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## Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity

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## ARTICLE III AND REMOVAL JURISDICTION: THE DEMISE OF THE COMPLETE DIVERSITY RULE AND A PROPOSED RETURN TO MINIMAL DIVERSITY

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### *Abstract*

The complete diversity rule is broken. Although easily applied in theory (federal courts can exercise subject matter jurisdiction over an action on diversity grounds only when no party is of the same citizenship as any adverse party), over time the number of judicially and legislatively created exceptions to the rule, as well as their varying and inconsistent application by the federal courts, has created an environment in which similarly situated parties are treated differently based solely on the forum in which the litigation is brought.

In the removal context, depending upon the forum in which an action is filed, a federal court may exercise diversity jurisdiction over a matter despite the presence of a nondiverse party where, for example, the defendant can show the plaintiff lacks a viable claim against the nondiverse party, or the plaintiff has improperly joined the claims of nondiverse parties to a completely diverse action, or, in mass actions, the plaintiffs have proposed trying the joined actions together (but not if they have not). In response, the federal judiciary (despite having brought this problem on itself through its myriad conflicting rulings on the subject) has cried out for

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order—requesting a revision to the current diversity jurisdiction regime that provides both uniformity in treatment and ease of application.

This article proposes the adoption of a minimum diversity standard for all matters between citizens of different states. This proposal is supported by Article III of the Constitution and its framers. Further, it is easy to apply, and largely incapable of manipulation. To ensure, however, that this change does not flood the courts with diversity matters, this article further proposes an increase to the amount-in-controversy requirement to bring it into the twenty-first century, along with a mandatory abstention provision precluding the federal courts from hearing matters local in nature.

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### *I. Introduction*

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .<sup>1</sup> The judicial Power

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1. U.S. CONST. art. III, § 1.

shall extend . . . to Controversies . . . between Citizens of different States . . . .<sup>2</sup>

This plan appears to me at present the most eligible of any that could be adopted; and in order to [implement] it, it is necessary that the power of constituting inferior courts should exist *in the full extent* in which it is to be found in the proposed Constitution.<sup>3</sup>

The framers expressed an intent that the federal courts be open to all cases and controversies “national” in nature: specifically, all controversies involving citizens of different states.<sup>4</sup> Over time, however, the jurisprudence of the Supreme Court and lower federal courts has turned the simple and easily applied concept of diversity jurisdiction as it was first envisioned into something that would be virtually unrecognizable to the founding fathers. Focusing on removal as a proxy for the larger issue, federal diversity jurisdiction today is applied inconsistently (some might argue arbitrarily) and suffers from myriad complex judicially and legislatively created exceptions to the complete diversity requirement. Consequently, it is subject to brazen gamesmanship between the parties—often with the court’s imprimatur—to avoid or manufacture federal jurisdiction. Nowhere is this more evident than in mass tort litigation. Consider the following six hypothetical situations, and determine which, if any, are removable from state to federal court on diversity grounds.<sup>5</sup>

1. Forty-nine individuals, each a resident of a state diverse from the others,<sup>6</sup> join together and bring a single product liability lawsuit against a defendant pharmaceutical manufacturer alleging injuries sustained from the use of defendant’s prescription medication.<sup>7</sup> The defendant drug manufacturer is

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2. U.S. CONST. art. III, § 2, cl. 1.

3. THE FEDERALIST NO. 81, at 471 (Alexander Hamilton) (J. & A. McLean ed., ABA 2009) (1788) (emphasis added).

4. U.S. CONST. art. III, § 2, cl. 1; *see also* THE FEDERALIST NO. 80, *supra* note 3, at 461-63 (Alexander Hamilton) (“It seems scarcely to admit of controversy that the judiciary authority of the Union ought to extend to . . . causes between two States, between one State and the citizens of another, and between the citizens of different States . . . .” (emphasis added)).

5. In making your assessment, presume for each hypothetical that the amount-in-controversy requirement of 28 U.S.C. § 1332(a) is met.

6. The term “state” as used in these hypothetical scenarios shall connote only the fifty states of the United States.

7. For purposes of these hypothetical scenarios, disregard whether the claims of the

diverse in citizenship from the forty-nine plaintiffs (i.e., it is a citizen of the fiftieth state of the union, of which none of the plaintiffs is a citizen). Plaintiffs file their complaint in a state court in a state different from the one in which defendant is a citizen.

2. The same group of plaintiffs from the first hypothetical again joins together and brings a single product liability lawsuit against a diverse defendant pharmaceutical manufacturer alleging injuries sustained from the use of defendant's prescription medication. *This time, however, the plaintiffs name a second defendant (a pharmaceutical distributor), which has the same citizenship as one of the forty-nine plaintiffs.* Although the distributor did, in fact, distribute the medication at issue, plaintiffs do not allege that the distributor prescribed, sold, or supplied the medication to any of the named plaintiffs in the suit, nor to the physicians who treated them. Plaintiffs file their complaint in a state court in a state in which neither of the named defendants is a citizen.

3. *Fifty individuals*, each a resident of a state diverse from the others, join together and bring the same lawsuit as proposed in the first hypothetical, against the same defendant. *This time, however, the defendant drug manufacturer is necessarily a citizen of the same state as one of the fifty plaintiffs.* Plaintiffs file their complaint in a state court in a state different from the one in which defendant is a citizen.

4. *Ninety-nine individuals*, citizens of numerous states of the union, join together and bring the same lawsuit as proposed in the first hypothetical, against the same defendant. At least one of the plaintiffs, but not all, is a citizen of a state different from the one in which defendant claims citizenship. Plaintiffs file their complaint in a state court in a state different from the one in which defendant is a citizen.

5. *One hundred individuals*, citizens of various states of the union, join together and bring the same lawsuit as proposed in

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plaintiffs suffice to meet the joinder requirements of the Federal Rules of Civil Procedure or the applicable procedural rules of the states in which they are filed. The question of the propriety of joinder in the above hypothetical scenarios will be assessed subsequently in this text. See discussion *infra* Part II.B.

the first hypothetical, against the same defendant. At least one of the plaintiffs, but not all, is a citizen of a state different from the one in which defendant claims citizenship. Plaintiffs file their complaint in a state court in a state different from the one in which defendant is a citizen.

6. *The same one hundred individuals* from the fifth hypothetical *band together in groups of twenty and file five separate lawsuits* against the same defendant. At least one of the plaintiffs in each of the five suits, but not all, is a citizen of a state different from the one in which defendant claims citizenship. The allegations in each of the five lawsuits are identical. Plaintiffs file all five complaints in the same state court and on the same date. The court in which the complaints are filed sits in a state different from the one in which defendant is a citizen.

So, which suits can be removed to federal court? The answer to the question, a response familiar to all first-year law students, is: “It depends.” But the very fact that there is no clear answer to the question goes to the heart of the issue: the complete diversity model for federal diversity jurisdiction, whatever its original intentions, is fundamentally broken.

Under the current landscape, the baseline criterion for federal subject matter jurisdiction premised on diversity grounds<sup>8</sup> (and removal founded on that premise<sup>9</sup>) mandates that no party can be of the same citizenship as any adverse party—colloquially referred to as the complete diversity rule.<sup>10</sup> Based on this rule and the allegations of citizenship in the hypothetical situations, only the complaint in the first hypothetical can be removed to federal court. Arguably, the analysis should end there.<sup>11</sup> But it does not.

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8. 28 U.S.C. § 1332(a)(1), (c) (2006).

9. *Id.* § 1441(a), (b).

10. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (establishing the complete diversity requirement).

11. *See, e.g., Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689 (9th Cir. 2005). In *Harris*, the Court of Appeals for the Ninth Circuit explained that removal premised on diversity jurisdiction presents one of three possible scenarios:

1) the case clearly is removable on the basis of jurisdictional facts apparent from the face of the complaint, i.e., complete diversity of citizenship; 2) the case clearly is not removable on the basis of jurisdictional facts apparent from the face of the complaint, i.e., lack of complete diversity; or 3) it is unclear from the complaint whether the case is removable, i.e., the citizenship of the parties is unstated or ambiguous.

*Id.* at 692-93. Because none of the complaints in the remaining hypothetical situations presents complete diversity of citizenship between adverse parties, the *Harris* rule would

First, federal courts have carved out an exception to the complete diversity requirement that allows for removal of any case to which a nondiverse defendant has been fraudulently joined to defeat federal subject matter jurisdiction.<sup>12</sup> A defendant commonly will prove fraudulent joinder by demonstrating an “inability of the plaintiff to establish a cause of action against the non-diverse party in state court.”<sup>13</sup> Relying on this doctrine, the defendant in the second hypothetical situation might be able to remove the matter to federal court after all, despite the absence of complete diversity on the face of the complaint. Because the proposed nondiverse defendant in that example had no contact with the plaintiffs, nor the physicians who prescribed the medications at issue, there would likely be “no reasonable basis for the district court to predict that the plaintiff[s] might be able to recover against” the nondiverse defendant supplier.<sup>14</sup> The outcome is less than definitive, however, as the rule is inconsistently applied across the federal district courts.<sup>15</sup> As a result, the ultimate outcome will turn on the state in which the suit is filed.

Second, some federal district courts, along with at least one (and possibly two) U.S. circuit courts of appeals, have upheld (or likely would uphold) removal despite the addition of nondiverse *plaintiffs* where the claims of the plaintiffs bear no relationship to each other.<sup>16</sup> This doctrine, known as “misjoinder” or “fraudulent misjoinder” of claims, addresses the following situation: although all plaintiffs named in a single complaint could potentially have viable claims against the named defendant or defendants, those claims are not sufficiently similar such that they can be joined together in a single action under the Federal Rules of Civil Procedure or the analogous rules of procedure of the state in which the suit is originally brought. Preliminarily, then, the matter presented in the third hypothetical situation might also be removable. But the misjoinder doctrine has not been universally adopted.<sup>17</sup> Moreover, the standards imposed by the courts to determine whether misjoinder has occurred vary among jurisdictions that employ the rule.<sup>18</sup> Again, these inconsistencies in

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preclude removal.

12. *See, e.g.*, *Smallwood v. Ill. Cent. R.R.*, 385 F.3d 568, 572-73 (5th Cir. 2004).

13. *Id.* at 573 (quoting *Travis v. Irby*, 326 F.3d 644, 646-47 (5th Cir. 2003)).

14. *Id.*

15. *See* discussion *infra* Part II.B.1.

16. *See* discussion *infra* Part II.B.2.

17. *See infra* notes 84-92 and accompanying text.

18. *See infra* notes 95, 97-104 and accompanying text.

adoption and application of the rule prevent uniformity in treatment across the jurisdictions of the United States of similar, national suits.

Third, in addition to judge-made exceptions to the complete diversity rule, Congress has also muddied the waters by enacting legislation that does away with the complete diversity requirement in certain, specific circumstances.<sup>19</sup> Of particular note, in 2005, Congress enacted the Class Action Fairness Act (CAFA),<sup>20</sup> which provides in part that so-called mass actions can be removed from state to federal court so long as “any [plaintiff] is a citizen of a State different from any defendant.”<sup>21</sup> Congress, for the first time, firmly adopted on a large scale the *minimal* diversity requirement originally proposed by the framers more than two hundred years earlier.<sup>22</sup> To qualify as a mass action, however, a suit must (1) join in a single action the claims of one hundred or more plaintiffs, (2) propose that the claims be tried jointly, (3) involve common questions of law or fact, and (4) must be a matter in which the amount in controversy exceeds \$5,000,000.<sup>23</sup> Therefore, assuming for the sake of argument that the amount in controversy is met, the complaint in the fifth hypothetical situation above can be removed to federal court. Incongruously, however, the subtraction of a single plaintiff (the fourth hypothetical situation) or artificiality in pleading the identical case (the sixth hypothetical) precludes removal.

It is in the rationale for denying removal in this last hypothetical situation that uniformity in interpretation and application of the rules on diversity jurisdiction has finally become unworkable—contrary to both legislative intent and the framers’ vision. Change is needed. For better or worse, the federal courts have long held that the plaintiff is master of the complaint and can style the complaint in such a way as to defeat federal subject matter jurisdiction.<sup>24</sup> Nonetheless, CAFA expressly targeted efforts

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19. See discussion *infra* Part II.C.

20. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

21. 28 U.S.C. § 1332(d)(2), (11) (2006).

22. See discussion *infra* Part II.C.2. Of course, minimal diversity had already been adopted by Congress in previous legislation as the jurisdictional standard, but only in very limited circumstances. See, e.g., Multiparty, Multiforum Trial Jurisdiction Act (MMTJA), 28 U.S.C. §§ 1369, 1441(e) (2006); see also 28 U.S.C. § 1335. Using CAFA, however, Congress brought the minimal diversity concept, and the framers’ rationale behind it, to the forefront of our collective consciousness.

23. 28 U.S.C. § 1332(d)(2), (11); see also *infra* notes 112–15 and accompanying text.

24. See, e.g., *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000) (“[P]laintiffs as masters of the complaint may include (or omit) claims or parties in order to

by plaintiffs' counsel to avoid the federal courts through creative pleading structure, and Congress intended the legislation, in part, to defeat such practices.<sup>25</sup> Congressional efforts in this endeavor were not novel. Rather, the rationale provided in support of CAFA was a direct extension of the same arguments offered in support of ratification of the diversity jurisdiction clause in Article III of the Constitution.<sup>26</sup> Further, it was the natural evolution of the federal courts' jurisprudence granting removal in situations where parties or claims were deemed to have been fraudulently or improperly joined to defeat federal diversity jurisdiction.

Despite this clear directive from Congress, however, the federal courts continue to map their own contradictory course in removal matters. For example, in *Tanoh v. Dow Chemical Co.*, the Ninth Circuit was presented with the question of whether seven identical lawsuits, each naming approximately ninety-five plaintiffs (comprising 664 total), could be aggregated and removed to federal court under the mass action removal provision of CAFA.<sup>27</sup> As the Ninth Circuit's opinion makes clear, the only possible reason for this pleading structure was to avoid CAFA's mass action removal provision.<sup>28</sup> Nonetheless, the court affirmed the district court's remand order.<sup>29</sup> The *Tanoh* opinion is a study in contradictions: it purports to follow the plain language of the statute, but improperly relies on imagined legislative intent to support its ruling (despite *actual* legislative history that contradicts the court's holding), and it renders the mass action removal provision both superfluous and inert, despite the court's attempts to explain its operation. Ultimately, it provides a roadmap to plaintiffs' counsel on how to plead mass actions to avoid removal to federal district courts on diversity grounds.<sup>30</sup> But irrespective of the many criticisms of the court's holding, *Tanoh* is still relevant for purposes of this article because, like the various cases and doctrines already discussed, it has taken a

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determine the forum . . . [so long as] the claims be real . . . the parties not be nominal." (emphasis added) (citations omitted).

25. S. REP. NO. 109-14, at 4 (2005) (noting that "current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state . . . actions in state courts"), reprinted in 2005 U.S.C.C.A.N. 3, 5, 2005 WL 627977.

26. See, e.g., THE FEDERALIST NO. 80, *supra* note 3, at 463 (Alexander Hamilton) (advocating for a federal forum for all minimally diverse suits to secure "the inviolable maintenance of [the] equality of privileges and immunities to which the citizens of the Union [are] entitled . . . against all evasion and subterfuge" (emphasis added)).

27. 561 F.3d 945, 950-51 (9th Cir. 2009).

28. *Id.* at 951.

29. *Id.* at 953-56.

30. See *infra* notes 133-44 and accompanying text.

concept simple in design and application and stretched it to absurd proportions.

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Viewing *Tanoh* as the tipping point, then, what clarity exists today, if any, vis-à-vis federal removal jurisdiction in diversity matters?<sup>31</sup> Must adverse parties be completely diverse? Yes. Unless, of course, the nondiverse parties were fraudulently or improperly joined. If fraudulently or improperly joined, what standard must the courts use to determine such improprieties? Must the defendant show no possibility of recovery against the nondiverse defendant, as some district courts require? Or, must the defendant go further and adduce evidence sufficient to prove sanctionable conduct by the plaintiff under the Federal Rules of Civil Procedure for fraudulent pleading practices,<sup>32</sup> as is necessary in other courts? Must the defendant demonstrate that the misjoinder of parties was egregious, or simply improper? And under CAFA, must mass actions actually be comprised of one hundred or more plaintiffs, or can multiple identical suits be aggregated and removed as a single action? As with complete diversity, the answer to this last question comes with a qualification. Yes, the statutorily specified number of plaintiffs must be joined in a single action to effect removal unless, of course, the plaintiffs request or the court orders that the claims be tried together.<sup>33</sup>

The framers proposed a straightforward rule: minimally diverse suits are federal in nature, and jurisdiction in the federal courts should be available to all parties in suits in which one party is a citizen of a state different from any one adverse party. Rather than incorporate this clear statement into the legislation establishing the federal courts, however, Congress's original directive on this point was less than definitive, leaving it open to interpretation by the courts. Moreover, once saddled with the Supreme Court's interpretation of diversity jurisdiction (i.e., that complete diversity is required), Congress declined to amend the law to make clear its intent

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31. Although the term removal jurisdiction suffers from multiple and vague definitions, Professor Scott Dodson provides a succinct explication of the concept, describing removal jurisdiction (and specifically removal statutes) as those that "permit removal to the extent of original jurisdiction," "expand jurisdiction," and "narrow removal authorization (and consequently could be seen as narrowing jurisdiction)." Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 61, 64 (2008).

