taken by Congress concerning the scope of diversity jurisdiction was perhaps also its most controversial—passage of the Class Action Fairness Act of 2005. Since at least the late 1990s, there have been annual introduc-

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157 The only other prior grant of minimal diversity Congress had made was for statutory interpleader claims, which gives federal trial courts jurisdiction over claims for interpleader with an amount in controversy of only five hundred dollars so long as at least two of the competing claimants are diverse from one another. See 28 U.S.C. § 1335(a)(1) (2000).
158 Floyd, supra note 144, at 628.
160 See infra Part III.D.
161 Floyd, supra note 144, at 627. Professor Floyd views such a movement as representing an “enormous intrusion[]” on the jurisdiction and functioning of the state courts” and suggests that it is an unconstitutional affront to federalism. See generally id. at 627, 638–52.
162 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. This statute has been codified now in several places, including 28 U.S.C.A. §§ 1332(d) (Supp. 2006) (granting minimal diversity jurisdiction), § 1453 (setting forth special rules for removing class actions to
tions in Congress of bills seeking to expand the scope of federal court diversity jurisdiction for class actions.\textsuperscript{163} These annual attempts to reform class actions in Congress coincided with an emerging public dissatisfaction with class actions, much of it fueled by stories of coupon settlements of questionable value and of growing fees for class counsel.\textsuperscript{164} With uncharacteristically strong bipartisan support,\textsuperscript{165} Congress finally acted on February 10, 2005 by passing the Class Action Fairness Act ("CAFA"), based upon the following congressional determination:

Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of


\textsuperscript{164} See, e.g., Editorial, \textit{Legal Extortion Series}, ST. PETERSBURG TIMES, July 17, 2003, at 14A ("Contrary to the trial lawyers' propaganda, class action abuse is a serious national problem that calls for congressional action. The big multistate cases should be directed to federal court, but Congress should take care that it doesn't trample the rights of consumers along the way."); see Juliet Eilperin, \textit{Curbs on Class Action Lawsuits Urged}, WASH. POST, June 12, 2003, at A6; Michael S. Gerber, \textit{Champions of Class Action Reform Seek Senate Supermajority for Bill}, THE HILL, April 23, 2003, \textit{available at} http://www.hillnews.com/business/042303_supermajority.aspx; Wendy McElroy, \textit{Jackpot Justice, the Wal-Mart Case} (June 30, 2004), http://www.foxnews.com/story/0,2933,1241977,00.html (last visited Nov. 3, 2004) (discussing the reasons class action lawsuits have become so prominent recently). Academics have participated in the debate by offering similar criticisms. See, e.g., John C. Coffee, Jr. & Susan P. Koniak, Op-ed, \textit{Rule of Law: The Latest Class Action Scam}, WALL ST. J., Dec. 27, 1995, at 11 (using several case examples to support the proposition that class action reform is needed to prevent the problems of misrepresenting consumers, multiplying and overlapping class actions, and collusive class action settlements spurred on by the ability to forum-shop class actions to friendly state courts); see also Debra Lyn Bassett, \textit{When Reform Is Not Enough: Assuring More than Merely "Adequate" Representation in Class Actions}, 38 GA. L. REV. 927, 929 (2004) (discussing criticisms by academics of the current class action model); James M. Underwood, \textit{Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action}, 46 S. TEX. L. REV. 391, 448–60 (2004) (explaining that federal diversity reform to permit interstate class actions to be removed to federal courts is the only mechanism available to fix the problems with class actions).

DIVERSITY JURISDICTION

diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.166

Although CAFA has several components,167 the most dramatic impact of this statute will be its liberalization of the federal diversity requirements for class action cases. Section 1332(d)(2) now states that the federal "district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000 . . . and is a class action in which (A) any member of a class of plaintiffs is a citizen of a State different from any defendant . . . ."168 This revision to the diversity statute changed the diversity analysis for class actions in two distinct ways. First, it expressly provided for minimal diversity rather than the complete diversity stated implicitly by § 1332(a)(1).169 Although the Supreme Court had long held in class actions that the complete diversity requirement was analyzed by looking solely to the named plaintiff class representatives and ignoring the citizenship of the unnamed class members,170 the complete diversity requirement still precluded any class action filed in state court from being removed if any one of the class representatives shared their state of citizenship with any one of the named defendants. Second, the Supreme Court had always applied § 1332(a)'s amount-in-controversy requirement in a harsh manner to class actions. The Court had held that the minimum amount could not

