

DIVERSITY JURISDICTION AND THE COMMON-LAW SCOPE OF THE CIVIL ACTION

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INTRODUCTION AND SUMMARY OF ARGUMENT

Federal law generally grants federal district courts subject-matter jurisdiction over prescribed “civil actions.”¹ But despite the ubiquity of the term, courts and commentators have mostly ignored the crucial role it

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1. See, e.g., 28 U.S.C. §§ 1330–1332, 1335–1336, 1338–1340, 1343–1344, 1347–1348, 1350, 1353, 1357, 1362–1365, 1367–1369.

plays.² This Article looks at diversity jurisdiction through the lens of the civil action and argues that a commonly accepted assumption about the scope of the civil action over which Section 1332(a) grants jurisdiction has obscured the proper application of the diversity and supplemental jurisdiction statutes in limited but important ways.³

The most common understanding of “civil action” includes within its scope the claims and defenses asserted together as a package by parties to litigation in accordance with the rules that govern joinder in a given procedural system.⁴ The scope of the civil action authorized by the Federal Rules of Civil Procedure (Federal Rules) is broad, and that breadth has influenced modern understandings of federal subject-matter jurisdiction in a variety of ways. A prominent example is the widespread modern assumption that complete diversity requires that all the plaintiffs in the civil action *authorized by the Federal Rules* be diverse from all the defendants.

This Article argues instead that a civil action within the meaning of Section 1332(a) has essentially the same *scope* as a suit at common law in 1789. A suit at common law prototypically involved a demand asserted by *one* party against another. Only when a “joint interest” was at issue could a suit at common law include more than one person on the same side of the “v.” The Marshall Court construed *both* the amount-in-controversy and diversity-of-citizenship requirements against this template *even when adjudicating suits brought under rules of party joinder more liberal than those at common law*. Specifically, parties on the same side of the “v.” who had distinct—as opposed to joint—interests were treated as if they were part of *separate suits* for purposes of analyzing subject-matter jurisdiction. The

2. The scholarly literature that seeks to grapple with the term is relatively sparse. For important scholarship, see, for example, Joan Steinman, *Claims, Civil Actions, Congress, & the Court: Limiting the Reasoning of Cases Construing Poorly Drawn Statutes*, 65 WASH. & LEE L. REV. 1593, 1603–05 (2008) (noting that a “civil action” ordinarily is understood to include the collection of claims asserted by parties in a judicial proceeding and arguing that the initial civil action asserted by the plaintiff or plaintiffs is the proper unit for determining whether the requirements of diversity jurisdiction have been satisfied); John Oakley, Reporter’s Memorandum on the Claim-Specific Nature of the Original Jurisdiction of the Federal Courts, FEDERAL JUDICIAL CODE REVISION PROJECT 599 (2004) (arguing that the original jurisdiction of the federal courts is only nominally action-specific); Richard Freer, *A Principled Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 36 (contending that a distinction exists between the basis of jurisdiction (which purportedly is claim-specific) and the scope of the civil action (which purportedly addresses what claims outside the jurisdiction-invoking claim may be heard by a federal district court)).

3. The implications of this Article’s approach for federal-question jurisdiction under Section 1331 will be developed in a separate article currently in progress. See Patrick Woolley, *The Elusive Reach of the Well-Pleaded Complaint Rule* (unpublished manuscript) (on file with author).

4. Steinman, *supra* note 2, at 1603–04 (“When persons knowledgeable of federal civil procedure think of a civil action, we normally conceive of the collection of claims and defenses that plaintiffs, defendants, intervenors, third-party defendants, and the like, are permitted by the Rules to assert against one another: claims by plaintiffs, counterclaims, cross-claims, third-party claims, etc., and the defenses to those claims.”).

settled rules governing the amount-in-controversy requirement are the product of this historical understanding. And because Section 1332(a) does not differentiate between the amount-in-controversy and diversity-of-citizenship requirements, the *same* definition of “civil action” must—as a textual matter—govern the application of both.

Treating a civil action for purposes of Section 1332(a) as having essentially the scope of a suit at common law means that the presence of a nondiverse plaintiff or defendant in a civil action authorized by the Federal Rules will not necessarily destroy diversity jurisdiction over *all* claims between plaintiffs and defendants in that action. Rather, the nondiverse party will spoil diversity jurisdiction only with respect to claims that would have been asserted in the same suit under common-law rules of party joinder. This distinction has important implications for subject-matter jurisdiction.

But the importance of the distinction has been obscured by the longstanding power of federal courts to cure defects in diversity jurisdiction. The presence of a nondiverse plaintiff or defendant in a civil action—however that action is defined—generally creates a jurisdictional defect. And by 1833, federal circuit courts in equity cases clearly had authority to cure such defects by dismissing nondiverse parties before entry of the decree. When a defect could not be cured through dismissal of the nondiverse party because the party was indispensable, the rules of equity required dismissal of the suit in its entirety. Thus, it was usually unnecessary for circuit courts to look to common-law joinder rules in applying the diversity-of-citizenship requirement to suits in equity.

Modern federal courts similarly may look to the civil action authorized by the Federal Rules when doing so would not affect the jurisdictional outcome. But attention to the precise scope of the civil action to which Section 1332(a) refers remains crucial. Indeed, there are at least two important jurisdictional provisions in which that scope makes a difference. First, the recognition that a civil action under Section 1332(a) has essentially the scope of a suit at common law sheds crucial light on Section 1367, the supplemental jurisdiction statute. Specifically, Section 1367 *sometimes* authorizes the exercise of supplemental jurisdiction over nondiverse plaintiffs in the civil action authorized by the Federal Rules, provided a civil action—as that term historically was understood—exists that would satisfy the requirements of diversity jurisdiction. And second, the common-law scope of the civil action under Section 1332(a) indicates that subdivision (3) of that section authorizes the joinder of citizens of foreign states as additional parties to a civil action only in connection with a joint right or obligation.

The argument unfolds in two parts. Part I recovers the historical understanding of the amount-in-controversy and diversity-of-citizenship requirements, with particular emphasis on the decisions of the Marshall Court. And Part II considers the relevance of the historical understanding to modern practice.

I. RECOVERING THE HISTORICAL UNDERSTANDING

Diversity jurisdiction under Section 1332(a) requires that there be complete diversity between all of the plaintiffs and all of the defendants in the civil action and that the amount-in-controversy requirement be satisfied. The modern assumption is that the relevant civil action for purposes of the complete-diversity requirement is the civil action authorized by the Federal Rules of Civil Procedure, but that each plaintiff generally must have claims against each defendant that satisfy the amount-in-controversy requirement.

This Part demonstrates that *both* the amount-in-controversy and diversity-of-citizenship requirements historically were understood in light of principles of party joinder that defined the scope of a suit at common law. Subpart A provides a primer on the difference between “joint” and “several” rights and obligations, essential concepts for understanding these principles. Subpart B discusses the amount-in-controversy requirement and explains why the use of common-law principles of party joinder in *all* cases to determine whether the requirement is satisfied furthered the balance between state and federal judicial systems struck by the Judiciary Act of 1789. Subpart C explains that the complete-diversity requirement similarly was applied in light of the principles governing the scope of a suit at common law, even in equity cases.

A. *A Brief Primer on “Joint” and “Several” Rights and Obligations*

The distinction between joint and several rights and obligations has no bearing on joinder under the Federal Rules.⁵ By contrast, the common law authorized the joinder of more than one plaintiff in a suit only if the plaintiffs shared a joint right and authorized the joinder of more than one defendant only if the defendants shared a joint obligation to the plaintiff or plaintiffs.⁶ Modern lawyers often view with trepidation the need to

5. FED. R. CIV. P. 20(a)(1)–(2) (authorizing in specified circumstances the joinder of multiple plaintiffs asserting “right[s] to relief jointly, severally, or in the alternative” and multiple defendants against whom “right[s] to relief are asserted jointly, severally, or in the alternative”).

6. See Jeffery L. Rensberger, *The Amount in Controversy: Understanding the Rules of Aggregation*, 26 ARIZ. ST. L.J. 925, 939–40 (1994) (“It was impossible to have a common law case in which one might seek to aggregate several and distinct claims by or against multiple parties because the

distinguish between “joint” and “several” rights and obligations. But although the distinction can be difficult to apply,⁷ the concepts themselves are not difficult to grasp. As the Seventh Circuit has noted, “where there is a single indivisible res, such as an estate or a piece of property (the classic example), it makes sense to think of co-parties’ claims to the res as common and undivided”⁸—in other words, “joint.” Put more abstractly, a joint interest is shared by parties on one side of a suit to the extent the *substantive law* creates the basis for their treatment as a unit vis-à-vis a party or parties on the other side of the “v.” It is after all the substantive law that determines whether an estate or piece of property should be treated as a single, indivisible whole.

A suit by the members of a partnership against a defendant for nonpayment provides another simple example. Because the substantive law of partnership provides that the partners *as a unit* would be entitled to recover for the alleged breach of contract, the partners—if joined as plaintiffs—share a joint interest.⁹ That does not necessarily mean that *each* partner would be entitled to an equal share of the contractually-required payment. The partnership agreement for example, might allot the senior partner 40% of the partnership’s income, and each of the six junior partners 10%. So although the partners share a joint interest vis-à-vis the defendant, they may have several interests as between themselves.

Consider, by contrast, a parent and her minor child who join in a suit against a tortfeasor. Because the parent and child are not a unit for purposes of tort law, it is simply not the case that they share a joint interest. The parent, for example, might seek to recover the cost of medical expenses in the suit and the minor child damages for permanent physical injury.¹⁰ Similarly, if a driver and her passenger join together in a negligence suit against the tortfeasor who caused the accident, the driver and passenger lack

rules of joinder at common law forbade joining such claims in the first place.”); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA 462 (1836) (“Now, in a suit at Common Law . . . no person can be made parties, except those, whose interests is joint . . .”). For a particularly lucid discussion of the rules of party joinder at common law, see Marlyn E. Lugar, *Common Law Pleading Modified Versus the Federal Rules*, 52 W. VA. L. REV. 137, 142–45 (1950). See also ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 98–99 (1952) (detailing the rules of common-law joinder in tort and contract actions).

