

A New Look at the Original Meaning of the Diversity Clause

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I. Introduction

The Diversity Clause is the Walter Mitty of Article III's jurisdictional grants: staid and pedestrian, nothing new or interesting seems possible to say about it. But like Walter Mitty, the Diversity Clause has unplumbed depths.

The hint that we don't know the Diversity Clause as well as we think we do lies in a jurisdictional puzzle raised by the Class Action Fairness Act,¹ passed by Congress in 2005. CAFA's principal goal is to pull large multi-state class actions filed in state court into federal court, where its proponents hope that federal judges—thanks to their independence from the fundraising pressures of state electoral politics and, perhaps, to Republican success in filling out the ranks of the federal judiciary—will take a sterner hand with the class action bar than their state counterparts.

To achieve that goal, CAFA jettisons the complete diversity rule, allowing federal court to exercise jurisdiction over multi-state class actions if a class action exhibits minimum diversity.² Notably, CAFA allows federal courts to consider the citizenship of absent class members before a class has been certified when determining whether minimum diversity exists.³ As a result, plaintiffs' lawyers cannot park a multi-state class action in state court simply by recruiting a nondiverse named plaintiff to sue the defendant. So long as the plaintiff proposes to represent a class that allegedly includes members who live outside the defendant's domicile, the class action is removable at the time it is filed.

The puzzle raised by CAFA was pointed out by Brian Wolfman, Public Citizen's litigation director, in 1999 testimony to the House Judiciary Committee on an early iteration of CAFA. "When a proposed class action is filed," he said,

the class does not yet exist and a constitutional "controversy" exists only between the named plaintiffs and the defendant. . . . Put another

¹ Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

² See CAFA § 4(a), 28 U.S.C. § 1332(d)(2). CAFA assumes that the "complete diversity" requirement of *Strawbridge v. Curtiss* is statutory rather than constitutional, H.R. Rep. No. 108-144, at 10 n.11 (2003), an assumption I accept in this article.

³ See 28 U.S.C. § 1332(d)(2).

way, there is no controversy between the absent class members . . . and the defendant, and thus it is difficult to imagine how diversity jurisdiction can be constitutionally maintained [based on class members' citizenship] prior to certification of the class.⁴

As Wolfman suggests, by treating absent members of a proposed class—persons conventionally seen as outside the scope of the suit at the time it is filed—as persons whose citizenship counts toward diversity jurisdiction, CAFA forces us to ask who an Article III “controversy” is “between” for purposes of establishing diversity jurisdiction.

Surprisingly, this elementary question about the meaning of the Diversity Clause hasn't been answered.⁵ Answering it—the task of this Article—uncovers something new about the scope of diversity jurisdiction: Diversity jurisdiction is limited to suits in which citizens of different states are within the court's power to bind their interests.⁶ In other words,

⁴ *Interstate Class Action Jurisdiction Act of 1999 and Workplace Goods Job Growth and Competitiveness Act of 1999*, Hearing Before the H. Comm. on the Judiciary, 106TH Cong. 132 (1999) (statement of Brian Wolfman). Wolfman suggested that Article III limits the minimum diversity inquiry to the citizenship of the litigant “parties” before the court. Because, he said, proposed class members in an uncertified class are not “parties,” their citizenship does not count in the minimum diversity calculus. *See id.* (“Assume a situation in which the named plaintiff and all the named defendants are citizens of state ‘X.’ 50% of the proposed class members are also citizens of state ‘X,’ but 50% of the proposed class members are citizens of states ‘Y’ or ‘Z.’ . . . [I]n the hypothetical, prior to class certification, all of the parties are from the same state – X . . . and thus it is difficult to imagine how diversity jurisdiction can be constitutionally maintained in this circumstance prior to certification of the class.”) This article explores the extent to which the original meaning of the phrase “controversies between citizens of different states” supports Wolfman's claims.

⁵ Obviously, the scope of a constitutional case or controversy has received a great deal of attention in the context of federal supplemental jurisdiction, where the Court, of course, defines a “constitutional case” as a grouping of transactionally related claims. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *but see* Richard A. Matasar, *Rediscovering “One Constitutional Case: Procedural Rules and Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 Cal. L. Rev. 1399 (1983) (arguing a constitutional case comprises whatever grouping of claims Congress authorizes parties to join as a litigative unit). Federal jurisdiction doctrine has, however, overlooked a very basic question about the scope of a constitutional case or controversy: namely, whose claims are “before the court” and therefore part of the jurisdictional calculus when deciding when *original* jurisdiction exists based on the “character of the parties”? That question has never been answered and, indeed, is rarely ever asked.

⁶ In this article, I use the phrases “preclusive reach of federal courts” and “federal courts’ power to bind” as shorthand for satisfaction of adequate notice and other

contrary to received wisdom, the constitutional reach of diversity jurisdiction and the constitutional scope of federal preclusion are linked.

The argument rests on the original meaning of an Article III controversy. As I show, an Article III controversy is a “suit,” and “suits” were defined in the eighteenth century to exist only “between” the “parties to the suit,” persons who had been brought “before” the court in a way that allowed it to bind their rights. Because an Article III “controversy” subsists between persons who can be bound by federal judgments, those persons’ citizenship—but no others—may be considered in the diversity jurisdiction calculus.

Showing Article III’s most familiar clause is also its most misunderstood takes some work. The argument builds over five parts. Parts II and III take some time to do some necessary ground-clearing. Because the argument is based on new evidence about the original meaning of an Article III “controversy,” Part II begins with a short overview of “original meaning” originalism, a frequently misunderstood interpretive method.

To forestall initial resistance to the argument based on its apparent novelty, Part III shows that the interpretation advanced herein isn’t novel. It was advanced soon after the Constitution’s ratification, only to be discarded by later courts and forgotten by commentators.

procedural due process protections required to bind litigants’ interests. *See, e.g.*, Taylor v. Sturgell, 128 S. Ct. 2161, 2166 (2008). Obviously, I do not use “power to bind” to mean the court’s “power in light of all relevant constitutional restraints,” because a federal court’s power to bind in this sense depends on whether it has subject matter jurisdiction. *See, e.g.*, Stoll v. Gottlieb, 305 U.S. 165 (1938) (binding effect of former adjudication presumes court had subject matter jurisdiction over the litigation).

While “personal jurisdiction” is also sometimes used in its nineteenth century sense as a loose label for the “power to bind,” *see, e.g.*, Ariel Waldman, *Allocating the Burden of Proof in Rule 60(b)(4) Motions to Vacate a Default Judgment for Lack of Jurisdiction*, 68 U. Chi. L. Rev. 521, 523 (2001), its post-*International Shoe* meaning is limited to the due process principles defining the territorial reach of a court’s compulsory process. *See, e.g.*, Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Due Process Reconsidered*, 62 Wash. L. Rev. 429 (1987); 16 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 108.90 (3d ed. 2003) (“The requirement of notice is entirely separate from the requirement of jurisdictional basis.”). Below I use “personal jurisdiction” in this narrower sense to avoid confusion.

The article then delves into the key evidence of the Clause's meaning, drawn from pre-ratification sources. The article develops this argument in two parts. Part IV shows that one of the conventional meanings of "controversies" was "suits" and that "suits" in the eighteenth century were defined to exist only between those within a court's power to bind. Part V then shows that the text of Article III requires us to interpret "controversies" to mean suits and excludes broader interpretations of the term.

With the hidden dimensions of the Diversity Clause revealed, Part VI ends by exploring two larger ramifications of the Clause's original meaning. First, recovering its original meaning reveals how Article III employs the standards governing preclusion to protect states from jurisdictional encroachment by federal courts. Second, the original meaning of the Clause also provides a powerful textual basis for involving Congress in important decisions about the outer reach of federal preclusion. I illustrate both of these points, and show how they are related, by applying the original meaning of the Diversity Clause to resolve questions about the constitutionality of CAFA.

II. The Method Explained

Led by Justice Scalia, a new generation of originalists has rejected a search for the framers' intentions and reframed originalism as a search for the meaning that reasonable readers of English within the Framers' linguistic community would assign to the Constitution's words.⁷ Below, I follow this general approach, which its practitioners call "original meaning" originalism or "semantic originalism."⁸

⁷ For various descriptions of this approach, see, e.g., Lawrence B. Solum, *Semantic Originalism*, Illinois Public Law Research Paper 07-24 (draft Oct. 9, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244; Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 Const. Commentary 47 (2006); Randy Barnett, *Originalism for Non-Originalists*, 45 Loyola L. Rev. 611 (1999).

⁸ This article accepts this method without spending time defending any particular normative justification for originalism. As a practical matter, the specific reasons one comes to originalism shape its application only in a subset of special interpretive problems, where the evidence of conventional meaning fails to identify a unique interpretive solution—a point explained more fully below. Outside this subset, however, conventional "original meaning" originalists, despite diverging at the level of theory, have converged around a shared family of interpretive methods. When, as in this article, these methods can supply interpretive solutions to a constitutional question, deep intramural debates about the normative foundations of originalism are, at least for

The distinction between older “original intent” originalism and modern “original meaning” originalism is often misunderstood. Accordingly, before diving into the evidence of the Diversity Clause’s original meaning, a quick overview of the method pursued is necessary both to clarify the hierarchy of evidence of original meaning on which I rely and to define some originalist terminology—particularly the distinction between “interpretation” and “construction”—that will be used later in the argument.

A. Evidence of Original Meaning

Original meaning originalists agree on a hierarchy of source material. At the top of the pyramid are publicly available examples of the conventional meaning ascribed to words by members of the framers’ linguistic community, including dictionaries, treatises, and (especially where words were used in a technical legal sense) cases.⁹

“[A]lmost all originalists agree, explicitly or implicitly, that the meaning . . . of a given Constitutional provision was fixed at the time the provision was framed and ratified.”¹⁰ As a result post-enactment evidence of usage, which may reflect changes in meaning after ratification, “ranks fairly low down on the hierarchy of reliable evidence concerning original meaning.”¹¹

Where the Constitution’s words were conventionally used in more than one way prior to ratification, the Constitution’s meaning isn’t necessarily ambiguous. Originalists agree that holistic interpretation of the text, taking account of intratextual inferences from surrounding words and clauses, may disambiguate the text when one of two conventional meanings of a term is (1) inconsistent with the necessary implications of words immediately surrounding it or (2) inconsistent with parallel use of the term in surrounding clauses.¹²

originalism’s adherents, a distraction. For our purposes, it is enough to note that all of the various originalist camps share a basic formalist commitment to treating the Constitution as a set of instructions that entrenches meaning against future generations.

⁹ See, e.g., Stephen Calabresi & Saikrishna Praksash, *The President’s Power to Execute the Laws*, 104 Yale L.J. 541, 552 n.35 (1994).

¹⁰ Solum, *supra* note 7, at 3.

¹¹ Lawson & Seidman, *supra* note 7, at 76.

¹² Akhil Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 795 (1999). See also

The “general point or purpose” of a text may also clarify the sense in which a word is used when that purpose would have been relied on by the general reader to make sense of the text.¹³ It does not matter that “bank” means “financial institution” as well as “river bank” if the word appears in a river navigation chart. When a word’s conventional meaning differs depending on context, ascertaining its meaning requires conventional *judgments* in light of contextual information that ordinary interpreters would treat as determinative.

Because “no tool of interpretation is a magic bullet,” the meaning of a word extracted from dictionaries, intratextual interpolation, and publicly available context must “be checked against readings generated by other lenses.”¹⁴ Those lenses, in order of probative value, include: (1) publicly available pre-ratification interpretations that “reveal something about the . . . meaning [of] the text” by “those who had the recognized political authority to ratify the Constitution”¹⁵ and (2) the secret records of the Constitutional Convention, when they “display[] how the text of the Constitution was originally understood and used” by the framers’ interpretive community.¹⁶

Finally, originalists of various normative stripes agree that constitutional meaning is the “most likely correct” meaning, based on all of the above evidence.¹⁷ Alternative burdens—proof beyond a reasonable doubt or “clear statements”—would guarantee that the Constitution, in most major cases, cannot fulfill its settlement function.¹⁸

Solum, *supra* note 7, at 105 (“clause meaning is bound by the publicly available context, and the whole of the constitutional text is indisputably part of that”).

¹³ Solum, *supra* note 7, at 52.

¹⁴ Amar, *supra* note 12, at 801.

¹⁵ Calabresi & Prakash, *supra* note 9, at 553.

¹⁶ Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 Geo. L.J. 1113, 1118 (2003); Akhil Amar, *The Supreme Court, 1999 Term: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 47 n.65 (2000) (“Details of legislative history invisible to ratifiers and later generations of ordinary Americans should never trump the text itself, though drafting history can at times help highlight certain features of the text.”).

¹⁷ Barnett, *supra* note 7, at 649.

¹⁸ Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 Harv. J.L. & Pub Pol’y 411, 418, 421 (1995) (making this point, while noting the risk that lowering the standard of proof too low may blind us to genuine indeterminacy).

B. A Note on Interpretation and Construction

The new originalism distinguishes what Keith Whittington calls acts of “constitutional construction” from acts of “interpretation.”¹⁹ Interpretation uncovers the range of meanings that a word considered in context might bear. Construction selects one of several available meanings as the operative meaning of a constitutional word or phrase or, when the meaning is vague, formulates rules for applying the text to everyday problems of litigation.²⁰

Within the field in which construction takes over from interpretation, the normative values that lead an interpreter to originalism come to the fore. As Randy Barnett explains, “So long as we stay within the frame provided by the original meaning of the text, our choice of specific rules to decide cases may be influenced by other considerations, such as justice or precedent, depending on what it is we think makes a constitution binding.”²¹

Because construction is dependent on different normative commitments, constructions of different clauses of the Constitution may vary widely among different self-described originalists. However, for purposes of this article, those normative commitments are largely irrelevant. My analysis of the meaning of the Diversity Clause operates at the level of interpretation rather than construction: it seeks to establish the outer limits of the Clause’s original meaning.²²

¹⁹ KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTIONS: DIVIDED POWERS AND CONSTITUTIONAL MEANINGS 3-5 (1999).

²⁰ *Id.* at 3-9; Solum, *supra* note 7, at 75.

²¹ Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 111 (2001).

²² At a key juncture, I make two moves that are pervasive in originalist scholarship: by using (1) the canon that careful word-choices should be given distinct legal effect and (2) an ascription to the framers of a general purpose to communicate intelligibly. See, e.g., John F. Manning, *What Divides Textualists from Purposivists*, 106 Colum. L. Rev. 70 (2006) (noting that textualists pervasively rely on these moves to resolve semantic ambiguity). Its not clear that all originalists would categorize both of these moves as acts of interpretation, although most would classify the latter as an “interpretive” move, at least in some contexts. Compare, e.g., Solum, *supra* note 7, at 78 (categorizing use of traditional interpretive rules as a “theory of construction”) with Solum, *supra* note 7, at 57 (suggesting semantic “opacity” may favor construing words as terms of art, when doing so renders text intelligible). Even so, my claim is that because these moves are so widely accepted among originalists, originalists with different normative commitments

III. The Rise and Fall of the Original Diversity Clause

Even though pre-ratification evidence of meaning of the Constitution's text is primary,²³ I begin by reviewing post-enactment interpretations of the Diversity Clause.

This is necessary to dispel a mistaken basis for initial resistance to my argument. Novel readings of a constitutional text arouse natural skepticism.²⁴ And this Article advances a reading of the Diversity Clause that will strike many as novel: I argue that diversity jurisdiction exists only where “parties” to a federal suit, defined as persons who courts are authorized to bind, are citizens of different states. This interpretation turns on evidence of the original meaning of the term “controversy,” which I will show means “suits,” and on the original meaning of the term “suit,” which I show was defined to subsist only “between” persons who were subject to the court’s preclusive power. Put simply, “controversies between citizens of different states” are “suits between persons whose interests the court is authorized to bind.”

This claim about the meaning of Article III “controversies” isn’t new. It was advanced, post-ratification, by John Marshall as a member of Congress, opposed by Alexander Hamilton, and adopted, in part, in *Osborn v. Bank of the United States*, only to be discarded by later courts and forgotten by commentators. This part briefly recounts that history. Parts IV and V then show that Marshall’s view is strongly supported by the pre-ratification evidence of Article III’s original meaning.

A. The Marshall-Hamilton Debate over the Meaning of Controversies Between Citizens of Different States

Article III’s jurisdictional menu grants federal courts subject matter jurisdiction over an enumerated set of cases and controversies. Some of these turn on the nature of the questions litigated—for example, “cases

are likely to agree that these moves are part of the toolkit for defining the outer *acceptable* meaning of the text even if we assume these moves constitute acts of “construction.”

²³ See *supra* note 11 and accompanying text.

²⁴ See, e.g., Gary Lawson & Guy Seidman, *The First “Establishment” Clause: Article VII and the Post-Constitutional Confederation*, 78 Notre Dame L. Rev. 83, 92 (2002) (“If no actual person held a mental state corresponding to a particular meaning Z, it gets trickier to determine whether Z could ever be the correct meaning.”)

arising under this Constitution, the laws of the United States, and treaties made . . . under their authority”—while others turn on the configuration of persons “between” whom a controversy subsists—for example, “controversies between citizens of different states” or “between states.” In the wake of the Constitution’s ratification, a debate arose about how to construe the latter Heads of Jurisdiction. Alexander Hamilton suggested they turn on the identity of persons “interested” in the underlying dispute out of which the suit arose, even if those persons were not capable of being bound by judgments in the suit. Marshall, by contrast, argued they turn on the “character of the litigant parties” in the filed suit—that is the persons who could be bound by the court’s judgments.

The debate was joined in *Fowler v. Lindsay*,²⁵ a case involving a dispute to land claimed under grants from Connecticut and New York. After the Connecticut grantees instituted an ejectment action in Connecticut’s district court, the defendants, fearing a biased jury had been impaneled, removed the case to the Supreme Court, invoking the Court’s original jurisdiction over “controversies between states.”²⁶

As neither Connecticut nor New York were actually litigants in the suit, the defendants’ theory of original jurisdiction may seem odd. The theory, however, had been laid out by Alexander Hamilton, the counsel for the New York defendants. In response to the natural objection that the Supreme Court lacked original jurisdiction because no state was, in fact, a party to the controversy, he argued that Connecticut and New York were *interested* in the underlying dispute, which concerned which state properly lay claim to the territory at issue. To construe jurisdiction to depend on whether a state is a “party to the suit, that is Plff. or Deft.,” he said, “would derogate from the end and view of the Constitution”—to preserve the “public tranquillity.”²⁷ Rather, he contended, both the Judiciary Act and Article III permit the Supreme Court to exercise original jurisdiction whenever a state is “a party in interest” to the larger dispute not simply where the state “is a suitor, Plff. or Deft.”²⁸

²⁵ 3 U.S. (3 Dall.) 411 (1799).

²⁶ See Julius Goebel, *The Connecticut Gore Controversy*, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 663-671 (Julius Goebel ed., Columbia 1964).

²⁷ *Fowler v. Lindsay*, Minutes of the Circuit Court, District of Conn., April Term, 1798, in 1 HAMILTON, *supra* note 26, at 682.

²⁸ *Id.*

Hamilton's argument didn't carry the day in *Fowler*. Justice Washington's opinion for the Court and Justice Cushing's concurrence held that "cases" and "controversies" enumerated in Article III are "suits," not disputes, and that the Supreme Court's original jurisdiction over controversies between different states therefore turns on whether states are "parties[] to the suit."²⁹ The states, the Court held, didn't qualify.

Beyond venturing that states' interests in the underlying dispute didn't qualify them as jurisdictional parties, *Fowler* did not define "parties to the suit." A year later, as member of Congress, then-Rep. John Marshall offered one definition: A party to an Article III "controversy," or suit, he said, is someone who "comes into court, who can be reached by its process, and bound by its power."³⁰

As we will see, that's the right reading of Article III. Hamilton's, by contrast, is a specious, if clever, piece of advocacy. Unfortunately, Marshall's interpretation never took hold—and he is largely to blame. As Chief Justice he took a slightly different view of the identity of a "party" to an Article III case or controversy in *Osborn v. Bank of the United States*,³¹ a case involving a suit by the Bank of the United States against the Treasurer of Ohio. His narrow construction helped Marshall reach a politically desirable outcome, but proved unworkable in the long run.

B. Marshall's Pyrrhic Victory

Osborn asked the Court to resolve a dispute about the scope of state immunity under the Eleventh Amendment, which bars federal jurisdiction over suits brought by citizens of one state against another state.³² The National Bank had filed suit to recover taxes unconstitutionally levied against it by Ohio's treasurer. While Ohio's attempt to tax the bank violated Marshall's ruling in *McCullough v. Maryland* that the bank was immune from state taxation,³³ the state hoped

²⁹ *Fowler*, 3 U.S. at 412; *id.* at 414 (Cushing, J., concurring).

³⁰ John Marshall, Speech Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (1800), reprinted in 4 THE PAPERS OF JOHN MARSHALL 82, 95-96 (Charles T. Cullen ed., 1984).

³¹ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824)

³² *Id.* at 829 (questions presented).

³³ *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

to evade *McCullough* by invoking its own immunity from suit under the Eleventh Amendment. The Bank, in turn, anticipated that problem and named the state treasurer, Osborn, as a party-defendant, but not the state itself.

Osborn argued that the suit was really “against” Ohio, not Osborn, because Ohio was substantially interested in the outcome—if *Osborn* lost, after all, the state would lose tax revenue.³⁴ Marshall responded by drawing a parallel between the Eleventh Amendment and Article III. Article III’s controversy-denominated Heads of Jurisdiction, he said, turn on the “character of the parties” to the suit. Immunity under the Eleventh Amendment turns on whether the state is a party to a suit. The Eleventh Amendment and Article III, he argued, should be interpreted *in pari materia*.

