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### The Changing Face of Diversity Jurisdiction

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## THE ARLIN M. AND NEYSA ADAMS LECTURE IN CONSTITUTIONAL LAW

### THE CHANGING FACE OF DIVERSITY JURISDICTION\*

*The Honorable Diane P. Wood\**

In the beginning, there was diversity jurisdiction. This is certainly not news to any lawyer. To the contrary: this fact is assiduously drilled into the head of every beginning law student. Not only did the Framers of the 1787 Constitution see fit to provide for “Controversies . . . between Citizens of different States . . . [and] between . . . the Citizens [of a State] and foreign States, Citizens or Subjects”;<sup>1</sup> in addition, of all the major branches of jurisdiction that Article III of the new Constitution made available, it was diversity jurisdiction—not federal question jurisdiction—that the First Congress immediately implemented in the Judiciary Act of 1789.<sup>2</sup>

The reasons *why* the Framers chose to include diversity jurisdiction, and *why* the First Congress jumped at the chance to breathe life into it, are less clear. Many scholars, including for example Wright, Miller, and Cooper, have noted that “[n]either the debates of the Constitutional Convention nor the records of the First Congress shed

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\* The Honorable Diane P. Wood delivered these remarks for the Arlin M. and Neysa Adams Lecture at the Temple University Beasley School of Law on October 12, 2009.

♦ The Honorable Diane P. Wood is a Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit.

1. U.S. CONST. art. III, § 2, cl. 1.

2. See Judiciary Act of 1789, § 11, 1 Stat. 73. Interestingly, this legislation included an amount in controversy requirement: the matter in dispute had to exceed, exclusive of costs, the sum or value of \$500. In so doing, it set a pattern for diversity jurisdiction that has remained constant up until the present day. See 28 U.S.C. § 1332(a) (2006) (specifying that amount in controversy must exceed \$75,000, exclusive of interest and costs).

[much] light” on the question.<sup>3</sup> Apparently the Anti-Federalists were quite opposed to this branch of jurisdiction. This fact is worth exploring. In my view, it sheds light on the hopes (or fears) that our eighteenth-century forebears had for diversity jurisdiction and on the way that they expected the federal courts to exercise this judicial authority: as a tool of national unification and as a way of providing a neutral forum for citizens from different states. Madison mentioned the latter purpose, which is still accepted today, when he speculated that there might be prejudice in some states against the citizens of others who had claims against the in-state parties.<sup>4</sup> But it is the former purpose that I would like to scrutinize in this Lecture.

Even at the time the Constitution was written, some people were already focusing on the question of whether the federal courts would, in any sense, have some implicit lawmaking role, and if so, to what extent. This is reflected in their suggestions that the real problem faced by the new nation might lie in laws passed by state legislatures that would provide some relief to in-state debtors.<sup>5</sup> National courts offered one possible way to overcome that type of parochialism. This idea is one illustration of the broader concept that the federal courts were, in a Hamiltonian sense, designed to foster the commercial soundness of the country, both through a neutral set of tribunals and through their ability to create what later came to be known, during the *Swift v. Tyson*<sup>6</sup> era, as federal common law. This function or rationale for diversity jurisdiction, however, seems to have drifted to the sidelines over the years.

My thesis, briefly put, is that the Anti-Federalists were right: diversity jurisdiction was—and remains—a potentially powerful tool to be used in the grand project of national unification. It served that purpose during the heyday of federal common law by opening the doors of the federal courts to private law litigation that otherwise would have stayed in the state courts. Beginning in the late nineteenth century, however, two developments came along that caused diversity jurisdiction to ebb in importance for a time. The first was part of the broader story of expansion of federal powers in the wake of the Civil War. It was the passage, in 1875, of another Judiciary Act—one that for the first time (with a minor exception) conferred general federal question jurisdiction on the federal courts.<sup>7</sup> The other was the Supreme Court’s 1938 decision in *Erie Railroad Co. v. Tompkins*,<sup>8</sup> which abolished general federal common law and reined in the federal courts’ substantive use of their diversity jurisdiction.

Lately, however, there has been a resurgence of the use of diversity jurisdiction, coming more or less from left field. This has come about through a modern revival of what is called “minimal diversity.” A word of explanation is in order for those who are not steeped in federal procedure. Since the Supreme Court’s fifteen-line decision in

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3. 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3601, at 12 (3d ed. 2009).