7. See, e.g., 14AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3704 (4th ed. 2006) (arguing that the distinction between joint and several rights is unclear).

8. Travelers Prop. Cas. v. Good, 689 F.3d 714, 719–20 (7th Cir. 2012) (quotation marks and citations omitted); *id.* (treating these examples as “easy, paradigm cases”).

9. RESTATEMENT (SECOND) JUDGMENTS § 60 cmt. a (AM. L. INST. 1982) (noting that “[a]t common law, a partnership was treated as an aggregation of individuals and not as a jural entity distinct from its members” and that “partners were regarded as joint obligees and joint obligors in contract”). The law today often treats partnerships as a jural entity distinct from the partners themselves. See *id.* (discussing, among other things, the Uniform Partnership Act).

10. See, e.g., Rosario Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 127 (1st Cir. 2004), *rev’d in part sub nom.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

a joint interest. Because each has a separate and distinct claim for her own damages, the suit by definition adjudicates the several interests of the plaintiffs.¹¹

One final introductory point is crucial to understand: The mere fact that the substantive law creates a relationship between parties such that it is appropriate to treat them as a unit in some contexts does not mean that the parties will always assert a joint interest in any lawsuit in which they are joined. Whether parties assert a joint interest depends on how they are aligned in the suit. The law of partnership, for example, traditionally treats partners as having a joint interest in a contract suit against a third party. But if the partners are on opposite sides in a suit about the distribution of partnership profits, the partners lack a joint interest with respect to that dispute.

B. The Amount-in-Controversy Requirement

1. The Settled Law in Multi-Party Suits

The law is settled that in general *each* plaintiff in a civil action authorized by the Federal Rules must satisfy the amount-in-controversy requirement with respect to *each* defendant against whom the plaintiff asserts claims.¹² A plaintiff may not aggregate his claims against multiple defendants to satisfy the amount-in-controversy requirement unless the plaintiff has a “joint” right against the defendants, as opposed to a separate and distinct right against each defendant.¹³ Similarly, multiple plaintiffs cannot

11. See *Good*, 689 F.3d at 720 (“[W]here the plaintiffs’ claims are cognizable, calculable, and correctable individually,—say, personal injuries arising from mass torts—they are clearly separate and distinct . . .”) (quotation marks and citations omitted).

12. Steven S. Gensler, *Diversity Class Actions, Common Relief, and the Rule of Individual Valuation*, 82 OR. L. REV. 295, 307 (2003). (“[T]he diversity statute rarely allows joined parties to aggregate the value of their claims to satisfy the amount in controversy requirement.”).

13. 1 CYCLOPEDIA OF FEDERAL PROCEDURE § 2:295 (3d ed.) (“When there are two or more defendants, plaintiff may aggregate amounts against defendants to satisfy amount in controversy requirement only if defendants are jointly liable.”). The general rule, however, will usually lead to the right result even when the plaintiff has a joint right against two or more defendants. Consider, for example, the hypothetical offered by Professor Rensberger at a time when Section 1332(a) required an amount in controversy in excess of \$50,000: a suit by a plaintiff against two joint tortfeasors in which she claims the negligence of the joint tortfeasors proximately caused her damages in the amount of \$60,000. Rensberger, *supra* note 6, at 960. Strictly speaking, the amount in controversy is \$60,000, the amount of the defendants’ joint obligation to the plaintiff. But because each defendant is liable for the entirety of the plaintiff’s damages, and the plaintiff so alleges in her complaint, it makes no practical difference for purposes of the amount-in-controversy requirement whether the defendants are conceptualized as having separate and distinct obligations to the plaintiff or as having a joint obligation. Moreover, as Professor Rensberger has noted, such a case has nothing to do with aggregation: “Because each defendant under the substantive law of torts is liable for the whole amount, the plaintiff does not need to resort to aggregation. Instead, it is more accurate to view the case as one in which the plaintiff has a claim for \$60,000 against each defendant.” *Id.*

aggregate their claims against a defendant to satisfy the amount-in-controversy requirement unless their claims stem from a joint right or title in which the plaintiffs have a common and undivided interest.¹⁴ Put simply, “[t]he rules of aggregation allow two plaintiffs holding a joint right to use the total value of that right as the measure of the amount in controversy and likewise permit a single plaintiff with a claim for joint liability against multiple defendants to base jurisdiction on the total value of the plaintiff’s claim.”¹⁵

2. *The Settled Law and the Scope of the Civil Action*

The Court in *Snyder v. Harris* declared that the rules discussed in the previous subpart determine whether “the matter in controversy” satisfies the amount-in-controversy requirement.¹⁶ But that begs the question: What is the proper scope of a civil action under Section 1332(a)? After all, the statute grants original jurisdiction, not over “the matter in controversy,” but over a *civil action* in which the matter in controversy satisfies the amount-in-controversy requirement. And the text provides no basis for concluding that such an action may include separate “matter[s] in controversy” for each plaintiff. Thus, if the civil action referred to in Section 1332(a) were in fact the civil action authorized by the Federal Rules, the aggregation rules would make no sense from a textual perspective. The plain language of Section 1332(a) instead would suggest that the claims of *all* the plaintiffs against *all* the defendants in the civil action authorized by the Federal Rules would constitute the matter in controversy.

But in fact, the claims of *each* plaintiff against *each* defendant generally must satisfy the amount-in-controversy requirement. Multiple plaintiffs cannot aggregate their claims in the absence of a joint right, and claims against multiple defendants cannot be aggregated unless defendants have a joint obligation to the plaintiff or plaintiffs. These rules—which track the historical scope of a suit at common law—are consistent with the statutory

14. *Shields v. Thomas*, 58 U.S. 3, 4–5 (1854) (holding that the amount in controversy “was the sum due to the representatives of the deceased collectively” because they “all claimed under one and the same title” and “had a common and undivided interest in the claim” with respect to which “it was perfectly immaterial to the appellant, how it was to be shared among them”). *See also* *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40–41 (1911) (“[W]hen several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.”); Gary Igal Strausberg, Note, *Class Actions and Jurisdictional Amount: Access to a Federal Forum—A Post Snyder v. Harris Analysis*, 22 AM. U. L. REV. 79, 93 (1972) (“If the claims are joint—sharing a single right with a common and undivided interest—aggregation is allowed . . .”).

15. Rensberger, *supra* note 6, at 960.

16. *Snyder v. Harris*, 394 U.S. 332, 336 (1969) (“The doctrine that separate and distinct claims could not be aggregated . . . is based . . . upon this Court’s interpretation of the statutory phrase ‘matter in controversy.’”).

text only if the scope of the “civil action” over which Congress grants federal courts original jurisdiction under Section 1332(a) is essentially that of a suit at common law when the Judiciary Act of 1789 was enacted. Thus, a “civil action” within the meaning of Section 1332(a) is properly understood as having the same scope as a suit at common law for purposes of applying the amount-in-controversy requirement.¹⁷

The Court in *Oliver v. Alexander*¹⁸ so construed a provision of the Judiciary Act of 1789 that granted the Supreme Court appellate jurisdiction over “final judgments and decrees in civil actions, and suits in equity in a circuit court, . . . where the matter in dispute exceeds the sum or value of two thousand dollars.”¹⁹ The case involved claims by seamen for wages. Separate decrees had been entered in the court below in favor of each seaman, none of which individually exceeded \$900, and most of which were for less than \$500.²⁰ The seamen could not have joined together in one suit at common law.²¹ “But a different course of practice ha[d] prevailed for ages in the court of admiralty, in regard to suits for seamen’s wages.”²² And

17. The discussion in the text is limited to rules of *party* joinder at common law. A single plaintiff may aggregate even unrelated claims against a single defendant to satisfy the amount-in-controversy requirement. See Gensler, *supra* note 12, at 306–07 (“It is well-settled that, when a single plaintiff joins claims against a single defendant under Rule 18(a), the aggregate value of the joined claims determines whether the amount-in-controversy requirement is satisfied, regardless of whether the claims are transactionally related.”). This is so even though claim joinder was far more restricted at common law than it is today. See MILLAR, *supra* note 6, at 111 (“According to the rule of the common law, joinder of causes of action was limited to the case where all fell within the same form of action, with the two exceptions, accounted for historically, that detainee might be joined with debt and trover with trespass on the case.”). The case law provides no clear explanation for the divergent treatment of the rules governing party joinder from those governing the joinder of claims by a plaintiff against a defendant. Perhaps the best explanation rests in how a suit was defined at the time the Judiciary Act of 1789 was enacted. As Mark Moller has noted, “eighteenth-century treatises and courts defined a ‘suit’ as an association, or relation, that subsisted only ‘between’ the ‘parties to the suit.’” Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*, 51 WM. & MARY L. REV. 1113, 1136 (2009); *id.* (“If the ‘suit’ were matter, the ‘party to the suit’ was an atom—the suit’s component piece or building block.”). This issue is addressed at greater length in an article currently in progress. See Woolley, *supra* note 3. That article similarly addresses the role of counterclaims in satisfying the amount-in-controversy requirement.

18. 31 U.S. 143 (1832). Justice Story indicated that the Court’s treatment of the amount-in-controversy requirement in *Oliver* represented “the long and settled practice in the admiralty courts of our country.” *Id.* at 150. The jurisdiction of a district court to hear a cause in admiralty and maritime jurisdiction was not subject to an amount-in-controversy requirement. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77. But the Judiciary Act did impose an amount-in-controversy requirement on proceedings in the circuit court by appeal or writ of error. See *id.* §§ 21–22.

19. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84 (granting the Supreme Court appellate jurisdiction over “final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs”). The Court had held in *Wiscart v. d’Auchy*, 3 U.S. 321, 328 (1796), that “causes in admiralty and maritime jurisdiction” within the meaning of section 9 of the Judiciary Act were “civil actions” subject to Supreme Court review under section 22 of the Act.