167 See id.
169 See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (holding that each plaintiff must be from a different state from every defendant for diversity jurisdiction), overruled in part by Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. 497 (1844) (dealing with the citizenship of corporations).
be satisfied through group aggregation of the total value of the class action, and had similarly found that § 1332 was not satisfied unless every single member of a putative class action independently possessed a claim in excess of the statutory minimum. CAFA changes this analysis by altering the focus to the aggregate value of the entire class claim and imposing a minimum requirement of $5 million. These two changes open the doors to many more state-law class actions being capable of federal court adjudication.

By loosening both the diversity and amount-in-controversy requirements otherwise applicable to class actions, in enacting CAFA Congress clearly exercised a greater piece of the constitutional grant of diversity jurisdiction than it had previously done. While Congress' official explanation for its motives was multi-faceted and did include an express concern with avoiding local bias, its actions suggest that local bias was not the real focus behind CAFA. For example, unlike other diversity removals, CAFA does not prohibit removals when the case is filed in the home state of any of the defendants. Another scholar has recognized this dichotomy behind the stated purpose for CAFA and its actual operations:

[S]ome of the most important aspects of [CAFA] have no apparent link to the desire to protect out-of-state defendants or businesses from the impact of local bias. In particular, the Act makes no effort to modify the general definition of corporate citizenship for diversity purposes as including both the state of incorporation and the state of the corporation's principal place of business, nor does it confine its removal authorization to out-of-state corporations or class members who might be thought to be subject to local bias.

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174 As the Supreme Court noted in its supplemental jurisdiction opinion, there are now two different diversity jurisdiction doors at the federal courthouse. One may either satisfy § 1332(d)'s requirements (i.e., minimal diversity between any class member and any defendant with an aggregate damage claim of greater than $5 million) or § 1332(a) (i.e., complete diversity between all named class representatives and all named defendants and with each class member having a claim in excess of $75,000). See Exxon Mobil v. Allapattah Services, Inc., 125 S. Ct. 2611, 2627-28 (2005).
175 See supra text accompanying note 166.
176 Compare 28 U.S.C. § 1441(b) (general diversity cases shall be "removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought") with § 1453(b) ("A class action may be removed . . . without regard to whether any defendant is a citizen of the State in which the action is brought . . . ").
177 Floyd, supra note 144, at 630.
The impact of CAFA will be enormous, particularly in opening the federal courthouse to the adjudication of so-called “negative value” consumer-oriented cases involving small claims for economic losses. Due to the relative small economic losses of each class member, these cases are very difficult to get into federal court under the traditional amount-in-controversy requirement of § 1332 because each class member will not typically have a large enough claim. Yet these seem to be the category of cases Congress was most interested in protecting because the individual class members have little incentive to give oversight to class counsel’s actions; but-for class certification these claims would not otherwise likely even be pursued, and such cases have often given rise to the notorious coupon settlements of questionable benefit to the consumers. Indeed, it is about such types of claims that even consumer rights advocates have criticized the class action system as “just another milking of the system by professionals, in this case lawyers.” These cases also, arguably, offer the strongest argument for national uniformity in terms of the impact of the litigation on the nationwide business practices of the defendants. In other words, such nationwide class actions argued strongly for adjudication by a forum with a national focus and perspective. While such national protection of interstate business is sometimes cited as an alternative historic purpose behind the Article III diversity grant, it clearly is distinct from any local bias concerns.