But, at this juncture, Marshall turned away from his earlier claim that a “party” to a controversy, or “suit,” is someone who can be “bound” by a federal court’s judgments. Instead, he said, a party to a suit is the person named as such “on the record”—that is, the persons specifically identified by name as plaintiff or defendant in the bill of complaint.³⁵ Because Eleventh Amendment immunity attaches where a state is a party, and Ohio was not named as a party on the record, he concluded, the Eleventh Amendment was no bar to the Bank’s suit.

As we will see, that definition of “party to the suit” was narrow, relative to the range of meaning given the term in contemporaneous cases.³⁶ But Marshall’s narrow construction had its purposes: It supplied an easy-to-state and easy-to-apply rule that provided the National Bank a roadmap to evade the reach of the Eleventh Amendment in subsequent cases.

After *Osborn*, courts interchangeably cited Eleventh Amendment and diversity precedents on party status throughout much of the first half of the nineteenth century.³⁷ Yet, applied to define diversity jurisdiction, the “party on the record” rule was too inflexible, as canny states

³⁴ *Osborn*, 1824 U.S. LEXIS 409, at **22-23 (summary of arguments).

³⁵ *Osborn*, 22 U.S. at 850-58.

³⁶ See *infra* notes 62-86 and accompanying text.

³⁷ See, e.g., *McNutt v. Bland*, 43 U.S. 9, 25 (1844) (Daniel, J., dissenting) (citing *Osborn* in diversity case).

recognized. To defeat diversity jurisdiction over suits between diverse citizens, for example, some states required litigants to sue and defend in the name of local in-state officials in certain cases.³⁸ Taken literally, the record rule would deny diversity jurisdiction in such a case, even if the actual litigants who controlled the suit were citizens of different states.

In these cases, the Court developed exceptions to the party on the record rule in order to justify jurisdiction.³⁹ But by the end of the nineteenth century, the Court's attempts to preserve some semblance of the "party-on-the-record" rule and explain this exception raised more questions than they answered about the rule's source, scope, and viability.⁴⁰

Frustrated by what appeared, by the end of the nineteenth century, to be a body of law mired in murky formalism, subject matter jurisdiction doctrine would abandon the concept of the "party to the suit" as a jurisdictional limit and cast elsewhere to explain the outer limits of Article III's party-centered Heads of Jurisdiction.

³⁸ In Mississippi, for example, where out of state judgment creditors sought to execute a judgment against an in-state residents, state law required the sheriff to provide a bond to the governor that he would execute process against the in-state resident, and then required the out of state judgment creditors to sue the resident under the bond using the governor's name. *See id.* at 13-15.

³⁹ For example, the Court variously suggested that the party of record rule didn't apply where named parties explicitly sue "to the use of" others, *id.* at 15 ; where the named parties were "conduits" for the active litigants, *Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 172, 177 (1871); *Irvine v. Lowry*, 39 U.S. 293, 300 (1840); where the "real parties in interest" possessed the "legal right" to control the suit, *McNutt*, 43 U.S. at 15; where the "real and only controversy" subsisted by unnamed parties, *id.*; or where the parties not named in the record had an exclusive interest in the "object" of the suit. *Id.* at 14. And, to justify these exceptions to the record rule, it insinuated that the rule was a mere statutory restraint on diversity jurisdiction, despite *Osborn's* assumption otherwise. *See, e.g., Blatchford*, 78 U.S. at 174.

⁴⁰ Ironically, the Court's expansion of diversity jurisdiction occurred in suits where the persons of diverse citizenship not named in the case caption would be bound by a final judgment. *Res judicata*, of course, attaches to those who control the litigation for their benefit, not just the persons who formally enter an appearance—a principle admitted in the nineteenth century as well as our own. *See, e.g., Lovejoy v. Murray*, 70 U.S. (3 Wall.) 1, 18-19 (1865). Thus, the Supreme Court applied the party concept in a way consistent with then-Rep. Marshall's claim in 1800 that "parties to the suit" were persons within courts' preclusive power.

C. Hamilton's Revenge: The Modern "Transactional" Definition of Controversies

How modern jurisdictional doctrine defines those outer limits remains, however, unclear. Modern commentators have exclusively analyzed questions about the outer scope of the Diversity Clause by referring to the transactional concept of a "constitutional case or controversy" developed in the Court's twentieth century supplemental jurisdiction cases.

The debate over the Class Action Fairness Act reflects this approach.⁴¹ CAFA authorizes federal courts to exercise jurisdiction over multi-state class actions so long as some putative absent class members and defendants are citizens of different states, even if the named plaintiffs and defendants are not diverse. Because class actions involve claims that share common questions of law fact, CAFA authorizes jurisdiction where at least some class members have claims arising out of the same transaction that gives rise to the plaintiff's suit and are diverse from the defendant. And, it is on this point that debate about constitutionality of CAFA has been joined.⁴² Some question whether the claims of class members and the named plaintiff in a typical Rule 23(b)(3) class are sufficiently related to a single underlying transaction to justify supplemental jurisdiction over the named plaintiff based on the citizenship of diverse absent class members.⁴³

What's startling, though, from the vantage of the Marshall-Hamilton debate, is that both sides of the debate over CAFA assume that the citizenship of diverse absent class members is jurisdictionally relevant, despite the fact that the procedures necessary to bring their claims within the scope of a court's preclusive power haven't been completed.⁴⁴ CAFA

⁴¹ Pub. L. No. 107-273, § 11020, 116 Stat. (2002) (codified in 28 U.S.C. §§ 1369, 1441(e)).

⁴² Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. Pa. L. Rev. 2035, 2066 (2008); James Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 Calif. L. Rev. 1423 (2007).

⁴³ Wolff, *supra* note 42, at 2067 & n. 84 (describing this argument).

⁴⁴ To certify a class under Rule 23(b)(3), the court must assess whether the class claims share sufficient commonality of facts and legal questions, whether common facts predominate, whether the named plaintiff's claim is typical of the class claims, whether the named plaintiff is an adequate representative, whether the claims are manageable as a

is seen as boundary pushing because it allows the court to exercise jurisdiction over a grouping of abstract claims that are questionably related to a single ideal “transaction or occurrence,” not because it hinges the court’s original jurisdiction on the citizenship of persons who are beyond the court’s power to bind.⁴⁵ In effect, modern jurisdictional analysis acts as if an Article III “controversy” is simply a grouping of actual and hypothetical claims arising out of a single pre-litigative transaction or occurrence.⁴⁶

This reflexive transactional approach to defining diversity’s outer boundaries should, in turn, sound familiar: in *Fowler v. Lindsay*, Hamilton, remember, suggested that at its broadest, jurisdiction under the party-centered Heads of Jurisdiction turns on the status of persons who are materially interested in the larger “controversy,” or pre-litigative legal “dispute,” that gives rise to the suit filed in federal court.⁴⁷ By assuming that diversity jurisdiction, in its most expansive permissible form, turns on the citizenship of adverse persons involved in the pre-litigative “transaction” that precipitates the suit, regardless of whether those persons are “before the court” in a preclusive sense, the modern transactional approach to defining the outer scope of diversity jurisdiction is hard to distinguish, as a functional matter, from Hamilton’s.

class, and whether a class action is superior to other mechanisms for adjudicating the claims. See Fed. R. Civ. P. 23(a), (b)(3). Even if the class satisfies these requirements, class members must be given notice of the action, and an opportunity to opt out of the class. Fed. R. Civ. P. 23(c)(2).

⁴⁵ This is not to say that debate over CAFA reflects a complete conceptual break between modern subject matter jurisdiction doctrine and the law of former adjudication. Nobody takes the position that a hypothetical class member’s citizenship could ground minimum diversity if were impossible for that person to join the suit as a party prior to a final judgment—no matter how “transactionally” related his claims might be to a named plaintiff’s. And, perhaps, some—if pushed—might take the position that the citizenship of class members who lack minimum contacts with the United States, and there for are not amenable to process, doesn’t count, either.

⁴⁶ CAFA is also consistent with treating an Article III “controversy” as a suit, if parties to the suit include those who have been granted expanded intervention opportunities. As we will see, if “controversy” means suit, the original meaning of “suit” excludes subject matter jurisdiction based on this theory, as well.

⁴⁷ See *supra* notes 27-28 and accompanying text.

IV. The Two Conventional Eighteenth Century Meanings of “Controversy”

In the last part, we encountered two post-ratification interpretations of the term “controversies,” with different implications for the meaning of the Diversity Clause. The Hamiltonian interpretation assumes an Article III controversy is broad enough to encompass the pre-litigative “dispute” out of which a suit arises. On that view, Article III flexibly extends diversity jurisdiction based on the citizenship of parties to that dispute.

The second view, advanced by then-Rep. Marshall, is that an Article III “controversy” is a suit that subsists only “between” persons who may be bound by a court’s judgments. On that view, Article III narrowly extends diversity jurisdiction based on the citizenship of those brought within a federal court’s preclusive power.

Neither sense of the word is a facially implausible candidate for the meaning of an Article III “controversy.” True, the advisory opinion rule forbids federal courts from “deciding legal questions outside of a litigated ‘case’ or ‘controversy,’” i.e., “a proper lawsuit, involving proper parties.”⁴⁸ And, consistent with that rule, most interpreters assume Article III uses the term “controversy” to mean “suit.”⁴⁹ But Hamilton’s alternative reading is not inconsistent with the advisory opinion rule, either. If Article III uses “controversy” in a flexible way that encompasses both pre-litigative disputes and suits, courts could construe “controversies” to mean disputes for purposes of establishing subject matter jurisdiction, while confining courts to deciding questions presented in the litigated portion of the dispute.

Who is right, Hamilton or Marshall? Figuring out the original meaning of “controversies” requires two steps: (1) determining the conventional pre-ratification meaning of the word and, (2) if the conventional meaning is ambiguous, resolving the ambiguity, if we can,

⁴⁸ Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 302-03 (1994) (describing the advisory opinion doctrine this way).

⁴⁹ See, e.g., Walter Dellinger, *The Class Action Fairness Act: Curbing Unfairness and Restoring Faith in Our Judicial System* 4 (Progressive Policy Institute Policy Report March 2003) (diversity clause extends jurisdiction to “suits ‘between citizens of different states’”).

through intratextual analysis of Article III.⁵⁰ Below I break this analysis into two parts.

In this part, I consider the conventional pre-ratification meaning of the word “controversy.” The evidence shows that Hamilton’s and Marshall’s interpretations reflect the two different conventional eighteenth century uses of the word. In Part V, I then consider which meaning fits the text of Article III.⁵¹

A. “Suits”

In the eighteenth century the term “controversy” was conventionally used both (1) to refer to disputes that precede the filing of a lawsuit, as in “controversies” “in which no action is depending”⁵² and (2) more narrowly to refer to various kinds of duly instituted “suit at law,” including originally filed suits and appeals.⁵³

I start, in this section, by examining the pre-ratification meaning of a “suit.” As I show, a “suit” subsisted only between “parties to the suit”; “parties to the suit” were persons who, as then- Rep. Marshall put it, “come[] into court [and] can be. . . bound by its power.”⁵⁴

⁵⁰ See *supra* notes 9-12 and accompanying text.

⁵¹ Splitting the “original meaning” inquiry into two parts is necessary because the two meanings of “controversy,” suit and dispute, reflect two different terms-of-art in eighteenth century jurisdictional law and each is associated with a body of nuanced jurisdictional terminology. Some of that terminology is used in Article III in a way that sheds light on the meaning of an Article III “controversy.” By thoroughly exploring both senses of the term, before turning to the text, we will be in the best position to make sense of the Diversity Clause in light of surrounding words and phrases.

⁵² For examples of use of controversy in this way, see WILLIAM BOHUN, *CURSUS CANCELLARIE; OR, THE COURSE OF PROCEEDINGS IN THE HIGH COURT OF CHANCERY*, at 506-513 (1723) (discussing “the Controversy between my Lord Coke and Chancellor Egerton,” which in context refers to a dispute concerning the jurisdiction of the court of chancery, standing above a variety of legal proceedings related to the dispute).

⁵³ For examples of use of “controversy” in this sense, see SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE, ABSTRACTED FROM THE FOLIO [XX]* (1792) (defining controversy as a “suit at law”); see also *Hite v. Fairfax*, 8 Va. 42 (1786) (referring to the “pendency of controversies in court”); *Jenifer v. Lord Proprietary*, 1 H & McH. 535 (Md. Provinc. Ct. 1774) (referring interchangeably to modes of appeal in “civil suits” and “civil controvers[ies]”). See also *infra* notes 146-49 and accompanying text (collecting examples of pre-ratification colonial statutes that use “controversy” to mean “suit”).

⁵⁴ See 4 PAPERS OF JOHN MARSHALL, *supra* note 30, at 95-96.

1. “Parties to the Suit”

To unpack the meaning of a “suit,” and its relationship to parties, it helps to start with the definition of “parties to the suit.” In the eighteenth century, English royal courts and their American colonial counterparts adhered to the rule that in personal actions, the “rights of no man [could] be decided in a court of justice, unless he himself be present”⁵⁵—a rule whose origins lay in the ancient precursors of the royal court system. In the early medieval period, proto-lawsuits were oral appeals for redress made in person either to the king, his judges, or local communal courts.⁵⁶ The term “party,” in turn, grew out of this system as a term that described the litigants who physically appeared to orally present claims and defenses,⁵⁷ thereby submitting themselves to the court’s power to resolve their dispute⁵⁸

After written replaced oral pleading, the formalist English common law system, wedded to continuing the ancient forms of legal procedure after they had outlived their correspondence to reality, continued to insist that physical presence “in court” was a touchstone for judicial power to bind. As a result, even in the eighteenth century, parties to the suit were, in theory, those who were literally “before the court” and therefore within courts’ power to bind their interests.⁵⁹

⁵⁵ See, e.g., FREDERIC CALVERT, PARTIES TO SUITS IN EQUITY B (1837); 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 594-95 (Cambridge Univ. Press 2d ed. 1898) (“Our law would not give judgment against one who had not appeared.”).

⁵⁶ See, e.g., 2 POLLOCK & MAITLAND, *supra* note 55, at 602-04 (describing the system of oral pleading in the Grand Assize of Henry II); JAMES STEPHEN, & FRANCIS P. PINDER, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS: COMPRISING A SUMMARY ACCOUNT OF THE WHOLE PROCEEDINGS IN A SUIT AT LAW 23 (6th ed. 1860) (describing early medieval precursors of system of written pleadings).

⁵⁷ The use of the term “party” to describe the persons who appear in court to present claims and defenses appears in Bracton. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 304 (Samuel Thorne trans. 1968-77) (c. 1210-1268) (describing the persons who appear in court as the “actor” or plaintiff and “reus” or defendant and as the “part[ies]” to the proceedings).

⁵⁸ 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 105 (1923) (noting the rule that “[t]here was no power to try an case, civil or criminal, in the absence of the other party,” a rule “common to other bodies of early Germanic law,” was “perhaps founded upon the idea that recourse to a law court depends upon the consent of the parties.”)

⁵⁹ 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 252 (1926) (“in

This definition of the term party is consistent throughout eighteenth century dictionaries, treatises, and cases. Giles Jacob's widely-used law dictionary, for example, defined the "parties to the suit" as the plaintiffs and defendants who carry on the suit;⁶⁰ the terms plaintiff and defendant were settled terms for the active litigants "in court" who submit their rights to a definitive resolution by the judicial power.⁶¹ Treatises⁶² and cases,⁶³ in turn, consistently define "parties" as persons "before the court" or "brought into Court" who could be "bound by the Decree" or judgment.

This understanding was, of course, also the assumption behind the necessary parties rule in equity, which provided that equity could act only when every interested person had been brought "before the Court" as parties,⁶⁴ meaning that all interested persons had met whatever requirements might apply to bring their rights within equity's preclusive power, setting the stage for a final, definitive resolution of the underlying

[eighteenth century] legal theory both plaintiffs and defendants must appear personally in court by themselves or their attorneys").

⁶⁰ GILES JACOB, A NEW LAW DICTIONARY 6K (1762) ("The Parties to a Suit, are the Plaintiff and Defendant, who carry on the same").

⁶¹ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 25 (1765-69) ("in every court there must be at least three constituent parts, the actor, or plaintiff, who complains of the injury done; the reus, or defendant, who is called to make falsification of it; and the judex or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact . . . [and] apply the remedy."); *see also* 2 BRACTON, *supra* note 57, at 304 (describing persons who appear in court as "plaintiff," or "actor," and "defendant," or "reus").

⁶² *See, e.g.*, 1 Eq. Ca. Abr. 164 ("All original Parties to the Suit, and likewise all those who come in *pendente Lite*, and are made Parties thereto by Process, are bound by the Decree."); 1 JOSEPH HARRISON, THE ACCOMPLISH'D PRACTISER IN THE HIGH COURT OF CHANCERY, SHEWING THE WHOLE METHOD OF PROCEEDINGS, ACCORDING TO THE PRESENT PRACTICE 32 (1779) ("none such as those that are parties and those claiming under them can be bound by [a decree]").

⁶³ *See, e.g.*, Anonymous, 1 Ves. Jun. 30 (1789) (dismissing bill for failure to make interested person a "party," based on the rule that all interested persons who the plaintiff seeks to affect through the decree must be "brought into Court"); Poore v. Clark, 2 Atk. 515 (1742) ("the general rule is, that if you draw jurisdiction out of a court of law, you must have all persons parties before this court, who will be necessary to make the determination complete"); Vernon v. Blackberry, Barn. C. 378 (1740) (considering whether "the Plaintiff has brought proper Parties before the Court").

⁶⁴ *See, e.g.*, Poore, 2 Atk. at 515 (to enter a complete decree you "must have all persons parties before this court").

dispute.⁶⁵

In the eighteenth century, the party, then, was a kind of fiction: When courts referred to those persons who were not physically before the court as “parties to the suit,” they indicated that these persons were treated *as if* they were “before the court,” and therefore subject to the court’s preclusive power, in the same way that persons who had literally appeared in the ancient royal and communal courts had subjected themselves to the courts’ power to determine their rights against their interests.⁶⁶ In effect, the term party was a placeholder for larger theoretical questions about *res judicata*.

2. The Relationship between “Suits” and “Parties”

Consistent with the view that a court’s power extended no farther than those “before the court,” eighteenth century courts defined a “suit” to exist only between the “parties to the suit.”⁶⁷

First, the suit, and with it the court’s jurisdiction to proceed to a final judgment, “commenced” upon the constructive appearance of the persons whose legal interests were at issue before the court;⁶⁸ and, as a

⁶⁵ See, e.g., 3 BLACKSTONE, *supra* note 61, at 442 (the “bill must call all necessary parties, however remotely concerned in interest, before the court; otherwise no decree can be made to bind them”). For a collection of statements of this general rule from treatises of the period, see Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum. L. Rev. 1254, 1262-70 (1961).

⁶⁶ Lon Fuller, *Legal Fictions*, 25 Ill. L. Rev. 363, 390 (1930) (noting that while “[t]he Roman fiction was an assumptive fiction, a fiction taking an ‘as if’ form; [and] the English fiction was (and is) a fiction ordinarily taking an ‘is’ or assertive form,” the difference is purely stylistic); F. W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 4 (A.H. Chaytor & W.J. Whittaker eds. Cambridge 2006) (“the words ‘really and truly’ seem hardly applicable to any part of the procedure of the eighteenth century, so full was it of fictions contrived to get modern results out of medieval premises”).

⁶⁷ Blackstone defined a “suit in courts” as a proceeding “wherein the act of the parties and the act of the law cooperate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument, by which the parties are enabled to procure a certain and adequate redress.” 3 BLACKSTONE, *supra* note 61, at 22.

⁶⁸ 9 HOLDSWORTH, *supra* note 59, at 252 (“the evolution of the rules . . . for beginning an action[] is intimately bound up with the evolution of the rules for securing the appearance of the defendant”); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1449, 1568 (2002) (in the eighteenth century, “the very existence of most kinds of judicial proceedings depend[ed] on the presence

corollary, parties were deemed to have constructively appeared when the initial procedures necessary trigger the court's power to decide their rights had been completed.⁶⁹

Once commenced, the suit continued to exist only so long as the parties remained before the court. Failure to file pleadings in a timely manner resulted in the absence of a party from court and a negation of the suit, or "nonsuit."⁷⁰ Similarly, the suit abated if a party died, further underscoring the existential link between the suit and the continuing "appearance" of the parties.⁷¹

In older cases, the defendant in Common Pleas or King's Bench constructively appeared when, after service of process by the sheriff, he filed "common bail" as security for his participation in the suit.⁷² The

(actual or constructive) of adverse parties"); see *infra* notes 71-80 and accompanying text for further discussion. The eighteenth century jurisdictional term *coram non judice* underscores the link between jurisdiction and constructive presence in court: "coram non judice" means "not in the presence of a judge."

⁶⁹ See *infra* notes 72-81 and accompanying text.

⁷⁰ See, e.g., 3 BLACKSTONE, *supra* note 61, at 315-16 ("from the time of the defendant's appearance . . . it is necessary that both the parties be kept or continued in court . . . until the determination of the suit"; failure to properly file required pleadings results in lapse of appearance and in the negation of the suit, or "nonsuit").

⁷¹ *Id.* at 301-02. In actions at law involving torts committed by the defendant, could not be revived by or against representatives of the decedent, because the right was personal to the decedent. In equity, a suit involving impersonal rights (i.e. to property) could be revived if the executor or other successor in interest of the decedent filed a bill of revivor; contractual suits at law, which were viewed as a species of property, could also be revived by or against successors in interest to the decedent. *Id.* at 302.

⁷² Traditionally, securing the defendant's appearance in Common Pleas, for example, required the purchase of an original writ stating the plaintiff's form of action and the simultaneous "suing out" of compulsory process against a defendant. The compulsory process in turn, took the form of a writ directing the sheriff to arrest the defendant.

In Common Pleas, the writ directing the sheriff to arrest the defendant was called the *capias ad respondendum*; in the King's Bench, the typical compulsory process was the Bill of Middlesex. 9 HOLDSWORTH, *supra* note 59, at 249-50 (cataloguing forms of compulsory process). See also Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 Yale L.J. 52, 68 (1968-69) (discussing "appearance" by filing bail).