20. *Oliver*, 31 U.S. at 145.

21. *Id.* at 145–46.

22. *Id.* at 146.

Congress by statute had specifically authorized the joinder of such claims.²³ Justice Story, writing for the Court, nonetheless insisted this difference in procedure between admiralty law and the common law did not make it easier to satisfy the amount-in-controversy requirement. Although the suit was “in *form* joint,”²⁴ what mattered was that *each* seaman had a *distinct* claim for wages. As the Court explained, the “whole proceeding . . . is in *reality* a mere joinder of distinct causes of action by distinct parties.”²⁵ For that reason, the seamen’s claims could not be aggregated to satisfy the amount-in-controversy requirement.

The Court later expressly extended *Oliver*’s amount-in-controversy holding. *Paving Co. v. Mulford*,²⁶ for example, made clear that the same principle applied to the Court’s jurisdiction over “suits in equity.”²⁷ Because Ballard Paving Co.’s claims against the defendants were several rather than joint, “the value of the matter in dispute with each defendant must be the sum for which he is separately liable.”²⁸ As the Court explained, “*each separate controversy must be treated as a separate suit.*”²⁹

Walter v. Northeastern Railroad Co. similarly applied that understanding to provisions authorizing the exercise of original jurisdiction by circuit courts.³⁰ “It is well settled,”³¹ the Court wrote,

that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff.³²

As the Court once again noted, “[t]he theory is, that, although the proceeding is *in form* but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action.”³³

23. *Id.* at 147.

24. *Id.* at 146 (emphasis added).

25. *Id.* at 147 (emphasis added).

26. 100 U.S. 147 (1879). For an earlier case to that effect decided under the Judiciary Act of 1789, see *Seaver v. Bigelow*, 72 U.S. 208 (1866) (holding that the Court did not have jurisdiction over the appeal because each appellant had a separate and distinct interest of less than the amount-in-controversy requirement on appeal).

27. *Mulford*, 100 U.S. at 147–48.

28. *Id.* at 148.

29. *Id.* (emphasis added).

30. *Walter v. Ne. R.R. Co.*, 147 U.S. 370 (1893).

31. *Id.* at 373.

32. *Id.*

33. *Id.* at 374 (emphasis added) (quoting *Schwed v. Smith*, 106 U.S. 188, 190 (1882)).

Critics have not been kind to *Walter*.³⁴ A leading federal courts treatise argues that *Walter* was decided “without any acknowledgement that different aggregation policies might be of greater importance for original federal court jurisdiction than for appellate jurisdiction.”³⁵ But the criticism is misplaced. *Walter* simply reaffirmed the longstanding principle that a “suit” or “civil action” had essentially the same scope—for jurisdictional purposes—as a suit at common law, even when the suit was brought on the equity side of a federal court.³⁶ Thus, “it is a mistake to think of *Walter* as wrenching . . . out of context”³⁷ the aggregation rules articulated in *Oliver*.³⁸

Defining a civil action for jurisdictional purposes by looking to the more expansive joinder rules of admiralty or equity would have undermined the policy choices of the Judiciary Act of 1789. Indeed, *Oliver* was a Marshall Court decision, and the Justices who decided that case would have been familiar with the background against which the Judiciary Act of 1789 was enacted: the fierce opposition of Anti-Federalists to ratification of the Constitution had led those in favor of a strong federal judicial system to accept greater limits on the federal judiciary than they might have otherwise.³⁹ Indeed, Wythe Holt has argued persuasively that “[t]he Judiciary Act solved many if not most of the problems raised by the opponents of the Constitution”⁴⁰ by coming “much closer to the wishes of

34. See Rensberger, *supra* note 6, at 938 & n.90 (noting that “*Walter* is often criticized as a slipshod extension of the rules of aggregation from the appellate context of *Oliver* to the original jurisdiction context” and citing scholarly criticism).

35. WRIGHT ET AL., *supra* note 7, at § 3704.

36. Although *Walter* was not decided while the Judiciary Act of 1789 was in force, there is no basis for concluding that successor statutes had changed the scope of a “suit” or “civil action” for purposes of applying the amount-in-controversy requirement.

37. Rensberger, *supra* note 6, at 939.

38. As Professor Rensberger explained:

The reasoning of *Oliver* in many ways leads directly to the result in *Walter*. . . . The implication is that even at the pleading stage a case may be characterized as involving joint or distinct demands and that this characterization has jurisdictional consequences. This is exactly what *Walter* indeed held.

More fundamentally, the preference for the rules of common law joinder over equity procedure is clear in both *Walter* and *Oliver*.

Id.

39. Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1476–77 (noting that the Constitution had been ratified “by the slimmest of margins” and that proponents of the new federal government knew that “their support was to a significant degree weak, suspicious and liable to dissolve” and believed that “the reorganization had to work or the nation would be torn asunder”). See also Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647, 667 (1995) (“The cogent and politically popular arguments of many antifederalists could hardly be forgotten as the Senate considered the drafting of the Judiciary Act.”).

40. Holt, *supra* note 39, at 1484.

. . . opponents”⁴¹ than to “the wishes of . . . advocates of a strong, unfettered judiciary.”⁴²

One serious concern of opponents was the extraordinary burden that parties distant from the national capital might face if forced to appear before the Supreme Court. That concern was addressed in part by authorizing appellate review by the Supreme Court of “final judgments and decrees in civil actions, and suits in equity in a circuit court” *only* “where the matter in dispute exceed[ed] the sum or value of two thousand dollars.”⁴³ That was an enormous sum in 1789,⁴⁴ and imposing an amount-in-controversy requirement of that size meant that parties would be spared the expense of litigation at the Supreme Court unless the stakes were especially high.⁴⁵

Defining a “civil action” for jurisdictional purposes by looking to the more expansive joinder rules of admiralty would have undermined the policy of denying review to all but the most substantial claims. Recall, for example, that none of the wage claims in *Oliver* exceeded \$900, a sum less than half that required for review by the Supreme Court. Yet, had the Court looked to admiralty procedure to determine the scope of the civil action for jurisdictional purposes, the relatively small claims of each of the individual seamen would have been subject to review simply because they had sued in one action.⁴⁶ Thus, the Court in *Oliver* appropriately concluded that the scope of the civil action for purposes of the amount-in-controversy requirement should be governed by the stricter common-law rules of joinder. It similarly would have been contrary to the jurisdictional policy of the Act to look to the more liberal joinder rules of equity to assess whether an equity proceeding satisfied the requisite amount in controversy for Supreme Court review.

The amount-in-controversy requirement imposed on the jurisdiction of the federal circuit courts arguably was even more important to the balance the drafters of the Judiciary Act struck between state and federal judicial systems. Section 11 required suits filed in circuit court to have an amount

41. *Id.*

42. *Id.*

43. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84.

44. *See infra* note 48.

45. Bourguignon, *supra* note 39, at 669 (noting that the \$2000 amount-in-controversy requirement meant that the circuit court “would thus be effectively a traveling mini-Supreme Court, the court of last resort for most cases within its jurisdiction”); Holt, *supra* note 39, at 1516 (stating that the high amount-in-controversy requirement for Supreme Court review “would eliminate the possibility of many poor and middling persons being dragged to the seat of the Court to face appeals”). For statistics on the business of the Supreme Court between 1790–1815, see John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 16 (1948).

46. *Cf.* Holt, *supra* note 39, at 1488 (noting that the \$2000 amount-in-controversy requirement for Supreme Court review was intended to “save the litigants in many cases—again, especially poorer litigants—from having to travel to the capital for appeals”).

in controversy in excess of \$500.⁴⁷ And because \$500 was a substantial sum in 1789,⁴⁸ the amount-in-controversy requirement meant that federal circuit courts would have jurisdiction over a relatively small number of the cases that would otherwise have fit within the grant of diversity jurisdiction.⁴⁹ As Professor Holt explained, under the compromise effected by the Judiciary Act of 1789, “[s]tate courts would retain a great deal of that jurisdiction many had thought to be rendered exclusively federal by the Constitution, but in alienage and diversity cases worth more than \$500 only at the option of both parties.”⁵⁰

The pre-enactment history of the Judiciary Act certainly provides no basis for giving suits in equity a broader jurisdictional scope than suits at common law. Indeed, the possibility that the federal courts would hear suits

47. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (providing that “the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars”). By contrast, the jurisdiction of the federal district courts in “civil causes of admiralty and maritime jurisdiction,” *Id.* at § 9, 77, was not limited by an amount-in-controversy requirement. The balance between state and federal courts in that area of law was struck by the clause “saving to suitors, in all cases, the right to a common law remedy, where the common law is competent to give it,” a provision that guaranteed a suitor the right to bring an action in state court when the common law provided a remedy, unless removal to the federal circuit court was authorized on the basis of diversity jurisdiction. For an excellent discussion of admiralty and maritime jurisdiction under the Judiciary Act of 1789, see STEVEN L. SNELL, COURTS OF ADMIRALTY AND THE COMMON LAW: ORIGINS OF AN AMERICAN EXPERIMENT IN CONCURRENT JURISDICTION 281–321 (2007).

48. Holt, *supra* note 39, at 1488 n.233 (noting that “[a] careful study of tort judgments given by the highest court in Connecticut in 1786–1795 . . . found only two greater than \$66.60, a \$249.75 judgment for assault and battery in 1786, and a \$999.00 judgment for the total destruction of a prosperous business in 1792”) (summarizing the research presented in William Casto, *The First Congress’s Understanding of Its Authority over the Federal Courts’ Jurisdiction*, 26 B.C. L. REV. 1101, 1113–14 & n.93 (1985)); Casto, *supra*, at 1109 (“The Farmers in the New England States not worth more than 1,000 D^r. on an Average.”) (reproducing Senator Patterson’s notes on the Senate’s debate of the Judiciary Act).