32. Specifically, FED. R. CIV. P. 11.

33. This assumes, with no guarantee, that no federal circuit court of appeals will in the future take up the mantle for defendants and, rejecting the Ninth Circuit's holding in *Tanoh*, grant removal under CAFA of multiple, aggregated cases each comprising fewer than one hundred plaintiffs.

either to adopt or to abrogate the complete diversity requirement. This allowed the issue to fester, with Congress continuing to sit idly by as the federal courts took the arguably concrete concept of complete diversity and slowly undermined its dictates over time, producing the various joinder exceptions previously discussed. Congress itself then exacerbated the problem further with recent legislation expressly adopting a minimal diversity standard in limited circumstances, thus bringing the issue to its present disjointed structure.

As a result, today ours has become a system in which federal jurisdiction in diversity matters improperly hinges on the jurisdiction in which the underlying state action is brought. Accordingly, it is a system in which similarly situated parties are treated differently.<sup>34</sup> For example, despite their significant similarities, including the fact that all unquestionably involve controversies national in nature by virtue of their inclusion of citizens of multiple states (thus implicating the different laws of those states), removal will be upheld in some, but not all, of the six hypothetical situations presented above. Moreover, of those hypothetical situations in which removal will be upheld, treatment will not necessarily be consistent across the federal district courts of the thirteen U.S. circuit courts of appeals.<sup>35</sup> This is antithetical to the framers' intent, which envisioned a federal forum for each of the suits described above. Ultimately, it is an ad hoc system with which the courts themselves have grown increasingly displeased. In recent years, numerous federal courts have openly campaigned for an overhaul of federal diversity jurisdiction in favor of a uniform, and easily applied test.<sup>36</sup> It is time to answer their pleas.

This article proposes, for the sake of simplicity in application, improved judicial efficiency, and to give effect to the framers' original intent, that federal diversity jurisdiction be extended to all matters involving minimally diverse parties.<sup>37</sup> Doing so would eliminate the unnecessarily complex

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34. For example, in actions removed to federal court under CAFA, the federal district court can exercise jurisdiction over all minimally diverse parties named to the dispute. 28 U.S.C. § 1332(d)(11) (2006). By contrast, in cases in which removal is premised on misjoinder, the district court can exercise jurisdiction only over those plaintiffs completely diverse to defendants, and must remand the claims of the remaining nondiverse plaintiffs to state court. *See, e.g.,* Chaney v. Gate Pharm., No. Civ.A. 98-20478, 1203, 1999 WL 554584, at \*3-5 (E.D. Pa. July 16, 1999).

35. That is, whereas removal of the case in the third hypothetical scenario will be upheld by the Courts of Appeals for the Fifth and Eleventh Circuits, for example, it will be rejected by the Courts of Appeals for the Seventh and Ninth Circuits, among others.

36. *See infra* note 146 and accompanying text.

37. Although this article focuses on removal to highlight various ways diversity

patchwork of rules that currently govern diversity jurisdiction. It would instead provide a uniform rule to be applied regardless of the number of parties to an action. It would also eliminate the temptation—so irresistible to so many parties litigating under the current regime—to “game” the system to manufacture or defeat jurisdiction, at the federal courts’ expense.

Part II of this article focuses on the origins of federal diversity jurisdiction, the complete diversity requirement, and its subsequent (and steady) erosion over time. Part III addresses the potential impact of this article’s proposal on concepts of federalism, and asks whether antiquated notions of state sovereignty and encroachment on so-called states’ rights remain valid concerns today—to the extent they were ever considerations taken into account by the framers when first proposing federal diversity jurisdiction. Part IV looks at the potential costs and burdens on federal courts that would result from a relaxation of the requirements of diversity jurisdiction. Part IV then highlights the benefits such legislation would produce (e.g., by providing a single forum to handle large-scale litigation unavailable under the current regime), and concludes that moving to a minimal diversity standard would result in an efficient and streamlined system of tort litigation in the federal courts focused on the merits of the disputes instead of procedural posturing.

### *II. The Complete Diversity Rule: Its Underpinnings and Subsequent and Steady Erosion over Time*

As a preliminary matter, it is important to clarify that the complete diversity rule is not a constitutional requirement, but rather a legislatively imposed restriction limiting access to the federal courts in diversity matters,

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jurisdiction principles are manipulated in practice, it proposes the adoption of a minimum diversity standard applicable across the board (i.e., both in cases removed to federal court, as well as those filed there in the first instance). The reason for the use of this framing device hopefully will be obvious—the major problems with the application of diversity jurisdiction derive from efforts by the parties to avoid (plaintiffs) or gain access to (defendants) the federal courts, which efforts are seen virtually exclusively in the removal context. Moving to a minimum diversity standard is unlikely to create more or less controversy in original filings than the current framework (because, under both scenarios, the plaintiff will have chosen to litigate in federal court), but it will produce significant benefits in the removal context by establishing an easily applied rule in contrast to the current regime. In response to concerns that this proposed standard will increase the number of cases filed with and heard by the federal courts, this article does not propose granting to the federal courts the full authority provided under Article III. Notably, this article proposes tempering the exposure of the federal courts to diversity cases by increasing the amount-in-controversy requirement and imposing a mandatory abstention provision for cases truly “local” in nature.

which Congress can correct on its own initiative.<sup>38</sup> To repeat the quote that begins this article, the Constitution provides that “[t]he judicial Power of the United States . . . shall extend . . . to Controversies . . . between Citizens of different States.”<sup>39</sup> Literally speaking, this provision requires only minimal diversity between adverse parties for the controversy to fall under the authority of the federal judiciary. Although unnecessary in light of its plain meaning,<sup>40</sup> this interpretation has been reiterated in numerous Supreme Court opinions.<sup>41</sup>

Moreover, the framers unquestionably *intended* that the diversity jurisdiction provision of Article III be broadly construed.<sup>42</sup> In defending the proposed implementation of a federal judiciary, Hamilton advocated for uniformity in decisions regarding the Constitution and the laws of the United States,<sup>43</sup> as well as “all those [matters] which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, *or to that between the States themselves.*”<sup>44</sup> Thus, not only did the framers intend for the federal judiciary to be open to all minimally diverse actions, they viewed the availability of a federal forum as the only way to ensure consistent treatment in these matters.

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38. *Cf.* U.S. CONST. art. V (requiring two-thirds majority vote in each house of Congress (or constitutional convention called for by two thirds of the fifty states) proposing an amendment to the Constitution, and subsequent ratification by three fourths of the states).

39. U.S. CONST. art. III, §§ 1–2.

40. 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:1, at 137–41 (7th ed. 2007) [hereinafter 2A SUTHERLAND]; *see also infra* text accompanying note 133.

41. *See, e.g.*, *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 67–68 & n.3 (1996); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 199 (1990); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 & n.13 (1978); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 & nn.6–7 (1967).

42. THE FEDERALIST NO. 80, *supra* note 3, at 463 (Alexander Hamilton) (“[T]he national judiciary *ought to preside* in all cases in which one State or its citizens are opposed to another State or its citizens.” (emphasis added)).

43. *Id.* at 462 (“Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.”).

44. *Id.* at 461 (emphasis added). Notably, Hamilton did not qualify his language regarding interstate disputes. Rather, his language was sufficiently broad to encompass all disputes involving citizens from more than one state. *See id.* at 462 (providing that this “plain proposition” rests on the concept that “the peace of the WHOLE ought not to be left at the disposal of a PART”); *see also supra* notes 3, 26 and accompanying text.

The Supreme Court's decision in *Strawbridge v. Curtiss*,<sup>45</sup> which originally established the complete diversity rule, admittedly (and importantly) focused exclusively on the words of a statutory provision, and not the language of the Constitution itself, in arriving at its conclusion.<sup>46</sup> Over time, the Court's repeated reaffirmation of *Strawbridge*<sup>47</sup> has perpetuated an unnecessary and unwarranted restriction on the plain meaning of Article III's diversity jurisdiction clause. Whatever the original intentions behind Congress's decision to stray from the contemporaneous language of Article III in establishing and defining access to the federal courts,<sup>48</sup> the complete diversity rule as applied today bars access to the federal courts for many suits that are national in nature, in contravention of the framers' design.

*A. Article III and the Federal Judiciary's Scope of Authority in Diversity Matters Following the First Judiciary Act*

Enacted in quick succession, and sharing many of the same authors, Article III and the Judiciary Act of 1789—the latter establishing the lower federal courts<sup>49</sup>—both spoke to the question of federal diversity jurisdiction, but with surprisingly discrepant definitions (resulting in subsequent divergent interpretations).<sup>50</sup> Whereas Article III unequivocally

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45. 7 U.S. (3 Cranch) 267 (1806).

46. *Id.* at 267 (expressly limiting its holding to “[t]he words of the act of congress”).

47. *See, e.g.*, *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005) (“Since *Strawbridge* . . . we have read the statutory formulation ‘between . . . citizens of different States’ to require complete diversity between all plaintiffs and all defendants.” (quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996))).

48. Professor Larry Yackle summarizes the long-espoused opinions regarding the purpose behind the enactment of federal diversity jurisdiction as follows:

The conventional explanation for diversity jurisdiction is that out-of-state litigants may not receive fair treatment in the courts of the state in which their adversaries reside, or that local state legislatures may enact statutes favorable to their own. Historians also point out that an effective system of federal courts was needed in the late eighteenth century to undergird national economic development.

LARRY W. YACKLE, *RECLAIMING THE FEDERAL COURTS* 230 n.116 (1994).

49. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78. It is important to recall that the jurisdictional provisions of Article III were not self-executing, and required an act of Congress to establish the lower federal courts and correspondingly to determine their judicial authority within the constraints provided by the Constitution.

50. Following its ratification by New Hampshire on June 21, 1788, the Constitution went into effect. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”); CRAIG R. SMITH, *TO FORM A MORE PERFECT UNION: THE RATIFICATION OF THE*

provides for federal jurisdiction in all controversies “between . . . Citizens of different States,” the authors of the First Judiciary Act extended jurisdiction to the federal courts only in circumstances “where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.”<sup>51</sup>

The Supreme Court quickly latched onto the variance between the two provisions, founding the complete diversity rule on the jurisdictional provision in the First Judiciary Act instead of Article III.<sup>52</sup> In doing so, the Court firmly established that the Constitution requires only minimal diversity between adverse parties to confer federal jurisdiction, even if a more restrictive rule ultimately is imposed by Congress—as was the case with the First Judiciary Act.<sup>53</sup>

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CONSTITUTION AND THE BILL OF RIGHTS 1787–1791, at 25 (1993) (“New Hampshire became the ninth state to ratify [the Constitution] on June 21st, 1788 . . .”). The First Judiciary Act was enacted slightly more than one year later. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. Both were conceived and drafted by many of the same individuals. See, e.g., Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 52 (2007) (noting that “the First Judiciary Act was drafted by a Congress that included many of the original Framers”).

51. § 11, 1 Stat. at 78. Because of their shared lineage, some scholars have suggested that the jurisdictional provisions of the First Judiciary Act “have been ascribed a stature near that enjoyed by Article III itself.” See, e.g., Bassett, *supra* note 50, at 52. Despite this common history, however, the Supreme Court almost immediately made clear the limited scope of the jurisdictional statute, and the expansiveness of the analogous provision of the Constitution. Although the complete diversity rule—based on the first jurisdictional statute—has existed for more than two hundred years, the Court has taken great pains to make clear that jurisdictional statutes (and in particular the complete diversity rule) are not co-equals with the Constitutional provisions on which they are founded. See *infra* note 52.

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

53. The Court’s jurisprudence has made clear over time that, as written, the concept of federal diversity jurisdiction as set out in Article III, Section 2, Clause 1 connotes only so-called minimal diversity—which requires only that any one party be of different citizenship from any one adverse party. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 & nn.6–7 (1967). The concept of complete diversity was founded on the language used by Congress in establishing the lower federal courts, not the language of the Constitution itself. *Strawbridge*, 7 U.S. (3 Cranch) at 267 (construing § 11, 1 Stat. at 78). This distinction is crucial to understanding Article III’s reach. For, as the Supreme Court has repeatedly reaffirmed since *Tashire*, the complete diversity gloss read onto 28 U.S.C. § 1332(a)(1) is a matter of statutory interpretation, and not a constitutional requirement. See generally *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005); *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996); *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978). Thus, Congress is not constitutionally barred from giving the framers’ intent full effect. *Tashire*, 386 U.S. at 531 (“Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse

Notably, the language of the First Judiciary Act repurposed Article III as a jurisdictional provision directed solely to the question of a dispute between an “insider” (or, resident of the forum) and an “outsider” (or, a person outside of the forum state). This is a narrow reading of Article III, which does not speak to forum, but only to the residences of the adverse parties.<sup>54</sup> In later iterations, including its present form, Congress removed the forum component from the jurisdictional statute and expanded the statute’s scope to acknowledge the type of multiple party litigation commonplace in today’s practice, thus more closely aligning the statute with the language of the Constitution.<sup>55</sup>

This statutory evolution is relevant because, with each modification to the diversity jurisdiction statute, the Supreme Court reaffirmed the complete diversity rule—despite a wholesale change over time of the jurisdictional provision from its original phrasing. Indeed, the current provision now repeats verbatim the language of Article III,<sup>56</sup> which, as demonstrated above, expressly abrogates complete diversity in favor of minimal diversity.

This disconnect in the interpretation of the current jurisdictional provision is reflected in statements both from the Justices of the Supreme Court and those in academia who mistakenly suggest that the basis for the complete diversity rule (i.e., the statutory language) has remained

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parties are not co-citizens.”). In fact, in limited contexts, Congress has already carved out certain exceptions to the complete diversity rule. *See* discussion *infra* Part II.C.

54. *Cf.* THE FEDERALIST NO. 80, *supra* note 3, at 463 (Alexander Hamilton) (advocating for the extension of federal judicial authority to all suits “between the different States and their citizens”). In addition to stressing the forum (“where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State”), Congress’s initial, awkward phrasing of the diversity jurisdiction clause unnecessarily limited disputes (from a literal perspective, at least) to those between a single plaintiff and single defendant. § 11, 1 Stat. at 78.

55. *E.g.*, 28 U.S.C. § 1332(a)(1) (2006) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy . . . is between . . . citizens of different States.” (emphasis added)).

56. Although Article III speaks of *controversies* between citizens of different states and § 1332 references *civil actions*, review of the legislative history surrounding the Constitution (both pre- and post-ratification) suggests that the framers intended the word “controversy” in Article III to refer exclusively to suits between named parties (and not, as some have suggested (including Hamilton) that “controversies” include all those with an interest in the suit—even if not named, or capable of being bound by the court’s decision). *See* Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*, 51 WM. & MARY L. REV. 1113, 1125, 1131–76 (2009).

unchanged over time.<sup>57</sup> The courts further suggest that the rationale supporting the complete diversity rule (the “bias” argument as Professor Larry Yackle describes it<sup>58</sup>) likewise remains a relevant concern today and supports the perpetuation of the complete diversity rule.<sup>59</sup>

Whereas the Supreme Court has answered the first concern regarding the evolution of the diversity jurisdiction statute<sup>60</sup>—at least to its own satisfaction<sup>61</sup>—the bias rationale suggests the demise of the concept. The key aspect of the bias argument is that state courts (and legislatures) could potentially be prone to bias against out-of-state parties when entertaining suits involving their own residents. This concept is reinforced by the First Judiciary Act, which places special emphasis on the forum: requiring that “the suit [be] between a citizen *of the State where the suit is brought*, and a

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57. See, e.g., *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005) (“Since *Strawbridge* . . . we have read the statutory formulation ‘between . . . citizens of different States’ to require complete diversity between all plaintiffs and all defendants.” (quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996))); see also Bassett, *supra* note 50, at 58 (“[T]he phrase ‘citizens of different States’ within § 1332(a) *historically has been read differently from the identical phrase in Article III*, with § 1332(a) requiring complete diversity of citizenship rather than merely the minimal diversity required by Article III.” (emphasis added)). Both Justice Ginsburg, writing for a unanimous court in *Lincoln Property Co.*, and Professor Bassett implicitly suggest that the language of the statute has remained unchanged over time—and in fact has always included the “citizens of different states” language of Article III, when history unquestionably demonstrates otherwise.