Prior to the eighteenth century, plaintiffs proceeding in Common Pleas typically purchased the writ and then served a summons on the defendant; if the defendant did not respond to the summons, the plaintiff sued out a *capias* against the defendant; by the eighteenth century, the *capias* had become the "first process" against the defendant in Common Pleas, in order to speed the commencement of the suit, a development precipitated by Common Pleas' competition with the King's Bench, which offered

plaintiff's appearance depended on the defendant's: When the defendant "appeared," by filing common bail, the plaintiff was brought into court with him.⁷³

However, the process necessary to initially bring one "before the court" as a party was in flux at the time of ratification. Anticipating the concept of default judgments, Parliament in the early eighteenth century created mechanisms that allowed the court to proceed to judgment in cases in which a person had been served with process but had not appeared, by allowing the plaintiff to enter an appearance for the defendant.⁷⁴ American colonies adopted a similar rule much earlier.⁷⁵

As a functional matter, then, service of process, not appearance,

speedier compulsory process. *See, e.g.*, S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 61-65 (2d ed. 1981).

⁷³ 9 HOLDSWORTH, *supra* note 59, at 252 ("On the part of the plaintiff, no formality expressive of appearance is observed, but, upon the appearance of the defendant . . . both parties are considered *as in Court*").

⁷⁴ In 1725, Parliament provided that if the defendant did not appear within four to eight days upon the return of process by the sheriff, the plaintiff could enter an appearance for the defendant "as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself." 3 BLACKSTONE, *supra* note 61, at 287. *See, e.g.*, An Act to Prevent Frivolous and Vexatious Arrests, 1725, 12 Geo., c. 29, 1 (Eng.); Nelson, *supra* note 68, at 1570 n.39. ("after being properly served . . . the court could proceed to judgment as if the defendant had really appeared"). In personal actions, the court was limited to a judgment of outlawry if the defendant could not be personally served; actual service remained essential to actually enter a default judgment on the issues raised in the suit. Levy, *supra* note 72, at 95.

Parliament provided by statute (1732) for decrees *pro confesso* against defendants in equity who evaded service. An Act for Making Process in Courts of Equity Effectual Against Persons Who Abscond, and Cannot Be Served Therewith, or Who Refuse To Appear, 1732, 5 Geo. 2, c. 25, 1 (Eng.).

Default judgments had long been available *in rem* actions, Nelson, *supra* note 68, at 1570-71 & n. 44, although the summons in *in rem* actions could be served "either to the person . . . or on the land demanded." GEORGE BOOTH, THE NATURE AND PRACTICE OF REAL ACTIONS, IN THEIR WRITS AND PROCESS, BOTH ORIGINAL AND JUDICIAL 4 (John Anthon, ed., New York, Stephen Gould 1808).

While quasi-in-rem attachment jurisdiction was still in its infancy, default judgments, satisfied by the attached property, were available in such proceedings, after "the initial issuance of a summons commanding the defendant to appear and answer the plaintiff's allegations," which was usually issued simultaneously with the writ of attachment. *See* Nelson, *supra* note 68, at 1573-74.

⁷⁵ Levy, *supra* note 72, at 69 n.84.

was the key to a court's power to decide the defendant's rights.⁷⁶ And, by the final decades of the eighteenth century, it was established that, in general, the service of a summons commanding the defendant to appear was sufficient to bring both the plaintiff who sued out the summons and the defendant to whom it was directed "before the court" as a party for jurisdictional purposes.⁷⁷

⁷⁶ See, e.g., *Kibbe v. Kibbe*, 1 Kirby 119, 126 (Conn. 1786) ("full credence ought to be given to judgments of the courts in any of the United States, where both parties are within the jurisdiction of such courts at the time of commencing the suit, and are duly served with the process").

The idea that one could not be bound without receiving service of process would, of course, become part of the settled understanding of constitutional "due process" in *Pennoyer v. Neff*. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877) ("appearance or personal service [are required] before the defendant could be personally bound by any judgment rendered.").

⁷⁷ *Windsor v. Windsor*, Dick. 706, 21 Eng. Rep. 446 (Ch. 1788) ("The naming of a party in the bill as defendant, and not praying process against him, is not considered as making him a party"); see also Nelson, *supra* note 68, at 1568 (while the "very existence of most kinds of judicial proceedings depend[ed] on the presence . . . of adverse parties," by the late eighteenth century, defendants were considered constructively "in" court "upon the issuance of some sort of command ordering the defendant to appear").

For the contrasting pre-1725 view of what was required to make one a party to an equitable action, see *Izrael v. Nawbourn*, 1 Vern. 87, 23 Eng. Rep. 329 (Rolls 1682) (to make a person named as defendant in the bill a party, plaintiff must "serve him to answer" and he must be "brought to hearing"). In one pre-1725 decision, *Fawkes v. Pratt*, 1 P. Wms. 593, 24 Eng. Rep. 531 (Ch. 1719), the chancellor stated that "they are only defendants against whom process is prayed," but, as *Izrael* suggests, the statement should be read as a statement of a necessary, but not sufficient, precondition for making a person a party.

The definition of the "party" as one who had received the process "due" before a court can bind his or her interests persists well into the nineteenth century. See, e.g., *See Barron v. Abeel*, 3 Johns 481, 482 (N.Y. 1808) ("the service of a declaration in ejectment on the tenant in possession is considered as much the commencement of the suit, as the service of a *capias ad respondendum* in personal actions"); *Hart v. Granger*, 1 Conn. 154, 168 (1814) (case is properly before the court "if there are proper parties before it, or rather if the plaintiff in that suit has a right to call the defendants before the court to answer his claim, and they are *properly* called"); *Gibson v. Haines*, 1 Hare 317, 66 Eng. Rep. 1054, 1054 (V. Ch. 1848) (argument of counsel) (noting that in equity the "Defendant, upon being served with a copy of the bill, may be bound by all the proceedings" and "no person is deemed a party unless his name is in the prayer of process, and the prayer of process is always referred to in the offices, as showing who are the parties to the suit").

By the time *Pennoyer* was decided, American courts ceased to connect service of summons, and its effect on the court's jurisdiction to bind, with the definition of a "party," a fact reflected in *Pennoyer* itself: while Justice Field treated service as a precondition for exercise of jurisdiction *in personam*, questions about whether persons

Blackstone's treatment of the "commencement of the suit" reflects this ambivalence about the steps necessary to be deemed before the court: while he defines the "commencement of the suit" as the means by which "the cause is drawn into . . . court,"⁷⁸ he waffles between suggesting that the suit "commenced" (1) upon appearance of the plaintiff and defendant in the traditional way⁷⁹ and, alternatively, (2) upon the service of process commanding the defendant to enter an appearance.⁸⁰ American courts of

had been brought before the court as "parties" did no work in his analysis.

⁷⁸ 3 BLACKSTONE, *supra* note 61, at 286 ("[t]hus differently do the three courts set out at first, in the commencement of a suit . . . [and] by this means the . . . cause is . . . drawn into the respective courts").

⁷⁹ *Id.* at 285 ("as soon as [the defendant] appears, or puts in bail to the process, he is deemed by so doing to be in such custody of the marshall, as will give the court [of King's Bench] a jurisdiction to proceed").

⁸⁰ *Id.* at 286-92 (suggesting that commencement is accomplished after the service of the "first process," and that subsequent proceedings to compel the defendant to answer occur "[a]fterwards, when the cause is once drawn into . . . court[.]"). *See also* Levy, *supra* note 71, at 69 (plaintiff's right to enter an appearance for defendant marked "the practical transition from arrest to summons in the beginning of personal civil actions in the [English] superior courts").

Blackstone's waffle was driven by the peculiarities of the jurisdictional divisions between the courts of Common Pleas and Kings Bench. Traditionally, constructive appearance (via arrest) was essential to establish the jurisdiction of the King's Bench and Exchequer vis a vis Common Pleas, *id.* at 285-86 ("once the defendant is taken into custody of the marshall" the King's Bench had power to hear causes originally committed exclusively to Common Pleas); *see also* MAITLAND, FORMS OF ACTION, *supra* note 66, at 64. Yet, even though he repeats the familiar mantra that arrest was necessary to commence an action in King's Bench, Blackstone, in the passage from the *Commentaries* cited at the start of this note—which follows the discussion of "first process" in the law courts and precedes and introduces general discussion of the mechanisms for compelling appearance—seems to assume that "first process" was sufficient to "draw[] the cause . . . into court" in all of the superior courts. *See id.* at 286 ("Thus differently do the three courts set out at first . . . Afterwards, when the cause is once drawn into the respective courts, the method of pursuing it is pretty much the same in all of them"). *But see* Bonner v. Foster, 2 Cowp. 454, 98 Eng. Rep. 1183, 1184 (KB 1776) (Mansfield C.J.) (when a constructive arrest via service of a summons precedes the filing a bill of complaint, the date that the bill is filed, rather than the prior date of the "summons to bring the defendant into court," marks the commencement of a suit).

The uncertainty hints at a shift that occurred in the nineteenth century, when courts would dispense with the requirement that defendants appear by filing bail entirely, recognizing—as we generally still do today—that the parties are before the court, in a way that brings them within the court's power to decide their rights, once the plaintiff has adequately served process commanding a defendant to appear. *See, e.g., Pennoyer*, 95 U.S. at 734; STEPHEN & PINDER, *supra* note 56, at 21 (describing mid-nineteenth century consensus on the availability of default judgments against defendant who had been

the period tended toward the latter view of the “commencement” of a suit.⁸¹

For our purposes, two important features of the meaning of the “suit” at the time of ratification stand out: First, the suit “commenced” after the procedures necessary to trigger the court’s power to decide the plaintiff’s and defendant’s rights—typically, service of process on the defendant⁸²—had been completed. Second, the suit continued to exist only

summoned but had not appeared).

In equity, a suit in equity “commenced” once a bill had been filed; here, too, though “commencement” of the suit was also keyed to service of process because in equity the filing of the bill that included a proper “prayer” of process automatically caused a subpoena (the form of service that issued from chancery) to issue against the named defendant. CHARLES BARTON, AN HISTORICAL TREATISE OF A SUIT IN EQUITY 58, 61-62 (1796) (suit in equity is “commenced by Bill” and upon filing the bill a “writ of Subpoena issues out of the Law side of chancery, requiring the Defendant (as prayed in the Bill) to appear and answer the charges”).

⁸¹ See *Barron v. Abeel*, 3 Johns 481, 482 (N.Y. 1808) (because failure to appear following proper service entitles plaintiff to a default judgment, “the service of a declaration in ejectment on the tenant in possession is considered as much the commencement of the suit, as the service of a *capias ad respondendum* in personal actions”); *Boyce v. Morgan, Cole. & Cai.* 476 (N.Y. 1805) (reporter’s note) (although it was argued that “levying the plaint was the commencement of the suit; . . . the court . . . ruled that issuing the summons, or warrant, was the beginning of the action “); *Nicholson’s Lessee v. Wallis*, 4 U.S. 154 (Pa. 1798) (holding that “the service of the declaration in ejectment upon the defendant, was a commencement of the suit”); but see *Darlings v. Corey*, 1 N.J.L. 232, 232 (N.J. 1793) (“The appearance of the parties on the summons was a regular commencement of the suit”).

⁸² Cases of the period did not uniformly distinguish between the sheriff’s actual “service” of process on the defendant and the “issuance” of the first process either for purposes of constructively making someone a “party” for jurisdictional purposes or for demarcating the “commencement” of the suit. Compare *Barron*, 3 Johns at 481 (stating, in action at law, that “service . . . is considered . . . the commencement of the suit”) with *Hart*, 1 Conn. at 168 (equity court has parties before it if they are “properly called”); and *Windsor*, 21 Eng. Rep. at 446 (person considered a party in equity if they are named in the “prayer of process”). This difference in emphasis may reflect common law court’s reliance on facts about service evidenced in the pleadings to establish prima facie jurisdiction, Michael G. Collins, *Jurisdictional Exceptionalism*, 93 Va. L. Rev. 1829 (2007); but may also reflect procedural differences in the availability of a default judgment in law and equity. See *Barron*, 3 Johns at 481 (linking commencement, service, and the procedures triggering default judgments). In a legal action involving personal rights, actual service was necessary to trigger the court’s power to enter a default judgment, when the defendant failed to answer, although issuance of service, coupled with failure of actual service, could be the basis for a judgment of outlawry. See *supra* note 72. In legal actions involving property, either actual service or service on the land triggered the right to a default judgment. *Id.* In equity, a judgment *pro confesso*

so long as the persons made parties through process remained constructively “before the court,” underscoring the existential link between suits and party presence. The upshot is that in the eighteenth century a paradigmatic “suit” existed only “between” the persons who had been brought, via “due process,”⁸³ within the court’s power to bind.⁸⁴ Persons who were not within that power were outside the scope of a “suit.”

3. Expansion of the Concepts of Parties and Suits in Representative Contexts

Because it was a fiction designed to paper over untheorized expansions of courts’ preclusive power, the concept of “parties to the suit” was not static. Rather, its applications expanded in the eighteenth century, foreshadowing the modern law of representation. In those cases, the concept of a “suit” expanded as well—to encompass not only the persons who were brought before the court in a way that subjected them to a court’s full preclusive power, but also persons brought “before the court” and subject to the preclusive power “in a sense.” This shift, in turn, is crucial to understanding the outer scope of diversity jurisdiction in the special category of representative actions.

This expansion of the party concept began in the seventeenth century, in cases where equity excused the necessary party rule in suits brought by tenants of a manor (usually the inhabitants of an entire village or villages) seeking to settle the common customary obligations that the tenants, as a class, owed to the manor lord. In these cases, a few of the tenants filed a bill in equity in their own names,⁸⁵ and pled that the bill was filed “on behalf of” the other tenants. Under the usual rules, these

was available after issuance of process, if the defendant either did not appear or could not be found; hence the rule in equity that party-status depended on the naming of the defendant in the prayer of process. *Id.*

⁸³ See BOOTH, *supra* note 74, at 73 (judgment properly entered upon constructive appearance after return of “due process” by the sheriff).

⁸⁴ As discussed in the next section, “parties” to a suit included both persons who were within the court’s power to bind in a full sense and persons over whom a court had a limited power to bind. See *infra* notes 95 -101 and accompanying text.

⁸⁵ Cases involving group litigating by tenants occurred in the medieval period, before the rise of the necessary party rule but, by the seventeenth century the practice had become unfamiliar. See STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 72-99 (1987).

absent persons were not parties because they were not named in the bill. And plaintiffs had every reason to want to avoid making them parties: the death of a party abated a suit in equity, and required the filing of a bill of revivor, which re-commenced the suit all over again, requiring relitigation of matters previously litigated.⁸⁶

The chancellors dealt with the problem by excusing the tenants from the necessary party rule: as the Lord Keeper said in *Brown v. Howard*, a suit by some tenants to determine the scope of a common, and legally fungible, customary obligation imposed on all the tenants as a group was “the Case”—the legal dispute or claim—“of all” and therefore all tenants needn’t be made parties.⁸⁷ Yet, the reported decisions confirm that the non-party tenants would nonetheless be bound by the decree: “If the [absentee tenants] should not be bound” by the litigation, said Lord Nottingham in *Brown v. Vermuden*, “Suits of this Nature . . . would be infinite and impossible to be ended.”⁸⁸

The manorial tenure cases created a precedent for excusing the necessary party rule in other associational cases, including precursors of modern shareholder derivative suits brought by shareholders of unincorporated associations.⁸⁹ As we proceed into the eighteenth century, however, equity begins to call the absent persons whose joinder is excused in these cases “parties.” In *Chancey v. May*, for example, shareholders of the Temple Brass Works, an unincorporated association, filed suit “in behalf of themselves and all other proprietors and partners” (numbering eight hundred shareholders) against thirteen officers to “call them to account for several misapplications, mismanagements, and

⁸⁶ Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B. U. L. Rev. 213, 243 & n. 65 (1990).

⁸⁷ See *Brown v. Howard*, 21 Eng. Rep. 960 (Ch. 1701) (discussing *Vermuden*); YEAZELL, *supra* note 85, at 163 (noting the Lord Keeper uses “case” in sense of shared claim or legal dispute). In the mid-seventeenth century, Lord Nottingham required the named plaintiffs to produce a “register” showing that absentees had authorized the suit; by the start of the eighteenth, the chancellors seem to have dispensed with that requirement, at least, in cases involving fungible customary rights. *Id.* at 146, 162-63. There are some suggestions that the requirement of prior authorization persisted in other contexts. See *infra* note 99.

⁸⁸ *Brown v. Vermuden*, 1 Chanc. Cas. 272, 22 Eng. Rep. 796, 797 (Ch. 1676); *Brown v. Howard*, 21 Eng. Rep. 960 (Ch. 1701) (“[A]ll [are] bound; though only a few are parties; else, where there are such numbers, no Right could be done, if all must be Parties; for there would be perpetual abatements . . .”).

⁸⁹ YEAZELL, *supra* note 85, at 166-79.

embezzlements.”⁹⁰ The defendant demurred, on the grounds that “all the rest of the proprietors were not parties, and so . . . they might be harassed and perplexed by a multiplicity of suits.”⁹¹ Lord Hardwicke, however, dismissed this fear because, he reasoned, the absent shareholders were, by dint of being “proprietors in the same undertaking” as the plaintiffs, “in effect parties,” without explaining exactly why this was the case.⁹²

By the mid-eighteenth century, equity relied on *Chancey* and the tenure cases to allow creditors to file bills seeking an accounting of the debtors’ assets without making all creditors parties in the traditional way and, similarly, to allow the crews of privateering vessels to file bills seeking an accounting of the proper distribution of shares of the prize captured from enemy ships. By the 1750s, equity was calling absent creditors in a bill of accounting “plaintiffs” when the bill was filed by some creditors on behalf of the others.⁹³ Similarly, in *Leigh v. Thomas*, a prize case, the court suggested that absent crewmates in a bill seeking an account of each crewmembers’ shares of the prize could be “brought before” the court as, variously, “parties” or “plaintiffs” if, on the model of a creditor suit, the actual plaintiffs sue “on behalf of” the absent crewmembers.⁹⁴

Robert Bone writes that in the creditor and prize cases, recognition of absentees as parties “expanded the intervention opportunities open to absentees,” but “had nothing to do with binding them.”⁹⁵ This overstates the case. In such cases, the suit involved two decrees: First, after the bill was filed, and the defendants had answered, the chancellor issued—as a matter of course—a decree directing a master to undertake an accounting of the assets at issue. Once that first decree issued, the represented absentees lost their right to seek alternative remedies at law, although they retained the right to litigate their shares in the accounting in equity.⁹⁶ In

⁹⁰ 24 Eng. Rep. 265 (Ch. 1722).

⁹¹ *Id.*

⁹² *Id.*

⁹³ 28 Eng. Rep. 201 (Ch. 1751) (“no doubt but a bill may be by a few creditors in behalf of themselves and the rest . . . and then the decree lets in all the others; and they are considered as plaintiffs”).

⁹⁴ *Id.* See also *Neve v. Weston*, 3 Atk. 557, 26 Eng. Rep. 1121 (Ch. 1747) (“A man who comes in before a Master under a decree, is quasi a party to that suit . . .”).

⁹⁵ Bone, *supra* note 86, at 243-44.

⁹⁶ Geoffrey C. Hazard, John L. Gedid, & Stephen Soble, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1869-70 (1998) (“[a]fter the

effect, the legal claims of absent creditors and crew members were merged into, and barred by, the equitable suit—they were subject to what we would, today, call a form of claim preclusion. And in exchange for their loss of their rights at law, absentees were given expanded intervention opportunities in the equitable accounting.⁹⁷

As a result, when a suit was instituted “on behalf of” absent creditors or crew members, these absent persons fell within the preclusive reach of the court on the basis of the representative nature of the bill, although not to the same degree as persons who had been made parties in the traditional way.⁹⁸

The same implication is evident in associational cases, like *Chancey v. May*. There, defendants’ concerns about multiple litigation

initial decree, no creditor or legatee could proceed by an action at law to collect his debt or legacy”). In effect, represented parties were treated as “before the court” because they had nowhere else to go.

⁹⁷ While the death of a person who had affirmatively appeared before the court ended the suit, the death of a represented “party” did not. CALVERT, *supra* note 55, at 31; Bone, *supra* note 86, at 244 n.70. Thus, the representative “suit’s” existence did not depend on the continued presence of represented parties brought “before the court” through representation. But the represented persons were nonetheless treated as part of the suit at the time of its commencement: in exchange for the loss of their rights at law, they were considered sufficiently part of the suit that they could file a writ of error, file a bill of revivor if the representative died, and take advantage of the final decree to the same degree as traditional parties. See, e.g., JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 96, 96 (1838) (suing “in behalf of” absentees allows the absentees to “come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing”); Bone, *supra* note 81, at 244 n.70 (collecting authorities).

⁹⁸ Hazard, Gedid & Sowle, *supra* note 96, at 1871; YEAZELL, *supra* note 84, at 183 (*Leigh* required the “suit be brought on behalf of all . . . on the grounds that crew members not a party to the share-assignment agreement would not be bound by it in subsequent litigation”); see also Bone, *supra* note 86, at 244.