Between the Supreme Court’s decision in Exxon in 2005 and Congress’ enactment of both the Multiparty, Multiforum Act and the Class Action Fairness Act of 2005, the last three years have seen an unprecedented and historic expansion of diversity jurisdiction. Of course, that is the prerogative of Congress since that body “controls federal jurisdiction and can expand it or retract it, within constitutional limits, as it chooses to do.” The irony is that this expansion came on the heels of what to many must have appeared to be the

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178 This is a phrase used to describe claims that are, individually, so small that they would likely result in an economic loss, balancing the expenses of litigation against the likely verdict. See, e.g., Castano v. The American Tobacco Co., 84 F.3d 734, 738 (5th Cir. 1996) (“The most compelling rationale for finding superiority in a class action—the existence of a negative value suit—is missing in this case.”).
179 See supra text accompanying note 174.
181 See generally Underwood, supra note 164, at 405–08 (referring to the concept of locally elected state court judges issuing orders to foreign corporations on how to treat other foreign consumers in their out-of-state business transactions as “irrational federalism”).
182 Id.
183 See supra note 19.
death knell for diversity—the 1990 recommendation of the Study Committee to abolish this least favored form of jurisdiction.

D. Footsteps at the Door?

Although diversity has continued to have many detractors among the bench and academia,185 diversity retains strong support among lawyers in private practice186 and, apparently, the majority of Congress. Perhaps this is because those in the trenches tend to agree that local bias is still a problem in the state courts.187 Yet the diversity debate should no longer be restricted to considerations of local bias even though its detractors would like for such focus to frame the issues. For example, Professor Chemerinsky states that the debate over diversity jurisdiction “centers on whether state courts are likely to be biased against out-of-staters.”188 Others, despite the experience of the last few years, agree with Professor Chemerinsky and continue to try to urge diversity’s abolition based upon the opinion that local bias is no longer a concern:

The continuing viability of diversity jurisdiction has rested primarily on the notion of avoiding local bias . . . As a form of discrimination, local bias cannot serve as the basis for the continuing use of diversity jurisdiction. Accordingly, this Ar-

185 See Thomas E. Baker, A View to the Future of Judicial Federalism: “Neither Out For Nor in Deep,” 45 CASE W. RES. L. REV. 705, 765 (1995) (“The debate over the advisability of diversity jurisdiction goes back to its inception and shows no sign of abating in the future. The contemporary debate is highly relevant to the future of the federal courts. The parties to the debate generally have chosen sides so that state and federal judges and academics favor abolition while the practicing lawyers favor retention.”).

186 Professor Wright states his belief that “the basis for [attorneys’] position is not that they love the state courts less but that they love a choice of forum more.” Charles Alan Wright, Restructuring Federal Jurisdiction: The American Law Institute Proposals, 26 WASH. & LEE L. REV. 185, 207 (1969); see also William E. Betz, For the Retention of Diversity Jurisdiction, N.Y. ST. B.J., July 1984, at 35 (arguing that a perception of continued bias at the state court level provides continued justification for diversity jurisdiction); Adrienne J. Marsh, Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts, 48 BROOK. L. REV. 197, 208–09 (1982).

187 One study in Cook County, Illinois found that 40% of the attorneys surveyed who had filed diversity cases pointed to “bias against an out-of-state resident” as a reason for their choice of the federal forum, Jerry Goldman & Kenneth S. Marks, Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry, 9 J. LEGAL. STUd. 93, 97–99 (1980), while another study found more than 60% of the attorneys believing that prejudice against non-residents existed in some cases, Note, The Choice Between State and Federal Court in Diversity Cases in Virginia, 51 VA. L. REV. 178 (1965). Professor Wright also reported that a poll of practitioners showed that they opposed any elimination of diversity jurisdiction by a 69% to 26% margin. WRIGHT, supra note 14, at 152 n.54 (citing Law Poll, 66 A.B.A. J. 148, 149 (1980)). But cf. Kristin Bumiller, Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform, 15 LAW & SOC'Y. REV. 749, 752 (1981) (finding that the perception of unfairness seemed to predominate in rural areas only).