58. YACKLE, *supra* note 48, at 230 n.116.

59. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553–54 (2005) (“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.”).

60. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373–74 (1978) (finding Congress’s failure to explicitly abrogate the complete diversity requirement in subsequent reenactments of the diversity jurisdiction statute evidence of the legislature’s tacit approval of the *Strawbridge* rule).

61. Under the reenactment rule of statutory interpretation, a presumption exists that, when a statute that previously received judicial interpretation is reenacted, “the reenacting Congress is presumed to have adopted the Supreme Court’s interpretations of [the] statute . . .” 2B NORMAN J. SINGER & J.D. SHAMBLE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 49:9, at 127, 130–31 (7th ed. 2008); see also *infra* text accompanying note 133. Implicit in the canon, however, is that the statute is reenacted without material change. In the case of the diversity jurisdiction statute, the provision changed from addressing the case of a single plaintiff versus a single defendant to acknowledging the possibility of multiple adverse parties, and in later versions omitted the forum requirement altogether. The *Kroger* rationale, although accepted, is not as definitive as the Court makes it appear—the statute has not remained unchanged over time, and in its current alignment with Article III could be perceived as having undergone significant change since its inception.

citizen of another State.”<sup>62</sup> By limiting its decision to the First Judiciary Act, the Court explicitly limited the reach of *Strawbridge* to cases adjudicated under the original diversity jurisdiction statute and therefore under the bias rationale.

Although the Court has over time continually reaffirmed the *Strawbridge* holding, the foundation for that decision nonetheless remains tied to the bias concept outlined by Professor Yackle. Contrast that with today’s mass tort litigation, in which suits often bear little or no connection to the chosen forum, save for the naming of a few (or even one) resident plaintiffs<sup>63</sup> and no resident defendant. The bias argument (and the corresponding complete diversity requirement) no longer applies. Rather, today’s litigation often has very little, if any, connection to the state in which the suit is brought when it involves numerous individual plaintiffs and multiple defendants, the vast majority of whom reside outside the forum.<sup>64</sup>

Today’s mass tort suit is the prototypical suit involving “citizens of different states,” and should not be governed by an outmoded concept (complete diversity) premised on an outdated rationale (bias in favor of in-state parties). Hamilton’s statement that “the national judiciary ought to preside in all cases” involving minimally diverse parties has never had more resonance.<sup>65</sup> Nevertheless, the lower federal courts (and Congress

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62. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (emphasis added).

63. Of course, the plaintiff may or may not have a valid claim against defendant. See *infra* Part II.B.

64. In fact, Congress has stated explicitly that traditional concerns regarding bias no longer play a role in diversity jurisdiction:

For example, less than 6 years ago Congress enacted the Federal Courts Improvement Act of 1996, which increased the amount in controversy requirement needed to remove a diversity case to Federal court from \$50,000 to \$75,000. *This statutory change was based on the Judicial Conference's determination that fear of local prejudice by state courts was no longer relevant* and that it was important to keep the Federal judiciary's efforts focused on Federal issues. In this same regard, the American Law Institute has found “there is no longer the kind of prejudice against citizens of other states that motivated the creation of diversity jurisdiction,” and the most recent Federal Courts Study Committee report on the subject concluded that local bias “is no longer a major threat to litigation fairness” particularly when compared to other types of prejudice that litigants may face, such as on account of religion, race or economic status.

H.R. REP. NO. 107-370, at 128 (2002), 2002 WL 388106 (emphasis added) (quoting AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 106 (1996); FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (1990)).

65. THE FEDERALIST NO. 80, *supra* note 3, at 463 (Alexander Hamilton).

itself) have already spoken on the issue, and have signaled a shift away from the complete diversity rule. Unfortunately, the piecemeal results have only complicated the issue, and mandate further change.

### *B. Gamesmanship in Pleading Practices and the Judicial Response*

Having established that the complete diversity rule is not required by the Constitution, and further that it is based on an outdated premise, it is also necessary to demonstrate that the rule is no longer effective to support this article's proposition that the complete diversity rule merits wholesale revision. For, regardless of its origins, the complete diversity rule is longstanding, and the lynchpin to the federal court system's exercise of subject matter jurisdiction over diversity issues. It should not be eviscerated without careful consideration.<sup>66</sup> As shown below, however, the continuous layering of exceptions on top of the rule has cracked its foundation. Accordingly, the rule must be rebuilt from the ground up, and rebuilt to address the types of multiple party, multistate lawsuits that dot the landscape today.

#### *1. The Fraudulent Joinder Doctrine*

One hundred years after the Court issued its rule in *Strawbridge*, it created an exception to that rule known today as the fraudulent joinder doctrine.<sup>67</sup> Under this rule, a defendant may seek removal of an action to federal court despite the presence of a nondiverse defendant where the nondiverse defendant has been fraudulently joined. On its face, the fraudulent joinder doctrine provides for a relatively simple test: defendants will be held to have been fraudulently joined if "there is no reasonable basis for predicting that plaintiffs might establish liability . . . against the in-state defendants" on the claims pled in state court.<sup>68</sup>

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66. Indeed, one legitimate response to the major premise of this article is that, rather than revise or abrogate the rule, it should simply be more rigorously and uniformly enforced. That is, the rule itself is not the problem; rather, the problem lies in the courts' unwillingness to enforce it. In response to those criticisms, the myriad exceptions to the doctrine have now become so intertwined with the rule that to revert back to a truly complete diversity system would be to give effect to a fallacy. The complete diversity rule is unworkable precisely because its name presupposes a system that does not exist. As the cases and statutes in this section demonstrate, federal diversity jurisdiction has no clear framework—despite its namesake complete diversity rule—thus mandating that such a framework be established and applied.

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

68. *Badon v. RJR Nabisco Inc.*, 224 F.3d 382, 393 (5th Cir. 2000). A defendant may also argue fraudulent joinder on the ground that the plaintiff committed "actual fraud in the

Although the doctrine has existed for a significant period of time, scholars have noted a recent upswing in its assertion,<sup>69</sup> corresponding with the increase in multiple party, mass tort suits filed across the country.<sup>70</sup> This expansion has proved problematic to the application of the rule. As the Court of Appeals for the Fifth Circuit has noted, “[t]here has . . . been some uncertainty over the proper means for predicting whether a plaintiff has a reasonable basis of recovery under state law.”<sup>71</sup>

For example, the Fifth Circuit contextualizes the test as follows: “[a] ‘mere theoretical possibility of recovery under local law’ will not preclude a finding of improper joinder.”<sup>72</sup> Instead, there must be a “reasonable basis” for recovery from the non-diverse defendant.<sup>73</sup> That is, the “mere assertion of metaphysical doubt as to the material facts i[s] insufficient” to establish a reasonable basis for predicting recovery under state law.<sup>74</sup> Conversely, other federal circuit courts of appeals require the defendant to prove that there is “no possibility” of recovery against a nondiverse defendant,<sup>75</sup> and that “[a] claim need not ultimately succeed to defeat

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pleading of jurisdictional facts.” *See, e.g.,* *Smallwood v. Ill. Cent. R.R.*, 385 F.3d 568, 573 (5th Cir. 2004). Because this latter ground for removal is less controversial than its “no reasonable basis” counterpart, is asserted far less often, and is more easily proved (e.g., the certificate of incorporation demonstrates that the relevant defendant in fact is not a resident of the forum state), it does not provoke the same exasperation as the no reasonable basis test, and is therefore omitted from discussion here.

69. *See, e.g.,* 13F CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3641.1 (3d ed. 2009) (noting “a virtual epidemic of the invocation of these procedures in the federal courts in the recent past . . .”).

70. Deborah R. Hensler, *Has the Fat Lady Sung*, 26 REV. LITIG. 883, 906 (2007) (noting that “federal product liability filings . . . almost quadrupled over the nine-year period” from 1997 to 2005 and that “the substantial increase in product liability filings . . . suggest[s] that the pool of cases from which mass toxic tort litigation arises is likely growing rather than shrinking”); *see also id.* at 910 (noting that the number of federal mass tort class actions doubled from 1997 to 2001).

71. *Smallwood*, 385 F.3d at 573.

72. *Id.* at 573 n.9 (quoting *Badon v. RJR Nabisco Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2000)).

73. *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699–701 (5th Cir. 1999) (emphasis added).

74. *Badon v. RJR Nabisco Inc.*, 224 F.3d 382, 393 (5th Cir. 2000) (quoting *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 816 (5th Cir. 1993)) (internal quotation marks omitted).

75. *See, e.g.,* *Baltimore County v. Cigna Healthcare*, 238 F. App’x 914, 920 (4th Cir. 2007) (quoting *Mayes v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999)); *Henderson v. Wash. Nat’l Ins. Co.*, 454 F.3d 1278, 1281–82 (11th Cir. 2006) (requiring proof of “no possibility” of recovery).

removal; only a possibility of a right to relief need be asserted.”<sup>76</sup> To further compound the confusion, even within a circuit a test may be described as the “no possibility” test, but in practice require proof only that there is no reasonable basis for recovery.<sup>77</sup>

In addition to the standard to be applied in demonstrating fraudulent joinder, the federal courts also disagree on whether to allow extrinsic evidence to demonstrate whether a plaintiff has a reasonable basis for recovery against a nondiverse defendant. Some courts limit their analysis to the facts as pled in the complaint, what the *Smallwood* court describes as a “Rule 12(b)(6)-type analysis.”<sup>78</sup> Other courts, however, will pierce the pleadings to determine the merits of plaintiff’s case.<sup>79</sup> In these latter cases, extrinsic evidence typically is allowed only to demonstrate that the plaintiff cannot prove a claim against the nondiverse defendant and not that the nondiverse defendant has a valid *defense* to that claim.<sup>80</sup>

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76. *Baltimore County*, 238 F. App’x at 920 (quoting *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 233 (4th Cir. 1993)) (internal quotation marks omitted).

77. *E.g.*, *In re 1994 Exxon Chem. Fire*, 558 F.3d 378, 385 (5th Cir. 2009) (defining the “no possibility” test as requiring defendant to demonstrate only that there was “no reasonable basis for the district court to predict that the plaintiffs might be able to recover” against the nondiverse defendants (emphasis added)). For a more detailed analysis of the various standards employed by the federal circuit courts of appeals in the fraudulent joinder context, see E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 216–20 (2005).

78. *Smallwood v. Ill. Cent. R.R.*, 385 F.3d 568, 573 (5th Cir. 2004); *see also* *First Baptist Church of Tex. City v. Knowles*, No. G-10-111, 2010 WL 2991224, at \*2 (S.D. Tex. July 27, 2010) (applying a Rule 12(b)(6) analysis and holding that, in assessing the pleadings, “[t]he Court does ‘not determine whether the plaintiff will actually or even probably prevail on the merits of [its state law] claim, but look[s] only for a possibility that the plaintiff might do so’” (quoting *Guillory v. PPG Indus. Inc.*, 434 F.3d 303, 308 (5th Cir. 2005))).

79. *See, e.g.*, *Badon*, 224 F.3d at 389 (“[D]iversity removal may be based on evidence outside the pleadings to establish that the plaintiff has no possibility of recovery on the claim or claims asserted against the named resident defendant and that hence such defendant is fraudulently joined and his citizenship must be disregarded for jurisdictional purpose.”); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (“Where fraudulent joinder is an issue . . . [t]he defendant seeking removal to the federal court is entitled to present the facts showing the joinder to be fraudulent.” (quoting *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987))); *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 263 (5th Cir. 1995) (endorsing “a summary judgment-like procedure” to dispose of fraudulent joinder claims) (citation omitted); *Cabalчета v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989) (“In addressing the issue of fraudulent joinder, the district court should resolve all questions of fact and controlling law in favor of the plaintiff and can consider any submitted affidavits and/or deposition transcripts.” (construing *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440 (11th Cir. 1983))).

80. *See, e.g.*, *Ritchey*, 139 F.3d at 1318 (noting that cases allowing extrinsic evidence

From a practical perspective, the fraudulent joinder analysis is further complicated by the fact that little to no discovery has been exchanged by the parties at the time of removal—if noticed contemporaneously with the pleadings—from which the defendant can determine the validity of the plaintiff's claims directed to the nondiverse defendant. Despite the procedural rule allowing for removal “thirty days after receipt . . . of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable,”<sup>81</sup> some courts allow for immediate removal of the matter if the removing defendant can show the plaintiff insufficiently investigated the claim against the nondiverse defendant.<sup>82</sup> This creates an interesting burden-shift in the removal context whereby the plaintiff is required to prove the validity of her claims against the nondiverse defendant to support remand.<sup>83</sup>

Of course, the legal standard to be applied, the corresponding burden of proof, and the admissibility of evidence to justify (or defeat) removal can all fluctuate from one jurisdiction to the next when evaluating fraudulent joinder. This can result in parties routinely involved in litigation arguing competing, or even contradictory, theories of federal subject matter jurisdiction in cases with nearly identical procedural postures.

## 2. *Misjoinder of Claims*

Similar to the concept of fraudulent joinder, but more recently adopted and with far more attendant controversy, certain federal courts have also upheld removal in matters lacking complete diversity on the ground that the claims of parties completely diverse to defendants were improperly joined with the claims of those who were not diverse to the defendants.

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“looked to whether the plaintiff truly had a cause of action against the alleged sham defendants,” and not “whether those defendants could propound defenses to an otherwise valid cause of action”). The court in *Ritchey* explained this distinction as being the difference between arguing the validity of joinder (where extrinsic evidence would be allowed) and arguing the merits of the case (where extrinsic evidence would be disallowed and, by extension, removal denied). *Id.* at 1318–19.

81. 28 U.S.C. § 1446(b) (2006).

82. *See, e.g., Sellers v. Foremost Ins. Co.*, 924 F. Supp. 1116, 1118–19 (M.D. Ala. 1996) (applying Federal Rule of Civil Procedure 11 and holding that, “to block a fraudulent-joinder charge,” plaintiff “must be able to provide some showing that her claim against the resident defendant has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery”).

83. *Cf. Smallwood*, 385 F.3d at 574 (“The party *seeking removal* bears a heavy burden of proving that the joinder of the in-state party was improper.” (emphasis added)).

The misjoinder concept was first adopted by the Court of Appeals for the Eleventh Circuit in 1996 in *Tapscott v. MS Dealer Service Corp.*<sup>84</sup> There, the Eleventh Circuit addressed a situation in which plaintiffs joined together in a single action two sets of unrelated claims against two separate groups of defendants—some diverse to plaintiffs and some nondiverse.<sup>85</sup> The district court found, and the appellate court affirmed, that the two sets of claims were improperly joined because, although certain facts were common to both claims, the claims did not assert “joint, several, or alternative liability.”<sup>86</sup> The *Tapscott* holding was later applied to cases in which numerous unrelated plaintiffs attempted to join unrelated personal injury claims against a single defendant in a single action.<sup>87</sup> To date, however, other federal circuit courts of appeals have been hesitant to rule on the validity of the misjoinder concept.<sup>88</sup> The rule likewise has received varying treatment in the federal district courts.<sup>89</sup>

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84. 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds by* Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000).

85. *Id.* at 1355.

86. *Id.* at 1359–60 (relying on Rule 20(a) of the Federal Rules of Civil Procedure in finding joinder of claims to be improper).

87. *See, e.g.,* Chaney v. Gate Pharm., No. Civ.A. 98-20478, 1203, 1999 WL 554584, at \*3–4 (E.D. Pa. July 16, 1999) (upholding the propriety of defendant’s removal where “[p]laintiffs attempt[ed] to join persons from seven different states into one civil action who have absolutely no connection to each other except that they each ingested [the drugs at issue]” and fail to “allege that they took the same drug or combination of drugs [or]. . . that they received the drugs from the same source or any other similar connection”); *see also In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002) (providing in dicta that “misjoinder of plaintiffs should not be allowed to defeat diversity jurisdiction”); Asher v. Minn. Mining & Mfg. Co., No. Civ.A. 04CV522KCC, 2005 WL 1593941, at \*7 (E.D. Ky. June 30, 2005) (adopting fraudulent misjoinder doctrine).

88. *See, e.g.,* Lafalier v. State Farm Fire & Cas. Co., 391 F. App’x 732, 739 (10th Cir. 2010) (“There may be many good reasons to adopt procedural misjoinder, as the Insurers argue. But we need not decide that issue today, because the record before us does not show that adopting the doctrine would change the result in this case.”); *Anderson v. Bayer Corp.*, 610 F.3d 390, 392, 394 (7th Cir. 2010) (declining to hear the argument for lack of appellate jurisdiction); *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 622 (8th Cir. 2010) (“We make no judgment on the propriety of the doctrine in this case, and decline to either adopt or reject it at this time.”); *In re Benjamin Moore*, 309 F.3d at 298 (implicitly upholding the rule in denying mandamus petition to review district court’s exercise of diversity jurisdiction).