The creditor cases treated absent creditors as “parties” under the necessary parties rules only in those cases where the interests of the plaintiffs and absentees were aligned. Mortgage creditors could not represent general creditors; creditors could not represent other creditors when seeking to establish “the priority of claims as against other creditors.” Hazard, Gedid, & Sowle, *supra* note 96, at 1867-68. In those cases, chancery required the absentees to be joined through traditional process. As a result, absentee creditors were not “parties” unless representation satisfied “what we now call ‘fairness’ and ‘adequacy’ of representation”—underscoring that courts reserved the term party for absentees that chancery considered it “fair,” at the time the suit was filed, to bind at least in a limited sense. *Id.* at 1868.

were premised on the assumption that the absent shareholders were not “parties” and therefore beyond the preclusive effect of any decree. The court responded that the fear was unfounded because the premise was false: the shareholders were in fact parties, and, the inference follows, would be bound by the decree to some degree. Chancellor Hardwicke, indeed, drove the point home by affirming that the decree in the case would “com[e] at justice”—that is, fulfill the requirement that equity would make a complete, and final, resolution of the dispute.⁹⁹

In effect, the caselaw defining the “party” concept follows a predictable pattern replicated throughout the fiction-ridden English common law: Individual courts innovate, in our case by expanding the scope of persons who can be bound. Later courts paper over a gap between the innovation and legal theory with a fiction: In our case, courts, unable to explain the expansion of preclusion in light of a larger theory of *res judicata*, simply papered over the theoretical gap by assigning the term “party”—the label for persons subject to the preclusive power of the court—to represented persons.

Thus, at the time of ratification, the concept of a suit was changing—from an older view which understood a “suit” to encompass only those persons who had either sued out process or received service, thereby bringing them under the court’s full power to bind their interests, to a newer view, which understood a “suit” to encompass passive persons,

⁹⁹ 28 Eng. Rep. 201 (Ch. 1731). The exact degree to which members of the association were bound is debatable—as Hazard, Gedid and Sowle note, its possible they may have been subject to the limited preclusive effect that occurred in creditor and prize cases, by losing their right to proceed independently at law. Hazard, Gedid & Sowle, *supra* note 96, at 1874 (suggesting that court in *Chancey* may have envisioned that absentees “if they wished to maintain the litigation, would be compelled to become parties to the instant case rather than proceed separately” at law). As in the creditor cases, the absentees were, apparently, treated as proper objects of preclusion either on the theory they consented to representation (with consent presumed from the fact that rights litigated arose out of a “prior voluntary association . . . in a commercial enterprise”) or an adequacy of representation theory, based on the fact the named plaintiffs and absentees shared a shared “defined right” and the representatives therefore “acted in their interest.” See YEAZELL, *supra* note 85, at 178, 182-83; *but see* Bone, *supra* note 86, at 242-57 (arguing representation was not based on theories of agency but rather on the formal similarity between the abstract legal rights and duties presented by those in court and those out of court). Leigh seems to suggest prior authorization of the crew-members may have been required, at least in prize cases. 28 Eng. Rep. at 202 (suggesting plaintiffs can bring bill “on behalf of the whole crew” if “authorised,” presumably by the other crewmembers).

like represented parties, who were joined to the preclusive effect of a suit “in a sense,”¹⁰⁰ in exchange for special intervention rights. Both the older and newer concepts of a “suit,” however, encompassed only those persons who were “before the court” in a way sufficient to subject them, to some extent, to the court’s power to bind.¹⁰¹

There upshot of this history for our interpretive puzzle? To the extent that Article III uses the term controversies to mean suits, the Heads

¹⁰⁰ See, e.g., *Adair v. The New River Co.*, 11 Ves. Jun. 429, 32 Eng. Rep. 1153 (Ch. 1805) (in “the case of persons, suing on behalf of themselves and all others,” absentees are “in a sense . . . before the Court.”).

¹⁰¹ By the early nineteenth century, English chancery courts settled on calling represented persons “quasi-parties,” reflecting both that they were subject to lesser preclusive effect than traditional parties (in that they were bound to pursue relief in equity, but could litigate their shares due under the final accounting) and that the person’s continuous constructive “presence” was not essential to the continuous existence of the suit. See, e.g., *Cockburn v. Thompson*, 16 Ves. Jun. 321, 33 Eng. Rep. 1005 (Ch. 1809) (noting in prize case that “where it is impracticable to make parties, and yet the Court can by arrangement afterwards introduce the persons, as Quasi parties, the Court does not require, that they shall be parties on the record”).

To be sure, not every eighteenth century case neatly followed the lead of *Brown*, *Chancey* and *Leigh*. During the chancellorship of Lord Thurlow from the 1770s through the mid-1790s, for example, equity courts pushed back against these innovations, refusing to either condone exceptions to the necessary party rule, to extend the term party to represented persons, or to recognize a power to bind persons who had not been joined through the traditional process. Hazard, Gedid & Sowle, *supra* note 96, at 1866 (“[t]oward the latter part of the eighteenth century, Chancery began to apply the Necessary Parties Rule with greater inflexibility”). In *Moffat v. Farquharson*, the master of the rolls, Lord Kenyon, in fact appeared to overrule *Leigh v. Thomas sub judice*, by holding, in an apparently identical prize case, that crew members must be made parties in the traditional way. 2 Bro. C. C. 338, 29 Eng. Rep. 189 (Rolls 1788). Moreover, not all courts applied the term “party” to absent persons who were treated as new objects of *res judicata*. Some courts in the first half of the eighteenth century, for example, experimented with other labels, including early intimations of the concept of “privity.” See, e.g., Bone, *supra* note 86, at 239; *Brown v. Vermuden*, 1 Chan. Cas. 273, 22 Eng. Rep. 796, 797 (1676) (objection that absentee should not be bound “for that he was not Party or privy”). In the eighteenth century, however, the privity concept remained largely confined to relationships or rights related to property. See, e.g., WILLIAM RASTELL, *LES TERMES DE LA LEY: OR, CERTAIN DIFFICULT AND OBSCURE WORDS AND TERMS OF THE COMMON AND STATUTE LAWS OF THIS REALM, NOW IN USE, EXPOUNDED AND EXPLAINED* 489 (1721) (defining “privities” to include cases where “the Tenant holds of the Lord by certain Service” and “where a Lease is made to hold at will, for Years, for Life, or a Feoffment in Fee”).

Nonetheless, no matter the scope of the court’s preclusive power assumed in any particular case, the term, when used, was applied to those who were fairly subject, at least to some degree, to the court’s power to bind their rights against their interests.

of Jurisdiction that depend on the identity of the persons “between” whom a suit subsists turn, at their broadest, on the identity of persons within the court’s power to bind “in some sense” at the time jurisdiction is tested—but who need not be subject to the court’s full preclusive power.¹⁰²

B. “Disputes”

What if Article III uses “controversies,” as Hamilton suggested, to mean “dispute”? To define the limits of the suit, eighteenth century procedural law distinguished between the parties to the suit and the persons “interested” in the underlying “dispute” or “question.” Suits occurred “between” parties to the suit. “Interested” persons, in turn, were not parties to the suit but were parties to the larger “dispute” out of which the suit arose.¹⁰³ The distinction had the biggest doctrinal significance in equity, where persons who were not parties, but were “interested” in the underlying dispute, were required to be made parties to the suit in order to bring them within the court’s preclusive power, thereby ensuring complete relief.

The distinction, which will prove important later when we turn to the text of Article III, also highlights the need for a careful reading of eighteenth century cases: Because interested persons were, albeit rarely in the eighteenth century, sometimes called “parties” “interested” in the larger dispute, careless reading of the caselaw can lead a reader to conflate the concepts of parties to the suit and persons interested in the question. In the infrequent instances where the term “party” was used to refer to persons interested in the dispute that preceded a filed suit, but not joined through process, eighteenth century cases always referred to the interested person as a “party in interest” or a “party concerned in the question,” while referring to the persons joined by process to the “suit” as “parties to the suit” or “parties” without any such qualification.¹⁰⁴

¹⁰² See, e.g., Fuller, *supra* note 67, at 524-29.

¹⁰³ Compare *Lessee of Cowper v. College of Dublin*, Gilb. Rep. 242 (1742) (using the term “parties in interest” to refer to persons “concerned” in a dispute about land rights preceding the filing of any claim); with JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL, at 39 (1787) (“All persons concerned in the demand . . . ought to be parties, if within the jurisdiction of the court”).

¹⁰⁴ When discussing suits or other legal proceedings, treatises and cases of the period were generally careful to refer to persons who were interested in the suit but hadn’t been served with process as “persons in interested in suit,” rather than as “interested parties.”

To make matters even more perplexing for the casual modern reader, the necessary parties caselaw also used the term “affecting”—a term that traditionally meant “bound”—when referring to persons who had not been joined as parties but were interested in the decree. This use of the term “affecting,” which will also prove important when we turn to Article III, grew out of its older use to mean “bound.” The necessary parties rule, again, provided that equity courts could not exercise jurisdiction unless they made a complete decree, and a complete decree, in turn, required the joinder of all interested persons as parties. Courts applying the rule referred to unjoined “interested” persons as persons who would be hypothetically “affected” by a complete decree, and therefore must be joined before the suit could go forward.¹⁰⁵ By the end of the

Indeed, every major treatise of the period and every major judicial statement of the rules governing joinder reserves the term parties for persons to be “brought before the court” through formal process, until the second edition of Mitford’s treatise published in 1787. Even in that treatise, Mitford is careful to qualify his alternative use of the term party, by referring to parties “interested,” whenever he refers to persons who haven’t been joined through process, while reserving the term party without qualification for persons joined by process. *See, e.g.,* MITFORD, *supra* note 103, at 39 (noting that persons “concerned” or “affected” by the relief prayed “ought to be parties”; but “if any . . . unnecessary parties are interested, the court, upon application will in general permit the proper alterations to be made”); 1 HARRISON, *supra* note 62, at 32 (“Regularly all that are interested are to be made parties”); 1 GILES JACOB, *THE COMPLEAT CHANCERY-PRACTISER: OR, THE WHOLE PROCEEDINGS AND PRACTICE OF THE HIGH COURT OF CHANCERY, IN A NEW PERFECT MANNER*, at 139 (1730) (“if those whose Right is concern’d, are not made Parties, the Defendant may demur to such Bill”); *see also* Poole v. Clarke, 2 Atk. 515 (1742) (“The general rule is, that if you draw the jurisdiction out of a court of law, you must have all persons parties before this court who will be necessary to make the determination complete”).

In the nineteenth century cases and treatises, use of the term “party in interest” or “parties interested” to refer to unjoined persons begins to appear with greater frequency. However, even in the early decades of the nineteenth century, cases are generally careful to reserve the term “party” for persons joined by process, and always used this alternative sense of party with a qualifier. *Compare* Wilkins v. Fry, 1 Mer. 262 (1816) (“In equity it is sufficient that all parties interested in the subject of the suit should be before the court, either in the shape of plaintiffs or defendants”) *with* CALVERT, *supra* note 55, at 11 (the “general rule” is that “[a]ll persons having an interest in the object of the suit ought to be made parties”); Small v. Atwood, Younge 458 (1832) (“The general rule is that all persons who are interested in the question, must be parties to a suit instituted in a court of equity”); Cockburn v. Thompson, 16 V. 325 (1809) (“The strict rule is, that all persons materially interested in the subject of the suit, however, numerous, ought to be parties”).

¹⁰⁵ *See* Joy v. Wirtz, 13 Fed. Cas. 1172 (No. 7554) (C.C.D. Pa. 1806) (Washington, J.) (“if a decree can be made without affecting the rights of a person not made a party . .

eighteenth century, the term “affected” had become a procedural term of art for non-parties interested in questions litigated in a lawsuit in certain specific ways. Mitford’s treatise on equity, for example, stated that the necessary parties rule required that “[a]ll persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties.”¹⁰⁶

The kind of “interest” that qualified one for mandatory joinder was unsettled. “Parties in interest” or persons “affected” included those with “remote” as well as “immediate” interests in the dispute that gave rise to the suit.¹⁰⁷ At a minimum, the class of interested persons included those who, if excluded from the preclusive effect of the decree, might collaterally attack, and negate, the rights declared.¹⁰⁸ Beyond that narrow class, however, confusion reigned about just how “remote” an interest was before it was beyond the outer scope of mandatory joinder, and, by themselves, the terms persons or “parties in interest” or persons “affected” conveyed no information about how to draw that line. Courts’ attempts at formulating line-drawing standards were, as commentators both before and after the Constitution’s ratification complained, “vague,” “indefinite” and “not eas[ily] reduced to general principles or grounds.”¹⁰⁹

. reason, as well as adjudged cases, will warrant the court in proceeding without him”); Anonymous, 1 Ves. Jun. 29 (1789) (“All parties having an apparent right . . . must be brought into Court, before the Court will do anything, which may affect their right”).

¹⁰⁶ MITFORD, *supra* note 103, at 39; *see also* 1 HARRISON, *supra* note 62, at 33 (discussing application of the necessary parties rule in cases where “parties and not parties are equally affected” by the prayer for relief); 1 JACOB, *supra* note 104, at 141 (noting rule that parties-plaintiff must “bring all Parties [in interest] who may be affected before the Court”).

¹⁰⁷ *See, e.g.*, 3 BLACKSTONE, *supra* note 61, at 442 (“the bill must call all necessary parties, however remotely concerned in interest”); *Sherrit v. Birch*, 3 Bro. C. C. 229, 229 (Rolls 1791) (“although the interest was upon such a remote contingency . . . [interested persons] must be made parties”).

¹⁰⁸ *See* GEOFFREY GILBERT, THE HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY . . . BY THE LATE LORD CHIEF BARON GILBERT 159 (1758) (necessary parties rule requires, at a minimum, joinder “where the party which is wanting . . . may controvert the plaintiff’s very right to the demand in question”). That risk was considered particularly acute where the relief requested by the plaintiff would require the absent person to perform some affirmative act. *See, e.g.*, *Fell v. Brown*, 2 Bro. C.C. 278 (Ch. 1787) (noting a distinction between active and passive parties in interest for purposes of mandatory joinder).

¹⁰⁹ 3 RICHARD WOODSON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND; AS TREATED IN A COURSE OF VINERIAN LECTURES, READ AT OXFORD, DURING A SERIES OF YEARS, COMMENCING MICHAELMAS TERM, 1777, at 370 (London 1793) (discussing the

This distinction, in turn, has two implications for the scope of diversity jurisdiction: First, if Article III uses controversy to mean pre-litigative dispute, as well as “suit,” the term is flexible enough to allow courts to test subject matter jurisdiction under the Diversity Clause based on the citizenship of persons who were, as Hamilton said, “parties in interest”—that is, those who are “interested in,” or “concerned in,” or “affected” by the underlying dispute that gives rise to the suit.

Second, if that is the correct reading of controversy, the outer scope of subject matter jurisdiction under Article III is vague, requiring either judicial or legislative definition of the degree of interest in a suit that triggers federal subject matter jurisdiction.

V. The Constitutional Meaning of Controversy

Which sense of “controversy” appears in Article III? The Diversity Clause, considered in isolation, doesn’t give us any clues. But intratextual evidence in the surrounding clauses, together with supporting evidence in the drafting history and ratification debates, compel the conclusion that “controversy” means suit and suit alone.

Section A takes on the intratextual evidence. I start by reviewing the structure of Article III, which reveals that Article III “controversies” are a subset of Article III “cases.” I then show that Article III uses “cases” to mean suits. Because “controversies” are a kind of “case,” and “cases” are suits, only one of the conventional meanings of the term “controversy”—“suits”—is consistent with Article III’s text and structure.

Of course, the text is a “lens whose reading must be checked against readings generated by other lenses,”¹¹⁰ including evidence of pre-ratification readings drawn from Article III’s drafting history and the subsequent ratification debates.¹¹¹ In section B, I examine whether pre-ratification interpretations of Article III during the Constitutional Convention and ratification debates reinforce the intratextual inferences. They do.

interests in a suit that are sufficient to qualify persons for joinder); CALVERT, *supra* note 55, at 4, 5 (same).

¹¹⁰ Amar, *supra* note 12, at 801.

¹¹¹ See *supra* notes 15-16 and accompanying text.

In section C, I'll summarize the implications of this evidence for the scope of diversity jurisdiction.

A. Textual Evidence

Below, subsection 1 shows that Article III “controversies” are a kind of, or subset, of “cases.” Subsection 2 then shows that the range of meaning of “case” was as broad as the meaning of “controversy.” Accordingly, to figure out in which sense Article III uses “case,” we must take a close look at the text of Article III itself. Subsection 3 undertakes that examination. As I show, both the Article III Jury Trial and Original Jurisdiction Clauses provide powerful intratextual evidence that “case” is used to mean “suit,” not pre-litigative dispute, *throughout* Article III, thereby eliminating “dispute” as a possible meaning of the narrower term “controversy.”

1. Article III “Controversies” Are a Kind of “Case”

Article III, section 2 begins, of course, by enumerating the nine Heads of Jurisdiction. Three of these Heads are denominated with the word “cases.” The other six Heads, including the Diversity Clause, are denominated with the word “controversy.”¹¹² This jurisdictional menu is followed by the Original and Appellate Jurisdiction Clauses. The former grants the Supreme Court original jurisdiction over “all cases affecting ambassadors, public ministers, and consuls” (the Ambassadors Subclause) and “those in which a State shall be party” (the State-party Subclause). The latter provides that in “all the other cases before mentioned, the Supreme Court shall exercise appellate jurisdiction,” with exceptions determined by Congress.

This structure requires us to interpret an Article III case as a broader term than an Article III controversy. To see why, imagine that “case,” as the word is used in the Original and Appellate Jurisdiction clauses and in the preceding jurisdictional menu, overlaps with, but is narrower than, the meaning of “controversy.” If that reading were correct, the Appellate Jurisdiction Clause would authorize the Supreme Court to exercise appellate jurisdiction only over, at most, a mysterious subset of “controversies” in the jurisdictional menu. Rather than construe

¹¹² U.S. Const. article III, § 2, cl. 1.

Article III in a way that creates this puzzling gap (which is particularly problematic given that the Exceptions Clause authorizes exceptions to, but not supplementation of, the Supreme Court's appellate jurisdiction),¹¹³ the unanimous view is that (1) the word "case" subsumes the word "controversy" and (2) that the reference to "cases" in the Original Jurisdiction and Appellate Jurisdiction Clauses refers back to both "cases" and "controversies" enumerated in the jurisdictional menu.¹¹⁴

That means, in turn, that the relationship between "case" and "controversy" is that suggested by the Virginia supreme Court of Appeals' 1782 decision in *Commonwealth v. Caton* and reflected in common usage of the time: that is, a "controversy" is a "civil" case, while "case" is a broader umbrella term for both civil and criminal matters.¹¹⁵ This relationship between the two words is the only way to make sense of the Original or Appellate Jurisdiction Clauses in a fashion consistent with contemporary uses of either term: both Clauses' references to "cases" encompass the "controversy"- as well as the "case"-denominated Heads of Jurisdiction because "controversies" are simply a special kind of "case."¹¹⁶

The upshot: Article III's structure requires us to interpret case to be at least as broad a term as controversy. *If* "case" means "suit"—and that is something we have yet to determine—controversy cannot be interpreted more broadly to include disputes that precede a suit. Rather, a controversy must be a special kind of suit (i.e., a civil suit).

¹¹³ Cf. Amar, *supra* note 12, at 765 ("[t]he fact that the Original Jurisdiction Clause does not contain augmentation wording symmetric to the exception wording of the Appellate Jurisdiction Clause elegantly buttresses Marshall's conclusion that Congress has no power to add to the Court's original docket.").

¹¹⁴ David P. Currie, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM 1829-1861*, at 63 n.71 (2005) ("surely 'cases' is not the *narrower* term"); Martin H. Redish, *Article III and the Judiciary Act of 1789: Text, Structure, and Common Sense in the Interpretation of Article III*, 137 U. Pa. L. Rev. 1633, 1642 n. 28 (1990) ("no one, to my knowledge, has suggested that the Supreme Court lacks constitutional authority to review controversies to which the United States shall be a party, simply because article III confines its appellate authority to the review of 'all the other Cases before mentioned.'").

¹¹⁵ See, e.g., 8 Va. (4 Call.) 5, 15 (1782), discussed further *infra* notes 146-54 and accompanying text; see also Nelson, *supra* note 73, at 1586; John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203, 221-30 (1997).

¹¹⁶ Harrison, *supra* note 115, at 249.

2. The Conventional Eighteenth Century Meanings of “Case”

What then was the conventional meaning of “case”? The word was most commonly used in the sense of “suit”—a use reflected in eighteenth century dictionaries, treatises and cases,¹¹⁷ and in pre-colonial procedural and jurisdictional statutes.¹¹⁸ “Case,” however, was also sometimes used, albeit more rarely, to refer to pre-litigative legal disputes out of which subsequent suits arose, usage evidenced by a few cases and some treatises.¹¹⁹ As a result, the range of conventional meaning of the term case does not, by itself, foreclose the possibility that an Article III controversy means dispute as well as suit.

It is tempting at this juncture to once again turn to the advisory opinion rule—which limits federal courts to deciding questions in “a proper lawsuit, involving proper parties”¹²⁰—to eliminate pre-litigative “dispute” as a candidate for the meaning of the Article III case. However, doing so again ignores that the advisory opinion rule only tells courts how to construe the “case” requirement for purposes of deciding which questions they may reach, but does not foreclose construing the term more broadly for other purposes. For example, the Original Jurisdiction Clause grants the Supreme Court jurisdiction over cases in which states are party. If Article III uses “case” in a way that

¹¹⁷ For uses of the word case to refer to suits, legal proceedings, or actions in reported cases of the period, *see, e.g.*, *Respublica v. Cobbet*, 2 Yeates 352 (Pa. 1792) (argument of counsel) (discussing whether “the present case is a suit of a civil nature” or an “action of criminal nature”); *Barrington v. The King*, 3 T. R. 499, 100 Eng. Rep. 699, 701 (K.B. 1789) (Holt, C.J.) (referring interchangeably to procedures that apply in “civil cases” and “civil proceedings”); *Kamper v. Hawkins*, 3 Va. 20, 89 (1788) (referring interchangeably to “civil cases” and “civil proceedings”); *id.* at 47 (referring to criminal cases as a setting “in” which a jury trial takes place—that is, a lawsuit. For a post-Framing dictionary that reflects the usage that had grown up by the end of the eighteenth century, *see* JOHN BOUVIER, *LAW DICTIONARY* (8th ed. 1914) (1839) (treating “case,” “cause,” and “suit or action” as synonyms).