4. *Id.* at 12–13 (citing 3 JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 533 (2d ed. 1836)); see also *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 67 (1809) (noting that one reason for diversity jurisdiction was “to preserve the real equality of citizens . . . by guarding against . . . local prejudices”).

5. 13E WRIGHT ET AL., *supra* note 3, at 15–16.

6. 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

7. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

8. 304 U.S. 64 (1938).

*Strawbridge v. Curtiss*,<sup>9</sup> some 203 years ago, it has been accepted that the statute implementing the Constitution's diversity authority demands "complete diversity"—that is, no one on one side of a case (say, the plaintiff's side) may have the same citizenship as anyone on the other side (say, the defendant's side). And *Strawbridge* went further than that: it drew a line between the statutory requirement for complete diversity (today found in 28 U.S.C. § 1332) and the seemingly identical constitutional language, implying that the Constitution required only "minimal diversity"—that is, only one person, wherever aligned in the case, had to be of a different citizenship than all the others. For a long time, with the exception of statutory interpleader,<sup>10</sup> Congress made almost no use of its broader constitutional power to open the doors of the federal courts to suits involving the more expansive notion of minimal diversity. Those days are over. Today, through a slightly different route than it took in the nineteenth century, Congress has begun to use diversity jurisdiction again to address genuinely national cases.

When one goes back to the beginnings of diversity jurisdiction, it is important to set aside the familiar twentieth- and twenty-first-century concepts of the relations among tribunal, procedure, and substance. As of the mid-eighteenth century, England and its colonies were still operating under a fairly pure common law system.<sup>11</sup> Obviously Parliament passed legislation from time to time, and the royal courts entertained lawsuits governed by those statutes. And some statutes dealt with procedural matters—for example, there was a law passed in the time of Queen Elizabeth I that required litigants to challenge defects in the form of a pleading promptly, through a special demurrer identifying the particular fault.<sup>12</sup> But on the whole, the system under which the American colonists were living at the time of the Revolution was one in which the choice of a court necessarily included the choice of law. In England, the king's courts had developed to apply the king's law to matters of royal interest—an ever-growing set of issues. Over the centuries, the royal courts proceeded—and grew—using "forms of action," which were instituted by a writ from the king's chancellor, and (if one's case fell within the scope of one of the recognized forms) allowed the litigant to appear before the king's tribunal instead of a manorial court or a local court. At the stroke of a pen, thus, the issuance of the writ confirmed the authority of the royal court to hear the case *and* the authority of the court to divine the rule of law that would apply to it.

That regime was already waning by the time the American colonies won their independence from Great Britain, although it was not until the Judicature Act of 1875 that it was finally put to rest.<sup>13</sup> This was, however, the legal background of the people

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9. 7 U.S. (3 Cranch) 267 (1806).

10. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (upholding constitutionality of federal interpleader statute, 28 U.S.C. § 1335, insofar as it permits actions in federal court against stakeholders based solely on minimal diversity).

11. See generally the excellent overview of these developments in RICHARD H. FIELD ET AL., *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE*, at pt. VI, topics B–C (8th ed. 2003).

12. 27 Eliz. 1, c. 5, § 1 (1585) (Eng.), supplemented by 4 Ann., c. 16, § 1 (1705) (Eng.); see also FIELD ET AL., *supra* note 11, at 1021.

13. See F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 8–9 (A.H. Chaytor & W.J. Whittaker eds., 1997) (1909).

in the First Congress. They took several steps in the First Judiciary Act, each of which played a critical part in the structuring of the federal court system. First, they exercised their constitutional power to create inferior federal courts.<sup>14</sup> Second, as has already been mentioned, they expressly conferred diversity jurisdiction on those courts. Finally, they added another statutory provision, which came to be known as the Rules of Decision Act, now 28 U.S.C. § 1652, which was designed to ensure that the new federal courts—at least some of the time—would apply state law.<sup>15</sup> As enacted in 1789, that statute provided that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, *in cases where they apply.*”<sup>16</sup> That last phrase is far from self-defining. First, it is not clear whether the Constitution compelled Congress to pass a statute like this; second, it is not clear *which* state laws were being referenced; and third, the Act does not throw much light on *when* those laws should or should not apply.