49. Bourguignon, *supra* note 39, at 669 (concluding that the “\$500 jurisdictional minimum . . . would leav[e] most cases in state court”); Holt, *supra* note 39, at 1487–88 (“The \$500 amount-in-controversy limitation would prevent many cases of small amount, thus presumptively those concerning poor people, from being brought in federal court, and it also would exclude a huge number of the British debt claims.”); Casto, *supra* note 48, at 1112 (noting that because “a great part of the aggregate British debt was for individual sums of less than five hundred dollars,” the monetary limit on the diversity jurisdiction of the circuit courts “effectively precluded a significant group of British creditors from having a federal court vindicate rights secured by the most important treaty” at the time, a consequence of which the Senate was “surely . . . aware”). For statistics on the business of the circuit courts from 1790–1815, see Frank, *supra* note 45, at 17.

50. Holt, *supra* note 39, at 1487; see *id.* (discussing the principal elements of Oliver Ellsworth’s compromise plan which were enacted into law by the Judiciary Act of 1789 and noting that these elements “tended to solve most of the large problems with article III put forward by the opponents of the Constitution”). See also Thomas E. Baker, *The History and Tradition of the Amount-in-Controversy Requirement: A Proposal to “Up the Ante” in Diversity Jurisdiction*, 102 F.R.D. 299, 305–06 (1984) (“The judicial federalism theme behind the original amount requirement sought to preserve the autonomy of the state courts and reduce the danger of federal court usurpation of the states’ judicial authority.”).

in equity was viewed with special hostility in some quarters.⁵¹ Even some proponents of diversity jurisdiction had concerns about the extent to which federal courts should have power to decide equity cases under the grant of diversity jurisdiction.⁵² Given this context, it is implausible that the drafters of the Judiciary Act would have made it easier to satisfy the amount-in-controversy requirement in suits in equity than in suits at common law. But determining whether the amount-in-controversy requirement was satisfied by applying the more expansive joinder rules of equity to determine jurisdiction over suits in equity would have had precisely that effect. For all these reasons, the Judiciary Act of 1789 is best understood as looking to common-law joinder rules to define “a civil action” even in equity cases.⁵³

C. The Diversity-of-Citizenship Requirement

The modern assumption supposes that the relevant civil action for purposes of the complete-diversity requirement is the civil action authorized by the Federal Rules, but that generally each plaintiff must have claims against each defendant that satisfy the amount-in-controversy requirement. But Section 1332(a) expressly grants jurisdiction only over a “civil action” in which *both* the amount-in-controversy and diversity-of-citizenship requirements are satisfied. And as explained in the previous subpart, the

51. Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 230 (2018) (“Many Americans were deeply skeptical of the broad discretion entrusted to equity courts, finding the notion of equity antithetical to the rule of law.”); Kristen A. Collins, “*A Considerable Surgical Operation*”: Equity, Article III, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 269 (2010) (“Some Antifederalists proclaimed their distrust of equity because of its traditional association with broad judicial discretion and because they worried about the preservation of trial by jury in common law cases.”); see Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. PA. L. REV. 287, 288–89 (1927) (noting that “[v]arious reasons have been assigned to the existence of this early American antipathy to equity jurisdiction,” but concluding that “[t]he fundamental explanation is probably to be found in the fact that the colonists regarded equity as an appanage of the Crown’s prerogative, and, therefore, inimical to their individual liberties”).

52. See Holt, *supra* note 39, at 1501–03 (discussing the role of Oliver Ellsworth, a principal drafter of the Judiciary Act, in restricting the scope of equitable jurisdiction and limiting departures from common-law procedure in suits in equity).

53. Nor would this have been the sole instance in which the Act had required looking to common law procedure in a suit in equity. See Bourguignon, *supra* note 39, at 672 (“Because admiralty and equity cases were strange to the practice of many common-law lawyers throughout the country, the Judiciary Act allowed these cases within the federal jurisdiction only after they took on some of the familiar appearances of common law cases.”). Section 22 of the Judiciary Act, for example, had authorized review by the Supreme Court only by writ of error even though at the time the Judiciary Act was enacted, an “‘appeal’ was the method of superior court review . . . in jurisdictions that did not use a jury (such as admiralty).” WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 67 (1990). Section 30 of the Act had similarly required that “the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law,” Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88, even though “[t]he usual mode of presentation of evidence in equity was by deposition,” Holt, *supra* note 39, at 1502.

scope of a suit at common law governs the scope of a civil action for purposes of the amount-in-controversy requirement.

The same civil action cannot plausibly have one scope for purposes of the amount-in-controversy requirement and a separate scope for purposes of the diversity-of-citizenship requirement. It could be argued that a civil action within the meaning of the statute may include more than one “matter in controversy.” The supposedly narrower matter-in-controversy language would provide the relevant unit for measuring the amount in controversy, and the broader civil action would do the same for diversity of citizenship.

But this construction of Section 1332(a) would be problematic for two reasons. First, the text provides no basis for the assumption that a civil action may include multiple matters in controversy. And second, a close reading of the text makes clear that “matter in controversy” refers to *both* the amount-in-controversy and diversity-of-citizenship requirements. The statute provides that a federal district court shall have original jurisdiction over “all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different states.” The word “is” in the preceding passage can refer only to the “matter in controversy.” The Court so recognized in *Owen Equipment and Erection Co. v. Kroger*.⁵⁴ As the Court explained, had Mrs. Kroger (a citizen of Iowa) joined both the Omaha Public Power Department (a citizen of Nebraska) and Owen (a citizen of Iowa) as defendants under Rule 20, complete diversity would have been lacking because “in the plain language of the statute, the ‘matter in controversy’ could not be ‘between . . . citizens of different States.’”⁵⁵

Thus, a full understanding of the statutory text and the settled law governing the amount-in-controversy requirement casts serious doubt on the modern assumption that the relevant civil action for purposes of the complete-diversity requirement is the civil action authorized by the Federal Rules. This Part demonstrates that the early Court in fact construed the complete-diversity requirement in the light of a suit at common law. The demonstration unfolds in three subparts. Subpart 1 makes the case that Marshall Court decisions read the complete-diversity requirement—even in equity cases—in the light of the principles of common-law joinder and explains how Marshall Court decisions authorizing circuit courts to cure defects in diversity jurisdiction had the effect of obscuring that approach. Subparts 2 and 3 illustrate that the Court continued throughout the nineteenth century to recognize that the complete-diversity requirement must be understood in the light of common-law joinder principles.

54. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

55. *Id.* at 374.

1. *A Descriptive Analysis of the Marshall Court's Jurisprudence*

The Marshall-era cases establishing what is now known as the complete-diversity requirement strongly suggest that the “civil action” in which complete diversity is required has the scope of a suit at common law in 1789. Specifically, parties on the same side of the “v.” who had distinct—as opposed to joint—interests were treated as if they were part of *separate suits* for the purpose of determining the extent to which a nondiverse party would destroy jurisdiction over claims by diverse parties.

Without changing this jurisdictional template, the Marshall Court endorsed an important shortcut in 1833. Specifically, the Court authorized federal circuit courts in equity cases to cure defects in diversity jurisdiction by dismissing nondiverse parties before entry of a decree. So long as a jurisdictional defect was cured before entry of judgment, the defect would not spoil diversity jurisdiction over claims by diverse parties. Moreover, when a jurisdictional defect could not be cured through dismissal of the nondiverse party because he or she was indispensable, the rules of equity required dismissal of the suit in its entirety. Thus, it was generally unnecessary for federal circuit courts to consider common-law rules of party joinder in assessing whether a civil action satisfied the complete-diversity requirement.

a. *Joint Interests and the Complete-Diversity Requirement*

*Strawbridge v. Curtiss*⁵⁶ is the seminal case enunciating what is now known as the complete-diversity requirement. But the Court itself did not use the term “complete diversity” until 1925.⁵⁷ *Strawbridge*—and other foundational cases—speak not of complete diversity, but of a requirement that all parties in a diversity action “be competent to sue, or liable to be sued”⁵⁸ in diversity. This terminology was more precise because Section 11 of the Judiciary Act of 1789 authorized diversity jurisdiction only when a suit was “between a citizen of the State where the suit [was] brought, and a citizen of another State.”⁵⁹

56. 7 U.S. 267 (1806).

57. *Balt. & Ohio R.R. Co. v. City of Parkersburg*, 268 U.S. 35, 38 (1925) (Brandeis, J.) (“For then one of the plaintiffs would have been a citizen of West Virginia, there would no longer have been complete diversity of citizenship, and the jurisdiction of the trial court would have been ousted.”).

58. *Strawbridge*, 7 U.S. at 267.

59. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Section 11 also authorized jurisdiction over a suit when “an alien is a party.” *Id.* The Court in *Hodgson v. Bowerbank*, 9 U.S. 303 (1809), held that this language as construed in light of the Constitution did not authorize a suit solely between two aliens. *Id.* at 304.

Strawbridge was a suit in equity in which the Court affirmed a dismissal for lack of diversity jurisdiction.⁶⁰ To understand the Court's reasoning, it is important to keep in mind that any suit brought in circuit court involved at least two distinct interests: that of the plaintiff and that of the defendant. But a distinct interest might be composed of persons who *together* shared a joint interest. The question posed in *Strawbridge* was whether all the parties whose joint interest formed a distinct interest had to be competent to sue or liable to be sued. In answering that question, Chief Justice Marshall declared:

The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.⁶¹

Strawbridge, in other words, held that the Judiciary Act required persons suing or being sued in diversity to satisfy the citizenship requirements of the Judiciary Act even if they shared a joint interest with a person who met those requirements. And a party's inability to sue or be sued because of his citizenship would destroy subject-matter jurisdiction with respect to co-parties who shared the joint interest.

The Court later explained that diversity jurisdiction was included in the Constitution so that the federal government could protect against the possibility of local bias in state court.⁶² But *Strawbridge* does not purport to

60. *Strawbridge*, 7 U.S. at 267 ("THIS was an appeal from a decree of the circuit court, for the district of Massachusetts, which dismissed the complainants' bill in chancery, for want of jurisdiction."); *id.* ("Some of the complainants were alleged to be citizens . . . of Massachusetts. The defendants were also stated to be citizens of the same state, excepting Curtiss, who was averred to be a citizen of the state of Vermont . . .").