¹¹⁸ *See infra* notes 147-48 and accompanying text.

¹¹⁹ For an example of the use of “case” in this way, *see* *Ford v. Botts*, 6 N.J.L. 388, 393 (1797) (noting that statute “is chiefly confined to cases where no suit is actually depending, and seems intended to put such disputes on the same footing as if there had been a suit commenced.”). *Cf.* Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Function of Federal Courts*, 69 Notre Dame L. Rev. 447, 480 (1994) (arguing that “case” referred to the legal “question” or legal dispute that transcended the interests of the actual litigants and collecting authorities).

¹²⁰ Paulsen, *supra* note 48, at 302-03.

encompasses both pre-litigative disputes and suits, the Court could flexibly construe “case” to mean disputes for purposes of establishing original jurisdiction of a suit (i.e. where states are parties in interest to the dispute out of which the suit arises), while confining itself to actually deciding the questions presented in the *litigated* portion of the dispute.¹²¹

We therefore need to push beyond the advisory opinion rule, and look for additional, firmer evidence in Article III’s text that excludes “dispute” as a plausible meaning of the Article III “case” and, therefore, “controversy.”

3. Intratextual Evidence that “Cases” (and “Controversies”) Mean Suits: The Article III Jury Trial Clause and Original Jurisdiction Clause

That additional evidence is found in two clauses—the Article III Jury Trial Clause and Original Jurisdiction Clause—which strongly suggest that Article III uses “case” to mean “suit,” not dispute. The latter Clause, in particular, is a rich intratextual interpretive key, which provides powerful evidence about the meaning of case throughout Article III.

First, if “case” includes disputes preceding a lawsuit, the Article III Jury Trial Clause, which provides that “the trial of all crimes, except in cases of impeachment, shall be by jury,” would make no sense. A “trial by jury” does not occur “in” a dispute that precedes a criminal proceeding; it occurs in the proceeding itself. “Cases,” here, obviously mean a formal criminal proceeding, not a criminal dispute or criminal law question that precedes that proceeding.

Reading “case” to mean disputes that precede lawsuits is also a poor fit with the Original Jurisdiction Clause—a point made by Chief Justice Marshall in *Osborn*.¹²² Marshall, however, wrongly insinuated that the Clause *can’t* be interpreted to use case in this way. But, even so,

¹²¹ See *supra* note 48 and accompanying text (making the same point with respect to the controversy requirement).

¹²² *Osborn*, 22 U.S. at 854-55 (“In the case of foreign ministers . . . it was intended, for reasons which all comprehend, to give the national Courts jurisdiction over all cases by which they were in any manner affected. In the case of States . . . it was intended to give jurisdiction in those cases only to which they were actual parties” to “the suit.”)

Marshall's instincts were correct: The *best* interpretation of "cases" in this Clause is "suits," because (1) that interpretation does the best job of giving the terms "affecting" and "party" a distinct legal effect, and (2) that interpretation also makes the best sense of the Clause in light of the larger political context in which Article III was ratified.

To see why Marshall's is the best reading, let's start by taking a diametrically opposite view of the word "case" than Marshall, by assuming "cases" here mean "a dispute preceding a lawsuit," as well as a "suit." If so, the Clause, at its broadest, refers to "disputes affecting ambassadors" and disputes "in which states are party." In that case, both the Ambassadors Subclause and the State-party Subclause, at their broadest, trigger original jurisdiction where ambassadors or states are *interested* in the dispute that gives rise to a suit. As we have seen, "affecting" was used to mean "interested" in the pre-litigative dispute. So was the term "party"—persons "interested" in the dispute that preceded a lawsuit were "parties" to the dispute or "parties in interest."¹²³

In that case, the carefully chosen words in the Ambassadors and State-party Subclauses would not have an obviously distinct legal effect. As we have seen, the concept of "affected persons" and "parties in interest" were interchangeable terms of art in the joinder law of the period and were also indistinguishably vague: they could refer to both "immediate" and "remote" interests in the dispute,¹²⁴ in ways that were "not easy to be reduced to general principles or grounds."¹²⁵ As a result, if we interpret case to mean "questions preceding a suit," there is no clear basis for distinguishing the reach of either grant of original jurisdiction: both terms would set indistinguishably vague boundaries around the scope of the Supreme Court's original jurisdiction over "cases" dealing with ambassadors and states.

Perhaps the framers used the words "affecting" and "party" to

¹²³ See, e.g., 3 WOODSON, *supra* note 109, at 167 (referring to "injuries affecting the plaintiff's person" and "civil right[s], affecting our persons or our property"); 2 GEOFFREY GILBERT, TWO TREATISES ON THE PROCEEDINGS IN EQUITY: AND THE JURISDICTION OF THE COURT, at XX [image number 260] (1756-58) (referring to a debt "affecting the heir"); *Lessee of Cowper v. College of Dublin*, Gilb. Rep. 242 (1742) (referring to "parties in interest" to a dispute about land rights preceding the filing of any claim).

¹²⁴ See *supra* note 107 and accompanying text.

¹²⁵ See *supra* note 109 and accompanying text.

signal that courts should construe the range of interests in which ambassadors, on the one hand, and states, on the other, have in a dispute differently. The claim is unconvincing because, in this context, “affecting” and “party” were not distinct concepts; used to describe persons interested in a dispute, they were synonyms for “parties in interest.” Yet, even if the framers implausibly used synonyms to signal that courts should treat the interests of states and ambassadors differently, the Clause would remain maddeningly opaque: Should courts construe “affecting” or “party” to be the broader term? The contemporary law of parties provides no answer—both terms were perplexingly vague.

Is there another interpretation that fits conventional usage and also gives the terms “affecting” and “party” intelligibly distinct legal effect?¹²⁶ One possibility is to interpret the term affecting to mean “bound”—as we have seen the word was sometimes used to refer to the preclusive effect of a judgment on a party to the suit.¹²⁷ If “affecting” is construed to mean “bound,” “case” must mean suit—one is not bound by a dispute that precedes a lawsuit—and the phrase “cases . . . affecting ambassadors” must mean “suits . . . in which ambassadors have been joined as parties.”

What, then, do we make of the phrase “cases . . . in which a state shall be party”? As we have seen, the framing generation carefully distinguished between “persons of interest” and “parties to the suit,” and never referred to persons as “parties” in a suit, without qualification, except when referring to the latter. Accordingly, if “case” means “suit”, the later reference to “cases . . . in which states shall be party” most naturally refers to “suits in which states are parties to the suit.” Again, the terms “affecting” and “party” would have no distinct legal effect.

One last interpretation is possible: Marshall’s. His interpretation fits conventional uses of both terms. As discussed in detail in the last part,¹²⁸ “affecting” was used to refer to persons who were interested in the legal questions raised in a suit already before the court but who had not

¹²⁶ *Cf.* *W. Va. Univ. Hosps. Inc. v. Casey*, 499 U.S. 83, 100-01 (1991) (Scalia J.) (ambiguity should be resolved in a way that makes “sense not nonsense” out of the *corpus juris*).

¹²⁷ *See, e.g., Cuthbert v. Westwood*, Gilb. Rep. 230 (1726) (“It is not sufficient to make the Land-Owners only, but they should have made the Occupiers, Parties to the Bill, for a Decree against the Land-Owners could not affect them.”).

¹²⁸ *See supra* notes 105-06 and accompanying text.

been made parties to the suit. And, as we have seen, “party” was used without qualification when referring to parties to the suit. If, in turn, affecting means “interested” in the suit and “parties” means “parties to the suit,” the terms also have a distinct legal effect, by extending the Supreme Court’s original jurisdiction much more broadly where litigated cases have diplomatic ramifications than in cases involving states.

Independent of textual coherence, there are good reasons for interpreting the terms these ways, rooted (1) in the diplomatic situation of the early United States and the law of ambassadorial immunity and (2) in the widespread concern about the geographic inconvenience of the Supreme Court as a forum for trial.

First, the early United States, befitting its tenuous position in the international arena, placed a premium on the maintenance of good diplomatic relations with other countries.¹²⁹ The Ambassadors Subclause, in turn, provides Congress with the requisite “flexibility in affording exclusive jurisdiction in the [Supreme] Court over the suits involving foreign representatives and their households most likely to upset foreign relations.”¹³⁰

Two examples illustrate the point: First, because the law of nations afforded the same immunity from suit to embassy personnel as it did to ambassadors, ambassadors had both practical and legal interest in judicial interpretations of the scope of immunity afforded such personnel¹³¹—and, indeed, violations of the immunity of ambassadorial staff caused the early United States its most serious diplomatic losses of face during the Articles of Confederation period.¹³² The term “affecting”

¹²⁹ See, e.g., *Mattueof’s Case*, 10 Mod. 5, 88 Eng. Rep. 598 (1710) (“The ill treatment of ambassadors . . . may involve the nation in a war.”).

¹³⁰ Thomas H. Lee, *The Supreme Court of the United States as a Quasi-International Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States against States*, 104 Colum. L. Rev. 1765, 1802 (2004).

¹³¹ See, e.g., EMMERICH DE VATTEL, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 556-58 (Northampton, Mass., Simeon Butler, 4th Am. ed. 1820) (1758); *Taylor v. Best*, 14 C.B. 486, 139 Eng. Rep. 201 (C.B. 1854) (Maule, J.) (noting that the privilege of the ambassador’s servant “is based on the assumption, that, by the arrest of any of household retinue, the personal comfort and state of the ambassador might be affected” and noting that the privilege traditionally extends to any case where ambassadors rights are “in any way made the subject of litigation” for the same reason).

¹³² William Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 472 (1986) (detailing

ensured that the Supreme Court would be open to any sensitive suits—including suits in which ambassadors' staff, but not ambassadors, were parties—that raised difficult questions about the proper scope of diplomatic immunity or other diplomatic rights in which ambassadors might be interested.¹³³

Second, some eighteenth century authorities suggested the law of nations did not immunize ambassadors acting as private market participants. Parliament in turn criminalized any suits against ambassadors outside the scope of this exception.¹³⁴ Cautious litigants seeking to test the scope of ambassadorial immunity but wary of this criminal provision had the option of bringing suit against the ambassadors' jointly liable business partners, not the ambassador. When the defendants demurred for failure to join the ambassador as a necessary party, courts could excuse the necessary party rule if it found that the ambassador was immune from process,¹³⁵ and such rulings provided occasions for significant decisions on the scope of ambassadorial immunity.¹³⁶

diplomatic fallout resulting from an attack on a member of the household of Ambassador Van Berckel of the Netherlands).

¹³³ Lee, *supra* note 130, at 1801.

¹³⁴ See, e.g., 7 Anne, c. 7, s. 5 (1710). The statute was held to codify the scope of the ambassadorial privilege under the law of nations. *Barbuit's Case*, Talbot 281, 25 Eng. Rep. 777 (1737). For authorities suggesting ambassadorial immunity from domestic jurisdiction did not apply to ambassadors acting as private market participants, see VATTEL, *supra* note 131, at 552 (suggesting ambassadors can be compelled, through attachment of his personal property, to answer actions of a commercial character, because such actions have “no affinity with his functions and character”).

¹³⁵ The necessary parties rule was subject to an exception where the necessary party was beyond the reach of process, as where the defendant was overseas, so long as a decree could be fashioned that would not require binding the parties' interests. See, e.g., Hazard, *supra* note 65, at 1261 (“If the absent party was outside the jurisdiction. . . joinder was not required”). Ambassadors were considered to reside, as a matter of law, in the dominions of his sovereign, and therefore outside the jurisdiction of the court. See, e.g., *Mattueof's Case*, 88 Eng. Rep. at 598 (“The same fiction of law that makes [the ambassador] represent the person of his master, makes him . . . quasi in the dominions of his master.”).

¹³⁶ The ambassadorial privilege was so infrequently litigated that the existence and scope of a “trader” exception to the privilege under the law of nations was contested well into the nineteenth century. A mandatory joinder case, in turn, was the occasion for a major mid-nineteenth century consideration of the exception in *Taylor v. Best*, 139 Eng. Rep. 201 (C.B. 1854), where an ambassador, a necessary party to a breach of contract action, resisted the court's jurisdiction on the ground of ambassadorial immunity. *Id.* at 202. Chief Justice Jervis's opinion recognized that ambassador, even though acting as a market participant, would have been entitled to the privilege, and that the ambassadors' joinder therefore might have been excused, but held that defendant had waived the

The first Congress also criminalized suits against ambassadors in cases where ambassadors enjoyed immunity under the law of nations—ensuring few suits were filed against ambassadors.¹³⁷ If, in turn, Article III confined the Supreme Court to hearing cases brought by or against ambassadors, but not cases where ambassadors were interested, the Court could not exercise exclusive jurisdiction in necessary party cases where questions about the scope of ambassadorial immunity would be litigated. The term “affecting” solves that problem, by giving Congress the flexibility to grant the Supreme Court exclusive jurisdiction in any sensitive cases in which the scope of immunity might be litigated, including cases where questions about ambassadorial immunity arose in the necessary parties context.

Interpreting the State-party Subclause to refer to parties to the suit also makes sense in light of widespread concerns that poor litigants could be dragged by wealthy ones to the distant federal capitol for trial. As Akhil Amar notes, “[g]eography preoccupied the founding generation,” including in its design of the federal court system.¹³⁸ Skeptics of the new Constitution feared that trial in the Supreme Court would prove “geographically onerous,” as it would “require that litigants, witnesses, and physical evidence be ‘dragged to the centre.’”¹³⁹ The fear, indeed, also pervaded post-ratification debates concerning whether the Original Jurisdiction Clause established a maximum ceiling on the Court’s original jurisdiction or only a constitutional floor.¹⁴⁰

In light of fears about the burden of trial in the national capitol, reading the Original Jurisdiction Clause to limit jurisdiction to cases in which states actually appeared as parties makes eminent good sense. As Marshall noted in *Osborn*, states’ “immediate and remote interests [are]

privilege by entering a plea. *Id.* at 214-15 (Jarvis, C.J.) (noting while the plaintiff was bound to sue all the “joint contractors, “the practice has been, not to stay the proceedings altogether [as a result of impossibility of joining a privileged party], but to discharge the party [entitled to the privilege] from custody”); *id.* at 215 (Jarvis, C.J.) (finding that the defendant had waived the privilege by entering a plea).

¹³⁷ An Act for the Punishment of certain Crimes against the United States, ch. 9, 25, 1 Stat. 112, 117-18 (1790); Lee, *supra* note 130, at 1804 n.162 (noting rarity of invocation of Ambassadors Subclause stems from Congress’s criminalization of suits against ambassadors).

¹³⁸ Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 469 (1989).

¹³⁹ *Id.* at 473.

¹⁴⁰ *Id.* at 474-75.

mixed up with a multitude of cases,” as they “might be affected in an almost infinite variety of ways.”¹⁴¹ If, in turn, the Court’s original jurisdiction extended to any case in which a state were interested, the scope of matters in which litigants, witnesses and evidence might be “dragged to the centre” “would be multiplied to a most oppressive degree.”¹⁴² Limiting jurisdiction to the class of suits in which states were actually parties, by contrast, naturally cabined the threat posed by the “geographic onus” of trial in the Supreme Court.

The upshot: giving distinct meaning to all of the terms of the Original Jurisdiction Clause in a way that makes the best sense of the Ambassadors and State-party Subclauses requires interpreting “affecting” to refer to persons interested or concerned in a suit, “party” to refer to the persons joined in the suit, and “case” to refer to the suit itself.¹⁴³

¹⁴¹ *Osborn*, 22 U.S. at 855.

¹⁴² 1 THE RECORDS OF THE FEDERAL CONVENTION 124 (Max Farrand, ed., 1937) (James Madison).

¹⁴³ One might argue that perhaps the meaning of “case” in the Original Jurisdiction Clause changes within the Clause. That is, perhaps case refers to pre-litigative disputes in which ambassadors are interested and, later in the same Clause, switches to mean litigated actions in which states are made a party through formal process. The composition of the Original Jurisdiction Clause, however, cuts against that interpretation: The word “cases” is used as the unitary object of the Original Jurisdiction Clause—which, to ordinary users of language, indicates that the meaning of “cases” is consistent throughout the Clause. The inference is supported, as well, by the use of the word “those” to refer back to “cases” when the Clause turns from ambassadorial cases to state-party cases; “those” is used here, consistently with its use in other parts of the Constitution, to refer back to an antecedent word when using that word in the same generic sense as its antecedent use.

For example, Article I, section 2 provides: “Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years . . .”. While this textual use of “those” occurs in an odious Article I context, it is consistent with the implication for the parallel use of the term in the Original Jurisdiction Clause: In Article I, the term “free persons” is used to mean non-slaves; “including those bound to a service for a term of years” simultaneously confirms that generic meaning of “free person” and underscores that “those” uses the antecedent word in a way that is consistent with its generic sense in the earlier subclause. *See also* U.S. Const. art. I, § 9 (“ . . . no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another”). This argument is not inconsistent with a reading of “those cases” to refer to “civil cases” in the State-party Subclause, while interpreting “all cases” in the Ambassadors Subclause to refer to criminal and civil proceedings. In Article I, section 2, “those” is also used to refer to a subset of the generic class of things embraced

With that understanding in hand, the Original Jurisdiction Clause, together with the Article III Jury Trial Clause, creates an intratextual presumption in favor of interpreting the term “case” to mean “suits” throughout Article III’s jurisdictional menu. As we have seen, that presumption also carries over to the word “controversy” because the State-party Subclause clearly refers back to, at a minimum, the controversies between states and others (i.e. “between two or more states,” et al.) enumerated in the preceding jurisdictional menu, underscoring that meaning of “case” in the Original Jurisdiction Clause is evidence of the meaning of “controversy,” as well.¹⁴⁴

One might imagine a counterargument that proceeded along the following lines: (1) perhaps the terms case and controversy, in the jurisdictional menu, are used in a more general sense to refer to suits and disputes, while (2) the State-party Subclause uses the word “case” to mean suits only. That reading, however, flies against the intratextual presumption that words are used in the same way throughout the text. If “case” is used to mean suits in the State-party Subclause, the presumption arises that it is used the same way elsewhere. The presumption that “cases” means “suits” in the jurisdictional menu is also reinforced by the Ambassadors Subclause, which grants original jurisdiction over “all” cases in which states are ambassadors. Because the evidence suggests the

by the word—i.e., a subset of “non-slaves,” “those” who are “bound to service for a term of years.”

¹⁴⁴ The Original Jurisdiction Clause also, of course, suggests that Article III defines controversies as disputes between “parties.” The orthodox “categorical” understanding of the State-party Subclause assumes the Subclause refers to the entire three enumerated categories of “controversies” between states and others (i.e. “between States and citizens of another State,” etc.). By identifying the *entire* categories of controversies “between” states and others as categories in which states are *parties*, the inference follows that the word “between” in other grants of jurisdiction refers to parties to the suit, as well.

The inference that all grants of jurisdiction “between” various persons refer to parties is also supported by the records of the Committee of Detail: James Wilson’s draft of the judiciary articles originally provided that the Supreme Court would have original jurisdiction in cases “in which a State shall be one of the Parties.” The phrase was later edited by John Rutledge to read “in which a State shall be Party.” 2 FARRAND, *supra* note 142, at 173. The change, while likely stylistic, also have been intended to ensure that the grant of original jurisdiction would extend to controversies “between States,” and would not be narrowly construed to reach cases where a State was only “one” of the parties to the suit. The uncorrected version underscores that all grants of jurisdiction “between” certain categories of persons were understood to refer to suits between “parties.”

word “case” means “suits” in the Ambassadors Subclause, the word “all” underscores that when case is used to define the “affecting ambassadors” Head of Jurisdiction in the preceding jurisdictional menu, “suit” cashes out the meaning of “case” there, as well.

That presumption is also reinforced by the Appellate Jurisdiction Clause, which provides that the Supreme Court exercises appellate jurisdiction in “all the *other* cases before mentioned.” By noting that it deals with the “other” cases “before mentioned,” the Appellate Jurisdiction Clause implies that it and the Original Jurisdiction Clause (the only “other” clause that refers back to the jurisdictional menu) refer to the “before mentioned” cases in the jurisdictional menu. One does not, in turn, claim to be using a word in a “before mentioned” sense if the word is, in fact, being used in a narrower, different sense than its previous mentioned uses.

Because the textual evidence suggests “case” means suit in both the Original Jurisdiction Clause and the jurisdictional menu, that is the broadest available interpretation of the word “controversy,” as well.

One might also imagine a final, additional counterargument along the following lines: Rather than drafting the jurisdictional menu in an extremely precise way—by providing, say, that jurisdiction extends to “suits where citizens of different states shall be parties to the suit”—the jurisdictional menu defines jurisdiction in an economical and abstract way, by providing only that jurisdiction extends to “controversies between citizens of different states.” Isn’t the brevity and abstraction of Article III’s text powerful evidence that we should interpret the terms broadly, rather than narrowly?

The objection, in fact, points out the importance of intratextual interpretation: We must be sensitive to the possibility that a term, like the word “controversy,” was used in lieu of wordy and detailed elaborations because the conventional meaning of the term, read in context, imported the same meaning as the wordy elaboration, but in an obvious, economical way to contemporary readers. Clause-bound interpretation risks blinding us to this possibility. Holistic interpretation, by contrast, helps correct the bias, because the use of the term across clauses can reveal that term was shorthand for a set of technical limits that aren’t apparent on the face of any individual clause.

B. Pre-Ratification Interpretations of Cases and Controversies

Of course, we must check the intratextual inferences against “other lenses.”¹⁴⁵ Below I consider the pre-ratification interpretations of the terms case and controversy in both colonial precursors to Article III as well as Article III as ratified. While discussion of Article III was notoriously sparse, the interpretations advanced throughout the drafting and ratification records support interpreting cases and controversies at a narrow level of generality, to mean suits between parties to the suit: Indeed, I have not found any evidence that any contemporary readers understood Article III to use either term to encompass pre-litigative disputes for purposes of establishing subject matter jurisdiction.