Those issues rumbled around in the federal courts until the Supreme Court decided *Swift v. Tyson* in 1842.<sup>17</sup> That case squarely presented the question of *which law* governed a basic commercial law issue: whether satisfaction of a preexisting debt could provide adequate consideration for a negotiable instrument. If the consideration was adequate, then the later indorsee (Swift) would be entitled to be characterized as a *bona fide* purchaser without notice *for valid consideration*; if not, then Swift would not be entitled to payment on the note. Justice Story, writing for the Supreme Court, waffled a bit on the content of New York law, but ultimately said “admitting the doctrine to be fully settled in New York, it remains to be considered, whether it is obligatory upon this Court, if it differs from the principles established in the general commercial law.”<sup>18</sup>

With those words, Justice Story set up the conclusion that ruled in the federal courts until *Erie*: the laws to which the Rules of Decision Act referred were only state statutes and local usages, not the general common law. The Court was dismissive of the idea that judicial decisions might themselves be “law,” saying “[i]n the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.”<sup>19</sup>

Although *Swift* did not inaugurate this notion, it had the effect of confirming the line of cases that had assumed that the federal courts, in cases within their diversity jurisdiction, had independent authority to articulate common law rules. And that they did, for just short of a century. *Swift* is understandable, insofar as the idea that certain rules of law go along with a tribunal was hardly new to the inheritors of the British common law. The Rules of Decision Act had modified this concept somewhat, but, according to *Swift*, only for positive sources of law. This understanding left the federal courts free to exercise a role in market integration during the nineteenth and early twentieth centuries that is reminiscent of the role that the European courts have been

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14. See generally U.S. CONST. art. III, § 1.

15. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73.

16. *Id.* § 34, 1 Stat. at 92 (emphasis added).

17. 41 U.S. (16 Pet.) 1 (1842).

18. *Swift*, 41 U.S. at 18.

19. *Id.*

playing in the European Union, in paving the way for the comparable integration of the EU.<sup>20</sup>

Pushing against that current was the fact that, under *Strawbridge*, statutory diversity jurisdiction extended only to cases where the rule of complete diversity could be satisfied. But, under the rules of practice and procedure that existed at the time, this was less of a hurdle than it now is. Apart from suits in equity (which after 1842 were governed by federal rules),<sup>21</sup> the massive multiple-claim, multiple-party suit to which we have become accustomed was a rarity. Instead, the courts normally saw cases in which *A* was suing *B*, and if *A* and *B* were of diverse citizenship and could satisfy the amount in controversy, the temptation to go to federal court was often great for the party who operated on a regional or national level.

Although general federal question jurisdiction was conferred on the federal courts in 1875,<sup>22</sup> it took some time before the menu of cases before the courts began to take on a distinctly federal flavor. Until the dawn of the regulatory era with the Interstate Commerce Act in 1887<sup>23</sup> and the Sherman Act in 1890,<sup>24</sup> the number of private cases “arising under” federal law was small. This might have been different had the Supreme Court not taken a narrow view of the Privileges and Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*.<sup>25</sup> But the Court there concluded that the constitutional language is limited to a small number of national rights, and it has never revisited that issue. The Court took a similarly restrictive approach—this time with a focus on the state action requirement—to the power of Congress to enact legislation implementing the Fourteenth Amendment’s Equal Protection Clause, when it decided the *Civil Rights Cases* of 1883.<sup>26</sup>

Eventually, of course, federal question jurisdiction grew to such dimensions that its exercise came to be seen as the primary function and justification for the federal courts. Today, diversity cases make up approximately 33% of the civil matters filed in the district courts.<sup>27</sup> It is still common to hear complaints like the ones attributed to Justice Robert Jackson (who is said to have commented shortly before his death that

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20. For example, it was the European Court of Justice that established, early in the history of what is now the European Union, that the European Community treaty and EC regulations would have “direct effects” on individuals living in the Member States, meaning that EC-level laws did not need to be put into effect through national legislation. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, 1963 ECR I. In addition, it was the Court that first articulated the principle that Community law is supreme and must prevail over conflicting Member State law. *Costa v. Ente Nazionale per l’Energia Elettrica*, Case 6/64, 1964 ECR 585.

21. See FED. R. EQ. 48 (1842) (repealed 1912), printed in 42 U.S. (1 How.) lvi (1843). For a history of where the first federal equity rules were published, see Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 460 n.2.

22. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

23. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

24. Sherman Act, ch. 647, 26 Stat. 209 (1890).

25. 83 U.S. (16 Wall.) 36 (1872).

26. 109 U.S. 3 (1883).

27. See JAMES C. DUFF, STATISTICS DIV., OFFICE OF JUDGES PROGRAMS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 19 tbl.4 (2009), available at <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf> (identifying “U.S. District Courts Civil Cases Filed, by Jurisdiction: Fiscal Years 2004 Through 2008”).