188 CHEMERINSKY, supra note 8, at 290.
ticle calls for the abolition of diversity jurisdiction under those circumstances traditionally justified on the basis of protecting nonresidents from local bias.\textsuperscript{189}

Of course, by limiting supporters of diversity jurisdiction to reliance upon the goal of avoiding local bias, opponents can not only check any growth in the use of diversity jurisdiction but can argue with some success for its abolition. However, if we are to learn anything from the recent actions of Congress, particularly in enacting the Multi-Forum, Multi-Party Act and the Class Action Fairness Act, it ought to be that the focus of the debate no longer is properly limited to consideration of the possible bias against litigants. Indeed, Professor Wright's words seem to capture the impact of the changed times on this debate well:

The conditions that existed, or were feared to exist, in 1789 are irrelevant in determining the continued necessity for diversity jurisdiction. As the protagonists in this continuing controversy have recognized, the decision to retain or abolish such jurisdiction today must depend on the utility of the jurisdiction in today's society.\textsuperscript{190}

The enactments of both § 1369 and § 1332(d) demonstrate Congress' willingness to rely upon diversity jurisdiction for goals wholly unrelated to avoiding local bias. Consequently, those who would try to force the debate into the narrow confines of concern for local bias should no longer be successful in erecting such straw-man arguments.

The recent round of legislation resulting in this "vast expansion of federal court jurisdiction"\textsuperscript{191} has accomplished its broader goals through the relaxation of either, or both, of the amount-in-controversy and the complete diversity requirements. Are there any constitutional

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\footnote{\textsuperscript{189} Bassett, \textit{supra} note 21, at 150. \textit{See also} Suzanna Sherry, \textit{Against Diversity}, 17 \textit{CONST. COMMENT.} 1 (2000) which offers a similar analysis in its advocacy against such jurisdiction: "Diversity" is a concept that has outgrown its origins and outlived its usefulness. In the end, it is really just a code word for preferential treatment. With little analytical basis, it was originally designed as a remedy for vague and undocumented fears of covert discrimination. Now it has become instead an automatic haven for the lucky few. Those who are able to benefit from it are, in fact, usually at no greater disadvantage than those who cannot do so. Often the differences between them amount to little more than happenstance. Indeed, some of those who can claim its benefits are less likely to be victims of discrimination than some of those who are excluded from its coverage. Outcomes should not turn on the fortuity of characteristics totally irrelevant to the merits. \textit{Id.} at 1.}

\footnote{\textsuperscript{190} WRIGHT, \textit{supra} note 14, at 143.}

\footnote{\textsuperscript{191} Floyd, \textit{supra} note 144, at 695.}
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limits to this type of legislation? There is no doubt that Article III in no way requires there to be any minimum amount in controversy for Congress to permit district courts to exercise any type of constitutional subject matter jurisdiction. Article III nowhere mentions such a limitation. In fact, the original grant by Congress of federal question jurisdiction to the lower federal courts included a minimum amount in controversy, only relatively recently removed. Likewise, the Supreme Court has made it abundantly clear that its complete diversity rule first enunciated in the *Strawbridge* decision was merely an interpretation of § 1332 and not Article III. Accordingly, the Supreme Court voiced its belief that Article III requires only minimal diversity of citizenship and that any legislation by Congress exercising such jurisdictional grant is constitutional. In the context of considering the constitutionality of the minimal diversity interpleader act, the Court explained the complete diversity holding from *Strawbridge* as follows:

Chief Justice Marshall there purported to construe only "the words of the act of congress," not the Constitution itself. And in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens. Accordingly, we conclude that the present case is properly in the federal courts.

As recently as 2005, the Supreme Court has reaffirmed this view that complete diversity is not required by the Constitution. Legal scholars have consistently agreed with this view. As one scholar stated recently in the context of the Class Action Fairness Act, "the re-