61. *Id.* The Judiciary Act literally granted diversity jurisdiction only over a suit "between a citizen of the State where suit is brought, and a citizen of another State." Judiciary Act of 1789 § 11 (emphasis added). *Cf. id.* (granting federal subject-matter jurisdiction when "an alien is a party.") (emphasis added). But the Court sensibly did not read that language as allowing a suit only between two persons. Chief Justice Marshall later explained: "In [*Strawbridge v. Curtiss*] the different members of the company formed *one* plaintiff, and the incapacity of one of them to come into the courts of the United States, was considered as extending to all the others, and as excluding the case itself from the jurisdiction of those courts." *Pegram v. United States*, 19 F. Cas. 119, 120 (C.C.D. Va. 1813) (Marshall, C.J.) (emphasis added). The Court later wrote: "The first, obvious, and necessary interpretation of the terms by which jurisdiction is given, is, that the suit need not be between citizen and citizen, but may be between citizens." *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 553 (1844).

62. See, e.g., *Bank of United States v. Deveaux*, 9 U.S. 61, 87 (1809) ("However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."). For discussion of why diversity was included in the Constitution as a head

construe the Constitution. And the complete-diversity requirement enunciated in that case in fact *restricts* the ability of federal courts to safeguard against local bias.⁶³ Specifically, while the joinder of a local and a nonlocal who shared a joint right or obligation might *deter* a state court from disadvantaging the nonlocal,⁶⁴ a state court conceivably might seek to *benefit* a local even if doing so would incidentally benefit a nonlocal as well. Consider a suit in Vermont by citizens of Vermont and Massachusetts asserting a joint right against a citizen of Massachusetts. A Vermont court in such a case might have an incentive to rule in favor of the Vermonter although the Massachusetts plaintiff would also benefit.⁶⁵ Moreover, the joinder of a local defendant and a nonlocal defendant could leave the nonlocal defendant alone susceptible to local bias, notwithstanding a joint obligation. That is because even a defendant alleged to be jointly liable could defend against the suit on separate grounds.⁶⁶

of subject-matter jurisdiction, see Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1006–25 (2007) (providing a critical overview of the scholarly debate).

63. At least one Justice of the Supreme Court has expressly noted this reality. See *The Removal Cases*, 100 U.S. 457, 480 (1875) (Bradley, J., concurring in the judgment) (noting that the object of the Constitution’s grant of diversity jurisdiction “would be defeated in many cases if the fact that a single one of many contestants on one side of a controversy being a citizen of the same State with one or more of the contestants on the other side, should have the effect of depriving the Federal courts of jurisdiction”).

64. Consider *Strawbridge*, for example. Because the plaintiffs (who had a joint right) would either win or lose *as a unit* and because the same was likely true of defendants (who allegedly had a joint obligation), having a citizen of the state in which suit was brought on both sides of the “v.” meant that the Massachusetts courts could not disadvantage the citizen of Vermont without also disadvantaging citizens of Massachusetts. See David P. Currie, *The Federal Courts and the American Law Institute (I)*, 36 U. CHI. L. REV. 1, 18 (1968) (“The suit was brought in Massachusetts, there were Massachusetts people on both sides, and the interests of the parties on either side were joint. It was thus impossible for a Massachusetts court to injure a nonresident without also injuring one of its own people . . .”).

65. *Id.* at 19. Dudley McGovney provided a similar hypothetical, suggesting that a plausible risk of local bias exists in a case where a citizen of Ohio and a citizen of Indiana sue another citizen of Ohio in Indiana state court. Dudley O. McGovney, *A Supreme Court Fiction: II*, 56 HARV. L. REV. 1090, 1107 (1943).

66. See 1 JOHN STEPHEN, *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS* § 144 at 304 (James Dewitt Andrews ed., 1894) (noting that at common law “if there be several defendants, . . . [e]ach defendant is at liberty to use such plea as he may think proper for his own defense”). Professor Currie made a similar point with respect to modern procedure. See Currie, *supra* note 64, at 19 (“When a Massachusetts plaintiff sues the drivers of two colliding automobiles, a Massachusetts court can satisfy its prejudices by finding the Vermont defendant negligent and exonerating the driver from Massachusetts.”). Moreover, as Professor Redish noted, the complete-diversity requirement does not provide protection from a state court intently focused on prejudicing a nonlocal rather than benefitting a local. See Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1805 (1992) (arguing that in a suit in which the plaintiffs are citizens of Illinois and New York and the defendant a citizen of Illinois, “[a]n Illinois state court bent on prejudicing the New York plaintiff—perhaps as retribution for the damage done by the 1969 Mets—is provided with little disincentive toward that end by the additional presence of the Illinois plaintiff”).

Strawbridge, in fact, focused not on protecting nonlocals from bias, but on a strict reading of the Act's text.⁶⁷ This point may most easily be understood by reference to the language of § 1332(a). It is sometimes thought that the text of § 1332(a) does not support requiring complete diversity.⁶⁸ But an action in which the parties are only minimally diverse is strictly "neither a suit between citizens of the same state *nor* a suit between citizens of different states."⁶⁹ Rather, such an action is a hybrid suit arguably outside the scope of the jurisdictional grant. As Dudley McGovney colorfully explained:

If we *must* classify mules as either horses or jackasses, we are in a dilemma. But must we? The true answer may be that the suit in [which the parties are minimally diverse is] neither a suit between citizens of the same state nor a suit between citizens of different states.⁷⁰

Although the language of the Judiciary Act of 1789 was more restrictive than § 1332(a), the point remains the same. The Court's insistence in *Strawbridge* that *each* of the persons concerned in a joint interest "be competent to sue, or liable to be sued" suggests a reading "of the words of the act"⁷¹ consistent with the observation that a suit that includes parties who

67. See McGovney, *supra* note 65, at 1109–11 (relying on decisions of the Marshall Court to argue that "[t]he general tenor of the Court's construction of statutes granting diversity jurisdiction has been to regard this concurrent jurisdiction . . . as exceptional and extraordinary, calling for narrow construction of the grants"). The Court has so held. See, e.g., *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) ("The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction.").

68. See, e.g., Scott M. Rickard, *Shoring up the "Doctrinal Wall" of Chapman v. Barney: In Support of the Aggregate Approach to Limited Liability Company Citizenship for Purposes of Federal Diversity Citizenship*, 40 WILLAMETTE L. REV. 739, 743 (2004) ("[T]he concept of 'complete diversity' is not found in the United States Constitution, or within the express language of the Judiciary Act of 1789."); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 356 (2001) ("[T]he rule of complete diversity has itself always been something of an extratextual addition to the diversity statute."); Redish, *supra* note 66, at 1803 ("Without any grounding in either constitutional or statutory text and with reasoning that charitably could be described as cryptic, Chief Justice John Marshall in *Strawbridge v. Curtiss* held that diversity jurisdiction requires 'complete' diversity among the parties—that is, *all* of the parties on one side of the litigation must be citizens of states different from those of *all* of the parties on the other side.").

69. McGovney, *supra* note 65, at 1106 (emphasis added).

70. *Id.* Professor McGovney made this observation while arguing that Article III should be read to authorize diversity jurisdiction only on the basis of complete diversity. *Id.* at 1106–09. But a strict reading of the statutory text does not necessarily require a strict reading of the constitutional text. The Court has held that jurisdiction on the basis of minimal diversity is constitutional. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) (stating that Article III "poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens").

71. *Strawbridge*, 7 U.S. at 267. An "initial draft of the Act provided for diversity jurisdiction where 'a citizen of another state than that in which suit is brought is a party.'" Scott Dodson, *Beyond*

do not meet the diversity-of-citizenship requirement is outside the scope of the statutory grant.

Indeed, it is impossible to explain Chief Justice Marshall's opinion ten years later in *New Orleans v. Winter* otherwise.⁷² *Winter* "was . . . a possessory action brought by the heirs of Elisha Winter . . . to recover the possession . . . of certain lands in the City of New Orleans."⁷³ The Court held that the joinder of a citizen of the Mississippi Territory with a citizen of Kentucky in a suit against a citizen of Louisiana meant that diversity jurisdiction was unavailable.⁷⁴ The Court had determined eleven years earlier that a citizen of the District of Columbia was not a citizen of a state within the meaning of Article III or the Judiciary Act,⁷⁵ and the logic of that determination applied equally to territorial citizens. But if the complete-diversity requirement in *Strawbridge* had been premised on the conclusion that there was no substantial risk of local bias in cases like *Strawbridge*, the Court would have been open to a minimal diversity construction of the Judiciary Act in cases like *Winter*. The risk of local bias in a suit involving two nonlocals against a citizen of the forum state is no less significant if *one* of the nonlocals is a citizen of a federal territory. Yet, the Court in *Winter* held that subject-matter jurisdiction was unavailable because "where a joint interest is prosecuted, the jurisdiction cannot be sustained, *unless each individual be entitled to claim that jurisdiction.*"⁷⁶

The Court's stated rationale demonstrates that the Court was determined to give the Judiciary Act's diversity-of-citizenship language a strict textual reading: a suit in the circuit court for the District of Louisiana involving a citizen of the Mississippi territory and a citizen of Kentucky on one side and a citizen of Louisiana on the other was not a suit between citizens of the state in which suit was brought and citizens of another state, but rather a hybrid suit outside the scope of the Judiciary Act.⁷⁷ Thus, *Strawbridge* and

Bias in Diversity Jurisdiction, 69 DUKE L.J. 267, 279–80 (2019) (quoting Charles Warren, *New Light on the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 77–78 (1923)). Had this language appeared in the Act, the statutory text would not have supported a complete-diversity requirement.

72. *Corp. of New Orleans v. Winter*, 14 U.S. 91 (1816).