“in my judgment the greatest contribution that Congress could make to the orderly administration of justice in the United States would be to abolish [diversity] jurisdiction”<sup>28</sup>) and to Justice Felix Frankfurter, who complained about “the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction.”<sup>29</sup> In order to understand the Scylla and Charybdis of diversity jurisdiction that has inspired such negativity, one must review the pivotal decision in *Erie*.

Years of experience under *Swift* had taught both the judges and the bar two things about diversity jurisdiction and the Rules of Decision Act. First, to put the point as neutrally as possible, a lawyer contemplating litigation had a rich choice of forums to consider on behalf of his or her client. A client that did not want to be in federal court could often arrange to stay in state court, by suing an in-state defendant (and thus defeating removal),<sup>30</sup> or by naming a plausible in-state opposing party (and thus destroying complete diversity). Alternatively, the lawyer could head off to federal court, as long as no nondiverse party essential to the litigation would be left out. Second, people had learned that it was literally impossible to maximize both uniformity of result from one federal court to the next (“horizontal uniformity”) and uniformity of result between the federal courts and the state courts of one particular state (“vertical uniformity”). So the question boiled down to which kind of inconsistency was the lesser of two evils.

In *Erie*, the Court reached out to decide that issue, and it concluded that for diversity cases in which the right of action arose under state law (or perhaps better put, nonfederal law), vertical consistency was more important. The Court was plainly distressed at how easily parties could manipulate the applicable law, citing as one egregious example a case in which a taxicab company was able, through the simple act of dissolution and reincorporation, to procure for itself both a federal court and a favorable federal rule of decision.<sup>31</sup> It focused on the antidiscrimination rationale of diversity jurisdiction and pointed out that the *Swift* rule had led to a different, and equally troubling, type of discrimination *by* noncitizens *against* citizens. Henceforth, the Court announced in *Erie*, the Rules of Decision Act would be (and perhaps constitutionally *had to be*) interpreted so as to require federal courts to apply *all* of the law of a state, including the decisional rules announced by the state courts. There would be no more federal common law. Legal realism had destroyed judges’ ability to believe that common law rules were anything but statements of the judges’ personal understanding of the law, and if that was all they were, then state judges (no less than state legislatures) had to have the last word on state law.

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28. 13E WRIGHT ET AL., *supra* note 3, at 22 (quoting ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 37 (1955)) (internal quotation marks omitted).

29. *Id.* (quoting *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring)) (internal quotation marks omitted).

30. The device of removal permits a state-court defendant to move a case from the state court to the federal court for the same area, if the federal court would otherwise have jurisdiction over that case. 28 U.S.C. § 1441 (2006).

31. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73–74 (1938) (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928)).

There can be no doubt that *Erie* changed the *role* of diversity jurisdiction, both from the standpoint of litigants and from the standpoint of judges. Incentives shifted: the federal court became the place where someone who was worried about an advance in state law might go, since the federal court had to accept state law for what it was, while the state court would naturally be freer to modify, extend, or contract a legal principle if it thought any of those steps advisable. In cases worth litigating, state law was often unclear, and so federal judges were reduced to guessing, as Judge Henry Friendly famously put it, what the state court “would have intended on a point not present to its mind, if the point had been present.”<sup>32</sup>

Why, then, did diversity cases during this period not disappear altogether from the federal courts? The answer can be expressed in one word: procedure. *Erie* was not the only momentous event that occurred for the federal courts in 1938. That was also the year when the project to develop a coherent set of transsubstantive federal rules of civil procedure came to fruition.<sup>33</sup> The rules boldly modernized federal procedure, abolished the old distinction between law and equity, abolished the vestigial remains of the forms of action, adopted a philosophy of notice pleading, took steps to expand the concept of a single lawsuit to include everything arising out of the same transaction or occurrence, and expanded the old device of the equitable bill of discovery to all civil litigation. And federal judges, then as now, were not subject to election cycles or other outside pressures. For procedural reasons, therefore, litigants, and especially business litigants, chose federal court if they could.