First, colonial and pre-Framing era state jurisdictional statutes—the closest analogues to Article III—employed both terms as interchangeable synonyms for lawsuit. I’ve examined jurisdictional and procedural provisions using “case” or “controversy” in Virginia statutes regulating state courts between 1700 and 1789 and have found no jurisdictional grant or regulation of court process that, considered in context, unambiguously used the words to mean pre-litigative dispute, and twelve jurisdictional and procedural statutes that clearly used the words are treated as a synonym for lawsuit or legal proceeding.¹⁴⁶

Representative examples of this latter usage of “case” include a 1781 Virginia statute incorporating the town of Fredericksburg, providing that “in civil cases, the [local] court of hustings shall not have jurisdiction where the demand shall exceed one thousand pounds of crop tobacco, or the value thereof in money at the time of entering the action, unless both parties shall be inhabitants of the town, at the time of suing out the first process in the suit.”¹⁴⁷ Here, the statute uses the words “action” and “suit” to refer to individual instances of “civil cases.” Given the context, interpreting “cases” to mean questions that precede a lawsuit makes no sense, since the statute hinges jurisdiction over such “cases” on the “demand” made “at the time of entering the action.” A similar interpretation of “controversy” follows from a 1784 Virginia statute incorporating the Episcopal church, which granted the church the power to

¹⁴⁵ Amar, *supra* note 12, at 801. See also *supra* notes 15-16 and accompanying text.

¹⁴⁶ See *infra* note 150 (collecting examples).

¹⁴⁷ An act for incorporating the town of Fredericksburg, in the county of Spotsylvania, Laws of Virginia, November 1781.

“sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in all suits, controversies, causes, actions, matters, and things, in any court or courts of law or equity whatsoever.”¹⁴⁸ Here, employing a belt-and-suspenders redundancy common in legal drafting of the period,¹⁴⁹ the word “controversy,” together with the word “suit,” “cause,” and “action,” refer to a formal legal proceeding, not a question preceding a lawsuit—an inference required by the statute’s treatment of “controversies” as settings for procedural steps (pleading, answers, and defenses) that occur only in lawsuits.¹⁵⁰

¹⁴⁸ An Act for incorporating the Protestant Episcopal Church, Laws of Virginia, October 1784.

¹⁴⁹ Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 Va. L. Rev. 647, 648-50 (1996) (noting constitutional redundancies must be interpreted in “commonsensical fashion,” because eighteenth century statutory drafting sometimes used redundancy out of an abundance of “caution”).

¹⁵⁰ For other examples of the use of the words case in contexts in which its legal connotation can only be “lawsuit” or legal “proceeding,” see, e.g., An act for establishing County Courts, and for regulating and establishing the proceedings therein, Laws of Virginia, October 1710, 9th Anne (“in all Cases where the Title or Bounds of any Estate in Land is determined, the Pleadings shall be all in writing, and shall be entered at large, with the Judgment thereupon, in particular Books set apart for that purpose only”); An act constituting the Court of Appeals, Laws of Virginia, October 1777 (granting court of appeals jurisdiction “in such cases as shall be removed before them by adjournment from the other courts before mentioned”); An act constituting the Court of Appeals, Laws of Virginia, May 1779 (“The auditors shall grant certificates to all witnesses, veniremen, and sheriffs, for their attendance in criminal cases, and shall allow them in such certificates two shillings per mile for travelling, and four pounds per day for their attendance, besides ferriages (instead of the allowances heretofore established by law) which the treasurer is directed to pay for their attendance at the general court.”); An act for incorporating the town of Richmond and for other purposes, Laws of Virginia, May 1782 (“the said court shall not hear and determine any penal case, unless it be for a breach of laws of the corporation, the penalty whereof does not exceed forty shillings, or two hundred pounds of crop tobacco, nor of any action beyond the value of one hundred pounds”); An act to approve, confirm, and ratify the compact made by certain commissioners appointed by the general assembly of the state of Maryland and by commissioners appointed by this commonwealth, Laws of Virginia, October 1785 (“in all cases to trial in pursuance of the jurisdiction settled by this compact, citizens of either state shall attend as witnesses in the other, upon a summons from any court, or magistrate, having jurisdiction, being served by a proper officer of the county where such citizen shall reside.”)

For other examples of statutes using “controversy” in a context in which its connotation can only mean “lawsuit,” see An Act to revive and continue certain parts of an Act, for ascertaining the fees of certain officers; and for better settling the fees of county court clerks, and sheriffs; and of attorneys, in causes depending in the county

This statutory usage of case or controversy, in turn, received judicial confirmation in *Commonwealth v. Caton*,¹⁵¹ the most authoritative pre-Framing judicial interpretation of these terms in a state jurisdictional statute. *Caton*, a famed pre-*Marbury* judicial endorsement of judicial review of the constitutionality of legislative acts, required Virginia's supreme Court of Appeals to determine whether Virginia's legislature had properly exercised its power to pardon three men convicted of treason. The Virginia "general court" had "adjourned," or referred, the case to the supreme Court of Appeals under a statutory provision that allowed the general court to do so in cases raising "new and difficult" legal questions.¹⁵²

However, the referral raised a preliminary jurisdictional question: did the legislature grant the Court of Appeals appellate jurisdiction over criminal proceedings? The answer turned on the meaning of the words "case" and "controversy." Specifically, the jurisdictional statutes provided that the Court of Appeals (1) "shall have jurisdiction, . . . in suits originating there and adjourned thither for trials by virtue of any

courts, to be allowed in the bill of costs; and for settling the fee for summoning witnesses, in controversies depending before the Governor and Council, Laws of Virginia, May 1732, 5th and 6th George II; An act for establishing the General Court, and for regulating the proceedings therein, Art. 29, Laws of Virginia, October 1748, 22th George II ("nothing in this act contained shall extend to any suits or controversies now depending in, or returnable to the general court"); An Act for altering the method of holding Courts in the Counties of Brunswick, Fairfax, Lunenburg, Frederick, Albemarle, and Augusta, Laws of Virginia, Preamble, October 1748, 22th George II ("That the said courts of the several counties aforesaid shall begin upon the respective days herein before appointed, and shall continue to be held from day to day, exclusive of Sundays, until all causes and controversies then depending before the said courts, respectively brought, by attachment, or petition, or in which any issue is to be tried, writ of inquiry to be executed, special verdict, case agreed, or demurrer to be argued, or any cause set down for hearing, or argument in chancery, shall be heard and determined."); An act for establishing county courts and for regulating and settling the proceedings therein, Laws of Virginia, Oct. 1748 ("the justices may adjourn from day to day, until all causes and controversies, then depending before them, shall be heard and determined"); An act for establishing a Court of Appeals, Laws of Virginia, October 1778 ("The said court [of appeals] shall have power to hear and finally determine all suits and controversies whatsoever which shall be brought before them by petition and appeal from the high court of chancery, or court of admiralty, or by writ of error sued out to correct any judgment of the general court, or which shall be adjourned thither from either of the said courts, on account of difficulty.").

¹⁵¹ 8 Va. (4 Call.) 5 (1782).

¹⁵² *Caton*, 8 Va. at 5 (reporters' note).

statute”; (2) “[in] all suits and controversies . . . which shall be brought before them by petition and appeal from . . . any judgment of the general court”; and (3) “in such cases as shall be removed before them by adjournment from the other courts before mentioned, when questions . . . new and difficult occur.”¹⁵³

The state argued that the terms “controversy” and “case” referred to privately initiated civil lawsuits, rather than publicly initiated criminal prosecutions.¹⁵⁴ Of the three reported opinions—by Chancellors George Wythe, Edmund Pendleton, and John Blair¹⁵⁵—Pendleton’s alone addressed the meaning of the jurisdictional statutes in detail.¹⁵⁶ He concluded that the term “suit” as well as the term “controversies” are synonyms for privately-initiated lawsuits, while the “more general” term “cases” referred to both private suits as well as public criminal prosecutions.¹⁵⁷ “Controversies,” he said, refers to civil disputes between “*litigant* parties.”¹⁵⁸ The “more general” word “case,” he continued, includes “controversies” so defined, as well as criminal suits.¹⁵⁹

Pendleton’s interpretation, moreover, makes sense of the statutes’ text. The text refers to “controversies” which are adjourned “by petition,” by appeal, or by “writ of error”—indicating that “controversy” is used to refer to different stages of a pending or filed legal suit. Similarly, the statute assumes that legal “questions” “occur” in a “case”—indicating that “case” is not simply the questions in the case, but the formal setting, including either a lawsuit or a criminal prosecution,

¹⁵³ *Caton*, 1782 Va. LEXIS at **1 (reporter’s summary of prior proceedings).

¹⁵⁴ *Caton*, 8 Va. at 9 (Wythe, J. op.) (statement of questions presented).

¹⁵⁵ A report of the case was not published until 1827, by Daniel Call. See Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1143 n. 90 (1987). Relying on Chancellor Pendleton’s notes of the case, Pendleton’s biographer, David Mays, supports the accuracy of Call’s reporting. See DAVID JOHN MAYS, 2 EDMUND PENDLETON 1721-1803: A BIOGRAPHY 187-202 (1952) (cited in Sherry, *supra*, at 1143 n.90); see also William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. Pa. L. Rev. 491, 532 (1994) (“where Call’s account is consistent with, but more detailed than, Pendleton’s—as is the case with his report of Wythe’s opinion—Call’s report is presumably accurate.”).

¹⁵⁶ Wythe’s reported opinion deals with the question in a cursory fashion. *Caton*, 8 Va. at 5 (Wythe J., op.) .

¹⁵⁷ *Id.* at 14-16.

¹⁵⁸ *Id.* at 14 (emphasis added).

¹⁵⁹ *Id.* at 15.

in which such questions arise.

The settled interpretation of colonial statutes, in turn, framed the drafting of the Constitution's judiciary articles. The text of Article III did not take its final form until after the Committee on Detail (a five member committee composed of James Wilson, Edmund Randolph, John Rutledge, Oliver Ellsworth, and Nathaniel Gorham) reported its draft of the Constitution to the Committee on the Whole on August 6, 1787.¹⁶⁰ Edmund Randolph, who argued *Commonwealth v. Canton* for the state of Virginia as its attorney general, and James Wilson took the lead on drafting.

Before the Committee took up the drafting oar, however, the Committee on the Whole had framed the goals of the judiciary article broadly, leaving the Committee on Detail the task of reducing these principles to concrete legal language: The New Jersey plan, for example, stated that jurisdiction should extend to "cases in which foreigners may be interested"; and the Virginia plan stated that jurisdiction should extend to "cases in which foreigners or citizens of other States applying to such jurisdictions may be interested." The Committee on the Whole's final resolution on the judiciary articles framed the goal even more broadly: it tasked the Committee with producing a judiciary article that would extend jurisdiction to "questions which involve the national peace and harmony."¹⁶¹

One might be tempted to view these resolutions as evidence that case and controversy are broad enough to encompass pre-litigative questions in which persons in different states, and the like, are interested, for purposes of establishing subject matter jurisdiction. The evidence, however, tends to cut the other way. First, Edmund Randolph's initial draft of the judiciary article provided that "[t]he jurisdiction of the supreme tribunal shall extend . . . to such other cases, as the legislature may assign, as involving the national peace and harmony . . . in disputes between the citizens of different states . . . and in disputes, in which subjects or citizens of other countries are concerned."¹⁶² Here, by referring to "cases . . . in disputes," the draft distinguishes "cases" from the larger dispute out of which it arises—suggesting cases is used in the

¹⁶⁰ 2 FARRAND, *supra* note 142, at 176.

¹⁶¹ 1 FARRAND, *supra* note 142, at 231, 237; 2 FARRAND, *supra* note 142, at 46.

¹⁶² 2 FARRAND, *supra* note 142, at 146-47.

sense of “suit,” not “dispute preceding the suit.” Note, as well, that the final draft jettisoned the jurisdictional grant over “cases . . . in which subjects or citizens of other countries are concerned,” replacing it with controversies “between a state, or the citizens thereof, and foreign states, citizens or subjects.” The final draft also jettisoned all other references to jurisdiction over “disputes” or “questions” in which various persons are vaguely “interested.”

By eliminating language that plainly would have supported a broad reading of Article III, the drafting history, if it has any interpretive import, cuts in favor, not against, the independent textual inference that Article III uses case and controversy as narrow terms of art. The framers, after all, knew how to authorize jurisdiction based on the identity of persons interested in the pre-litigative dispute, but chose not to do so.

And, indeed, James Wilson’s later comments on the Committee’s work suggest this is the correct inference: He noted that the Committee converted the broad resolutions into specific enumerations in order “to lessen or remove the difficulty arising from discretionary construction” of the Constitution’s power-conferring grants.¹⁶³

After the Committee reported its work, interpretations continue to point in the same direction—either explicitly acknowledging, or consistent with, use of “case” and “controversy” to mean “suit.” For example, on August 30, 1787, Governour Morris proposed an amendment to the Committee of the Whole granting Congress the power to make rules and regulations governing the territories.¹⁶⁴ Luther Martin moved to amend Morris’s proposal by adding the following clause: “But all such claims may be examined into & decided by the supreme Court of the United

¹⁶³ Wilson made that comment while explaining to the Pennsylvania ratification convention why the Committee had replaced a similarly broad resolution—that the national legislature should be competent “to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted”—with the enumeration of legislative powers in Article I, § 8. Speech Delivered in the Convention of Pennsylvania (Nov. 26, 1787), in 2 THE WORKS OF JAMES WILSON 765 (Robert McCloskey, ed. 1967). Given the parallel generality of the resolutions on Congress’s and the judiciary’s powers, Wilson’s explanation of the Committee’s use of enumeration in Article I sheds light on the parallel use of enumeration of specific cases and controversies in Article III. See, e.g., David Engdahl, *Intrinsic Limits on Congress’s Power Regarding the Judicial Branch*, 1999 B.Y.U. L. Rev. 75, 148.

¹⁶⁴ 2 FARRAND, *supra* note 142, at 466.

States.”¹⁶⁵ Morris, joined by a majority of delegates, objected that the amendment was “unnecessary as all *suits* to which the United States are parties are already decided by the Supreme Court.”¹⁶⁶ Because the then-current draft of the Heads of Jurisdiction provided that the judicial power extends to “controversies to which the United States shall be a party,”¹⁶⁷ Morris’ objection treats “controversies” and “suits” as synonyms.¹⁶⁸

After the Convention reported its draft to the states, various ratifying conventions reported amendments that evidenced a similar understanding of case and controversy. New Hampshire, for example, proposed amending the draft to include a proviso that “all common-law cases between citizens of different states shall be commenced in the common-law courts of the respective states.”¹⁶⁹ By referring to the “commence[ment]” of “cases” in “court,” the text uses case to mean suits rather than questions *preceding* a suit.¹⁷⁰

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (emphasis added).

¹⁶⁷ *Id.* at 423 (motion to add words “to which the United States shall be a party” after the word “controversies” passed on August 27, 1787).

¹⁶⁸ Similarly, a draft circulated either toward the end of the Committee on Details’s drafting process or after the Committee had reported its final draft, provides, like the final version of Article III, that federal jurisdiction shall extend “to controversies . . . between citizens of the same State claiming lands of different States,” but also provides, in its version of the Original Jurisdiction Clause, that “in suits between persons claiming lands under grants of different States the Supreme Court shall have original jurisdiction.” *Id.* at 432-33. By referring to the “controversies” involving land grants of different states as “suits,” the draft treats the terms as synonyms.

¹⁶⁹ 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (Jonathan Elliot, ed.).

¹⁷⁰ See, e.g., JOSEPH HARRISON, THE ACCOMPLISH’D PRACTISER IN THE HIGH COURT OF CHANCERY, at 73 (1st American ed. 1807) (chapter on “commencement of suits”); 3 WOODSON, *supra* note 109, at 367 (referring to the “commencement of a suit in equity”).

Virginia’s delegates proposed an amendment which, in the illustrative version introduced in Virginia, provided that “the judicial power shall extend to no case where the cause of action shall have originated before the ratification of this Constitution, except in *suits* for debts due to the United States. . . .” See, e.g., 3 ELLIOT’S DEBATES, *supra* note 169, at 530 (proposal of George Mason at Virginia ratifying convention). By treating “suits for debts due to the United States” as an exception to the general rule that the judicial power shall extend to “cases,” the text treats cases and lawsuits as synonyms. See also *id.* at 530 (remarks of George Mason) (referring to the amendment’s various exceptions from the bar on retroactive jurisdiction, including “suits” for debts owed the United States, as “these cases”).

North Carolina’s similarly read: “the judicial power of the United States shall

Despite spinning many ingenious horror stories, no anti-federalist suggested that jurisdiction would turn on the identity of a vaguely defined class of persons other than the parties to the suit. In the most extended anti-federalist treatment of the Heads of Jurisdiction, Brutus assumes that the citizenship inquiry under the Diversity Clause will turn on the citizenship of persons who are parties “in a suit” through formal “process,” and pitches his opposition to the Clause based on fears that courts would devise “fictions” governing the citizenship of parties.¹⁷¹

The Heads of Jurisdiction were the subject of the most extensive ratification debates in the Pennsylvania, Virginia, and North Carolina ratifying conventions. Yet, despite 228 uses of “case,” and 50 uses of “controversy” during discussions of the judiciary articles, I have found no instance in which a speaker defines the words to extend to pre-litigative questions or disputes. To the contrary, “suit” is the meaning of every unambiguous use of the words—by James Wilson in Pennsylvania’s ratification debates, who referred to parties to controversies with the United States as “suiters”; and James Iredell in North Carolina’s, and George Mason, John Marshall and John Madison in Virginia’s, who interchangeably used the words “cases,” “controversies,” and “suits” as synonyms.¹⁷²

extend to no case where the cause of action shall have originated before the ratification of this Constitution, except in disputes between states about their territory, disputes between persons claiming lands under the grants of different states, and suits for debts due to the United States.” 4 ELLIOT’S DEBATES, *supra* note 169, at 246.

¹⁷¹ His comments, in turn, clearly equate “parties” to Article III controversies with parties to suits, and therefore use “controversy” to mean lawsuit, not disputes that precede a lawsuit. Essays of Brutus XII, Feb. 14, 1788, in 2 THE COMPLETE ANTI-FEDERALIST 426-27 (Herbert J. Storing, ed. 1981). See also *id.* at 246 (“[n]othing more is necessary than to set forth, in the process, that the party who brings the suit is a citizen of a different state from the one against whom the suit is brought”).

¹⁷² 2 ELLIOT’S DEBATES, *supra* note 169, at 490 (James Wilson) (parties in “controversies” with the United States are “suiters”); 4 ELLIOT’S DEBATES, *supra* note 169, at 145 (remarks of James Iredell) (interchangeably referring to “suits” and “cases” as settings for jury trial—i.e., a lawsuit); 3 ELLIOT’S DEBATES, *supra* note 169, at 557 (John Marshall) (referring to a “controversy” between a state and foreign state as “such a suit”); 3 ELLIOT’S DEBATES, *supra* note 169, 523 (remarks of George Mason) (referring to “controversies” between citizens claiming land grants under different states as “suits”: viz., absent the grant of jurisdiction over such a controversy, “the suit must be brought and decided in one or the other state, under whose grant the lands are claimed, which would be injurious, as the decision must be consistent with the grant.”); *id.* at 527 (remarks of George Mason) (interpreting clause extending jurisdiction over “controversies between a state, or the citizens thereof, and foreign states, citizens, or

Indeed, in every instance in which members of every state ratifying convention specified the procedural status of citizens of different states under the Diversity Clause or others “between” whom a controversy must subsist (aliens, states, and foreign states), they identified these persons or entities as “parties” to either “suits” or “actions,” and never once referred to them as persons interested in the underlying questions litigated.¹⁷³

Of course, because no one rejected a broader meaning of the terms, none of the evidence definitively excludes the possibility that the framers understood that the words case and controversy might encompass pre-litigative disputes for purposes of establishing subject matter jurisdiction. The important point is that the framers and ratifiers pervasively explained the terms case and controversy at a narrow level of generality, to refer to duly instituted suits or related legal proceedings, rather than the abstract

subjects” to refer to “suits between [a state] and a foreign state”); 4 ELLIOT’S DEBATES, *supra* note 169, at 428 (remarks of James Madison) (noting the Constitution grants federal courts jurisdiction over “suits between citizen and citizen”).

James Madison not only insisted that federal jurisdiction was confined to “suits,” but invoked the law of proper parties, which regulated litigants’ capacity to sue, to explain why states would not be “made parties” to a lawsuit in federal court without their consent. 3 ELLIOT’S DEBATES, *supra* note 169, at 532-33 (under the law of proper parties, diversity jurisdiction “will not go beyond the cases where [citizens] may be parties. A femme covert [i.e., a married woman] may be a citizen of another state, but cannot be a party in this court.”); *id.* (“[a] subject of a foreign power . . . may carry [a state] to the federal court; but an alien enemy cannot bring suit at all.”); *id.* (because, under the law of proper parties, states cannot be made parties without their consent, grants of jurisdiction over controversies “between” states and citizens of other state also “can have no operation” unless “a state should condescend to be a party”). Because the proper parties requirement arose only in the context of litigation, Madison, here, treats Article III as a grant of jurisdiction over various kinds of suits between litigant parties, rather than a grant of jurisdiction premised on the interests that persons outside court may have in the litigated question.