89. *See, e.g.,* Reuter v. Medtronics, Inc., No. 10-3019 (WJM), 2010 WL 4628439, at \*4 n.1 (D.N.J. Nov. 5, 2010) (noting the adoption of the misjoinder rule by federal district courts in Hawaii, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New York, Oregon, Pennsylvania, South Dakota, Texas, and West Virginia, and its rejection by federal district courts in California, Illinois, Ohio, and Rhode Island).

The reasons for the federal judiciary's hesitance to adopt *Tapscott* are many. But in particular, the courts rejecting the concept have pointed to two critical issues: (1) whether to apply state or federal rules of procedure in determining misjoinder; and (2) plaintiffs' level of culpability in their joinder of potentially unrelated claims.<sup>90</sup> These concerns were recently summarized by the United States District Court for the Southern District of Illinois in *Baker v. Johnson & Johnson*,<sup>91</sup> in which the court issued a scathing rebuke of the misjoinder doctrine:

Finally, the Court surveyed case law attempting to apply the fraudulent misjoinder doctrine and observed that *courts have struggled with virtually every aspect of the meaning and scope of the doctrine*, including: whether a mere misjoinder of parties or claims can constitute fraudulent misjoinder or if an egregious misjoinder is required; what constitutes an egregious misjoinder of parties or claims; and whether fraudulent misjoinder is to be tested using federal procedural rules governing joinder or state procedural rules governing joinder.<sup>92</sup>

From one perspective, the *Tapscott* rule attempts to combat a very real pleading practice,<sup>93</sup> the explicit design of which is to avoid federal diversity jurisdiction.<sup>94</sup> But the *Baker* court's concerns regarding the application of the rule are legitimate, and further demonstrate the fracture of removal jurisdiction on diversity grounds into a concept with many competing rules and no clear consensus.

First, the question of which procedural rules to apply in determining misjoinder is not easily answered. Beginning with *Tapscott*, several courts that have adopted the doctrine have advocated for an application of the

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90. See *Baker v. Johnson & Johnson*, 709 F. Supp. 2d 677 (S.D. Ill. 2010).

91. *Id.*

92. *Id.* at 686 (emphasis added).

93. See, e.g., Notice of Removal ¶ 1, *Ward v. AstraZeneca Pharm. LP*, No. 2:10-cv-01881-SLB (N.D. Ala. July 16, 2010), 2010 WL 3878787 (summarizing the case as having been "commenced by 99 plaintiffs from 30 different states—only some of whom are Alabama citizens . . . for injuries allegedly arising from the use of" defendants' prescription medication).

94. See, e.g., *Chaney v. Gate Pharm.*, No. Civ.A. 98-20478, 1203, 1999 WL 554584, at \*3 (E.D. Pa. July 16, 1999) (finding a pleading structure purporting to join claims of plaintiffs of "vast geographic diversity and . . . [no] reasonable connection to each other" as "devoid of any redeeming feature as respects the underlying purposes of the joinder rules" and intended solely to defeat defendants' right of removal).

Federal Rules of Civil Procedure.<sup>95</sup> This decision is not without logic, and can be said to have a legitimate basis in the law.<sup>96</sup> The rationale offered by these courts in support of the application of federal rules of procedure invokes an *Erie*-type choice, even if the Supreme Court's decision in *Erie* is not referred to by name.<sup>97</sup>

Yet the rationale for the application of the Federal Rules of Civil Procedure ultimately begs the question. That is, arguably implicit in the application of the federal rules is the assumption that the plaintiffs have attempted to evade the federal courts through fraudulent pleading practices and therefore should be bound by federal joinder standards. One could thus

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95. See, e.g., *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds by* *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000) (“The joinder of defendants in this action has been accomplished solely through [Rule] 20.”); *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 651 (S.D. Tex. 2005) (“[J]oinder among plaintiffs is only proper if they allege a claim ‘arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.’” (quoting FED. R. CIV. P. 20(a))). Under the Federal Rules of Civil Procedure, permissive joinder of parties in the same action is allowed only where plaintiffs “assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences [and] any question of law or fact common to all plaintiffs will arise in the action.” FED. R. CIV. P. 20(a)(1).

96. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (establishing principle that federal rules of procedure apply in diversity cases).

97. See, e.g., *In re Silica*, 398 F. Supp. 2d at 651 n.141 (noting that, in procedural matters, “we are controlled by the Federal Rules of Civil Procedure . . . [and] look to the federal statutes as construed by . . . [sic] federal decisions to determine whether the case is removable in whole or in part, all questions of joinder, non-joinder, and misjoinder being for the federal court” (quoting *Edwards v. E.I. du Pont de Nemours & Co.*, 183 F.2d 165, 168 (5th Cir. 1950))). Although the court in *In re Silica* did not perform a full-blown *Erie* analysis, the court further acknowledged that the question of joinder would be the same under the applicable state rules of procedure, as they did not differ materially from the federal rules. *Id.* at 654. Under the *Erie* line of cases, absent a conflict between state and federal rules, and no inducement on the part of the plaintiff to seek the federal forum, the application of the federal procedural rule is likely the correct holding. See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752–53 (1980). Further, even were the rules to conflict, *Erie* and its progeny likely would still favor application of the federal rule. See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010) (noting validity—and applicability—of federal rule that “regulates procedure . . . regardless of its incidental effect upon state-created rights”). As other courts have acknowledged, however, irrespective of a conflict between the rules, applying the federal rules to a nondiverse matter removed from state court premised on a misjoinder argument assumes jurisdiction over the matter before the validity of federal diversity jurisdiction is actually determined. See *infra* note 98 and accompanying text.

argue that courts adopting the misjoinder doctrine and applying federal rules of procedure have already placed a finger firmly on the scale in favor of federal jurisdiction.<sup>98</sup> For this reason, many courts have broken with *Tapscott* on this point, choosing instead to apply state rules of civil procedure in determining propriety of joinder.<sup>99</sup> Nonetheless, there remains a split of authority in the federal courts, with some continuing to apply federal rules, and others relying on their state counterparts.

Second, and equally confounding to critics of the misjoinder doctrine, is the emphasis placed on the level of culpability of the plaintiffs. In *Tapscott*, the Eleventh Circuit emphasized that removal could not be supported in all cases of misjoinder, but only in those instances where misjoinder was “egregious.”<sup>100</sup> This type of “smell test” used by the courts to determine propriety of joinder has not received universal support from all courts that have adopted the misjoinder doctrine. Indeed, not even all federal courts that have followed *Tapscott* have deemed egregious pleading practices necessary to reach a conclusion of misjoinder.<sup>101</sup> Although policy reasons likely support the *Tapscott* heightened standard,<sup>102</sup> the “egregious”

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98. In applying the Federal Rules of Civil Procedure to determine propriety of joinder, the court essentially puts the cart before the horse—exercising jurisdiction over a matter filed in state court on the ground of fraudulent pleading practices, only to then determine that those pleading practices were, in fact, fraudulent. *See, e.g., Jamison v. Purdue Pharma Co.*, 251 F. Supp. 2d 1315, 1321 n.6 (S.D. Miss. 2003) (“It makes little sense to say that the resident doctor’s joinder became fraudulent only after removal and only under the federal rule.”).

99. *Asher v. Minn. Mining & Mfg. Co.*, No. Civ.A. 04CV522KKC, 2005 WL 1593941, at \*6 (E.D. Ky. June 30, 2005) (citing cases); *see also Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1128 (E.D. Cal. 2004) (“[Applying state rules of procedure] seems the better choice since the question is whether the parties were misjoined in state court.”).

100. *Tapscott*, 77 F.3d at 1360 (“We do not hold that mere misjoinder is fraudulent joinder, but we do agree with the district court that Appellants’ attempt to join these parties is so egregious as to constitute fraudulent joinder.”).

101. *Compare Burns v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.D. W. Va. 2004) (“In this district, the ‘egregious’ nature of the misjoinder is not relevant to the analysis.”), and *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 147–48 (S.D.N.Y. 2001) (“While aware that several courts have applied *Tapscott*’s egregiousness standard when considering misjoinder of plaintiffs in the context of remand petitions, this Court respectfully takes another path.”), with *Asher*, 2005 WL 1593941, at \*7 (“[S]omething more than ‘mere misjoinder’ is required before this Court may take the extraordinary step of exercising jurisdiction over an action where jurisdiction is lacking on the face of the complaint.”).

102. For example, the rule likely was not intended to allow for removal of every case in which an unsophisticated plaintiff’s counsel believed, however erroneously, that his complaint under the law legitimately joined the claims of multiple parties against defendant. Rather, the rule was intended to target the fraudulent gamesmanship of certain counsel to

concept is amorphous, and not easily or consistently applied. No matter the application, however, the larger issue is the variation in treatment of similarly situated parties. And with each successive court's modified interpretation of the rule, the potential for a new plaintiff- or defendant-friendly jurisdiction arises.

Finally, certain courts have questioned whether federal courts have the ability to entertain removals premised on misjoinder at all. To these courts, the question of whether joinder is legitimate not only is an issue of state procedure, but a question to be decided exclusively *by the state court* in which the suit is filed.<sup>103</sup> As such, a defendant's recourse in these jurisdictions, rather than to attempt removal, is to move the state court to sever the unrelated claims.<sup>104</sup>

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avoid federal diversity jurisdiction.

103. *See, e.g.*, *Rutherford v. Merck & Co.*, 428 F. Supp. 2d 842, 851 (S.D. Ill. 2006) (finding that "the federal courts traditionally have held that matters of state civil procedure, including, presumably, joinder of parties and claims, have no bearing on the existence or nonexistence of federal subject matter jurisdiction in a given case"). Accordingly,

the fraudulent misjoinder doctrine is contrary to settled judicial understanding of the scope of federal diversity jurisdiction on removal. . . . [T]he jurisprudence of both the United States Supreme Court and the Seventh Circuit Court of Appeals regarding fraudulent joinder to defeat diversity jurisdiction has never suggested that a misjoinder of legally viable and non-fraudulent claims under state law is a species of fraudulent joinder, and in fact the longstanding principle in the federal courts has been that questions of joinder, particularly under state rules of civil procedure, do not implicate federal subject matter jurisdiction.

*Baker v. Johnson & Johnson*, 709 F. Supp. 2d 677, 686 (S.D. Ill. 2010).

104. Some scholars suggest that the complexities of the misjoinder doctrine militate in favor of seeking severance at the state court level, and then later attempting removal in those severed cases in which complete diversity then exists:

In many situations, confusion could be reduced if removing parties would challenge fraudulent joinders and misjoinders in state court, before defendants file a removal notice. The 30-day time limit for removal (but not the overall one-year limit for diversity cases) would not begin to run until any misjoined, or fraudulently joined, non-diverse party was dropped from the action. Thus, a requirement that fraudulent joinder or misjoinder be addressed in the state court would not impair the ability of an individual to remove an action following the elimination of the improperly joined party—unless the one-year limit on removal were implicated.

14B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3723 (4th ed. 2009). Although arguably a valid suggestion (from an efficiency standpoint), it omits the fact that removal might not be allowed following severance based on a separate, longstanding principle: "that *only a voluntary act by the plaintiff* [can] convert a non-removable case into a removable one." *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 761 (11th Cir. 2010) (emphasis added). Should defendants move to sever misjoined

Like its fraudulent joinder cousin, the misjoinder doctrine, because of its limited acceptance and varied application, creates the potential for one set of facts to be treated in multiple different ways depending upon the jurisdiction in which the suit is filed.

*C. Congress's (Limited) Reversion to Minimal Diversity*

Congress recently enacted two pieces of legislation that sought, in limited contexts, to vest the federal judiciary with the full authority granted by the diversity jurisdiction provision of Article III (and by extension the full authority envisioned by the framers of the Constitution).<sup>105</sup> In both instances, Congress focused squarely on the need to provide a federal forum

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plaintiffs in the state court in a jurisdiction that has adopted the misjoinder rule (and succeed), the plaintiffs would then have a legitimate argument, in support of remand, that the case has now become removable solely because of defendant's action, precluding the federal district court from exercising diversity jurisdiction. *See, e.g.,* *Insinga v. LaBella*, 845 F.2d 249, 252 (11th Cir. 1988) (“[I]f the [nondiverse] defendant was dismissed from the case by the voluntary act of the plaintiff, the case [becomes] removable, but if the dismissal was the result of either the defendant's or the court's action *against the wish of the plaintiff*, the case [can] not be removed.” (emphasis added) (citations omitted)). Moreover, this argument naïvely presumes that state courts will readily sever misjoined parties—a presumption contradicted by past precedent. For example, in *McCallum v. General Electric Co.*, the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois, denied defendant's motion to sever and dismiss the claims of twenty-four out-of-state plaintiffs (hailing from twelve different states) purportedly joined to the claims of two Illinois residents. No. 08-L-394 (Ill. 20th Jud. Cir. Ct. St. Clair Cty. Oct. 28, 2009) (order denying motion to sever and dismiss) (on file with author); *see also* Brief of Appellants-Defendants at 4–8, *McCallum v. Gen. Elec. Co.*, No. 5-09-0633 (Ill. App. Ct. Feb. 11, 2010) (noting number and citizenship of parties) (on file with author). The trial court upheld the propriety of joinder under the Illinois rules of procedure, which require that the claims arise out of the same transaction or series of transactions, 735 ILL. COMP. STAT. ANN. 5/2-404 (West 2003), despite the fact that the twenty-four nonresident plaintiffs received medical treatment in their respective states of residence, from different doctors, for varying medical conditions, *see* Brief of Appellants-Defendants at 10–16, *McCallum*, No. 5-09-0633.

105. This article suggests neither that the two pieces of legislation discussed herein are the only two in which Congress has adopted a minimal diversity standard nor that Congress's adoption of minimal diversity is a recent phenomenon. *See, e.g.,* *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (interpreting the federal interpleader statute, 28 U.S.C. § 1335, which allows for federal subject matter jurisdiction in suits involving “[t]wo or more adverse claimants, of diverse citizenship,” to require only minimal diversity among adverse parties). Rather, the two statutes were selected for discussion because they reflect a recent effort by Congress to implement a minimal diversity standard in tort litigation on a broad scale, and Congress's reliance on the framers' original understanding of the scope and intent of Article III to support the statutes' enactment.

for suits involving parties from multiple states, notwithstanding a lack of complete diversity among those parties.

As the following will demonstrate, however, those pieces of legislation, with respect to artificial limitations placed on the federal courts' exercise of jurisdiction, are as maddeningly inconsistent in their treatment of similarly situated parties as the judge-made exceptions to complete diversity already discussed. Further, the statutes were, in part, the product of extensive lobbying from the defense bar, and thus are extremely limited in scope and purpose. They ultimately did nothing to ameliorate the lack of uniformity in providing a federal forum to actions national in nature. To the contrary, they only served to further complicate the problem.

*1. Multiparty, Multiform Trial Jurisdiction Act*

In 2002, Congress passed the Multiparty, Multiform Trial Jurisdiction Act (MMTJA), a piece of legislation designed to consolidate and provide a federal forum to all cases arising from a single, massive accident or disaster.<sup>106</sup> Under the MMTJA, original jurisdiction is conferred upon the federal courts in any civil case involving minimal diversity between adverse parties and involving a single accident at a discrete location where at least seventy-five persons died and either (a) the accident occurred in a state or other location different from that of defendant's residence, (b) "any two defendants reside in different States," or (c) "substantial parts of the accident took place in different States."<sup>107</sup>

Further, and notable in its alignment with the framers' intent, Congress took the additional step of expanding Title 28 of the U.S. Code to allow for removal not only of an action that "could have been brought" under the MMTJA, but of any action arising from the same accident forming the basis of an action already proceeding in federal court and to which the defendant seeking removal is a party, "even if the action to be removed *could not have been brought in a district court as an original matter*."<sup>108</sup>

Prior to passage of the MMTJA, Congress stressed the importance of a single, federal forum to provide consistency in decisions, and economy of resources, for the type of suit that spans parties and events covering multiple different states:

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106. 28 U.S.C. §§ 1369 (a), 1441(e)(1) (2006); *see also* H.R. REP. NO. 107-685, at 199 (2002) (Conf. Rep.), *reprinted in* 2002 U.S.C.C.A.N. 1120, 1151, 2002 WL 31163881.

107. 28 U.S.C. § 1369(a).

108. *Id.* § 1441(e)(1) (emphasis added).