At the same time, as federal legislation grew, diversity cases became a smaller and smaller percentage of the docket in federal court. Within a few years of 1938, the building blocks of modern federal statutory law were almost entirely in place. Congress’s authority under the Commerce Clause was firmly established no later than *Wickard v. Filburn*.<sup>34</sup> The confirmation of Congress’s extensive Commerce Clause power, coupled with its Spending Clause powers and the authority granted by Section 5 of the Fourteenth Amendment, led over the years to pivotal federal legislation including the Civil Rights Acts in the early 1960s;<sup>35</sup> the Clean Air and Water Acts;<sup>36</sup> and a range of laws aimed at consumer protection. The Court was following suit: cases like *J.I. Case Co. v. Borak*<sup>37</sup> underscored the national commitment to a system of private attorneys general empowered to enforce important federal laws such as those

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32. Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410 (1964) (quoting JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 173 (Beacon Press 1963) (1909)) (internal quotation marks omitted).

33. The project began in earnest in 1934, when Congress passed the first Rules Enabling Act. *See* Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (granting Supreme Court authority to pass general rules for federal courts). In 1935, the Supreme Court appointed an Advisory Committee to prepare a draft set of rules. That Committee’s work eventually culminated in the draft rules submitted to Congress on January 3, 1938, which, given the absence of legislation to the contrary, took effect on September 16, 1938. *See generally* 4 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 1001–1005 (3d ed. 2002).

34. 317 U.S. 111 (1942).

35. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86.

36. Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Clean Air Act, ch. 360, 69 Stat. 322 (1955).

37. 377 U.S. 426, 432 (1964).

prohibiting fraud in securities transactions. The story of the growth of federal legislation from the New Deal forward is one that goes well beyond the scope of this talk. The only point that is important here is to see how the constraints placed on diversity jurisdiction through the combined effect of the complete diversity rule and the *Erie* doctrine, coupled with the growth of the federal sector, caused people to begin to see the federal courts as the specialists in federal law. If, or to the extent that, resources to support the courts were limited, then many thought that those resources would be better spent on enabling the federal courts to address federal questions, and to leave questions of state private law to the experts—the state courts.

While all this was taking place, however, the national economy was continuing to grow by leaps and bounds. Markets that were once local became first regional, then national, and finally global. Although in some areas Congress began to pass laws creating federal standards that preempted state law—the treatment of the peaceful use of nuclear energy in the original Atomic Energy Act of 1946 is one example<sup>38</sup>—in many other areas it was careful to respect the traditional authority of the states.<sup>39</sup> This was especially true in traditional private law areas: contract, tort, property rights, and status. The regulation of insurance has continued to be entrusted primarily to the states,<sup>40</sup> and even areas dealing with telecommunications<sup>41</sup> and the environment have tended to reflect shared responsibility rather than wholesale federal displacement of state law. From time to time, the business community has supported legislation that would strengthen the federal role.<sup>42</sup> To date, however, none of these bills has moved beyond the legislative process. Instead, Congress has turned back to procedure and has opened the door to the federal courts for certain kinds of litigation that had been excluded for a long time.

Congress had been very modest in taking advantage of the constitutional room left by *Strawbridge*, that is, in authorizing suits supported only by minimal diversity. In *State Farm Fire & Casualty Co. v. Tashire*,<sup>43</sup> the Supreme Court offered the following

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38. See Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (amended 1954) (creating federal standards for atomic energy). *But see* Pacific Legal Found. v. State Energy Res. Conservation & Dev. Comm'n, 659 F.2d 903, 928 (9th Cir. 1981) (finding California law was not preempted because it did not interfere with federal regulatory authority of Atomic Energy Act).

39. Compare *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1011 (2008) (finding federal preemption of state-law claim asserting that medical device was unsafe), with *Wyeth v. Levine*, 129 S. Ct. 1187, 1203–04 (2009) (finding no preemption over state-law tort claim based on failure to warn about dangers of drug), and *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 551 (2008) (finding no preemption over claim under Maine Unfair Trade Practices Act for misleading cigarette advertisements).

40. See *McCarran-Ferguson Act of 1945*, 15 U.S.C. § 1011 (2006) (declaring that regulation of insurance by states is in public interest).

41. See *Telecommunications Act of 1996*, 47 U.S.C. § 251(d)(3) (2006) (declaring that certain state telecommunication regulations shall not be preempted by federal regulation).

42. For example, bills have been introduced that would nationalize the law of product liability. *E.g.*, Product Liability Fairness Act of 1995, S. 565, 104th Cong. (1995); Common Sense Product Liability Reform Act, H.R. 917, 104th Cong. (1995); Product Liability Reform Act of 1997, S. 5, 105th Cong. (1997). Bills with a focus on the tort liability of small businesses have also been introduced. *E.g.*, Small Business Liability Reform Act of 2003, H.R. 2813, 108th Cong. (2003). See also the comparably named bills, S. 1546, 108th Cong. (2003); H.R. 1805, 107th Cong. (2001); S. 865, 107th Cong. (2001); H.R. 2366, 106th Cong. (1999).