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193 *See* *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).
194 *Id.* at 531 (footnotes omitted).
195 *Exxon Mobil v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2617 (2005) (arguing "[t]he complete diversity requirement is not mandated by the Constitution") (citing *State Farm v. Tashire*, 386 U.S. 523 (1967)).
196 *See*, e.g., *WRIGHT, supra* note 14, at 154 ("To have held that the Constitution requires complete diversity would have had a debilitating effect on the interpleader act, and would have largely precluded the possibilities of using the diversity jurisdiction as a basis for providing a federal forum for other cases in which no state court could grant effective relief. Even those most critical of diversity jurisdiction have recognized and supported the potentialities of diversity for situations of the sort described, and a construction barring this use of diversity would have been most unfortunate."); *Fink, supra* note 184, at 164 ("The rule of *Strawbridge v. Curtiss* goes back to an early nineteenth-century decision of the United States Supreme Court, which, later decisions of the Court make clear, was a reading by Chief Justice Marshall of a jurisdictional statute—now 28 U.S.C. § 1332—not an interpretation of the parallel language of Article III.").
requirement of complete diversity comes from Congress, not Article III. Congress may authorize 'minimal diversity' suits in federal court and did so [in 2005] with class actions."\textsuperscript{197}

A somewhat isolated dissenting scholar maintains, however, that any grant by Congress of minimal diversity jurisdiction to the district courts must be tied to a clearly expressed desire by Congress that is "necessary and proper" to achieving the goal of avoiding local bias against nonresident litigants—the chief motivation of the founding fathers in authorizing diversity jurisdiction.\textsuperscript{198} Professor Floyd, while being alone thus far in this regard, has espoused such a proposed limitation upon Congress in apparent reaction to Congress' recent legislation. For Professor Floyd, Congress' failure to link its recent legislation to a primary goal of avoiding local bias results in those statutes being unconstitutional:

[S]ome of these concerns may, in appropriate circumstances, provide an appropriate basis for the conferral of federal diversity jurisdiction. Others, such as the desire to promote judicial economy (standing alone), the large size of the litigation, or the alleged incompetence of state courts to handle large scale class action litigation, are not, without more, sufficient to warrant the massive transfer of power from the state to the federal judiciaries that the Act seeks to effect. The core of the problem lies in the failure of the Act to tailor its jurisdictional provisions to the purposes underlying Article III's grant of diversity jurisdiction to the federal courts.\textsuperscript{199}

Nevertheless, the only constitutionally logical limitation that applies in a world where Congress chooses to vigorously exercise minimal diversity jurisdiction would be that the additional parties' claims relate enough to the claims of the diverse parties that they form part of the same constitutional "case," as envisioned by the Supreme Court in \textit{Gibbs}.\textsuperscript{200} Thus, hypothetical legislation creating minimal diversity jurisdiction in cases where the parties' claims do


\textsuperscript{198}See Floyd, supra note 144, at 634–35.

\textsuperscript{199}Id. at 631.

\textsuperscript{200}United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (stating that all claims that derive from a "common nucleus of operative fact" shall be deemed part of the same constitutional case).
not arise out of the same transaction or occurrence, and thus do not form what Article III envisions to be part of the same "case," would arguably be impermissible. However, because both § 1369 and § 1332(d) apply in circumstances where there would almost necessarily be such a close relationship among the various parties to constitute such a "case," it seems implausible that the Supreme Court would find Congress to have overstepped its broad discretion in opening the doors to the federal courthouse.

Accordingly, regardless of the original intentions of the framers in drafting Article III or of the first Congress in enacting the Judiciary Act of 1789, the question to ask today is not so much about constitutional limits on Congress but about issues of public policy and whether diversity jurisdiction continues to serve any existing purpose. As one scholar observed: "Issues of federal court versus state court jurisdiction are best understood to be issues of power. The demarcation of federal court jurisdiction is given over to the Congress. Federal jurisdiction is not law. It is politics." At least from Congress' perspective, which is the sole gate-keeper in terms of the jurisdiction of the "inferior" federal courts, diversity not only is still important but increasingly so—and this belief is held by a rather large majority. One cannot help but wonder if Justice Scalia's invitation in Finley for Congress to legislate in the field of supplemental jurisdiction, with its implicit recognition that Congress is the ultimate monarch in terms of setting the boundaries for the federal district courts' jurisdictional reach, has helped to usher in this seeming new golden era for diversity jurisdiction.