It is common after a serious accident to have many lawsuits filed in several states, in both state and federal courts, with many different sets of plaintiffs' lawyers and several different defendants. . . . The waste of judicial resources—and the costs to both plaintiffs and defendants—of litigating the same liability question several times over in separate lawsuits can be extreme.<sup>109</sup>

Moreover, the report went on to suggest that “[t]he revisions should reduce litigation costs as well as the likelihood of forum-shopping . . . .”<sup>110</sup> Nonetheless, despite the rhetoric regarding the benefit to the parties and economies of scale provided by consolidation of matters in federal court, the MMTJA is infrequently used as a basis for federal jurisdiction (in no small part due to its seventy-five-death requirement), and only then primarily in air disaster litigation.<sup>111</sup>

## 2. CAFA, Tanoh, and the Question of Aggregation

Three years later, in 2005, Congress passed the Class Action Fairness Act (CAFA), expanding the scope of judicial authority in the minimum diversity context to the class- and mass-action settings.<sup>112</sup> CAFA's construct, as well as its logic, is surprisingly simple. Under CAFA, the federal courts shall have original jurisdiction over any class action<sup>113</sup> in which the adverse parties are minimally diverse and the total amount in controversy exceeds \$5,000,000.<sup>114</sup> Further, defendants may remove to federal court any “mass action” joining the claims of one hundred or more

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109. H.R. REP. NO. 107-685, at 200, *reprinted in* 2002 U.S.C.C.A.N. 1120, 1152, 2002 WL 31163881.

110. *Id.*

111. This should not be surprising since the driving force behind the legislation, at least in prominent part, came from the airline industry lobby. *See id.* (“The need for enactment of [the MMTJA] was articulated by an attorney who testified on behalf of a major airline manufacturer at the June 16, 1999, hearing on H.R. 2112.”). Moreover, however sadly, passage finally occurred—despite years of haggling in Congress—mere months after the tragedies of (and resulting litigation from) September 11, 2001. *See* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826–29 (2002).

112. *See* Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

113. As certified under FED. R. CIV. P. 23.

114. 28 U.S.C. § 1332(d)(2) (2006).

plaintiffs in a single suit, so long as the CAFA amount in controversy is met.<sup>115</sup>

The directive behind the legislation was clear: “[t]he purposes of this Act are to . . . restore the intent of the framers of the United States Constitution by providing for Federal court consideration of *interstate cases of national importance* under diversity jurisdiction,”<sup>116</sup> and, more specifically, to combat efforts to defeat federal subject matter jurisdiction through creative pleading practices.<sup>117</sup> To meet these objectives, CAFA’s scope in application of minimum diversity truly is expansive—requiring only that there be minimal diversity between any class member (whether named or unnamed) and any defendant.<sup>118</sup> This broad application of minimum

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115. *Id.* § 1332(d)(11). Although the term “mass action” is used in the removal context instead of the term “class action,” the terminology reflects only that a class action is not required at the state level to allow for removal to federal court, because requiring class certification under various state procedural rules could be used by plaintiffs to preclude removal (e.g., by filing the equivalent of a class action, but posturing it as the joinder of numerous related claims). As CAFA’s legislative history suggests, the statute was designed specifically to address these types of semantic variations in pleading structure that potentially could defeat federal subject matter jurisdiction. See S. REP. NO. 109-14, at 35 (2005) (“[T]he overall intent of [CAFA] is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications[;] . . . the definition of ‘class action’ is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled ‘class actions’ by the named plaintiff or the state rulemaking authority.”), reprinted in 2005 U.S.C.C.A.N. 3, 34, 2005 WL 627977; see also *id.* at 46 (“Mass action cases function very much like class actions and are subject to many of the same abuses.”), reprinted in 2005 U.S.C.C.A.N. 3, 43.

116. CAFA § 2(b), 119 Stat. at 5 (emphasis added).

117. See S. REP. NO. 109-14, at 4 (“[C]urrent law enables lawyers to ‘game’ the procedural rules and keep nationwide or multi-state class actions in state courts . . .”), reprinted in 2005 U.S.C.C.A.N. 3, 5, 2005 WL 627977.

118. 28 U.S.C. § 1332(d)(1), (2). Some scholars have skeptically noted the validity of a jurisdictional provision based on the citizenship of unnamed parties, which some have argued pushes CAFA to the brink of what is allowed under the Constitution. See, e.g., Moller, *supra* note 56, at 1129–30. Although Professor Moller concludes otherwise regarding the validity of CAFA, as he suggests, the case or controversy requirement of Article III refers to “suits” as that term has traditionally been interpreted, meaning that it includes only those parties “before the court”—or those parties *named* in the suit. *Id.* at 1174. *Cf. id.* at 1180 (demonstrating that “Article III allows federal courts to exercise jurisdiction over a suit on a minimum diversity theory, even if the named plaintiff and defendant are nondiverse,” so long as the unnamed party has “(1) an identifiable . . . relationship with one of the named parties . . . and (2) she lives outside the state of an adverse named party’s residence at the time the suit is filed”).

diversity dovetails neatly with Hamilton's arguments in favor of an expansive interpretation of Article III.<sup>119</sup>

Yet, in its application, CAFA has missed the mark in bringing all suits of national importance before the federal courts. Rather, although it has proved to be another obstacle for plaintiffs' attorneys attempting to defeat removal to federal court, by no means has it proved to be insurmountable. In CAFA, Congress, with the help of the federal judiciary, unwittingly created a roadmap to the plaintiffs' bar for avoiding federal subject matter jurisdiction entirely in mass tort litigation.

As it is constructed, CAFA places an odd and unnecessary restriction on removal jurisdiction, contradicting its stated intent to bring mass, national litigation before a federal forum. Specifically, CAFA's mass action removal provision provides that, after removal, the district court may exercise jurisdiction only over those plaintiffs whose claims exceed the individual amount in controversy requirement of § 1332(a), or \$75,000.<sup>120</sup> This restriction appears even more arbitrary and capricious when contrasted with the statute's provision that removal may be effected in any mass action in which the claims of one hundred or more "persons" are to be tried jointly.<sup>121</sup> Some have argued that this choice of words allows nonparties to be counted toward the one hundred person requirement.<sup>122</sup>

The internal inconsistency presents an interesting paradox contrary to the statute's stated purpose: CAFA seemingly provides vast authority to remove, at least if one liberally construes the one hundred person requirement to allow for removal, but once removed, the federal court is both (1) required to excise a potentially large number of plaintiffs for failing to meet the amount-in-controversy requirement<sup>123</sup> and (2) precluded

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119. See *supra* notes 42–44 and accompanying text.

120. 28 U.S.C. § 1332(d)(11)(B).

121. *Id.*

122. See, e.g., *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008) (holding that unnamed policy holders were "real parties in interest" such that they counted toward the one hundred "person" requirement of CAFA's mass action removal provision). Indeed, such a construction would not seem out of place when viewed in tandem with CAFA's provision on class actions, allowing for original federal jurisdiction based on minimal diversity between defendant and any *unnamed* plaintiff.

123. This restriction regarding the amount in controversy seems especially incongruous given CAFA's history. The traditional rationale for the amount-in-controversy requirement is typically summarized as necessary "[t]o ensure that diversity jurisdiction does not flood the federal courts with minor disputes." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). Based on Congress's statements in support of CAFA, by the fact of its consolidation, a mass action necessarily is no longer a "minor dispute." Further, excising

from issuing binding judgments regarding the potential claims of persons—not “parties”—with potential claims against the defendant. Thus, the litigation as a whole does not benefit either from consolidation or a federal forum.<sup>124</sup> Rather, a single, joined action is severed into multiple parts and scattered among federal and state courts.<sup>125</sup> Moreover, this internal inconsistency seems quaint by comparison when contrasted with recent judicial interpretations of CAFA that have eviscerated the statute’s aim to

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individual claims from a mass action makes little sense in light of CAFA’s requirement that those claims be “tried together” in order to justify federal subject matter jurisdiction. 28 U.S.C. § 1332(d)(11)(B).

124. CAFA’s artificial limitation based on the amount-in-controversy requirement creates a further inconsistency in the treatment of similarly situated parties. Consider removal of a similar multiple party, minimally diverse action (albeit, one naming fewer than one hundred plaintiffs, though no less federal in nature than a CAFA suit) on grounds of fraudulent misjoinder of plaintiffs. Whereas under CAFA the district court can exercise jurisdiction only over those individual plaintiffs whose claims meet the \$75,000 amount-in-controversy requirement, § 1332(d)(11)(B), in multiple plaintiff cases in which the adverse parties are completely diverse, the Supreme Court has ruled that the district courts may exercise supplemental jurisdiction over the claims of properly joined plaintiffs, even when those claims *do not* meet the \$75,000 amount-in-controversy requirement. *Exxon Mobil Corp.*, 545 U.S. at 557–67 (construing supplemental jurisdiction provisions of 28 U.S.C. § 1367 (2006) and joinder Rules 20 and 23 of the Federal Rules of Civil Procedure). Thus, under CAFA the court can exercise jurisdiction over all *minimally diverse* parties so long as each meets the \$75,000 amount-in-controversy requirement, but when *complete diversity* exists, the amount-in-controversy requirement need not be met by all parties joined to an action.

125. Compare the purported rationale behind enacting CAFA:

Multiple class action cases purporting to assert the same claims on behalf of the same people often proceed simultaneously in different state courts, causing judicial inefficiencies and promoting collusive activity. Finally, many state courts freely issue rulings in class action cases that have nationwide ramifications, sometimes overturning well-established laws and policies of other jurisdictions.

S. REP. NO. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6, 2005 WL 627977. This result further contradicts the interpretation given to other related jurisdictional provisions—in particular, the supplemental jurisdiction statute (a logical analogue to the expansive breadth of CAFA, which includes the claims of both named and unnamed class members in the class action setting, and all “persons” for purposes of the mass action removal provision). Using language that could apply equally to CAFA, the Supreme Court has emphasized that “the [supplemental] jurisdictional statutes should be read broadly, on the assumption that *in this context Congress intended to authorize courts to exercise their full Article III power to dispose of an entire action before the court [which] comprises but one constitutional case.*” *Exxon Mobil Corp.*, 545 U.S. at 553 (emphasis added) (citations omitted) (internal quotation marks omitted). Nonetheless, the distinctions in treatment of virtually identical mass actions remain.

combat pleading gamesmanship and provide a federal forum to national suits.

In 2009, the Court of Appeals for the Ninth Circuit heard argument in *Tanoh v. Dow Chemical Co.*, in which 664 West African foreign nationals alleged injuries resulting from exposure to a Dow Chemical-manufactured pesticide while working on plantations in two Ivory Coast villages.<sup>126</sup> Although originally brought as seven identical lawsuits, none of which named one hundred or more plaintiffs, defendant Dow Chemical removed each, in part, on the ground that “the seven actions filed by plaintiffs, taken together, qualified as a ‘mass action’ removable to federal court under CAFA.”<sup>127</sup>

In its recitation of the facts, the court in *Tanoh* did not suggest that the seven suits were divided according to the residence of the plaintiffs, type of injury, or type of tort claim. Rather, the suits were identical with respect to types of injuries and causes of action.<sup>128</sup> The only “commonality” among the suits was that each named fewer than one hundred plaintiffs.<sup>129</sup> The only logical conclusion to be derived from the court’s summary of the case’s posture is that the *Tanoh* plaintiffs deliberately constructed their complaints “to ‘game’ the procedural rules and keep [their] actions in state courts.”<sup>130</sup> But, relying on a provision of CAFA that prohibits removal where the *defendant* joins claims of the plaintiff to obtain the requisite one hundred plaintiff threshold,<sup>131</sup> the court rejected Dow Chemical’s interpretation of CAFA and affirmed the lower court’s decision to remand.<sup>132</sup> The basis for the court’s decision, however, is not nearly as problematic as the length to which the court then went to justify its holding.

Admittedly, on its face, CAFA appears to reject the very type of practice employed by Dow Chemical to remove litigation in which fewer than one hundred plaintiffs have joined together in a single action. Had the court in *Tanoh* rested on that premise, it is likely that the opinion would have generated less controversy and criticism. But instead, the court offered multiple, conflicting arguments in support of remand, undercutting its

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126. 561 F.3d 945, 950 (9th Cir. 2009).

127. *Id.* at 951.

128. *Id.*

129. *Id.*

130. S. REP. NO. 109-14, at 4 (summarizing rationale behind passage of CAFA), reprinted in 2005 U.S.C.C.A.N. 3, 5, 2005 WL 627977.

131. The relevant provision of the statute provides that “the term ‘mass action’ shall not include any civil action in which . . . the claims are joined upon motion of a defendant.” 28 U.S.C. § 1332(d)(11)(B)(ii)(II) (2006).

132. *Tanoh*, 561 F.3d at 950, 953–56.

holding and giving credence to the argument that a literal interpretation of CAFA in this context produces a result contrary to congressional intent.

First, the court pointed to CAFA's legislative history to support its holding, despite its claim that the plain language controlled.<sup>133</sup> Specifically, under the plain meaning rule of statutory construction, the court must follow the plain meaning of the statute unless doing so would lead to an absurd result (that is, one that Congress did not intend).<sup>134</sup> The court violated this concept in its holding, giving credence to a pleading practice that CAFA's legislative history makes clear the Act was intended to stop.<sup>135</sup>

Once the court in *Tanoh* decided to look to legislative history, it was duty bound to look to the actual legislative history of the statute, instead of creating a history out of whole cloth based on what the court *thought* Congress intended. Yet, in its holding the court suggested that "Congress anticipated . . . that defendants like Dow might attempt to consolidate several smaller state court actions into one 'mass action,' and specifically directed that such a consolidated action was *not* a mass action eligible for removal under CAFA."<sup>136</sup> Although a seemingly logical statement, this sentiment does not appear anywhere in the act's legislative history. In fact, to suggest that Congress intended to stop defendants like Dow Chemical from combating the very type of fraudulent pleading practices employed by the *Tanoh* plaintiffs, particularly in light of the actual legislative history accompanying CAFA, which focused on combating gamesmanship in pleading practices,<sup>137</sup> is patently absurd.

More realistically, the CAFA provision on which the court in *Tanoh* relied was intended to prevent defendants from employing their own version of pleading gamesmanship by, for example, moving to join one hundred separate actions into one mass action for purposes of removal. Because such practice was not evident here and because of the obvious fraud on the part of plaintiffs, the court should have allowed removal.

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133. Compare, e.g., *id.* at 952–53 (reviewing legislative history of CAFA to suggest that the act's primary purpose was to curb abuses in the *class action* context, and therefore should be broadly construed in that context, but that the concern over procedural abuses did not apply to the corresponding mass action removal provision, which therefore should be narrowly construed), *with id.* at 953 (holding that "[b]y its plain terms" the mass action removal provision requires that a civil action join the claims of one hundred or more persons).

134. See 2A SUTHERLAND, *supra* note 40, § 46:1, at 137–43, 157.

135. See *supra* notes 116–17 and accompanying text.

136. *Tanoh*, 561 F.3d at 953.

137. See *supra* notes 116–17 and accompanying text.

Second, the Ninth Circuit's decision violated another canon of construction by adopting an interpretation of CAFA that rendered the mass removal provision obsolete.<sup>138</sup> Following *Tanoh*, plaintiffs are free to artificially plead mass actions as separate, but related, multiple plaintiff suits (each with ninety-nine or fewer plaintiffs) in order to avoid running afoul of the mass action removal provision. If any validity to the mass action removal provision remains after *Tanoh*, it arguably arises only in the situation where one hundred or more minimally diverse *plaintiffs* desire to litigate their claims jointly (i.e., not as a class action) and in a federal forum. Because of the complete diversity requirement and CAFA's limited grant of original jurisdiction only to class actions, in this one instance plaintiffs would be required to file in state court and rely on defendants to remove.<sup>139</sup> Yet, this is truly a bizarre reading of the statute if Congress's intent was in fact to combat plaintiff pleading practices.<sup>140</sup>

Third, by this point *Tanoh* has assuredly become required reading for plaintiffs' attorneys practicing mass tort litigation, as it provides a clear roadmap on how to plead the claims of multiple plaintiffs in mass litigation in a single suit without risk of removal under CAFA.<sup>141</sup> *Tanoh* makes clear that plaintiffs can avoid the federal courts by structuring their pleadings to name fewer than one hundred plaintiffs. But *Tanoh* also suggests that plaintiffs may avoid the federal courts even when filing complaints naming more than one hundred plaintiffs so long as they indicate in their pleadings that the joined claims are not to be *tried* together.<sup>142</sup> This presents another

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138. Another longstanding canon of statutory construction provides: "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2A SUTHERLAND, *supra* note 40, § 46:6, at 230–31, 242, 244 (footnotes omitted).

139. Although this author disagrees that this interpretation of the mass action removal provision is even remotely legitimate, there is at least some logic to the practice whereby plaintiffs file completely diverse actions in state court, with full knowledge that they will be removed, in order to benefit from the lower filings fees in state court.