43. 386 U.S. 523 (1967).

examples of early uses of minimal diversity: the idea of a separate and independent action for purposes of the removal statute, found now in 28 U.S.C. § 1441(c); class actions (including actions under the predecessors to modern Rule 23); and intervention under Rule 24 by co-citizens.<sup>44</sup> In *Tashire* itself, the Court confirmed the constitutionality of the interpleader statute, 28 U.S.C. § 1335, which applies when there are two or more adverse claimants of diverse citizenship—meaning, as everyone understood, minimal diversity.<sup>45</sup> The Court accomplished this task in very few words:

There remains, however, the question whether such a statutory construction is consistent with Article III of our Constitution, which extends the federal judicial power to “Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” In *Strawbridge v. Curtiss*, this Court held that the diversity of citizenship statute required “complete diversity”: where co-citizens appeared on both sides of a dispute, jurisdiction was lost. But Chief Justice Marshall there purported to construe only “The words of the act of congress,” not the Constitution itself. And in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens. Accordingly, we conclude that the present case is properly in the federal courts.<sup>46</sup>

This is a fairly terse explanation of the reason why language in Article III means something different from seemingly identical words in a statute. But the Court has done the same thing for Article III and § 1331: at the Article III level, there needs only to be a federal ingredient in a case, while for § 1331 purposes the federal question must be part of the well-pleaded complaint.<sup>47</sup> The Court’s position has the virtue of giving Congress broad discretion in choosing the best way to implement the constitutional grants of power. And as long as it has understood the breadth of the constitutional provision, all that remains is for Congress to draft statutes that communicate how much authority it wishes to confer.

In part because of constitutional doubt over Congress’s authority to enact a general federal law in areas such as contract and tort, which traditionally have been entrusted to the states, and in part because of the lack of a political consensus supporting such legislation, wide areas of responsibility continue to rest at the state level. As noted earlier, there have been some efforts to enact preemptive federal laws, but they have not—at least as of the present time—yet succeeded.

What has happened instead has been a quiet procedural shift. (It is not quite a revolution, unless one is thinking of a velvet revolution, but it is a change of potentially

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44. *Tashire*, 386 U.S. at 531 n.7. The Court also noted at this point in the opinion that “the American Law Institute’s proposals for revision of the Judicial Code to deal with the problem of multiparty, multijurisdiction litigation are predicated upon the permissibility of ‘minimal diversity’ as a jurisdictional basis.” *Id.*

45. *Id.* at 530–31.

46. *Id.* (footnotes and citation omitted).

47. *Compare* *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824) (finding Constitution requires only federal “ingredient”), with *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (holding statute requires federal claims to be in well-pleaded complaint; no original jurisdiction in district court under predecessor to 28 U.S.C. § 1331 if federal claim is part of anticipated defense).

far-reaching importance.) In two areas in particular, Congress has acted decisively to move litigation from the state courts and to give it to the federal courts, using the device of minimal diversity: certain mass tort cases, and multistate class actions.

In 2002, Congress enacted the Multiparty, Multiforum Trial Jurisdiction Act,<sup>48</sup> or MMJA, which confers jurisdiction on the district courts over “any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location,” if certain criteria are met.<sup>49</sup> The defendant must reside in one state, and a substantial part of the accident must have taken place in “another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place.”<sup>50</sup> Alternatively, jurisdiction exists if any two defendants reside in different states, “regardless of whether such defendants are also residents of the same State or States.”<sup>51</sup> Or as a third option, the statute applies if “substantial parts of the accident took place in different States.”<sup>52</sup> Finally, the district courts are directed to abstain—note that they do not appear to be stripped of jurisdiction—if a substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens, *and* the claims will be governed primarily by the law of that state.<sup>53</sup> The statute is careful to define exactly what is meant by the term “minimal diversity,” lest there be any doubt about the power Congress is exercising.<sup>54</sup>

The second is the Class Action Fairness Act of 2005, or CAFA, which both amended § 1332 and added a new § 1453 to the Judicial Code. New subsection (d) of § 1332 authorizes jurisdiction over “any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000 . . . and [which] is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant.”<sup>55</sup> Like the single accident statute, CAFA allows a district court to abstain from exercising jurisdiction over a class action in which between one- and two-thirds of the proposed plaintiffs, as well as the primary defendant, are from a single state.<sup>56</sup>

48. Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, 116 Stat. 1826 (codified in scattered sections of 28 U.S.C.).