Prior to 2002, some advocated "changes that would open the door of the federal courts to virtually all mass tort, mass disaster, and ma-

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201 Section 1369 will only apply in instances where there have been deaths caused by at least seventy-five people arising out of one "single accident...at a discrete location." 28 U.S.C. § 1369(a) (Supp. 2002). Such limitations would certainly appear to limit the statute's application to cases that arose out of the same occurrence. Likewise, the various definitional limitations contained within Fed. R. Civ. P. 23(a) and (b) would also seem to help limit the exercise of minimal diversity in class actions to instances where the joinder of the various claims would seem to satisfy a constitutional "case."


203 See discussion supra note 167.

204 This attitude is consistent with the Supreme Court's historic views on the matter: [T]he judicial power of the United States ... is ... dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) ... and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. Palmore v. United States, 411 U.S. 389, 401 (1973).
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ajor class actions, where they can best be handled." Congress has now already adopted examples of such legislation. What other changes, if any, may Congress consider that would be consistent with the foregoing expansion? Other possible areas where Congress might consider flexing its diversity muscles a bit more could include the following:

- Loosening some of the removal limitations such as the court-mandated requirement of unanimity, as well as the 1988 revision imposing a one-year limit on diversity removals, as these serve to encourage the fraudulent joinder of local citizens.

- Revising the removal statutes to liberalize, or at least to streamline, the analysis for considering allegations of fraudulent joinder or procedural misjoinder.

- Removing the complete diversity requirement that the Supreme Court read into § 1332 or, in the alternative, removing the complete diversity requirement only for cases of extraordinarily large size (i.e., over $1 million in damages) or for certain claims such as product liability lawsuits involving products used or sold in interstate commerce, where uniformity is particularly important.

- Redefining the citizenship of a corporation to be either the state of incorporation or the principal place of business—rather than both—and permitting removal whenever either state of citizenship would create the diversity needed.

- Granting the federal district courts exclusive jurisdiction over certain diversity claims. While this may seem extreme,

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205 Fink, supra note 184, at 163.
206 See generally Haiber, supra note 15 (arguing for rejection of court-created barriers to litigants' broad exercise of diversity removal rights).
207 See generally Underwood, supra note 38 (advocating for possible congressional legislation to at least unify the fraudulent joinder analysis); Hines & Gensler, supra note 197 (advocating for formal recognition, and possible congressional legislation, of procedural misjoinder as an exception to the complete diversity requirement of § 1332).
208 "Even Chief Justice Marshall, who wrote the Court's opinion in Strawbridge, later expressed some serious doubts and regret about the case. What hold should this decision, rendered in a far different era, continue to have upon us today?" Fink, supra note 184, at 164.
there appears to be nothing in the Constitution that would prohibit it and another prominent scholar believes Congress has the power to “go even farther and grant such jurisdiction [over mass-tort cases with minimal diversity] exclusively to the federal courts—as it has done in patent and copyright cases.”

This article will not attempt to advocate for any such legislative changes by Congress to the subject matter jurisdiction of the federal courts. Such debates can best be left to another time. Nevertheless, what is significant about the experience of the last few years is that Congress not only possesses the power to make such radical shifts in the federal courts’ diversity powers but that Congress has now begun to exercise that power in significant ways. Such actions will have a profound impact on whether, and how, certain claims continue to be litigated in this country and should likewise impact the nature of the debate over the continued vitality of diversity jurisdiction.

IV. CONCLUSION

Congress appears to have recently adopted the notion that the best litigation reforms are tied to the identity and location of the court and to the related objective of minimizing redundant litigation. This argues for an increased role for diversity jurisdiction, at least in the case of certain types of claims where policymakers believe a national response is effective. Faced with the choice of accepting the Study Committee’s recommendation of abandoning diversity jurisdiction, Congress has instead embarked on a very different path, apparently intent upon pulling diversity out of the academic and judicial doghouse and more fully exercising its Article III power to open the doors to the federal courts. Such conduct is constitutional and likely to lead to dramatic changes in the way important interstate disputes are resolved. It is time for the legal community to wake up to these changes.

209 Id. at 167.

210 As Professor Fink noted with regard to Congress’ legislative powers in the area of § 1367, “[s]upplemental jurisdiction is the unused weapon in Congress’ arsenal to solve national litigation problems in the federal courts.” Id. at 169.