140. If true, Congress need not have limited the federal courts' jurisdiction in mass actions to removal jurisdiction only.

141. *See, e.g.*, Notice of Removal ¶ 1, *Ward v. AstraZeneca Pharm. LP*, No. 2:10-cv-01881-SLB (N.D. Ala. July 16, 2010), 2010 WL 3878787 (referencing plaintiffs' blatant derogation of CAFA's precepts by noting that "[t]his civil action commenced by 99 plaintiffs from 30 different states . . . is [1] of 31 virtually identical actions brought by the same plaintiffs' counsel on behalf of more than 3,000 plaintiffs . . .").

142. *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954–55 (9th Cir. 2009) ("[T]he decision to try claims jointly and thus qualify as a 'mass action' under CAFA should remain, as we concluded above, with plaintiffs.").

anomaly in attempting to apply the mass action removal provision, one which the Court of Appeals for the Seventh Circuit has already acknowledged in *Anderson v. Bayer Corp.*<sup>143</sup> *Anderson* presents the possibility that the cases of one hundred or more plaintiffs could be litigated at the state court level, under state court rules of procedure, up until the very eve of trial, only then to be removed to federal court. It should go without saying that Congress did not intend such a result in enacting CAFA.<sup>144</sup>

### *III. The Minimum Diversity Proposal: Refuting Antiquated Notions of Federalism Offered in Defense of the Status Quo*

Given that diversity jurisdiction as currently applied suffers from too many diverse—and diversely applied<sup>145</sup>—rules to produce any semblance of consistency or reliability in application, a modification is warranted. The complexities of the current diversity jurisdiction landscape are very real problems that have very real impacts on the federal judiciary. Federal jurists have grown increasingly vocal in their pleas for revisions to the diversity standard to provide uniformity in decisions: “Jurisdictional rules

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143. 610 F.3d 390, 392, 394 (7th Cir. 2010) (denying remand of four identical suits comprising 168 plaintiffs under the CAFA mass action removal provision for the same reasons as set forth in *Tanoh*, but suggesting that the cases could be removed at a later date if the “plaintiffs (or perhaps the state court) . . . propose to try these cases jointly in state court . . .”).

144. CAFA’s legislative history unquestionably refutes *Tanoh*’s holding on this count. The day before its passage, Representative Jim Sensenbrenner explained on the House floor that the “joint trial” requirement of CAFA would be met by the joinder of claims of one hundred or more persons in a single action “because there would be no other apparent reason to include all of those claimants in a single action unless the intent was to secure a joint trial of the claims asserted in the action.” 151 CONG. REC. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner), 2005 WL 387992, at \*H729. Thus, *Tanoh*’s suggestion of a separate affirmative action by plaintiffs to request a single trial of their joined claims is incorrect and suggests that Congress was concerned with procedural gamesmanship in both the class- and mass-action contexts. Interestingly, taken to its logical extreme, *Tanoh*’s ruling supports a finding that plaintiffs could join together claims without the intention of trying them together (in part, on the logic that they do not “present common questions of law or fact”). See *Tanoh*, 561 F.3d at 954. Yet, if true, *Tanoh* has unwittingly provided support for the application of the misjoinder doctrine in the Ninth Circuit in so-called ninety-nine plaintiff cases (i.e., those that fall outside the scope of CAFA) absent an express statement in the pleadings that the claims be tried together because without that statement, a question would arise whether the claims truly present common questions of law or fact sufficient to support joinder under Rule 20 of the Federal Rules of Civil Procedure.

145. Puns intended.

ought to be simple and precise so that judges and lawyers are spared having to litigate over not the merits of a legal dispute but where and when those merits shall be litigated.”<sup>146</sup> A return to minimal diversity (with certain restrictions, as will be discussed in Part IV) would provide both the simplicity and reliability sought by the federal judiciary. It would also avoid needless litigation on jurisdictional issues at the expense of arguments on the merits. Further, a minimal diversity proposal has support in the Constitution and in the statements of its framers.

Nonetheless, since the founding of our republic, any proposed change to expand the scope of federal diversity jurisdiction, particularly proposals to adopt a broad minimum diversity standard, has routinely been met with and defeated by the rejoinder of federalism (e.g., having the federal courts decide issues of state law infringes on states’ rights).<sup>147</sup> This part will demonstrate that these concerns are antiquated notions lacking basis in fact. Indeed, the original focus of federalism was not states’ rights, but rather personal freedoms; federal courts have always decided issues of state law.

The suggestion that so-called federalism concerns militate against—or should defeat outright—a movement to a minimal diversity standard fails for two reasons. First, to the extent “federalism” was originally offered by our founding fathers in opposition to diversity jurisdiction, and Article III in particular, the rationale behind the original construction of federalism (i.e., maintenance of separate but united national and state sovereignties<sup>148</sup>) was

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146. *In re Lopez*, 116 F.3d 1191, 1194 (7th Cir. 1997); *see also, e.g., In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987) (“The more mechanical the application of a jurisdictional rule, the better. The chief and often the only virtue of a jurisdictional rule is clarity.” (citations omitted)); *Exch. Nat’l Bank of Chi. v. Daniels*, 763 F.2d 286, 292 (7th Cir. 1985) (“The first characteristic of a good jurisdictional rule is predictability and uniform application.”); *cf. Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004) (declining to adopt fraudulent misjoinder doctrine because “the last thing the federal courts need is more procedural complexity”).

147. *Cf. Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1674–75, 1677 (1992) (calling for an end to diversity jurisdiction on the premise that having federal courts decide issues of state law “unavoidabl[y] intru[des] . . . [on] the lawgiving function of state courts” and that, as a result, “there have been increasing gaps in dispositive decisional law rendered by those [state] courts [which] are acutely felt by federal judges who look to the state supreme courts to enunciate the governing principles” on the relevant state law).

148. In discussions regarding the creation of a national military, Hamilton noted the precarious balance of power between the national government and that of the states: “Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.” THE FEDERALIST NO. 28, *supra* note 3, at 151 (Alexander

not a defense of states' rights, but rather of personal freedoms.<sup>149</sup> As used today, however, federalism no longer refers to the traditional twin ideologies of personal freedoms and limited federal government. Instead, it has become a convenient shorthand (much like "liberal" and "conservative"; or "Republican" and "Democrat" for that matter) used by political groups to curry favor with their constituents. Invoking "federalism" signifies a challenge to federal power through an assertion of state prerogative. It is used by those out of power to stake out a contrarian position (used at times by both liberals and conservatives, Democrats and Republicans) to that of the party controlling our federal government, *in order to depose that party and gain power themselves*.

Second, state governments no longer sit in a position of authority equal to that of the federal government. We are no longer a federation of states. Even if federalism had been premised originally on states' rights, concerns over states' rights and their proper application have given way (largely by voter choice) to a more dominant federal government, to which we look ever more increasingly for authority and order in our daily lives.

Federalism as originally conceived was intended to address and combat the potential for centralized government run amok—a perceived legitimate threat to our personal liberties.<sup>150</sup> Specifically, early federalists literally envisioned violent conflict between federal government and state militias,

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Hamilton); *see also id.* ("It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.").

149. Although "federalism" is commonly offered as a knee-jerk response to any minimal diversity proposal, the term is typically misapplied. Discussing diversity jurisdiction in the context of fraudulent joinder, Professor E. Farish Percy restates the popular refrain regarding diversity jurisdiction: specifically, that it raises "serious federalism concerns." Percy, *supra* note 77, at 193. Professor Percy, however, then goes on to explain the problem as the possible misapplication of state law by federal courts. *Id.* at 201–02. As this article will show, misapplication of the law was not federalism's primary concern; rather, federalism addressed the unauthorized exercise of federal power in contravention of individual liberties. Misapplication of state law can be corrected; total overthrow of state authority cannot. Were simple misapplication of state law encompassed in the same fear of federal dictatorship that drove the original federalist party, diversity jurisdiction would not have been included in the Constitution, which was specifically designed to curb such abuse.

150. As Professor Larry Yackle explains it, "[t]he early Americans most concerned for individual rights . . . envisioned a nation in which yeoman farmers would govern themselves at the local level while the fearful power of the central government of the United States was held at a safe distance." YACKLE, *supra* note 48, at 17; *see also id.* ("Then, federalism was the language of freedom; governmental power was to be dispersed in order that it not be concentrated at the center and turned to the ends of despotism.").

such that discussion regarding ratification of the Constitution necessarily included talk of armed resistance to combat an unauthorized exercise of power by the federal government.<sup>151</sup> Although scholars often suggest that protection of states' rights (and, by extension, a state's dominion over its own laws) was foremost on the minds of early federalists,<sup>152</sup> the facts simply do not support this position. To the contrary, federalists feared centralized authority, irrespective of the source (i.e., from the federal and state levels).

No better example of federalists' relative lack of concern over federal review of state laws can be found than the First Judiciary Act. The Constitution did not establish the lower federal courts—an elected Congress created them almost immediately after the Constitution's ratification and with them enacted the original diversity jurisdiction statute.<sup>153</sup> From the early federalist's perspective, the question of judicial review at the federal or state level was immaterial—so long as *individual* rights were not infringed. This same sentiment is further evident in choice of law rules—which allow that, like federal courts sitting in diversity, state courts may also construe the laws of other states (with binding effect). Were state laws truly the sole province of the state in which the laws were promulgated, and thus states' rights (not personal freedoms) the focus of early federalist ire, these various examples of shared judicial review would not be so commonplace.<sup>154</sup>

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151. ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 15 (2001). Addressing the issue of federal authority, James Madison offered the not-so-veiled threat that,

should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case . . . the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate . . . would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

THE FEDERALIST NO. 46, *supra* note 3, at 268 (James Madison).

152. *See, e.g.*, Moller, *supra* note 56, at 1177–78 (“Opponents of the Diversity Clause were concerned about federalism in an older ‘states’ rights’ sense: they sought to preserve the raw power and influence of state courts relative to the new federal courts and feared that the Diversity Clause would be a wedge for federal courts to diminish that power.”).

153. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78; *see also supra* notes 50–51 and accompanying text.

154. It is interesting to note that federal question jurisdiction—which many modern day “federalists” suggest should be the limited scope of federal subject matter jurisdiction, was enacted almost one hundred years after the federal courts were granted jurisdiction on

The “states’ rights” construct of federalism occurred much later. Almost one hundred years after ratification of the Constitution, and enactment of the First Judiciary Act, the “states’ rights” construct of federalism evolved in response to efforts by a post-Civil War Congress to ensure equal rights to all U.S. citizens.<sup>155</sup> Thus, although initially offered in support of limited federal government on the basis of individual freedoms, proponents of federalism later asserted it as a basis to *deny* individual freedoms (granted by the federal government) on the ground that states’ rights, not individual freedoms, should prevail over federal authority.<sup>156</sup>

Over the following decades, federalism’s rationale would become surprisingly fluid. The motivations for asserting federalism were typically self-serving, and concerned with neither personal freedoms nor states’ rights.<sup>157</sup> Accordingly, because early federalists’ fear of infringement on

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diversity grounds. *See, e.g.*, YACKLE, *supra* note 48, at 18 (“In 1875, Congress finally conferred on the federal courts a general jurisdiction to entertain civil actions raising federal questions.”).

155. *See, e.g., id.*

156. One common post-individual-freedom rationale for federalism originated with Justice Brandeis, who ennobled the concept of federalism by suggesting that it established state “laboratories” in which policy could be tested and developed before being implemented nationally. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Justice Brandeis’s construct, however, is not without its critics. *E.g.*, John A. Ferejohn & Barry R. Weingast, *Introduction*, in *THE NEW FEDERALISM: CAN THE STATES BE TRUSTED* at ix (John A. Ferejohn & Barry R. Weingast ed., 1997) (“For example, the long history of legal discrimination against African Americans demonstrates that states cannot be trusted on all dimensions of public policy. Competition among states is unlikely to prevent particular states from abrogating certain citizen rights—[including] the right to vote and to public participation on an equal basis.”); James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 *TEMP. POL. & CIV. RTS. L. REV.* 355, 357 (2008) (questioning the validity of Brandeis’s laboratory rationale: “[H]istory teaches us to regard with some skepticism the notion that state governments will consistently serve as engines of progressive social change”).

157. *See, e.g.*, YACKLE, *supra* note 48, at 18 (noting the devolution of federalism from concern over individual freedoms to its current construct as a wedge used variously by liberals and conservatives to effect national policy from the state level: “[I]t should surprise no one that federalism is today a devil to American liberals and a darling to conservatives”); Pfander, *supra* note 156, at 355–56 (noting fluctuating allegiance to concepts of federalism by whichever political party is “excluded from political control at the national level” at the time); *see also* NAGEL, *supra* note 151, at 16 (“This steady and by now vast expansion of the role of the national government has been sponsored by both conservatives and liberals.”). Thus, today federalism is used to ascend to positions in the federal government on the inherently contradictory premise that by taking federal authority, power can be returned to

personal liberties did not (by virtue of the First Judiciary Act) correlate directly with implementation of diversity jurisdiction, and because a “states’ rights” theory behind federalism was one of many ex post explanations offered in defense of the concept, federalism should not be viewed as an impediment to expanding the scope of the federal judiciary’s authority on diversity grounds.<sup>158</sup>

Irrespective of the motivations behind federalism, however, the reality today is that the states necessarily hold less political sway than at any time in the past and have become subservient to federal interests, such that federalism arguably is no longer a going concern.<sup>159</sup> Although from a political perspective effecting policy change at the state level always has been an opportunity for those in the national minority to build a following and ascend to national prominence, realistically the decentralized government envisioned by early federalists no longer exists:

[I]t is simply no longer credible to believe that the national government is restricted to an enumerated set of powers. By degrees and for largely understandable reasons, the courts, the Congress, and the regulatory bureaucracies have gradually expanded the jurisdiction of the central government into all areas of life. It is not possible to get medical care or attend a public school or plan for retirement or seek support payments from an absent spouse or flirt with a coworker or find a parking space at

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states.

158. States’ rights as a rejoinder to application of state laws by the federal courts is further inapposite in the context of mass tort litigation described in Part II. Specifically, in actions involving numerous plaintiffs from different states, no one state’s laws will be applicable, and therefore, regardless of whether or not a state or federal court presides over the controversy, the laws of one or more states necessarily will be construed by a court other than one sitting in the state in which the relevant laws were enacted. Moreover, because the state laws themselves are often misapplied by the state courts tasked with interpreting them, any argument regarding protection of states’ rights is moot. *See* S. REP. NO. 109-14, at 4 (2005) (“One key reason for these problems [with the class action system] is that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures . . . .”), *reprinted in* 2005 U.S.C.C.A.N. 3, 5, 2005 WL 627977.

159. Martin Shapiro, *American Federalism*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 359 (R. Collins ed., 1980) (“Any discussion of federalism in a legal context must begin with the absurdity of federalism as a legal concept . . . . The key feature of the nation state was the rejection of the medieval system of multiple . . . feudal obligations and its replacement by a single political authority . . . .”), *quoted in* RAOUL BERGER, FEDERALISM: THE FOUNDERS’ DESIGN 49 (1987).

a community recreational facility or advertise the availability of a basement apartment or prosecute an ordinary street crime—*or do just about anything else*—without running into at least the possibility of federal authority.<sup>160</sup>

As a society, we look to the federal government to regulate virtually all aspects of our lives (from complex financial instruments to Barbie® dolls) and to take initiative to fight on our behalf at every turn. We have come to rely on federal regulation of industries as diverse as prescription drugs,<sup>161</sup> dog food,<sup>162</sup> and children's toys.<sup>163</sup> We clamor for federal intervention following tragedies as diverse as environmental disasters (both natural<sup>164</sup> and man-made<sup>165</sup>) and financial collapse.<sup>166</sup> We grow angry when the

160. NAGEL, *supra* note 151, at 16 (emphasis added).

161. *See, e.g., Regulatory Information: Legislation*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/RegulatoryInformation/Legislation/default.htm> (last updated Jan. 3, 2011) (noting that the “FDA regulates \$1 trillion worth of products a year” and “ensures the safety of all food except for meat, poultry and some egg products; ensures the safety and effectiveness of all drugs, biological products . . . , medical devices, and animal drugs and feed; and makes sure that cosmetics and medical and consumer products that emit radiation do no harm”).

162. *Id.*

163. *See, e.g., About CPSC: CPSC Overview*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/about/about.html> (last visited Feb. 16, 2011) (explaining that the federal Consumer Product Safety Commission “is charged with protecting the public from unreasonable risks of injury or death from thousands of types of consumer products,” including “protecting consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard or can injure children [including, but not limited to,] toys, cribs, power tools, cigarette lighters, and household chemicals . . .”).