73. *Fla. Cent. & Peninsular R.R. Co. v. Bell*, 176 U.S. 321, 333 (1900).

74. *Winter*, 14 U.S. at 94–95. The case stated that plaintiffs were "described in the record" as a citizen of Kentucky and as a citizen of the Mississippi territory. *See id.* at 92.

75. *Hepburn & Dundas v. Elizzey*, 6 U.S. 445, 452–53 (1805). Congress in 1940 enacted a statute that included citizens of the District of Columbia within the scope of diversity jurisdiction. *See* 54 Stat. 143 (1940). The Court upheld the constitutionality of that provision in *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

76. *Winter*, 14 U.S. at 95 (emphasis added) (citing the Court's decision in *Strawbridge*).

77. *See* McGovney, *supra* note 65, at 1110 (noting that the Court was not swayed by the obvious fact that the "possibility of prejudice of local courts against the outsider is as great in such cases as in suits between citizens of different states," but instead focused on the rule of *Strawbridge* that "each essential plaintiff separately must be competent to sue each essential defendant separately in a federal court").

Winter—read together—leave no doubt that the possibility of local bias has no bearing on the rule of *Strawbridge*: a person who is *not* “competent to sue or liable to be sued” under the Act cannot evade the requirement of the Judiciary Act by joining or being joined with another person who is competent to sue or liable to be sued.

Chief Justice Marshall also used *Winter* to clarify another aspect of the Court’s holding in *Strawbridge*. As the Chief Justice noted, there was an argument in *Winter* that under the civil law applicable in Louisiana the plaintiffs might have chosen to sue severally.⁷⁸ But the Court concluded that because the plaintiffs had “*elected* to sue jointly, the court [was] incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite.”⁷⁹ This conclusion was fully consistent with the holding in *Strawbridge* that *all* parties asserting a joint interest must be competent to sue or liable to be sued. That is because when an interest was *both* joint *and* several, the party or parties asserting the right or suing on the obligation had to *elect* to sue on *either* the joint *or* the several right or obligation.⁸⁰ Plaintiffs elected to sue on a joint right by joining together in one suit, and one or more plaintiffs elected to sue on a joint obligation by joining the jointly-liable defendants in one suit. Thus, once the plaintiffs in

78. *Winter*, 14 U.S. at 95 (“In this case it has been doubted, whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case . . .”). Civil-law joinder principles were more liberal in some respects than those of the common law. See generally Henry George McMahon, *Parties Litigant in Louisiana*, 13 TUL. L. REV. 385, 387–91 (1939). But counsel for the parties used essentially the same terminology as would have been used had the suit been one at common law. See *Winter*, 14 U.S. at 92 (“The right of action was joint, but they might have severed it, which they did not, and they are incompetent to join in point of jurisdiction.”) (*Winter*, for plaintiffs in error); *id.* at 93 (“In this case, each party takes an undivided interest, and has a right to a separate action, whether the inheritance be of moveable or of real property.”) (*Key*, for defendants in error); *id.* at 93–94 (“The action is brought jointly, not each claiming his several part; and the court cannot disconnect the parties. . . . By the civil law, inheritances of real as well as personal property, are joint.”) (*Harper*, in reply for plaintiffs in error). Cf. McMahon, *supra*, at 391 (noting that the required connection for joinder of parties under Louisiana law was described in a variety of ways in nineteenth-century Louisiana cases, but that one 1857 case had insisted that “the plurality of plaintiffs [must] hav[e] a ‘joint interest’” (quoting *Clement v. Wafer*, 12 La. Ann. 599 (1857))).

79. *Winter*, 14 U.S. at 95 (emphasis added).

80. See MILLAR, *supra* note 6, at 98–99 (discussing the rules at common law in tort and contract). As one writer explained late in the nineteenth century with respect to joint and several liability in tort:

The plaintiff who is injured by a tortious act shared in by several must elect whether he will prosecute them all in a joint action, or sue one or more separately. He cannot do both. [T]he injured party in such a case may proceed against all the wrong-doers jointly, or he may sue them all or any one of them separately. . . . [I]f he sues any one of them separately and has judgment, he cannot afterwards seek his remedy in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy.

HENRY CAMPBELL BLACK, TREATISE OF THE LAW OF JUDGMENTS INCLUDING THE DOCTRINE OF RES JUDICATA § 780 at 939 (1891).

Winter asserted a joint interest by suing together,⁸¹ *Strawbridge* a fortiori required that all the parties on the same side of the suit who shared that joint interest be competent to sue.

And while *Winter* involved plaintiffs with a joint interest, the decision applies with equal force to jointly and severally liable defendants joined in the same suit. As Justice Story explained for the circuit court in *Smith v. Rines*:⁸² “[W]hen the plaintiff has joined all the wrong-doers, it is clear, that they have a joint interest in the event of such suit. They are jointly liable for the damages”⁸³ Thus, “upon like grounds [as in *Winter*], it may be said, that being united compulsively by the plaintiff, the defendants are to be treated throughout as being joint and proper parties in the suit.”⁸⁴

b. Distinct Interests and the Complete-Diversity Requirement

When *Strawbridge* was decided, multiple parties could be on the same side of a suit at common law only when a joint right or obligation cognizable

81. Modern commentators sometimes miss the fact that by choosing to sue together the plaintiffs in *Winter* elected to sue on their joint right. *Federal Practice and Procedure*, for example, asserts: “The Chief Justice noted that the parties initially could have elected to sue severally rather than jointly. Had they done so, *Winter* could simply have been dismissed as a proper but not indispensable party and diversity would have been preserved.” 13E CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3605 (3d ed. 1998). See also Scott Dodson & Phillip A. Pucillo, *Joint and Several Jurisdiction*, 65 DUKE L.J. 1323, 1338 n.75 (2016) (suggesting that *Winter* “surmised that, had the plaintiffs elected to sue severally, the spoiling plaintiff could have been dropped to preserve the remainder of the action.”). Had *Winter* and his co-plaintiff elected to sue severally, they would not have joined in the same action. And despite the argument that the jurisdictional defect could have been cured, no effort was made in the circuit court to strike the nondiverse plaintiff. Transcript of Record, Corp. of New Orleans v. *Winter*, 14 U.S. 91 (1816) (No. 720). By the time the case got to the Supreme Court, it would have been too late to cure the jurisdictional defect. See Part I.C.1.c.

82. *Smith v. Rines*, 22 F. Cas. 639 (C.C.D. Mass. 1836). James Smith had brought suit in Massachusetts state court against five defendants who allegedly were jointly and severally liable to the plaintiff in tort. The plaintiff and four of the defendants were citizens of Massachusetts. The fifth defendant, Joseph Rines, a citizen of Maine, petitioned for removal of the suit to the circuit court for the District of Massachusetts. *Id.*

83. *Id.* at 643. As Justice Story more fully explained:

But, assuming it to be true, that the tort, stated in this action, is several, as well as joint, still it does not advance the argument at all, unless it can be established, that the defendant has a right to elect to consider it as several, and also that the defendant has no joint interest in this suit. . . . [W]hen the plaintiff has joined all the wrong-doers, it is clear, that they have a joint interest in the event of such suit. They are jointly liable for the damages, which may be assessed against them by the jury; and if they sever in their pleadings, or the jury assess different damages against them severally, the plaintiff has a right to a joint judgment de melioribus damnis [i.e., for the highest damages assessed against anyone]. So . . . it is difficult to maintain . . . that in this case the defendant has a separate and distinct interest from the other defendants throughout. On the contrary, for the general purposes of the suit, he has a joint and common interest with them. . . .

Id. (material in brackets taken from a definition in 2 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 56 (1846)).

84. *Smith*, 22 F. Cas. at 644.

at law was at issue.⁸⁵ The situation in equity was more complicated. When multiple persons shared a joint interest, their joinder on the same side of the “v.” was often required.⁸⁶ But a joint interest was not a prerequisite to joinder. As Justice Story explained, “[t]he general rule, in Courts of Equity . . . is . . . that all persons materially interested in the subject-matter, ought to be made parties to the suit, either as plaintiffs, or defendants . . . in order . . . that complete justice be done and that multiplicity of suits may be prevented.”⁸⁷ The need to do complete justice, for example, sometimes authorized creditors whose rights did not derive from a single title or right to join together in a suit in equity against a debtor.⁸⁸ Similarly, rival claimants to real property might in appropriate circumstances be necessary parties to a suit in equity to quiet title by a third claimant even when the claimants had distinct rather than joint interests.⁸⁹ In short, a suit in equity could involve persons with distinct interests on the same side of the suit.

The question then was how to handle distinct interests for purposes of the diversity-of-citizenship requirement. Chief Justice Marshall expressly reserved that question in *Strawbridge*: “But the court does not mean to give

85. As Justice Story explained:

In general, Courts of Law require no more than, that the persons directly and immediately interested in the subject-matter of the suit, and whose interests are of a strictly legal nature should be parties to it. All other persons, who have merely equitable, or remote interest are not only not required to be parties, but are excluded from being made parties; and if any are improperly joined, the fault may be fatal to the suit.

JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA, § 76 at 77 (1st ed. 1838).

86. *Id.*, § 159 at 151 (“[I]n cases of joint interests, joint obligations and contracts, and joint claims, duties, and liabilities. . . the general rule is that all the joint owners, joint contractors, and other persons having a community of interests in duties, claims, and liabilities, who may be affected by the decree, should be made parties.”).

87. JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA § 76a at 77 (2d ed. 1840).

88. *See, e.g.*, STORY, *supra* note 85, § 161 at 153 n.3. (“Mr. Chancellor Kent has held, that where there are several judgment creditors claiming by several and distinct judgments, who seek the aid of a Court of Equity, to render their judgments available against certain illegal, fraudulent acts of the judgment debtor, equally affecting them all, they might, to prevent multiplicity of suits, unite in one Bill . . .”). *See also id.* § 120 at 120–21 (“The third class of cases already alluded to, as constituting an exception to the general rule, as to parties, is, where the parties are very numerous, and although they have, or may have, separate and distinct interests, yet it is impracticable to bring them all before the Court, and, on this account, they are dispensed with.”).