¹⁷³ See, e.g., 1 ELLIOT’S DEBATES, *supra* note 169, at 323 (Massachusetts ratifying convention) (proposing alteration that would read: “In civil actions between citizens of different states, every issue of fact, arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it”); 1 ELLIOT’S DEBATES, *supra* note 169, at 326 (New Hampshire ratifying convention) (same); 2 ELLIOT’S DEBATES, *supra* note 169, at 132 (jury trial should be allowed trial by jury “in civil actions between citizens of different states, if either of the parties shall request it”); 2 ELLIOT’S DEBATES, *supra* note 169, at 491 (Pennsylvania ratifying convention) (remarks of James Wilson) (noting that the Diversity Clause allows parties to file suits against citizens of different states in federal court, it does not prevent “the parties [from] commenc[ing] suits in the courts of the several states”); 4 ELLIOT’S DEBATES, *supra* note 169, at 163 (federal jurisdiction lies where “parties” claim under land grants from different states).

questions that precede a lawsuit. The unrelenting specificity with which the framers' explained the terms correlates with the inferences of the text: both terms are used at a narrow level of specificity—to mean “suits”—and are not flexible enough to mean disputes for purposes of establishing subject matter jurisdiction.

C. Reconstituting the Diversity Clause

Hamilton's claim that Article III's party-based Heads of Jurisdiction turn on the identity of parties interested in the questions that precede a suit accordingly finds no direct supporting evidence in text, drafting history, or pre-ratification interpretations of Article III.

Rather, that evidence uniformly points the other way: Article III cases and controversies are terms of art that refer to suits. As we have seen, “suits” subsisted only “between” persons who were “before the court” and capable of being bound in some sense—that is, in conventional eighteenth century parlance, “parties to the suit.”

The upshot is that Marshall had the big picture right, but his narrow construction of the term “party” in *Osborn* wasn't required as a matter of original meaning. Article III's party-centered Heads of Jurisdiction, interpreted for all they are worth, turn on the identity of those who meet prerequisites to be bound in some sense, a category broader than the parties named as such in the case caption of a federal complaint.

To be sure, while the intratextual evidence is strongly suggestive, and the historical evidence of meaning one sided, that evidence is also circumstantial: there is no smoking gun that proves, to a historical certainty, that the framing generation would have accepted the understanding of the Diversity Clause advanced above.

For original meaning originalists, however, that's not a problem: originalism's goal is determining the objective—that is, the “most likely”—meaning of the text, a burden of proof that is either explicitly adopted by, or implicit in, all conventional applications of “original meaning” originalism.¹⁷⁴ Readers can judge for themselves whether the evidence presented above rises to, say, the level of “clear and

¹⁷⁴Barnett, *supra* note 7, at 69.

convincing”; but, the claim here is that the evidence available to us isn’t even arguably in equipoise between Hamilton’s and Marshall’s interpretations. One can reject the interpretation advanced above only at the price of dismissing reliance on the “more likely than not” standard of proof that underpins other conventional applications—to, say, the Second Amendment or the Commerce Clause—of the originalist project.

So understood, the concept of the jurisdictional party imposes outside limits on Congress’s power to define the scope of diversity jurisdiction. That is, Congress cannot authorize courts to exercise jurisdiction on a minimum diversity theory based on the citizenship of persons courts can’t bind. To be sure, under the horizontal portion of the Necessary and Proper Clause, Congress has wide power to prescribe laws “necessary and proper to carry into Execution” the judicial power, including laws prescribing “when and how the federal courts can hale people before them.”¹⁷⁵ And, under the current understanding of the Necessary and Proper Clause, Congress also has the power to control the *res judicata* effect of federal judgments, subject to the dictates of due process.¹⁷⁶ But Congress cannot rewrite the meaning of the party concept as a term of jurisdictional limitation: Because, said Marshall in *McCullough v. Maryland*, the Necessary and Proper Clause limits Congress to actions “within . . . the letter and spirit of the constitution,”¹⁷⁷ Congress must take the terms governing the conditions of execution of judicial power as it finds them. And because Article III’s text, understood in light of its original meaning, hinges diversity jurisdiction on the identity of persons who can be bound, Congress cannot pin minimum diversity¹⁷⁸ on the citizenship of persons that it has not

¹⁷⁵ Nelson, *supra* note 68, at 1630.

¹⁷⁶ Patrick Wooley, *The Sources of Federal Preclusion Law after Semtek*, 72 U. Cin. L. Rev. 527, 535 (2007); Stephen Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733, 781 (1986).

¹⁷⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

¹⁷⁸ There may be additional constitutional limits on minimum diversity. It is possible, for example, that some claims may be so transactionally unrelated that they constitute separate “suits” under the original meaning of the term, preventing the citizenship of parties in the diverse “suit” from grounding supplemental jurisdiction over parties to the separate, nondiverse “suit.” Cf. C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 Hastings L.J. 613 (2004) (suggesting eighteenth century principles governing necessary and permissive joinder should inform scope of a “constitutional case”); *but see* Matasar, *supra* note 5 (arguing scope of permissive joinder is a matter of legislative discretion). I do not investigate that possibility here.

authorized courts to bind at the time jurisdiction is tested.¹⁷⁹

This article also has no valence for debates about the statutory amount-in-controversy requirement. Congress obviously may, as a statutory matter, impose an amount in controversy limit on diversity jurisdiction and nothing in this article prevents Congress from allowing diverse claimants to satisfy that statutory limit by aggregating the anticipated value of absent class members' claims. The original meaning of the Diversity Clause requires only that the court's original jurisdiction depend on the citizenship of persons within the court's power to bind at the time jurisdiction is tested.

¹⁷⁹ Diversity jurisdiction is tested by party configuration at the time of filing. *Anderson v. Watt*, 138 U.S. 694 (1891). The original meaning of the Diversity Clause doesn't address how a plaintiff or removing defendant may demonstrate that the prerequisites for issuance of binding judgments have been met as a jurisdictional matter; that is a matter for construction.

The modern approach requires a full blown investigation into constitutionally required jurisdictional facts, such as the parties' citizenship, under the usual burden of proof applicable at trial. *See, e.g.*, Michael G. Collins, *Jurisdictional Exceptionalism*, 93 Va. L. Rev. 1829 (2007). But, a lesser, prima facie showing of contested jurisdictional facts that intertwine with the merits is permitted. *See, e.g.*, Kevin Clermont, *Jurisdictional Facts*, 91 Cornell L. Rev. 973 (2006) (prima facie showing made by showing of some plausible competent evidence supporting those facts); *see also* Collins, *supra*, at 1838-39 (noting pervasive early nineteenth century practice of allowing pleadings, absent objection, to establish jurisdictional facts).

While questions of proof of jurisdictional party status are beyond the scope of this article, it would fall within the range of acceptable liquidations to allow certification of service to presumptively establish a named defendant is a jurisdictional party, while allowing a defendant to overcome that presumption by showing that she has not received proper notice. In representative contexts, a lesser prima facie showing might establish contested facts intertwined with the merits, such as facts relating to adequacy of representation. Of course, some jurisdictional facts won't be present under any standard of proof. For example, the provision of required notice to putative class members and the completion of the opt out period—required to make Rule 23(b)(3) class members parties for purposes of preclusion under most standard accounts of preclusion in the class context, *see infra* notes 204-15 and accompanying text—are plainly not in being at the outset of a putative class action.

For reasons suggested in the next section, courts should treat completion of the certification process at the trial level as a prerequisite for recognizing absent class members as jurisdictional parties, absent further direction from Congress. *See infra* notes 216-25 and accompanying text.

VI. The Structural Role of the Diversity Clause

It is left to show that the original meaning of the Diversity Clause yields normatively satisfying results in concrete cases.¹⁸⁰ In sections A and B, I show that enforcing its original meaning serves two structural principles: federalism, by protecting state's sovereignty over litigation in their courts, and separation of powers, by reinforcing a role for Congress in defining the proper scope of *res judicata* at the federal level.

I conclude, in section C, with an illustration of the ways that enforcing the original meaning of the Diversity Clause serves these values, with a focus on the implications of its original meaning for the scope of diversity jurisdiction in the class action context.

A. Liberty Interests as a Federalism Safeguard

Among skeptics of the new Constitution, the party-based Heads of Jurisdiction were viewed as, in George Mason's words, "unnecessary, and dangerous."¹⁸¹ Federalists, in turn, were lukewarm about the provision.¹⁸²

Opponents of the Diversity Clause pitched their concerns in terms of federalism—but in an antiquated sense that most advocates of federalism do not embrace today. Today, federalism is typically defended either in terms of "competitive federalism"—the idea that decentralization promotes competition for law among different legal regimes¹⁸³—or in terms of Justice Brandeis' "laboratory of the states" idea—which views federalism as a mechanism for testing out ideas at a local level before they are tried nationally.¹⁸⁴

Opponents of the Diversity Clause were concerned about

¹⁸⁰ Amar, *supra* note 12, at 801 (textual analysis must be supplemented by consideration of whether the reading actually works in action and yields "satisfying" results).

¹⁸¹ 3 ELLIOT'S DEBATES, *supra* note 169, at 527.

¹⁸² *Id.* at 533 (James Madison) ("As to . . . cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to the state courts.").

¹⁸³ See Charles Tiebout, *A Pure Theory of Local Expenditure*, 64 J Polit Econ 416 (1956).

¹⁸⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

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.

The party, as a concept of jurisdictional limitation, was designed to mollify opponents’ concerns, by placing raw limits on the power of federal courts to draw litigation out of state courts. And, against the baseline of preclusion law of the eighteenth century, it did that with a vengeance: triggering federal jurisdiction only when a cross-border dispute had been reduced to concrete litigation in which identifiable litigants meeting jurisdictional requirements had appeared in court, according to long-established, narrow, rules-based joinder principles.

That limitation also meshed with the anti-bias purpose of the Clause. The risk of bias against out of state litigants, of course, was much more acute in cases where an actual litigant resided out of state and the other resided in-state; the risk of bias was far more attenuated when both litigants resided in the same state but some nameless persons out of court lived out of state and had an interest in the suit.

Today, the scope of federal preclusion has changed, and with it the balance of power between federal and state courts under the Diversity Clause. But it still continues to protect raw state power, relative to that of federal courts, in a more indirect way.

To see how, it is necessary, first, to clarify the terminology of modern preclusion law. Modern preclusion law distinguishes between ordinary preclusion—the rules of merger and bar and collateral estoppel applicable to a named party-plaintiff or party-defendant—and “non-party preclusion”—the preclusive effect of a judgment on those not named as parties in the litigation. This party/non-party distinction reflects a change in the use of the party concept that occurred in the nineteenth century, as lawyers increasingly began to equate parties with persons named in a complaint and the additional persons bound as “privies,” rather than as “parties.”¹⁸⁵

Determining the outer range of persons who are jurisdictional parties today requires figuring out who *other than* the named party-

¹⁸⁵ Richards v. Jefferson County, 517 U.S. 793, 797-98 (1996).

plaintiff and defendant will be bound by subsequent judgments. That means the definition of jurisdictional parties turns on the reach of what we, today, call “non-party” preclusion. Thus, below, I use the term non-party in its narrow, modern sense, not in its Article III sense. When I refer to “jurisdictional parties” by contrast, I use the term party in its original Article III sense—meaning all the persons who will be bound by a judgment in the suit.

The right to a “day in court” is a liberty interest protected by the Due Process Clause,¹⁸⁶ while “non-party” preclusion—which allows one to be bound even if they have not literally had a “day in court”—describes a set of exceptions to that entitlement.¹⁸⁷ Each of those exceptions reflects a determination that an actual “opportunity to be heard” is not required by due process because constitutionally adequate safeguards substitute for that opportunity.¹⁸⁸

¹⁸⁶ *Id.* at 798-99.

¹⁸⁷ *Id.*

¹⁸⁸ The Supreme Court’s recent decision in *Taylor v. Sturgell*, 128 S. Ct. 2161 (2008), summarizes the five (actually six—I’ve condensed it to five) categories of expanded “non-party” preclusion:

First, those not named as parties in a suit may consent to be bound by it—for example, parties in actions arising out of the same transaction may “agree that the question of the defendant’s liability will be definitely determined, one way or the other, in a ‘test case.’” *Id.* at 2172.

Second, persons in a narrow class of “substantive legal relationship[s]” with the named party in a suit may be bound by judgments against the named party: for example, succeeding owners of property are bound by in rem judgments against the preceding owner. *Id.*

Third, persons who “assume control” over litigation, but did not appear as a formal party to the litigation, may be bound by judgments against the named party. *Id.* at 2173.

Fourth, a “special statutory scheme”—bankruptcy, for example—may “expressly foreclos[e] successive litigation by nonlitigants, if the scheme is otherwise consistent with due process.” *Id.*

Fifth, persons “adequately represented by someone with the same interests who [was] a party” to the suit are bound by a judgment against the representative if the representative relationship was understood by the absentee or if courts have assessed the adequacy of representation and respected other due process safeguards. *Id.* at 2172-73.

Absentees who fall within categories of non-party preclusion qualify as jurisdictional parties under Article III. That means that Article III allows federal courts to exercise jurisdiction on a minimum diversity theory over a suit, even if the plaintiff and defendant are nondiverse, if (1) an identifiable absentee has a relationship with one of the parties that draws her into any recognized category of non-party preclusion and (2) lives outside the state of an adverse party's residence at the time the suit is filed or removed.

Thus, the contours of non-party preclusion draw lines around the interests in a suit that are considered jurisdictional and therefore draw lines around the range of persons whose citizenship can ground minimum diversity. In effect, because the boundaries of non-party preclusion are a function of due process, Article III converts the Due Process Clause into a federalism safeguard.

This is not as peculiar as it sounds. Personal jurisdiction doctrine makes much the same use of due process. To protect individuals' liberty interests in the predictable exercise of state's power to issue extraterritorial compulsory process, the Court bars states from exercising personal jurisdiction over out-of-staters who have not purposefully directed their conduct toward the state or consented to the states' exercise of jurisdiction.¹⁸⁹ In *World-Wide Volkswagen v. Woodson*, the Court, in turn, held that personal jurisdiction doctrine "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."¹⁹⁰ However, in *Insurance Corporation of Ireland v. Compaigne Des Bauxites De Guinee*,¹⁹¹ the Court emphasized that the due process restraints on personal jurisdiction protect state sovereignty *by* protecting individual liberty interests. "The requirement of personal jurisdiction, as applied to state courts," the Court agreed in *Bauxites*, "reflects an element of federalism and the character of state sovereignty vis-a-vis other States."¹⁹² But "the restriction on state sovereign power" accomplished by personal jurisdiction doctrine "must be seen ultimately as a function of the individual liberty interest preserved by the Due Process Clause."¹⁹³ In

¹⁸⁹ 444 U.S. 286, 297 (1980).

¹⁹⁰ *Id.* at 291-92.

¹⁹¹ 456 U.S. 694 (1982).

¹⁹² *Id.* at 702 n.10.

¹⁹³ *Id.*

other words, by protecting individual's liberty interests, personal jurisdiction doctrine protects state sovereignty, by drawing lines around a state's ability to draw litigation out of other states.

Article III thus does exactly what personal jurisdiction doctrine does with respect to "state sovereignty vis-a-vis other States": It offers protection to states from the federal government "as a function of the individual liberty interest preserved by the Due Process Clause." The difference is that the liberty interest relevant to Article III is derived from the due process standards governing preclusion, while the liberty interest that is relevant in the personal jurisdiction cases turns on due process standards governing the territorial reach of compulsory process.

Of course, those who drafted the Constitution may not have anticipated the Diversity Clause and the Due Process Clause would interact in quite this way; they may have assumed joinder principles of the eighteenth century were fixed points in the legal universe and would, in turn, fix the scope of diversity jurisdiction. The meaning of a text, however, is different than expectations about its application; and, here, as original expectations about its application have become outmoded, a deeper structure lurking just beneath its surface comes to the fore.

Considered at a pure normative level, the deeper structure of the Diversity Clause may not attract passionate adherents today, as no one ascribes normative value to state sovereignty in the way that many in the eighteenth century did. Even so, the Diversity Clause reflects a compromise, essential to the Constitution's passage, with people who took that vision of state sovereignty seriously.¹⁹⁴

B. The Diversity Clause and Separation of Powers

The jurisdictional party enhances another, secondary structural feature of the Constitution: separation of powers.

It does so by providing an explicit textual basis for Congress's

¹⁹⁴ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1998) (Federalists were forced to concede that the "problem of sovereignty," meaning the concern that the Constitution would be driven to consolidate power at the expense of states, "was the most powerful obstacle to the acceptance of the new Constitution the opponents could have erected").

role in defining the preclusive reach of federal judgments. Article III's grants of jurisdiction are, of course, not self-executing. Because Congress must therefore define the scope of diversity jurisdiction federal courts can exercise, and because the permissible scope of diversity jurisdiction depends on the extent of federal courts' power to preclude, Congress will often be forced to make decisions about the proper scope of preclusion when defining the persons whose citizenship counts toward diversity jurisdiction.¹⁹⁵

By contrast, under the current understanding of the Diversity Clause, Congress is under no obligation to deliberate about the scope of preclusion when it decides to expand the scope of federal diversity jurisdiction. Predictably, Congress has generally ceded this territory to the common-lawmaking powers of federal courts.¹⁹⁶

Enforcing the original meaning of the Diversity Clause therefore has a modest but important democracy-forcing effect on the evolution of the law of preclusion. As Congress expands the universe of persons whose citizenship counts in the diversity calculus, it makes decisions about preclusion in the federal system.

Of course, due process imposes an outer limit on the scope of non-party preclusion. But, even here, Congress has a role to play. Modern due process doctrine is dynamic, rather than static. And, while changes in

¹⁹⁵ Of course, under *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), state rules of preclusion govern the preclusive effect of federal judgments in diversity cases as matter of federal common law. Where due process standards allow jurisdictional variation in the rules for non-party preclusion, Congress could, therefore, make jurisdictional party status contingent on applicable state law. However, in some cases, including in the class context, uniform federal rules control because "state law is incompatible with federal interests" in uniformity. *Id.* at 509; *In Bridgestone/Firestone, Prods. Liab. Litig.*, 333 F.3d 763, 767-68 (7th Cir. 2003) (Easterbrook J.) (*Semtek*'s proviso overcoming default application of state preclusion rules is applicable to class certification and other class judgments). In such cases, if Congress wants to treat persons outside the scope of federal preclusion principles as jurisdictional parties, it must displace the uniform federal common law rule. Moreover, when, as will often be the case, Congress wishes to employ diversity jurisdiction as a comprehensive net for certain classes of state law cases, uniform standards for diversity jurisdiction, and therefore uniform preclusion rules, will be required.

¹⁹⁶ A few exceptions prove the rule. *See, e.g.*, The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n) (2000) (precluding attacks on "an employment practice that implements . . . a litigated or consent judgment" by those who had actual notice, a reasonable opportunity to present objections, and were adequately represented).

that doctrine are court-driven, Congress is not irrelevant. At a minimum, Congress can try to influence the evolution of due process principles by staking out positions on the proper scope of preclusion in unsettled areas of the law. Some argue that Congress can even overrule many of the Courts' due process precedents in the preclusion arena, on the theory that those rules are a species of default "constitutional common law" that can be displaced by Congress.¹⁹⁷ Even if you reject this somewhat radical claim—which the current Supreme Court does not appear to accept¹⁹⁸—federal courts can certainly take the views of the political branches into account when deciding what due process requires.

Many non-originalists will quickly agree that the views of the political branches are relevant to liquidation of constitutional meaning.¹⁹⁹ What is less appreciated is that many, probably most, current originalists agree with this view to some degree, particularly when it comes to liquidating what due process requires. The content of the Due Process Clause is vague and indeterminate. Liquidating what that Clause means is accordingly a quintessential example of constitutional construction. A significant proportion—probably the dominant portion—of originalists agree that the constitutional constructions of federal courts should, at a minimum, *consider*, if not always defer to, the views of the political branches. As Keith Whittington argues, while constructions must "on occasion" be made by judges, those constructions are necessarily shaped by constitutional interpretations advanced by "political actors in and around the elected branches of government."²⁰⁰ Some originalists, of course, go farther, arguing that "when a constitutional question is . . . ambiguous . . . the tie for many reasons should go to the side of deference

¹⁹⁷ Henry P. Monaghan, *The Supreme Court, 1974 Term - Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 23, 24 (1975) ("ever lengthening line" of procedural due process cases "invite analysis" as a species of constitutional common law, subject to legislative alteration).

¹⁹⁸ The Supreme Court recognizes that due process leaves room for jurisdictional variation in non-party preclusion subject to a constitutional ceiling, but is coy about which of its due-process flavored preclusion precedents are constitutionally required. *See, e.g.*, *Taylor v. Sturgell*, 128 S. Ct. 2161 (2008) (reaffirming the existence of a constitutional ceiling on non-party preclusion, in the course of rejecting a virtual representation theory of preclusion, while refusing to specify whether its ruling is a matter of federal common law or is constitutionally required).

¹⁹⁹ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

²⁰⁰ Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol'y 599, 612 (2004).

to democratic processes.”²⁰¹

Either group would agree that federal courts should consider Congress’s views about that boundary when liquidating what the boundary actually is. Enforcing the original meaning of the Diversity Clause, in turn, will increase the odds that federal courts will have the benefit of Congress’s views on that question. When Congress considers treating persons who are not clearly proper objects of preclusion as jurisdictional parties, it is forced to deliberate about whether those persons should and *could* be subject to the preclusive effect of federal judgments, since only an affirmative answer on that score would allow Congress to treat those persons as jurisdictional parties. And, in such cases, Congress’s jurisdictional enactment provides federal courts with information about the political branches’ views of the constitutional boundaries on non-party preclusion.

C. Implications of Enforcing the Original Meaning of the Diversity Clause: The Example of CAFA

Enforcing the original meaning of the Diversity Clause, then, simultaneously protects federalism and draws Congress into a dialogue with federal courts over the scope of preclusion and due process at the federal level. The two goals are in some tension: Traditionally, federal courts have been reluctant to expand the scope of non-party preclusion.²⁰² Yet, the more the political branches are involved in defining preclusion principles and the more deference federal courts give to the political branches’ views on unsettled questions of preclusion, the less sanguine we can be that the law of preclusion will remain a stable line in the sand against aggrandizement of federal courts at the expense of state courts.