164. *See* Press Release, Sen. Joe Lieberman Ranking Member Homeland Sec. & Governmental Affairs Comm., Lieberman Says Katrina Report Should Be Primer for Future Disasters (Apr. 27, 2006), *available at* [http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord\\_id=bf6e7b3c-736c-4813-aba2-b7f68720cdeb](http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=bf6e7b3c-736c-4813-aba2-b7f68720cdeb) (“In national catastrophes, the nation does look to the President, who is uniquely charged and powered to lead our country’s response to a catastrophe of Katrina’s magnitude.”).

165. *See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-394T, GAO’S 2011 HIGH-RISK SERIES—AN UPDATE: TESTIMONY BEFORE THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM 6* (2011) (statement of Gene L. Dodaro, Comptroller General of the United States), *available at* <http://www.gao.gov/new.items/d11394t.pdf> (noting in discussions of the 2010 BP Deepwater Horizon oil spill in the Gulf of Mexico the federal government’s virtual monopoly on regulation of onshore and offshore oil and gas activities, the need for increased federal authority both in permitting and inspecting oil and gas facilities, and expansion of the Department of the Interior to oversee both safety and collection of oil and gas revenue); Robbie Brown, *Witness Cancellations Thwart Hearings on Oil Spill*, N.Y. TIMES, July 21, 2010, at A16 (noting the U.S. Coast Guard and federal Bureau of Ocean Energy Management, Regulation and Enforcement as heading the

federal government is unable to provide quick or sufficient fixes to our problems.<sup>167</sup> As a result, the size of our federal government has far outstripped the size and relevance of any one state or group of states.<sup>168</sup>

Proponents of federalism rely on various rationales to support a decentralized federal government. But adjudication of state laws (and “states’ rights”) has never been federalism’s primary focus as much as it has been a convenient rallying cry to accuse the federal government of usurping state authority. The truth of the matter is that the states have always ceded some judicial authority over their laws to the federal government. Diversity jurisdiction over time has proved neither detrimental to individual freedoms nor destructive to state authority.

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investigation into the Deepwater Horizon spill); *cf.* Editorial, *Oil Drilling Delay Appropriate*, TAMPA TRIB., Dec. 3, 2010, at 18 (criticizing Florida’s then governor-elect Rick Scott and U.S. Senator-elect Marco Rubio for attacking the federal government’s moratorium on offshore drilling, designed to assess and improve safeguards against environmental and economic harm, as “partisan politics” and not concerned with “Florida’s welfare”).

166. *See, e.g.*, David Greising, *It’s Never Too Late to Declare a Recession*, CHI. TRIB., Dec. 2, 2008, at 21 (chronicling the collapse of the housing market in 2007, the failure in 2008 of investment banks Bear Stearns & Co. and Lehman Brothers, and subsequent government bailouts of failing mortgage agencies Fannie Mae and Freddie Mac and insurer American International Group, Inc.).

167. *See, e.g.*, Karl Vick & Sonya Geis, *Calif. Fires Continue to Rage*, WASH. POST, Oct. 24, 2007 (comparing response times by the federal government to Hurricane Katrina in 2005 and wildfires in southern California in 2007 and noting that President Bush “was sharply criticized for his sluggish response to Hurricane Katrina in 2005”); Editorial, *The Tale of TARP: A Good-News Story That’s Actually True*, WASH. POST, Oct. 3, 2010, at A18 [hereinafter *Tale of TARP*] (noting that “voters loathe the idea of showering Wall Street with their money through the Troubled Assets Relief Program (TARP).”). *But cf. Tale of TARP* (arguing that intervention by the federal government was necessary following the economic collapse of 2008: “the costs of TARP . . . have to be considered in the context of the unprecedented emergency that faced the policymakers who adopted it [and] must be weighed against the costs of not intervening”); *see also id.* (“Financial stability is a public good, but it isn’t free. TARP helped save the United States from an economic collapse and bought time to get America’s house in order . . .”).

168. As Richard Socarides, a former advisor to President Clinton, noted in 2010 in response to suggestions that President Obama and fellow democrats would advocate for reduction in the size of the federal government: “I’m sure he would . . . . We all would as Americans.’ . . . ‘But when you are faced with these enormous economic and social problems we face in this country, you have little alternative but to in some ways expand the role of government in fixing them.’” *With Every Intervention, Concerns Build over Size of Federal Government*, FOXNEWS.COM (Mar. 29, 2010) (emphasis added) (quoting Richard Socarides), <http://www.foxnews.com/politics/2010/03/29/intervention-concerns-build-size-federal-government/>.

Moreover, as a nation we have come to expect the federal government to be the “decider”<sup>169</sup> on issues affecting the nation as a whole—which necessarily include the types of interstate disputes that define diversity jurisdiction.

#### *IV. Balancing the Costs and Benefits of Imposing Increased Burdens on the Federal Judiciary*

Like federalism, concerns regarding increased costs imposed on the federal judiciary in the form of an increased number of federal cases filed—viewed as the natural response to a relaxing of the rules on diversity jurisdiction—are often used to challenge proposed changes to diversity jurisdiction requirements. Unlike federalism, these concerns are real<sup>170</sup> and take on added significance in hard economic times. But more generally, opponents of diversity jurisdiction often argue that Article III courts are unduly burdened with diversity cases; in fact, jurists and legislators of all stripes routinely call for an overhaul of diversity jurisdiction to scale back its scope, or to eliminate it altogether.<sup>171</sup>

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169. Sheryl Gay Stolberg, *Buzzwords: The Decider*, N.Y. TIMES, Dec. 24, 2006, at 44 (“I hear the voices and I read the front page and I hear the speculation, . . . [b]ut I’m the decider, and I decide what’s best.”) (quoting President George W. Bush)).

170. Using CAFA as a proxy to determine the result of a movement toward a uniform minimal diversity standard, the likelihood of an increased number of cases heard by the federal judiciary would appear virtually certain. See, e.g., Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1751 (2008) (noting an increase in the number of actions originally filed in or removed to federal court following enactment of CAFA).

171. See, e.g., H.R. REP. NO. 100-889, at 44 (1988) (“Legislative efforts to eliminate or reduce diversity jurisdiction in the Federal courts come to the fore at various intervals. The Judicial Conference of the United States has long supported total abolition of diversity jurisdiction . . . . It has always been a controversial endeavor.”), reprinted in 1988 U.S.C.C.A.N. 5982, 6005, 1988 WL 169934; see also H.R. REP. NO. 107-370, at 128 (2002) (noting in discussions regarding enactment of CAFA that “in 1978, the House twice passed legislation that would have abolished general diversity jurisdiction”), 2002 WL 388106; H.R. REP. NO. 107-14, at 3 (2001) (noting in discussions regarding enactment of MMTJA “efforts . . . by those of the Carter Administration to improve judicial machinery by abolishing diversity of citizenship jurisdiction and to delineate the jurisdictional responsibilities of state and Federal courts”), 2001 WL 244389. Professor Larry Yackle similarly notes public sentiment favoring elimination of diversity jurisdiction. YACKLE, *supra* note 48, at 47, 230 n.116 (citing support from both the American Law Institute and the Federal Courts Study Committee for the abolition of diversity jurisdiction and suggesting that the sole reason for its continued existence is the “support from corporations and lawyers who believe their clients benefit from being in federal court for litigation”). Professor

Coupled with an increased case load, cost further becomes relevant in light of a historically understaffed federal bench. In his 2010 year-end report on the federal judiciary, Chief Justice John Roberts notes in particular the “persistent problem of judicial vacancies in critically overworked districts” as an “immediate obstacle[]” to the federal judiciary’s effort at achieving greater cost savings and efficiencies and reducing its backlogs.<sup>172</sup>

Nonetheless, and without discounting legitimate concerns over costs, the efficiencies to be achieved by a reversion to a minimal diversity construct far outweigh its economic impact. This argument is strengthened when considering that some of the most pressing problems (e.g., an underfunded and understaffed federal judiciary) can be remedied in other ways, thereby allowing for an increased number of federal cases filed. Specifically, as Chief Justice Roberts noted, both Congress and the President should “provide the financial resources that the courts must have to carry out their vital mission.”<sup>173</sup> At present, the federal judiciary commands “*less than two-tenths of 1%* of the federal budget for one of the three constitutional branches of government.”<sup>174</sup> With respect to staffing, filling judicial vacancies has become an entirely political process, without any concern for the impact vacancies have on the efficiency of the judiciary.<sup>175</sup> These problems stem from irresponsible behavior by elected officials from both parties who find it convenient to use the federal judiciary as a wedge in political disputes, at the taxpayers’ expense.

Moreover, the current jurisdictional morass outlined in Part II has done nothing to curb the number of diversity suits heard by the federal courts.

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Yackle further personally opines later in his text, in defense of a rarified federal judiciary, the unwanted result of providing federal courts the full powers granted to it by Article III. *Id.* at 96 (noting with obvious sarcasm the unwanted result of “expand[ing] [diversity jurisdiction] to its constitutional limits,” suggesting that by doing so “most judicial business would be shifted from the state to the federal forum”).

172. *2010 Year-End Report on the Federal Judiciary*, SUPREME COURT OF THE U.S., 4–5 (Dec. 31, 2010), <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.

173. *Id.* at 7.

174. *Id.* (emphasis added).

175. *Id.* (“Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes.”); *see also* H.R. REP. NO. 100-889, at 45 (discussing the Judicial Improvements and Access to Justice Act, noting that, “as inflation, the workload of the Federal courts, and the unwillingness of Congress to solve caseload problems *by creating new judgeships* coalesce pressures are created to review ways to reduce Federal jurisdiction” (emphasis added)), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6005, 1988 WL 169934.

Said differently, proof that the status quo somehow reduces, or at least maintains, the number of diversity suits filed in, or removed to, federal court is lacking. In fact, this article suggests that because of the vagaries inherent in the exceptions to the complete diversity doctrine, the current status quo encourages parties to attempt removal, even in jurisdictions where doing so would appear to be expressly prohibited.<sup>176</sup>

Even conceding an increase in costs, a minimal diversity standard will ensure (1) that actions are decided more quickly (without having to address the preliminary question of jurisdiction) and (2) that related litigation is consolidated before a single federal district court and handled uniformly. Costs can also be limited by imposing other restrictions on access to the federal courts that can be more easily applied (e.g., an increase to the amount-in-controversy requirement and mandatory abstention provisions for matters truly local in nature).

*A. Getting to the Merits (More Quickly)*

Jurisdictional haggling has become de rigueur in mass tort litigation and, save for matters truly local in nature, the question of whether removal on diversity grounds is possible is an assessment made by defendants in virtually every tort action following the filing of the complaint. This article does not suggest that a change in the rules of diversity jurisdiction will transform this paradigm. Defendants will always consider the potential for removal irrespective of the rules.<sup>177</sup>

Adopting a true minimal diversity standard<sup>178</sup> will allow federal actions to proceed almost immediately to discovery and pre-trial motion practice (that is, to the actual merits of the case) and to bypass the jurisdictional arguments that accompany so many disputes out of the gate.<sup>179</sup> To

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176. See Notice of Removal ¶¶ 25–26, *Bain v. AstraZeneca LP*, No. 3:09-cv-04147-JL (N.D. Cal. Sept. 8, 2009), 2009 WL 3465064 (pleading in the alternative for federal subject matter jurisdiction on misjoinder grounds despite acknowledging the existence of binding authority in the jurisdiction rejecting the argument (citing *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009))).

177. See, e.g., Pfander, *supra* note 156, at 368 (citing authority for the proposition that “[e]mpirical studies confirm . . . that the removal of cases from state to federal court tends to reduce win rates for plaintiffs [and] that this reduction in win rates is not likely to have been influenced by case selection effects that often obscure the implications of win rate data”).

178. That is, a revision to 28 U.S.C. § 1332 to provide that “[t]he district courts shall have original jurisdiction of *all* civil actions” in which any one party is a citizen of a state different from any one adverse party. 28 U.S.C. § 1332 (2006) (emphasis added).

179. Although discussing the situation of propriety of remand on procedural defect, Judge Frank Easterbrook of the Court of Appeals for the Seventh Circuit offers a criticism

demonstrate, in *Tapscott v. MS Dealer Service Corp.*, more than one and a half years elapsed from the time of removal to the time the Court of Appeals for the Eleventh Circuit affirmed propriety of removal under the misjoinder standard.<sup>180</sup> During this time, no merits discovery could be conducted and the case was no closer to resolution than when originally filed. By comparison, for the twelve-month period ending March 31, 2010, the median time interval from filing to disposition for all cases filed in the federal district courts was eight months.<sup>181</sup> *Tapscott* remained in limbo for more than twice the period of time during which more than 100,000 federal cases were filed *and resolved* in the past year.<sup>182</sup> This is not to say that the complex questions of law and fact in *Tapscott* could have been resolved in eight or even eighteen months, but rather that those eighteen months could have been better spent addressing the merits of the case as opposed to determining the court in which the proceedings would be tried.

Even in cases in which the jurisdictional question is decided more quickly, precious time is nonetheless wasted on the question of “where litigation shall proceed.”<sup>183</sup> For example, in recent litigation in the Southern District of Illinois, in which the court raised the question of subject matter jurisdiction on its own motion and relied on recent precedent directly on point to reject defendants’ argument for removal on misjoinder grounds, three months elapsed from the time of filing of the complaint to the district court’s order.<sup>184</sup> Had a minimal diversity standard been applied from the outset (and questions of jurisdiction avoided), in that same three

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easily applied to disputes over diversity jurisdiction more generally: “The [jurisdictional analysis] in this case has stopped this litigation dead in its tracks. It should now get back under way, and in federal court.” *In re Cont’l Cas. Co.*, 29 F.3d 292, 295 (7th Cir. 1994).

180. 77 F.3d 1353, 1355 (11th Cir. 1996), *abrogated on other grounds by* *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000).

181. *U.S. District Courts—Median Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2010*, U.S. COURTS, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf> (last visited Mar. 10, 2011).

182. *Id.* The *Tapscott* time to resolution is not an anomaly, but rather the norm. *See, e.g., Anderson v. Bayer Corp.*, 610 F.3d 390, 392 (7th Cir. 2010) (elapsing approximately ten months from time of filing to resolution of the question of federal subject matter jurisdiction); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 951 (9th Cir. 2009) (elapsing thirty months from time of filing to resolution on jurisdiction question).

183. *In re Cont’l Cas. Co.*, 29 F.3d at 295 (noting the importance of procedural rules that “prevent[] extended litigation that does no more than determine where litigation shall proceed”).

184. *Baker v. Johnson & Johnson*, 709 F. Supp. 2d 677, 681, 686–87 (S.D. Ill. 2010).

month span the parties at a minimum would have been required to meet and confer on the nature of the claims and defenses, prepare and submit to the court a discovery plan and scheduling order, exchange initial disclosures, and possibly exchange discovery requests and notice depositions.<sup>185</sup>

At a minimum, the question of efficiencies resulting from this proposed standard requires investigation, if for no other reason than to rule out minimal diversity as a legitimate response to the jurisdictional problems outlined above.

### *B. Giving “Teeth” to Mass Tort Legislation*

Adopting a minimal diversity construct further will ensure that, as the framers intended, an entire action is heard by a single, federal court.<sup>186</sup> Under the current landscape, although the misjoinder rule has been applied to provide for federal jurisdiction in cases in which minimal diversity exists, the federal court can retain jurisdiction only over those parties who are completely diverse to defendants (i.e., mis- or fraudulently-joined parties are severed and dismissed from the action, and to the extent claims against those parties are refiled, refiling must occur in state court).<sup>187</sup> This current limitation on the exercise of diversity jurisdiction guarantees that parallel actions will proceed simultaneously in federal and state courts—risking inconsistent treatment of identically situated parties.<sup>188</sup> This result

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185. See FED. R. CIV. P. 26(a), (d), (f).

186. See *supra* notes 3, 26, 42–44 and accompanying text.

187. See, e.g., *Chaney v. Gate Pharm.*, No. Civ.A. 98-20478, 1203, 1999 WL 554584, at \*4 (E.D. Pa. July 16, 1999) (noting that “[b]ecause the court finds that the Plaintiffs that destroy diversity jurisdiction are fraudulently joined it may ignore the citizenship of the those parties and exercise jurisdiction over this civil action,” and that “[o]nce the court properly exercises jurisdiction . . . [the court will] dismiss the non-diverse Plaintiffs’ claims without prejudice”). Of course, in the case of fraudulently joined parties, those parties are by definition not proper parties to the suit and their dismissal does not truly sever one action into multiple suits since plaintiffs in those cases likely did not intend to (and typically will not) pursue their claims against the dismissed defendants. In the case of misjoined parties, however, some will argue that although those parties are deemed to have valid claims against defendant, those claims do not arise from the same transaction or occurrence, and thus cannot be joined under Rule 20(a)(1). That is, they could not be consolidated into a single action regardless of whether or not they remained in federal court. Although true, this part will demonstrate that federal legislation does provide for coordinated pretrial practice in federal court to eliminate risk of inconsistent treatment, from which these misjoined parties cannot benefit if they are remanded back to state court.