49. 28 U.S.C. § 1369(a) (2006).

50. *Id.* § 1369(a)(1).

51. *Id.* § 1369(a)(2).

52. *Id.* § 1369(a)(3).

53. *Id.* § 1369(b).

54. *Id.* § 1369(c)(1).

55. *Id.* § 1332(d)(2).

56. *Id.* § 1332(d)(3). A number of criteria to guide the district court’s decision are listed, including:

- (A) whether the claims asserted involve matters of national or interstate interest;
- (B) 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;
- (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
- (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

Abstention is mandatory if more than two-thirds of the proposed plaintiffs are from the state where the case was filed, and certain other criteria are satisfied.<sup>57</sup> For cases that are commenced in state court, CAFA added a new removal statute, § 1453, permitting the defendant to shift them over to the federal court.

What little legislative history there is on the MMJA shows that Congress believed that there was a problem when something like an airplane crash injured many people from different states and a correspondingly large number of lawsuits were filed simultaneously in both state and federal courts. To the extent that those lawsuits either were commenced in federal court or could be removed to federal court, the Judicial Panel on Multidistrict Litigation is then able to assign pretrial responsibility to one district court and thus to eliminate duplicative efforts. But, prior to the MMJA, there was no way that anything could be done to coordinate or consolidate the state court suits with the federal actions. As the House Report put it,

[c]urrent efforts to consolidate all state and federal cases related to a common disaster are incomplete because current federal statutes restrict the ways in which consolidation can occur—apparently without any intention to limit consolidation. For example, plaintiffs who reside in the same state as any one of the defendants cannot file their cases in federal court because of a lack of complete diversity of citizenship, even if all parties to the lawsuit want the case consolidated.<sup>58</sup>

The emphasis on the problem created by the complete diversity rule, and the willingness to take advantage of minimal diversity, is even more apparent for CAFA. In the Conference Report on CAFA, Congress could not have been more explicit about its view of the purpose of diversity jurisdiction and the need, at least for multistate class actions, to close what it described as a “loophole” in § 1332—meaning the complete diversity requirement. It commented, for example, that “[o]ne of the primary historical reasons for diversity jurisdiction ‘is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court.’”<sup>59</sup> The report offers several reasons why the Constitution extends federal court jurisdiction “to encompass one category of cases involving issues of state law”:<sup>60</sup> (1) citizens in one state might experience injustice if they were forced to litigate in out-of-state courts;<sup>61</sup> (2) the availability of federal courts would “shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents”;<sup>62</sup> and (3) the option of going to federal court would guard against the

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(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

*Id.*

57. *Id.* § 1332(d)(4).

58. H.R. REP. NO. 107-685, at 200 (2002) (Conf. Rep.), *reprinted in* 2002 U.S.C.C.A.N. 1120, 1152.

59. S. REP. NO. 109-14, at 5 (2005) (quoting *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999)), *reprinted in* 2005 U.S.C.C.A.N. 3, 6.

60. *Id.* at 7, *reprinted in* 2005 U.S.C.C.A.N., at 8.

61. *Id.* at 7–8, *reprinted in* 2005 U.S.C.C.A.N., at 8–9.

62. *Id.* at 8 (quoting *The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 97 (1999) (statement of E.

possibility that the state courts “might discriminate against interstate business and commercial activities,” implying that diversity jurisdiction is itself “a means of ensuring the protection of interstate commerce.”<sup>63</sup>

After setting forth the various abuses that Congress found were taking place in multistate class actions being adjudicated in the state courts (especially some state courts that the report singled out), the report moved to a section entitled “National Class Actions Belong in Federal Court Under Traditional Notions of Federalism.”<sup>64</sup> One cannot read this part of the report without being struck by the fact that Congress’s concern was substantive as well as procedural. It repeatedly points to the inappropriateness of “one state court . . . dictat[ing] to 49 others what their laws should be.”<sup>65</sup> It criticizes “a system that allows state court judges to dictate national policy on . . . numerous . . . issues from the local courthouse steps.”<sup>66</sup> And it notes that the existing system often led to one state issuing a ruling that actually contradicts the law of the sister state that is implicated.<sup>67</sup>