A sensible compromise that respects the importance of both the federal and separation of powers features of the Clause would require Congress to speak clearly about the preclusive effect of federal judgments before federal courts will consider upholding jurisdictional grants whose constitutionality depends on an expansive resolution of unsettled questions

²⁰¹ J. Harvie Wilkinson, *Of Guns, Abortion, and the Unraveling of the Rule of Law*, Va. L. Rev. ____ (2008) (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265118.

²⁰² See, e.g., Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 196 (1992).

of preclusion. As in other areas of the law, requiring this kind of clear statement from Congress protects state sovereign interests from federal encroachment by imposing process-based limits on Congress “derived from both the representation of the states in Congress and the procedural difficulties of federal lawmaking.”²⁰³

The point is illustrated by the Class Action Fairness Act. Whether CAFA’s jurisdictional provisions are consistent with Article III, originally understood, depends on unsettled questions about the scope of preclusion in the class context. Assessing CAFA’s constitutionality, in turns, provides an opportunity for courts to solicit Congressional input about how to resolve those questions. But, to respect the federalism-protecting role of the Diversity Clause, federal courts must demand that Congress squarely resolve these questions before upholding the statute.

1. The Questionable Constitutionality of CAFA

According to the conventional understanding of *Phillips Petroleum v. Shutts*,²⁰⁴ absent class members in a Rule 23(b)(3) class are, as matter of due process, beyond the preclusive reach of courts prior to the issuance of notice to the class and the expiration of the Rule 23 “opt out” period, which occurs after the trial court has assessed whether the class satisfies Rule 23’s commonality, typicality, adequacy and predominance requirements.

If that’s correct, CAFA’s jurisdictional provisions violate Article III. Absentees do not qualify as jurisdictional parties prior to certification and their citizenship cannot ground federal jurisdiction under a minimum diversity theory. The upshot is that, while the Diversity Clause doesn’t prevent removal of large aggregations of claims out of state courts *for pre-trial discovery and trial*, it does, in cases where the named plaintiffs and defendants are not diverse, delay that removal until the certification process is completed by the state court (making the state’s certification decision, in turn, the “law of the case”).

That doesn’t doom CAFA by any stretch of the imagination. Defendants could still remove large multi-state class actions into federal

²⁰³ Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after Gonzales v. Raich*, 2005 Sup. Ct. Rev. 1, 32.

²⁰⁴ 472 U.S. 797 (1985).

court where the named plaintiffs and defendants are minimally diverse. But it robs CAFA of its greatest promise: to create a seamless web of jurisdiction over nationwide class actions.²⁰⁵ While that result does not ruin federal efforts to comprehensively address abusive state-level class actions, it would force Congress to cast in new directions for a comprehensive fix.²⁰⁶

However, an alternative revisionist view claims that notice and opt out are not prerequisites to federal courts' power to bind absent Rule 23(b)(3) class members. If that is correct, CAFA might survive.

The revisionist view finds some significant support in the Court's opinion in *Shutts* itself. There, plaintiffs, owners of royalty rights from natural gas leases to Philips Petroleum, filed a class action in Kansas state court seeking interest due on royalty payments that Philips had withheld from the class. The defendant objected that Kansas lacked personal jurisdiction over the class members, the majority of whom resided outside Kansas, under the due process framework of *International Shoe*, because "Kansas had no prelitigation contact with many of the plaintiffs and leases involved."²⁰⁷ Absent such contacts, defendants, argued, Kansas can exercise personal jurisdiction over the class only if "out-of-state plaintiffs affirmatively consent," or opt in, "[to] the Kansas courts' . . . exert[ion] of jurisdiction over their claims."²⁰⁸ The Court disagreed opt in was required to establish consent, holding, instead, that constructive consent was sufficient to ground personal jurisdiction and that such consent is

²⁰⁵ By authorizing original and removal jurisdiction whenever class members are diverse, even if the named plaintiffs are not diverse, CAFA hoped to confer two benefits on defendants: First, it prevented plaintiffs' lawyers from evading federal jurisdiction by suing on behalf of non-diverse named plaintiffs, thereby allowing federal courts to exercise jurisdiction in *any* class action with national sweep. Second, it prevented plaintiffs' lawyers from subjecting defendants to simultaneous federal and state class actions with national reach. Through simultaneous federal-state litigation, plaintiffs increase pressure on the defendant to settle by inflating the defendants' cost of defending against the underlying claims. By ensuring that diversity jurisdiction arises whenever putative class members are diverse, CAFA denied plaintiffs the ability to execute this strategy by suing the defendant in state court on behalf of nondiverse named plaintiffs. Enforcing the original meaning of the jurisdictional party would, in turn, gut the features of CAFA that made these pay-offs possible, transforming CAFA from a comprehensive jurisdictional solution to class action abuse to a porous, and incomplete, solution.

²⁰⁶ See *infra* notes 227-29 and accompanying text.

²⁰⁷ 472 U.S. at 806.

²⁰⁸ *Id.*

established when an absent class member is provided notice of the class action, an opportunity to opt-out, and declines that opportunity.²⁰⁹

As noted earlier, modern personal jurisdiction doctrine is premised on the view that individuals have a liberty interest in the predictable issuance of extraterritorial compulsory process. Revisionists accordingly argue that *Shutts* is irrelevant when we turn to defining the scope of federal courts' personal jurisdiction. Federal courts "can exercise personal jurisdiction throughout the territory of the United States when authorized to do so by rule or statute, whether the underlying cause of action is based on federal or state law."²¹⁰ Because *Shutts*, in turn, requires notice and opt out as a condition of exercise of extraterritorial jurisdiction by states, *Shutts* has no direct implication for federal-level litigation.²¹¹

Revisionists argue that where a decision does not involve a direct or concrete determination of class members' right relief, procedural due process allows federal courts to bind Rule 23(b)(3) class members without providing them notice and an opportunity to opt out, so long as they are adequately represented at the time of judgment.²¹² A court's denial of class certification does not involve the direct adjudication of their right to relief. Therefore, so long as the class members were adequately represented during the certification hearing and an injunction enforcing the denial "leave[s] open the opportunity to bring statewide class actions," rather than national class actions, revisionists argue, class members may be bound by the certification denial without notice or an opportunity to opt out.²¹³

If *Shutts* revisionists are correct, CAFA's treatment of absent class members as jurisdictional parties could survive, at least in most applications. Class members qualify as jurisdictional parties once

²⁰⁹ *Id.* at 812.

²¹⁰ Wolff, *supra* note 42, at 2093.

²¹¹ Of course, as Mark Weber notes, the revisionist account glosses over the fact that the Court "flatly stated" that notice and opt out was required to bind class members. Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, J. L. Reform 347, 382 (1988).

²¹² Wolff, *supra* note 42, at 2101-02.

²¹³ *Id.* at 2105-09. Revisionists agree that if a class is certified, notice and opt out may be required to reach a final judgment on class members' ultimate right to relief. *Id.* at 2102, 2106-07.

adequacy of representation is assessed—they are capable of being bound “in a sense,” because they are subject to issue preclusion if the certification request is denied. Federal courts, in turn, have “jurisdiction to determine their jurisdiction,”²¹⁴ and nothing in the federal rules of procedure prevents a federal court from undertaking an early assessment of adequacy as part of the removal jurisdiction inquiry.²¹⁵

Thus, *if* we accept that *Shutts* is inapplicable at the federal level, Article III is susceptible to constructions that could save CAFA’s treatment of Rule 23(b)(3) absentees’ citizenship from at least a facial challenge, and would also likely save its treatment of absentees’ citizenship in many applications of the statute.

2. Rectifying the Federalism and Separation of Powers Problems with CAFA

Resolving uncertainty about *Shutts*, and CAFA’s constitutionality, requires a clear statement rule: that is, before upholding CAFA, courts must demand Congress clearly state that federal courts can bind adequately represented absent class members to a certification denial without notice and opt out. Application of the clear statement rule would leave open the possibility that courts would revisit *Shutts* and uphold CAFA if Congress reenacts the absent class member-citizenship provision, coupled with the clear statement.²¹⁶

Applying a clear statement rule captures both the federalism and separation of powers benefits of the Diversity Clause, originally understood. First, expanding federal jurisdiction will always be politically more costly when consensus must be reached not only on the scope of

²¹⁴ *United States v. Mine Workers*, 330 U.S. 258, 291 (1947).

²¹⁵ Congress might, for reasons suggested earlier, also permit a lesser showing of adequacy for jurisdictional purposes than for purposes of certification. *See supra* note 180; *compare* *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (allowing standing to be assessed on a motion to dismiss by taking the facts alleged as true). As I suggest in the next subsection, any such alteration in evidentiary standards applicable to jurisdictional facts should be made by Congress, not courts. *See infra* notes 220-25 and accompanying text.

²¹⁶ This approach is consistent with the Court’s use of clear statement rules to give teeth to process-based political restraints on Congress’s power in other contexts, including, for example, the Commerce Clause. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991).

federal jurisdiction vis a vis state courts but also on the scope of federal courts' coercive power over individuals. As a result, requiring Congress to deliberate about the scope of preclusion in the class context imposes process-based political hedges against expansion of minimum diversity at the expense of states.

Indeed, it's not clear Congress would have passed CAFA in its present form if CAFA's treatment of the citizenship of absent class members depended on recognition that those class members could be bound against their interests without notice or an opportunity to opt out. Many libertarian-leaning conservatives, including some prominent members of the Congress that enacted CAFA, favored moving to an opt-in regime, in which class members must affirmatively consent to representation before they can be subject to the preclusive effect of a judgment.²¹⁷ On the other side, corporate defendants tend to favor restricting the autonomy rights of class members, because settling classes in which class members have no exit rights allows defendants to buy out claims wholesale from the litigation market, achieving peace. In a world in which the Supreme Court enforced the original meaning of the Diversity Clause, accordingly, one might expect to see libertarian-oriented conservatives split with business-oriented conservatives over a proposal that treats absent class members as jurisdictional parties, given the implications for the preservation of exit rights in the class context.

Second, when the political branches reach a consensus favoring expanding the citizenship inquiry, courts have a far more powerful democratic warrant to expand the scope of non-party preclusion over those persons. As a result, enforcing the original meaning of the Diversity Clause also opens a dialogue between Congress and federal courts about the outer reach of the power to bind in the class context.

From the standpoint of federalism and separation of powers, those results compare favorably to our world, in which the original meaning of the Diversity Clause is unenforced. In our world, of course, the Congress

²¹⁷ For example, in the year CAFA passed, then Rep. (now Securities Exchange Commission (SEC) Chairman) Christopher Cox circulated a draft bill (tentatively entitled the "The Right to Choose Your Lawyer Act") that would have changed federal rules governing damages class actions to require absent class members to opt in, rather than opt out, in order to be bound by a class judgment, Email from Christopher Cox's Chief of Staff Peter Uhlmann [DATE] (on file with author)—a proposal endorsed, in turn, by the libertarian Cato Institute. [CITE].

that passed CAFA didn't face the political restraints that enforcing the original meaning of the Diversity Clause would impose.²¹⁸ Moreover, post-CAFA, uncertainty about the meaning of *Shutts*, and the relation between notice, opt out, and preclusion in the class context, will probably be resolved without any input by Congress.

The latter risk is evident in the wake of CAFA's passage. CAFA has worked a "dramatic change in the allocation of class actions within the dual American court system."²¹⁹ And commentators in turn have treated CAFA's enactment as though it has implicitly "giv[en] voice to regulatory policies" favoring "class actions—and, in particular, the federal forum—in promoting the fair and efficient resolution of claims."²²⁰ In light of this a penumbral "policy," a host of major proceduralists argue CAFA invites judicial readjustments, sometimes radical, to the conventions that frame and regulate federal judicial power, because those conventions are not up to the task of furthering "fair" and "efficient" claim resolution. CAFA, it has been argued, favors overruling *Klaxon Co. v. Stentor Electrical*, which holds that federal courts must follow the choice of law rules of the forum state, in the class context;²²¹ expanding, without further legislative authorization, antisuit injunctions against state-filed actions;²²² and even rethinking the larger contours of the *Erie* doctrine,²²³ despite the statute's silence on all of these questions.

The reaction to CAFA illustrates that major jurisdictional policy shifts have power to catalyze the intellectual culture of the federal legal system, with hard-to-predict implications for the judge-made rules governing judicial federalism.

While it is too early to make firm predictions for CAFA's impact

²¹⁸ Congress did not consider whether the gains from expanding diversity jurisdiction are worth curtailing absent Rule 23(b)(3) class members' rights to notice and an opportunity to opt out; as discussed, the design of the Diversity Clause makes that liberty interest a proxy for states' sovereignty interests. See *supra* notes 186-94 and accompanying text.

²¹⁹ Wolff, *supra* note 42, at 2036-37.

²²⁰ *Id.* at 2038.

²²¹ Samuel Issacharoff, *Settled Expectations in an Unsettled World: Choice of Law After the Class Action Fairness Act*, 106 Colum. L. Rev. 1839 (2006).

²²² Wolff, *supra* note 42, at 2046-73.

²²³ Suzanna Sherry, *Overruling Erie: Nationwide Class Actions and National Common Law*, 156 U. Pa. L. Rev. (2008).

on principles of *res judicata*, commentators have also relied on CAFA's penumbral "regulatory policies" to revive the argument that opt out is not required to bind absent class members, again despite CAFA's silence on this question.²²⁴ It is far from clear whether this view will catch on post-CAFA, but, in a decision predating CAFA's passage, Judge Easterbrook held that absent class members were precluded from relitigating certification, because the court that denied the class representative's certification request determined, in the course of denying that request, that the class members were adequately represented.²²⁵ Defense counsel will obviously redouble their efforts to convince courts to follow Easterbrook's approach in CAFA's wake, and courts may well treat CAFA's supposed regulatory "vision" as a thumb on the scale in favor of doing so.

If, as the *Shutts* revisionists argue, the modern doctrine of non-party preclusion ill-serves the penumbral "regulatory policies" that CAFA supposedly reflects, Congress—not courts—should make the changes. Unfortunately, by separating questions about diversity jurisdiction from questions about the scope of *res judicata*, modern jurisdictional doctrine has allowed Congress to expand jurisdiction but punt questions about preclusion to unaccountable federal courts.

Enforcing the original meaning of the jurisdictional party, in turn, stands this state-of-affairs on its head: If Congress wants to expand the range of persons whose citizenship counts toward federal diversity jurisdiction, it must take a position on courts' power to bind those persons' rights. Jurisdictional policy and preclusive policy are made hand in hand by Congress.

3. Some Final Objections Considered

A predictable objection goes like this: Federal jurisdiction over class actions results in real efficiencies, by increasing the accuracy of class judgments and eliminating wasteful duplicative federal-state litigation. At the same time, litigant autonomy is normatively valuable. Isn't it perverse to force Congress to choose between these two goods?

²²⁴ Wolff, *supra* note 42, at 2045, 2109-17 (tacit "imprimatur" of CAFA favors expanding preclusion beyond traditional *Shutts* boundaries in Rule 23(b)(3) classes).

²²⁵ *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 769 (7th Cir. 2003).

At one level, the response is that a trade-off between these goods is inescapable under a Constitution that protects state sovereignty through the law of *res judicata*. To realize limits on federal courts' jurisdiction, lines had to be drawn. Any line-drawing exercise will involve difficult tradeoffs. Using the strength of our commitment to autonomy rights in the preclusion arena as that line is no less perverse than making liberty interests against compulsory process the line that protects states from the extraterritorial reach of other states. That line also forces courts to make hard trade-offs—there, between protecting individual liberty interests and realizing efficiency gains derived from consolidation of suits in a single state.²²⁶

Second, the objection slights the fact that Congress can sometimes achieve the same efficiencies achieved by CAFA in other ways. Congress could use its commerce power to “establish legislative limits on state courts['] ability to exercise personal jurisdiction over . . . individuals who have no contacts with the state,” thereby limiting state jurisdiction over multi-state class actions;²²⁷ or preempt state law causes of action between citizens of different states and create a federal right of action in its place, creating federal question jurisdiction over class actions in that area;²²⁸ or commit matters now dealt with by state-level class actions to administrative oversight, giving agencies the power to preempt state law.²²⁹ Enforcing the original meaning of the Diversity Clause does not require a stark choice between protecting litigant autonomy and realizing the efficiencies of federal management of class litigation—it requires a choice between achieving those efficiencies by expanding federal diversity jurisdiction or achieving those efficiencies through another constitutionally adequate avenue.

²²⁶ True, some originalists believe pragmatic considerations can help differentiate between different constitutional constructions of an ambiguous text. Solum, *supra* note 5, at 79. But the evidence presented below underscores that the link between preclusion and the scope of diversity is required by the Diversity Clause. These tradeoffs are simply inescapable if we enforce its original meaning.

²²⁷ Pfander, *supra* note 42, at 1468.

²²⁸ Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Actions*, 102 Nw. U.L. Rev. 551 (2008).

²²⁹ Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. Tort Law, art. 4 (2006). For those who take a narrow view of Congress's commerce power, I've sketched a more creative route to reform. See, e.g., Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 Harv. J.L. & Pub. Pol'y 855 (2005).

Third, even if enforcing the original meaning of the Diversity Clause will often force difficult trade-offs between efficiency and autonomy, enforcing the original meaning of the Diversity Clause does not require senseless trade-offs. Indeed, in many cases expanding jurisdiction and curtailing litigant autonomy will make good sense. In a hypothetical world in which courts enforce the original meaning of the jurisdictional party, Congress will expand minimum diversity only in cases where Congress believes the anticipated value of federal management is significant enough to outweigh the normative cost of curtailing the “day in court” entitlement.²³⁰ If, in turn, expanding federal control over multi-state class actions results in significant gains in accuracy and cost-savings, those gains will usually swamp any gains that might come from permitting prior judgments to be relitigated by absentees: the accuracy benefits of relitigating judgments usually “decline[] sharply and rapidly approach[] zero as the number of lawsuits [seeking to relitigate prior judgments] increases.”²³¹ In the class context, for example, if the value of federal management of class litigation is so great, it will make sense for federal courts to preclude absent class members from relitigating a failed class certification bid in another forum.

Finally, refusing to enforce the original meaning of the Diversity Clause doesn’t eliminate the need to resolve difficult trade-offs between efficiency and autonomy in the class context. If the original meaning of the Diversity Clause remains unenforced, CAFA will remain on the books as is. And if the efficiency gains promised by CAFA are real, courts

²³⁰ People value the day in court entitlement for different reasons: including for both efficiency and autonomy. Bone, *Nonparty Preclusion*, *supra* note 202, at 237-79 (considering normative justifications for nonparty preclusion). Most people—including most members of Congress—are likely to value it for both autonomy and efficiency reasons. In addition, where—as with the opt out rule—there is a case to made a particular form of the entitlement is constitutionally required, some members of Congress will also believe that curtailing the right entails additional harms to the rule of law and separation of powers. As a result, Congress, as a body, is likely to rate the day in court entitlement more highly than it is worth from a pure efficiency standpoint.

²³¹ *Id.* at 246. Of course, as Bone notes, the efficiency of non-party preclusion will vary depending on the asymmetry of stakes between parties in the first suit. *Id.* at 251-55. The point, here, is not that non-party preclusion is always cost-justified, but that enforcing the original meaning of the Diversity Clause will rarely result in conjoined expansions of jurisdiction/ curtailment of the day in court entitlement where the latter decision is unjustified from an efficiency standpoint.

post-CAFA have powerful incentives to adjust preclusion doctrine in way that will allow them to protect the value of their judgments. If, for example, federal management of multi-state class actions is indeed as valuable as Congress presumes, courts have powerful incentives to adjust preclusion doctrine in way that will allow them to preclude absent class members from collaterally attacking federal judgments about the amenability of their claims to class treatment. Yet, because current law allows Congress to expand jurisdiction but punt on preclusion, courts are likely to do so unilaterally.

A refusal to enforce the original meaning of the Diversity Clause, then, won't insulate the law of non-party preclusion from the push and pull of class litigation. A refusal to enforce the original meaning of the Diversity Clause will ensure only this: *If* autonomy rights in class litigation are curtailed at the federal level, the choice will be made by unelected federal judges, acting outside the control of the political branches.

VII. Conclusion

This Article started with a puzzle created by a relatively obscure portion of the Class Action Fairness Act and ends with the rediscovery of a forgotten limit on Article III: the outer reach of diversity jurisdiction is cabined by federal rules of preclusion.

Discovering that limit revealed that, much like personal jurisdiction doctrine, Article III protects state sovereignty “as a function of [an] individual liberty interest preserved by the Due Process Clause.”²³² Rediscovering the meaning of the Diversity Clause, accordingly, helps restore some symmetry to our understanding of the role due process plays in limiting state courts’ power vis a vis those of other states and federal courts’ power vis a vis state courts.

Recapturing the original meaning of the Diversity Clause also revealed the Clause has a democracy-reinforcing effect. Because diversity jurisdiction is intertwined with the scope of courts’ preclusive power, enforcing the original meaning of the Clause can force Congress to deliberate about, and resolve, unsettled questions about scope of *res*

²³² *Insurance Corporation of Ireland v. Compaigne Des Bauxites De Guinee*, 456 U.S. 694, 702 n.10 (1982).

judicata as an incident to expanding diversity jurisdiction.

Finally, our investigation of CAFA's constitutionality suggested that a clear statement rule will help capture both the federalism and democracy-reinforcement benefits of the Clause. That is, federal courts must demand that Congress speak clearly about the preclusive effect of federal judgments before exercising diversity jurisdiction based on the citizenship of persons, like members of an uncertified Rule 23(b)(3) class, who fall outside the settled boundaries of the federal law of preclusion. As we have seen, requiring such a clear statement checks the expansion of diversity jurisdiction at the expense of states, while helping ensure that changes in the scope of federal preclusion occur through the democratic process, in response to real national needs. Together, both results vindicate the Diversity Clause's intended role in our system of federalism and separated powers.

We hardly knew the seemingly humble Diversity Clause. It is, as it turns out, worth knowing better.