188. This risk is not insignificant and has the potential for affecting the claims of hundreds, if not thousands, of individual claimants. For example, in personal injury litigation involving the prescription medication Seroquel®, the federal court presiding over

contravenes the framers' intent and undercuts federal legislation specifically designed to handle pretrial issues in mass tort litigation to ensure uniform treatment of parties.<sup>189</sup>

Section 1407 of Title 28 of the U.S. Code provides that "civil actions involving one or more common questions of fact [pending in the federal district courts] may be transferred to any district for coordinated or consolidated pretrial proceedings."<sup>190</sup> Although these coordinated actions, commonly known as multidistrict litigation proceedings (MDLs), are designed to handle discovery and pretrial proceedings (with individual cases being remanded to their original transferor courts for trial<sup>191</sup>), they very often determine the outcome of the entire litigation, including the initial trials themselves.<sup>192</sup>

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the consolidated federal claims noted the existence of "approximately 26,000 Seroquel cases presently pending in state and federal court," and that "[m]ore cases are sure to follow." *In re Seroquel Prods. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB, 2010 WL 3465151, at \*1 (M.D. Fla. Aug. 30, 2010); *see also* Jef Feeley & Margaret Cronin Fisk, *AstraZeneca Judge to Urge Return of Seroquel Cases to Courts*, BLOOMBERG (Nov. 19, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=asXBF7VliqVQ> (noting in 2009 the existence of more than 6,000 lawsuits pending in state courts); *Risperdal/Seroquel/Zyprexa Mass Tort, Case List*, NEW JERSEY COURTS, [http://www.judiciary.state.nj.us/mass-tort/rsz/risplist\\_2011.pdf](http://www.judiciary.state.nj.us/mass-tort/rsz/risplist_2011.pdf) (last visited Sept. 15, 2011) (noting the pendency of 3,728 individual actions involving atypical antipsychotic medications, including Seroquel®, pending in New Jersey state court). Thus, there exists the potential (at the most extreme end) for many thousands of individual plaintiffs to be denied recovery in their respective state or federal court while, in the parallel action, similarly situated plaintiffs' claims are deemed meritorious either through settlement or jury verdict.

189. 28 U.S.C. § 1407 (2006).

190. *Id.* § 1407(a).

191. *Id.* ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred *unless it shall have been previously terminated . . .*" (emphasis added)).

192. For example, an MDL court's order requiring plaintiff to make an initial evidentiary showing to prove both injury and likelihood of causation by defendant to state a prima facie claim (commonly known as a *Lone Pine* order) can drastically alter the landscape of the litigation by forcing dismissal of numerous fraudulent or unsupported claims. *See Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507, at \*1-2 (N.J. Super. Ct. Law Div. Nov. 18, 1986). Similarly, an MDL court's decision on motions to dismiss and motions to exclude expert testimony can affect the outcome of the litigation as a whole by forcing parties to the settlement table. *See, e.g., In re Gadolinium-Based Contrast Agents Prods. Liab. Litig.*, No. 1:08 GD 50000, 2010 WL 1796334, at \*14-28 (N.D. Ohio May 4, 2010) (permitting expert testimony from all seven of plaintiffs' challenged expert witnesses but striking testimony from defense experts on significant issues of liability, including defendant's lack of foreseeability of potential injury and opinion that injury at issue can occur in the absence of exposure to defendant's product). Ultimately, an MDL court can

The MDL process can only truly be effective, however, if all of the related actions are consolidated before the MDL court. Under the current system of diversity jurisdiction, this is not possible. The Judicial Panel on Multidistrict Litigation (JPML), which determines the creation and location of MDLs,<sup>193</sup> can only coordinate and consolidate those actions pending in the *federal* district courts. State court actions are beyond the Panel's reach. More frustrating still, Congress has further decreed that mass actions removed under the CAFA mass action removal provision cannot be transferred to a related MDL proceeding—irrespective of whether or not they involve “one or more common questions of fact”—unless plaintiffs agree to the transfer.<sup>194</sup> This requirement is counterintuitive, as it places the transfer decision in the hands of the plaintiffs, rather than the JPML, whose sole duty it is to oversee creation of MDLs. Moreover, it runs counter to the purpose of the MDL statute, which provides that “transfers for such proceedings will be *for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.*”<sup>195</sup> Requiring defendants to participate in MDL proceedings and separately defend against identical claims in a second court (albeit a federal one) promotes neither convenience nor efficiency.<sup>196</sup>

Allowing federal courts to exercise subject matter jurisdiction over any action in which the parties are minimally diverse will (1) fully empower an MDL court to preside over all related actions in a mass tort litigation<sup>197</sup> and

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delay remand of actions to transferor courts until after bellwether trials are conducted by the MDL court of claims of plaintiffs over whom the MDL court has subject matter jurisdiction, the results of which can again promote settlement. *See, e.g., In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., No. 3:09-md-02100-DRH-PMF, 2010 WL 4024778, at \*1 (S.D. Ill. Oct. 13, 2010)* (noting, in selecting cases for bellwether trials over which the MDL court would preside, that “the holding of bellwether trials is within the discretion of the transferee judge”).

193. 28 U.S.C. § 1407(a), (b).

194. *Id.* § 1332(d)(11)(C)(i) (“Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.”).

195. *Id.* § 1407(a) (emphasis added).

196. *Cf.* 28 U.S.C. § 1369(e) (2006) (requiring that a district court presiding over an action whose jurisdiction is premised on the MMTJA “shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action,” presumably so that the JPML, and not one of the parties, can determine whether the action should be transferred to an existing MDL).

197. By definition, this article assumes that true mass torts are those involving parties from more than one state. Further, although a subject for a separate article, the author does

(2) counteract the CAFA mass action removal provision (and its corresponding restriction on MDL transfer). In addition, a reversion to minimum diversity would further eliminate the type of congressional waste evident in CAFA's passage and similar legislation designed to address too specific an issue, when more generalized legislation would suffice.<sup>198</sup>

*C. Limiting the Federal Courts' Workload: Abstention and the Amount-in-Controversy Requirement*

Until such a sweeping change to diversity jurisdiction of the type proposed by this article is implemented, the resulting shift in the number of cases filed in the federal district courts cannot truly be known. Although some scholars have offered statistics, which suggest that expanding diversity jurisdiction will necessarily increase the number of federal actions,<sup>199</sup> those numbers are limited to specific contexts. In fact, it could be argued that the number will not change significantly. Defendants will often attempt removal under various theories of law despite the absence of complete diversity.<sup>200</sup> For the period 2005 through 2008, the total number of cases removed to federal court remained relatively flat, generally hovering at 30,000 cases.<sup>201</sup> Focusing on 2008, and extrapolating those statistics over the total number of authorized federal judgeships at the time,

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note the restriction currently imposed by 28 U.S.C. § 1441(b) precluding removal on diversity grounds in cases in which none of the defendants "properly joined and served . . . is a citizen of the State in which such action is brought," and advocates that, in light of the arguments regarding the demise of federalism's "bias" theory, the rule no longer has merit. *See supra* notes 64–65 and accompanying text.

198. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1441 (2008) ("[CAFA], after all, resulted from years of intense lobbying (on both sides of the aisle by interest groups associated with both plaintiffs and defendants), partisan wrangling, and, following two successful filibusters, fragile compromises.").

199. *See Lee & Willging, supra* note 170, at 1751.

200. The focus on removal, and not general filings, is warranted here because, as masters of their complaints, to the extent plaintiffs desire to litigate in federal court an argument could be made that they are able to do so by exercising selectivity in choice of defendants. Conversely, the number of cases removed to federal court can be viewed as more representative of the effect minimal diversity would have on federal filings because the number of removals (which necessarily include removals premised on exceptions to the complete diversity rule, for example misjoinder) can be seen to provide at least a rough estimate of the number of potentially minimally diverse cases filed in a given year.

201. *U.S. District Courts—Civil Cases Filed, by Origin*, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table403.pdf> (last visited Mar. 10, 2011).

each judgeship averaged 224 civil cases.<sup>202</sup> Of those, only twenty-five cases per judge were removed from state court, and only six of those were tort suits based on diversity.<sup>203</sup> Thus, using removals as a proxy for the potential increase in cases, it is possible that the total number might be something less than the “flood” of cases many fear.

But even assuming the number of cases will increase, several measures can be implemented to ensure that the number of actions filed remains constant with, or is even reduced from recent statistics. First, this article proposes an increase in the amount in controversy commensurate with factors including inflation and average jury verdicts in diversity matters tried in the federal courts.

The amount-in-controversy requirement for diversity cases has remained static, at \$75,000, since 1996.<sup>204</sup> Adjusting solely for inflation, this number today should be increased at a minimum to approximately \$105,000.<sup>205</sup> Alternatively, using past increases as benchmarks, the amount in controversy was increased one and a half times its current value between

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202. In 2008, the number of authorized federal judgeships at the district court level was 1192, comprising 678 district court judges and 514 magistrate judges. *Total Judicial Officers—Courts of Appeals, District Courts, and Bankruptcy Courts*, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table101.pdf> (last visited Mar. 10, 2011). The total number of civil cases filed that year was 267,257. *U.S. District Courts—Civil Cases Filed, Terminated, and Pending*, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table401.pdf> (last visited Mar. 10, 2011).

203. See *U.S. District Courts—Civil Cases Filed, by Origin*, *supra* note 201 (noting 30,065 removals from state court in 2008, or 11% of the total number of cases filed); *U.S. District Courts—Diversity of Citizenship Cases Filed, by Nature of Suit*, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table409.pdf> (listing 62,427 tort actions based on diversity filed in 2008, 11% of which, spread across 1,192 judges, equates to 6 cases per judge) (last visited Mar. 10, 2011).

204. Congress adopted the \$75,000 amount in the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847. This amount remains unchanged today. 28 U.S.C. § 1332(a) (2006).

205. *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Mar. 10, 2011). Indeed, recently proposed (though ultimately unsuccessful) legislation suggested this very type of inflation-based indexing of the amount in controversy, under which proposal the Director of the Administrative Office of the United States Courts would, beginning January 1, 2011, and at five-year intervals thereafter, adjust the amount in controversy in multiples of \$5,000 to correlate with fluctuations in the Consumer Price Index for the previous five-year period. Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, 111th Cong. § 103(a) (as introduced in House, Nov. 19, 2009), 2009 CONG US HR 4113 (Westlaw).

1988 and 1996.<sup>206</sup> Using this standard, the amount in controversy calculated in 2012 would be \$168,750. A third option is to analyze and derive an amount from actual jury verdicts entered in federal tort cases. Under this analysis, an amount in controversy for the current term between \$325,000 and \$340,000 would not be extraordinary.<sup>207</sup> Although more research is required, these statistics hopefully show that the current amount is set remarkably low and may be insufficient “[t]o ensure that diversity jurisdiction does not flood the federal courts with minor disputes . . . .”<sup>208</sup>

Skeptics will suggest that the amount-in-controversy can be as easily manipulated as the complete diversity requirement, and adopting a minimal diversity standard with an increased amount in controversy will do no more than exchange one underdeveloped standard for another. The point is well taken, which is why this article further proposes that any increase to the amount be coupled with a legislatively-adopted provision stating that a party’s failure to plead a specific amount in damages will create the presumption that the federal amount-in-controversy requirement is met.<sup>209</sup>

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206. Compare Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205(a), 110 Stat. 3847, 3850 (adopting the \$75,000 standard), with Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201(a), 102 Stat. 4642, 4646 (1988) (increasing the amount-in-controversy requirement to \$50,000). Extrapolating further, the amount in controversy was quintupled in value between 1958 and 1988. See Act of July 25, 1958, Pub. L. No. 85-554, § 1332(a), 72 Stat. 415, 415 (setting the amount-in-controversy requirement at \$10,000). Under this calculus, the amount in controversy requirement would be \$250,000 in 2018 and \$375,000 in 2026.

207. The estimated median damages award in federal tort trials between 1996 and 1997 was \$141,000, increasing to \$201,000 for the period 2002 to 2003. See *Federal Tort Trials and Verdicts, 1996–97*, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATS. (May 3, 1999), <http://bjs.ojp.usdoj.gov/content/pub/ascii/ftv97.txt>; *Bulletin, Federal Tort Trials and Verdicts, 2002–03*, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATS. (Aug. 2005), <http://bjs.ojp.usdoj.gov/content/pub/ascii/ftv03.txt>. Extrapolating from these statistics, the median award for the period 2008 to 2009 will be \$281,400, and \$393,960 for the period 2014 to 2015.

208. . Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005).

209. Understandably, this suggestion will be met with the response that the federal statute in effect places a pleading requirement on pleadings filed in state court. Although true, it is a necessary step to eliminate the gamesmanship played at the federal court level and ensure efficiencies in determining jurisdiction in the federal courts. Moreover, this concept is not foreign to experienced litigators, and in fact is used currently to avoid federal jurisdiction. See, e.g., Plaintiffs’ Amendment to Complaint ¶ 1, Ward v. AstraZeneca Pharm., LP, No. 2:10-cv-01881-SLB (N.D. Ala. Aug. 2, 2010), 2010 WL 3878788 (providing that “[a]ll Plaintiffs in the Complaint amend the amount of damages sought in this action so that no individual Plaintiff claims more than \$74,500 in damages from Defendants,” “Plaintiffs make clear that they seek no more than \$74,500 from Defendants,” and “[e]ach Plaintiff

Combining the presumption with an elevated amount-in-controversy requirement is one step toward eliminating “minor disputes” from federal consideration, without imposing complex and manipulable criteria on the jurisdictional analysis.

Finally, this criterion will be further enhanced, and burden on the federal courts similarly reduced, by a comprehensive and mandatory abstention provision incorporated into the general diversity jurisdiction statute. Already common in specialized legislation,<sup>210</sup> this article proposes that courts be required to abstain from exercising diversity jurisdiction over matters that (1) are comprised primarily of parties (both plaintiffs and defendants) from one state and (2) involve claims that will be governed by the laws of that state.<sup>211</sup>

Although minimal diversity as a construct is by definition easily applied (thus, the reason for it being offered as a more viable, and more uniform rule in the diversity jurisdiction calculus), it is nonetheless at risk of abuse if not properly constrained. Accordingly, increasing the amount-in-

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*further agrees to waive any claim in excess of \$74,500 and not collect more than \$74,500, even if awarded in excess of that amount” (emphasis added); see also H.R. 4113, § 104(a), 2009 CONG US HR 4113 (Westlaw) (proposing use of declarations filed by plaintiffs in state court limiting amount of damages sought as dispositive in determining whether the amount-in-controversy requirement has been met for purposes of deciding propriety of removal).*

210. *See, e.g.*, 28 U.S.C. § 1332(d)(3) (2006) (providing that a court may “decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed,” and based on considerations including “whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States”); 28 U.S.C. § 1369(b) (regarding MMTJA actions providing that the court will abstain from hearing any civil action “in which—(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and (2) the claims asserted will be governed primarily by the laws of that State”).

211. Admittedly, the use of undefined terminology in legislation (e.g., “primarily of parties from one state” and “substantial majority of all plaintiffs”) can prove problematic in application. Nonetheless, this article proposes adopting the specific provision used by Congress in the MMTJA, § 1369(b), because it minimizes the question of the requisite number of same-state plaintiffs or defendants necessary to meet the jurisdictional standard by tying to it the requirement that the applicable law also come from that same state. In addition, adopting the MMTJA rule would give the courts a ready-made judicial framework (i.e., previously decided MMTJA cases) from which to extrapolate in applying this provision more generally to all diversity cases. At a minimum, like the amount-in-controversy requirement, this issue requires further exploration to craft a precise rule regarding abstention that can be uniformly applied.

controversy requirement and requiring abstention from hearing matters that do not “involve matters of national or interstate interest” must necessarily be incorporated into any proposed rule change.

#### *V. Conclusion*

The Constitution provides for the extension of federal diversity jurisdiction to all suits national in nature. Necessarily included in this writ of authority are cases involving minimally diverse adverse parties. The complete diversity rule contravenes the framers’ intent by unnecessarily limiting access to the federal courts. Further, the myriad exceptions to the rule that have developed over time, in their selective and varying application by the federal courts, preclude uniformity in treatment of similarly situated parties—with some improperly denied the opportunity to litigate in federal court. Adopting a universal minimum diversity standard will restore uniformity and clarity to the application of the test. Incorporating a significant increase to the amount-in-controversy requirement, along with a mandatory abstention provision for local actions, will ensure that this proposal does not unnecessarily increase the number of suits heard in federal courts, but does open the doors of the federal judiciary to *all* cases of national importance.