89. *See, e.g.*, *Findlay v. Hinde*, 26 U.S. 241 (1828). The Court held in that case that the complainant had failed to join a necessary party in a bill brought against other parties for an order requiring conveyance of the property at issue:

[H]owever perfect all the other links may be in the chain of the complainant Belinda’s equitable title to the lot in contest, she can have no claim to it in equity, but through and under the executory contract of Garrison with the Jones’s. Garrison has a right to contest the equitable obligation of that contract. No decree can be made for the complainants, without first deciding, that the contract of Garrison ought to be specifically decreed.

Id. at 245. For further discussion of this litigation, see *infra* notes 147–160 and accompanying text.

an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.”⁹⁰

This passage has been a source of confusion for modern readers.⁹¹ John Oakley, for example, claims that it makes “little sense.”⁹² If *Strawbridge* is understood to require complete diversity with respect to joint claims in the civil action, he argues, “there would seem little reason to preserve the possibility of retaining jurisdiction over an action in which the looser joinder of parties asserting several claims includes in the mix some nondiverse parties.”⁹³ Professor Oakley assumes that an action-specific application of the complete-diversity requirement necessarily looks to the entirety of the action authorized by the relevant procedural law. But this is wrong. The question reserved in *Strawbridge* was whether distinct interests on the same side of an equity suit should be treated as if they were part of separate suits for purposes of assessing subject-matter jurisdiction. And the Marshall Court later answered that question in the affirmative.

Cameron v. McRoberts—decided two years after *Winter*—appears to have been the first Supreme Court case that relied on the contrast between joint and distinct interests in applying the diversity-of-citizenship requirement.⁹⁴ John McRoberts, a citizen of Kentucky, had filed a suit in equity against Charles Cameron, a citizen of Virginia, and other parties, none of whose citizenship was alleged in the bill.⁹⁵ All the defendants appeared and answered the bill,⁹⁶ and a final decree was entered in favor of McRoberts.⁹⁷ Cameron later moved to set aside the decree for lack of

90. *Strawbridge v. Curtiss*, 7 U.S. 267, 267–68 (1806).

91. See, e.g., C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 658 (2004) (“[T]he decision expressly left open the possibility—not subsequently taken up—that the result might be different where the plaintiffs asserted separate and distinct claims.”). For the same apparent confusion by a late nineteenth century commentator, see HOWARD M. CARTER, JURISDICTION OF FEDERAL COURTS, AS LIMITED BY THE CITIZENSHIP AND RESIDENCE OF THE PARTIES 120 (1899) (“The court in [*Strawbridge*] expressly declined to give an opinion as to a case in which it should appear that the interests of the parties on one side of the controversy were several and not joint, but this distinction has never been developed . . .”). Professor Floyd states that “the common explanation for the reservation [in *Strawbridge*] has been that where local bias against an out-of-state claimant necessarily would prejudice a local citizen as well—as it would in the case of joint interests but not necessarily where the plaintiffs asserted separate and independent claims—a jury would be unlikely to find against an out-of-state citizen at the expense of one of their own.” Floyd, *supra*, at 659 & n.199 (citing THE AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 433 (1968)).

92. Oakley, *supra* note 2, at 622 (“It makes little sense for the *Strawbridge* Court to have reserved the question of the status of statutory diversity jurisdiction over nondiverse several claims if the statute itself conferred jurisdiction only over actions in which all joined claims were between diverse parties.”).

93. *Id.*

94. *Cameron v. McRoberts*, 16 U.S. 591 (1818).

95. *Id.* at 592.

96. *Id.*

97. *Id.*

subject-matter jurisdiction,⁹⁸ and the propriety of setting aside the decree by motion came to the Court on a certificate of division.⁹⁹ The Court decided:

If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.¹⁰⁰

Because the modern understanding of the complete-diversity requirement has been oblivious to the role joint and distinct interests played in the Marshall Court's conception of diversity jurisdiction,¹⁰¹ *Cameron* has been susceptible to serious misinterpretation. But viewed through the right lens, the Court's ruling is remarkably clear. The first sentence appears to be a straightforward application of *Strawbridge* and *Winter*. Specifically, as those decisions made clear, all parties to a suit who together share a joint interest must be competent to sue or liable to be sued, or the federal trial court lacks jurisdiction to adjudicate the joint interest.¹⁰² That was true even

98. *Id.*

99. *Id.* at 593. A certificate of division initiated an interlocutory determination by the Supreme Court. If the judges hearing the case in circuit court were evenly divided, the court, at the request of an affected party, would ask the Supreme Court for a ruling on the question. See Judiciary Act of 1802, ch. 31, § 6, 2 Stat. 156, 159–161.

100. *Cameron*, 16 U.S. at 593–94. The Court first addressed whether the circuit court had the power to set aside the decree in response to a motion. *Id.* at 593. Because the Court ruled that the circuit court lacked the power to set aside its decree by motion after a lapse of five years, the Court's ruling on subject-matter jurisdiction arguably was dicta. The Court may have chosen to discuss the jurisdictional question because there was also a "bill of review" pending in the circuit court. *Id.* at 592. A bill of review was a "more formal mode of obtaining a rehearing." THOMAS ATKINS STREET, *FEDERAL EQUITY PRACTICE* (1909) § 2117. "Want of jurisdiction apparent on the face of the record [was] a good ground for a bill of review . . ." *Id.* at § 2131. "The nonjoinder of a party interested in the subject-matter of a suit" was also a ground for a bill of review if "the nonjoinder has operated to injure the rights of those before the court." *Id.* at § 2135 (citing *Whiting v. Bank of U.S.*, 38 U.S. 6 (1838)).

101. The failure to recognize the jurisdictional role of "joint interests" in the Court's jurisprudence may be the product of two twentieth-century developments. First, from 1938 until the Rule was revised in 1966, Federal Rule 19 provided with important exceptions that "persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants." FED. R. CIV. P. 19 (1938). And second, the Court has not used the word "joint interest" to describe the holding in *Strawbridge* since 1919. See *infra* note 189. Thus, after 1938, many reading the Court's early cases were primed to equate "joint interest" solely with the law of necessary and indispensable parties.

102. See *supra* Part I.C.1.a. An attorney in a later case succinctly explained the governing principles:

In *Curtiss v. Strawbridge*, . . . it was said that each distinct interest must be represented by persons, all of whom must be capable of suing, or liable to be sued in the federal courts. . . . [I]n order to understand the true meaning of the court, we must advert to the fact that the suit was on the equity side of the court, where there may be several defendants having distinct interests from each other, and where it may happen that a complete decree may be made between some of the parties without affecting the interests of others.

Each party having an interest, is said to represent that interest. If several persons have the same

if it was clear that a party with a joint interest was not a necessary party.¹⁰³ Thus, if Cameron shared a joint interest with defendants who could not be sued in diversity, the suit in its entirety should be dismissed for lack of subject-matter jurisdiction.¹⁰⁴

The second sentence emphasized that the existence of a distinct interest over which a court has jurisdiction does not necessarily mean that a court should exercise its jurisdiction with respect to that distinct interest. As the Court put it with respect to Cameron: “If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.”¹⁰⁵ Conversely, if substantial justice so far as Cameron was interested could not be done without affecting the interests of other defendants, the circuit court should not have exercised its jurisdiction.¹⁰⁶ Thus, while the second sentence permits a suit to move forward in limited circumstances, it is not a rule of subject-matter jurisdiction. As the Court more clearly explained in *Elmendorf v. Taylor*, the equitable rule set forth in the second sentence “does not affect the jurisdiction, but addresses itself to the policy of the Court.”¹⁰⁷

interest, they jointly represent that interest, and if they all have the requisite citizenship, and a complete decree can be made as against them, without affecting other defendants having a different interest, notwithstanding such other defendants, or some of them, have not the requisite citizenship, the court will proceed to adjudicate between the complainant and the defendants, who have the requisite citizenship.

Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. 497, 532 (1844) (argument in reply of Mr. Mazyck for the plaintiff in error).

103. See, e.g., *Corp. of New Orleans v. Winter*, 14 U.S. 91, 95 (1816) (holding that because the plaintiffs had “elected to sue jointly, the court [was] incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite”) (emphasis added); Federal Equity Rule LI (1842), reprinted in 42 U.S. lvi (1843) (“In all cases in which the plaintiff has a joint and several demand against persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.”).

104. See *Kirkpatrick v. White*, 14 F. Cas. 685, 687 (C.C.D. Pa. 1826) (Washington, J.) (“Now it is decided by the supreme court, in the cases of *Cameron v. M’Roberts*, 3 Wheat. [16 U. S.] 391; *Strawbridge v. Curtis[s]*, 3 Cranch [7 U. S.] 267; [and] *Corporation of New Orleans v. Winter*, 1 Wheat. [14 U. S.] 95,—that when there is a joint interest in all the defendants, the jurisdiction cannot be sustained unless each individual be entitled to claim that jurisdiction; and that even in a case where the parties might elect to sue jointly or separately, if they nevertheless sue jointly, the case is not distinguishable from one where they are compelled to unite.”).

105. *Cameron*, 16 U.S. at 593 (emphasis added).

106. Whether “substantial justice (so far as he was interested) could be done without affecting the other defendants,” *id.*, was a matter that could properly be addressed even after the entry of a decree through a bill of review. See *supra* note 100.