The Committee concludes the report with these words:

the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy. By enabling federal courts to hear more class actions, this bill will help minimize the class action abuses taking place in state courts and ensure that these cases can be litigated in a proper forum.<sup>68</sup>

These two statutes—especially CAFA—are bringing the federal courts back into the business of adjudicating matters of national importance where no federal law prescribes the rule of decision. Of the many unresolved issues that surround CAFA, perhaps none is as central as the choice-of-law question. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>69</sup> federal courts are required to apply the choice-of-law rules that would be used by the state where they sit.<sup>70</sup> This does not mean, however, that the federal court has an entirely free hand in making that choice. To the contrary, *Phillips Petroleum Co. v. Shutts*<sup>71</sup> establishes that there are constitutional limits on a state court’s ability to impose its own law on members of a multistate class action.<sup>72</sup> Moreover, Rule 23 still requires class actions—including those governed by CAFA—to satisfy both the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as one of the Rule 23(b) categories. If the CAFA

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Donald Elliott, Professor, Yale Law School) (internal quotation marks omitted), *reprinted in* 2005 U.S.C.C.A.N., at 9.

63. *Id.*, *reprinted in* 2005 U.S.C.C.A.N., at 9.

64. *Id.* at 23, *reprinted in* 2005 U.S.C.C.A.N., at 24.

65. *Id.* at 24, *reprinted in* 2005 U.S.C.C.A.N., at 25.

66. *Id.*, *reprinted in* 2005 U.S.C.C.A.N., at 25.

67. *Id.*, *reprinted in* 2005 U.S.C.C.A.N., at 25.

68. *Id.* at 27, *reprinted in* 2005 U.S.C.C.A.N., at 28.

69. 313 U.S. 487 (1941).

70. *Klaxon*, 313 U.S. at 496.

71. 472 U.S. 797 (1985).

72. *Shutts*, 472 U.S. at 822–23.

class action is a “common question” under Rule 23(b)(3), then the class form must be superior and the common issues must predominate.

One case involving a multidistrict class action shows how difficult it is to mesh those requirements of Rule 23 with CAFA: *In re Bridgestone/Firestone, Inc.*<sup>73</sup> There the Seventh Circuit found that the district court had abused its discretion when it certified nationwide classes in a tort case covering multiple models of Ford vehicles and Firestone tires sold between 1990 and 2001.<sup>74</sup> One of the primary difficulties the court highlighted was the fact that different rules of law would govern different members of the class, according to the appellate court’s understanding of Indiana’s choice-of-law doctrines.<sup>75</sup>

*Shutts*, however, leaves the door open to the application of a single state’s law to a multistate class action if there is no conflict in the relevant principles among the affected states. As the Court put it, “[t]here can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.”<sup>76</sup> On the other hand, the Court held that a state has no greater latitude to apply its own law because it is adjudicating a multistate class action than it otherwise would have. It also appears to be possible to use subclasses that group together similar sets of state laws, as long as the court stays within constitutional boundaries. But this remains largely uncharted territory, and the final solution to the choice-of-law problem will have a profound impact on CAFA’s success. Without some solution to the choice-of-law problem, CAFA’s *expansion* of access to the federal courts might in the end amount to the *abrogation* of the right to bring a class action at all, if, as in *Bridgestone/Firestone*, the choice-of-law problem proves to be intractable.

Notwithstanding these unresolved questions, there is no reason to end on a pessimistic note. From the very outset, as Congress recognized in CAFA, diversity jurisdiction has existed as one tool for assuring a national approach to national problems that happen to be governed by state law. Viewed that way, diversity jurisdiction complements the federal question jurisdiction that we view today as such a natural part of the business of the federal courts. My thesis here has been that diversity jurisdiction was a vibrant part of the picture from the inception of the Republic through *Erie*, but that a combination of the *Erie* doctrine and the complete diversity rule forced it onto the sidelines. More recently, however, Congress has recognized how useful a targeted application of minimal diversity can be. We may see more of this in years to come, for areas in which national lawmaking is thought to be a bad idea or out of reach. In the meantime, we are gaining experience with a more robust form of minimal diversity. As we move forward with this new dimension of judicial federalism, we are likely to see new ways in which tribunal, procedure, and substantive law interact. If past is prologue, it is likely to be an exciting trip.

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73. 288 F.3d 1012 (7th Cir. 2002).

74. *In re Bridgestone/Firestone*, 288 F.3d at 1020–21.

75. *Id.* at 1018.

76. *Shutts*, 472 U.S. at 816.