107. *Elmendorf v. Taylor*, 23 U.S. 152, 166 (1825). As the Court in *Elmendorf* more fully explained:

Courts of equity require, that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the Court itself, and is subject to its discretion. It is not, like the description of parties, an

That said, the second sentence implicitly recognized that the lack of diversity jurisdiction with respect to one distinct interest made no difference to the existence of diversity jurisdiction with respect to a second distinct interest on the same side of the “v.” If that were not the case, it would not have mattered whether substantial justice could be done as to Cameron in the absence of defendants who could not be sued in diversity. The suit *in its entirety* would have been jurisdictionally defective. And because a decree had already issued,¹⁰⁸ it would have been too late to cure the jurisdictional defect by dismissing defendants who could not be sued in diversity.¹⁰⁹ Thus, if Cameron had a distinct interest from other defendants, the inability to sue them in federal court could have had no effect on the *jurisdiction* of the circuit court to enter a decree with respect to Cameron.

Justice Story—who was on the Court when *Cameron* was decided—confirmed this understanding of the case in his circuit court decision in *Smith v. Rines*.¹¹⁰ James Smith, the sole diverse defendant, had removed the claim against him from state court, arguing that he had “a separate and distinct interest from his co-defendants . . . within the reasoning of the court in the case of *Strawbridge v. Curtis*[s].”¹¹¹ He therefore insisted that the plaintiff’s claims against him be deemed “a suit . . . within the original jurisdiction of the circuit court.”¹¹² Justice Story did not reject the argument that a plaintiff’s demands against a defendant who has a “separate and distinct” interest from other defendants should be treated as a separate suit within the meaning of section 11.¹¹³ But he distinguished *Smith*—which involved a suit at common law against tort defendants—from *Cameron*.¹¹⁴ As he explained, *Cameron* and other cases “in which a separate and distinct

inflexible rule, a failure to observe which turns the party out of Court, because it has no jurisdiction over his cause; but, being introduced by the Court itself, for the purposes of justice, is susceptible of modification for the promotion of those purposes.

Id. at 166–67.

108. Although the suit came before the Supreme Court on a certificate of division, the circuit court had already heard the case and entered a decree in favor of McRoberts without dismissing the defendants whose citizenship had not been alleged. *See supra* notes 95–99 and accompanying text.

109. *See* Part I.C.1.c.

110. *Smith v. Rines*, 22 F. Cas. 639 (C.C.D. Mass. 1836).

111. *Id.* at 643.

112. *Id.* (“But the argument which has been addressed to the court upon the present occasion is, that in the suit now before us the defendant has a separate and distinct interest from his co-defendants, and, therefore, it falls within the reasoning of the court in the case of *Strawbridge v. Curtis*[s], as a suit, not only within the original jurisdiction of the circuit court, but within the jurisdiction founded on the removal from the state court.”).

113. *Id.* at 643–45.

114. Justice Story ordered that the suit be remanded back to state court on the ground that the defendant in fact shared a joint interest with the other defendants. *See supra* note 83 (quoting the court’s reasoning on this point). He also concluded that permitting the defendant to remove the suit in its entirety without the consent of his co-defendants or to remove the suit only as to him would be inconsistent with § 12 of the Judiciary Act and “upon any acknowledged principles of law.” *See Smith*, 22 F. Cas. at 644–45. For further discussion of removal under the Judiciary Act of 1789, see *infra* note 161.

interest, or a nominal interest, is spoken of, were bills in equity, capable in their own nature of separate and distinct decrees upon separate and distinct interests, where there was, or might be, no community of interest.”¹¹⁵ By contrast, suits at common law could not include distinct interests on the same side of the “v.”¹¹⁶

Some scholars of mandatory joinder nonetheless have failed to recognize that *Cameron* addressed *both* the statutory requirements of diversity jurisdiction and equitable rules governing compulsory joinder.¹¹⁷ One academic, for example, has read *Cameron* as simply setting up a dichotomy between joint and distinct interests for purposes of mandatory joinder.¹¹⁸ Under that reading, sharing a joint interest with nondiverse defendants meant that all of the defendants were indispensable parties in whose absence the suit should be dismissed.¹¹⁹ But if *Cameron* had a distinct interest, according to this reading, the other defendants *by definition* were not indispensable.

That argument is flawed in two ways. First, it equates parties who share a joint interest with indispensable parties. At least during the Marshall

115. *Smith*, 22 F. Cas. at 643. After quoting *Cameron*, Justice Story wrote:

And it is most material to remark, that this case and all the others, in which a separate and distinct interest, or a nominal interest, is spoken of, were bills in equity, capable in their own nature of separate and distinct decrees upon separate and distinct interests, where there was, or might be, no community of interest, and where the general question was presented as to the proper parties necessary to be made in a suit in equity. Very different considerations do, or at least may apply, to suits at common law, where the nonjoinder or misjoinder of parties has a very different effect upon the character of the suit, and very different rules apply to it.

Id. See also Henry Craig Jones & Leo Carlin, *Non-Joinder and Misjoinder of Parties in Common Law Actions*, 28 W. VA. L.Q. 197, 197 (1922) (“The rigid concept of the common law is that there may be only one judgment, and such judgment must be entered in favor of all of the plaintiffs or against all the defendants. . . .”); but see Lugar, *supra* note 6, at 144 n.24 (noting that “[w]hen a defendant in an action at law pleaded or gave in evidence matter which barred the action against him only, that is, a personal defense, judgment could be given for such a defendant and against the rest”).

116. See *supra* note 6.

117. John Reed erroneously cites *Cameron* for the proposition that Chief Justice Marshall mistakenly concluded that a defect of subject-matter jurisdiction would exist if indispensable parties were not joined in a suit in equity. See John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 347–48 (1957). There were no absentees in *Cameron* who could have led the Court to treat the absence of an indispensable party as jurisdictional, and the Court said nothing on the matter.

118. See Howard P. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403, 416 n.53 (1965). In discussing *Cameron*, Professor Fink wrote:

[I]t is difficult to determine whether the Court meant that if there was a joint interest among all the defendants, the Court had no power to proceed in the absence of one of them. Or whether the *presence* of nondiverse indispensable parties destroyed diversity jurisdiction, since all of the defendants named in the bill had appeared and answered.

119. *Id.* (treating *Cameron*’s reference to a “joint interest” as meaning that persons with such an interest were indispensable).

Court, the mandatory joinder rule was not so rigid.¹²⁰ Second, the argument ignores the jurisdictional posture of the case. Specifically, the argument appears to assume that subject-matter jurisdiction would turn on whether the nondiverse defendants were indispensable because a jurisdictional defect could be cured by dismissing *dispensable*, nondiverse parties. But because a decree had already issued when *Cameron* reached the Court,¹²¹ it was too late to cure a defect in diversity jurisdiction.¹²²

The difference between the Marshall Court's understanding of the complete-diversity requirement and the modern assumption about what that requirement means is further illustrated by comparing the modern understanding of *Carneal v. Banks*¹²³ with what the decision actually says.

Carneal reviewed a circuit court decision of a suit brought by Henry Banks against the heirs of Thomas Carneal and those of John Harvie. Banks, through an agent, had entered into a contract with Carneal to exchange pieces of land.¹²⁴ The bill filed by Banks against Carneal's heirs alleged that Carneal had defrauded Banks by fraudulently "pretending to have good title"¹²⁵ to and by misrepresenting the value of land that Carneal had contractually agreed to transfer to Banks.¹²⁶ Banks therefore sought rescission of the contract and title to the lands he had exchanged as consideration.¹²⁷ Banks also joined Harvie's heirs as defendants on the mistaken belief that Harvie's heirs retained legal title to the lands Banks had agreed to transfer to Carneal.¹²⁸ In fact, legal title to the lands had been transferred to Carneal by Harvie.¹²⁹

Banks and Harvie's heirs were citizens of Virginia, and Carneal's heirs were citizens of Kentucky, the state in which suit was brought.¹³⁰ The jurisdictional question before the Court was whether the lack of diversity

120. See, e.g., *West v. Randall*, 29 F. Cas. 718, 723 (C.C.D.R.I. 1820) (Story, J.) ("[W]here a partner[] or joint trustee . . . if made a plaintiff would defeat the jurisdiction, and thus destroy the suit, I should struggle to administer equity between the parties properly before us, and not suffer a rule, founded on mere convenience and general fitness, to defeat the purposes of justice." (citing *Russell v. Clarke*, 11 U.S. 69, 98 (1812))); STORY, *supra* note 85, § 79 at 80 ("[I]t is a general rule in the Courts of the United States to dispense, if consistently with the merits of a case it can possibly be done, with all parties, over whom the Court would not possess jurisdiction."). Indeed, parties with a "joint interest" for purposes of diversity jurisdiction were not always necessary parties. See *supra* notes 78–84 and accompanying text.

121. See *supra* notes 95–99 and accompanying text.

122. See *supra* Part I.C.1.c.

123. *Carneal v. Banks*, 23 U.S. 181 (1825).

124. *Id.* at 182.

125. *Id.*

126. *Id.*

127. *Id.* at 182–83.

128. *Id.* at 183.

129. *Id.* at 183, 188.

130. *Id.* at 187–88.

between Banks and Harvie's heirs had affected the circuit court's jurisdiction with respect to Banks's claims against Carneal's heirs.¹³¹

Modern readers usually have understood the decision as holding that appellate courts have power to cure defects in diversity jurisdiction by dismissing nondiverse parties.¹³² But that reading—premised on the modern assumption that the joinder of Harvie's heirs as defendants destroyed diversity jurisdiction with respect to Carneal's heirs—is flatly inconsistent with the Court's reasoning. As Chief Justice Marshall explained:

If the validity of this [jurisdictional] objection, so far as respects Harvie's heirs, be unquestionable, it cannot affect the suit against Carneal's heirs, unless it be indispensable to bring Harvie's heirs before the Court, in order to enable it to decree against Carneal's heirs. This is not the case. . . . The bill . . . as to Harvie's heirs, may be dismissed, without in any manner affecting the suit against Carneal's heirs. *That [Harvie's heirs] have been improperly made defendants in his bill, cannot affect the jurisdiction of the Court as between those parties who are properly before it.*¹³³

Note that the reference to “the Court” in this passage is a reference to the circuit court.¹³⁴

131. *Id.* at 187.

132. See, e.g., *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 834–35 (1989) (“Chief Justice Marshall’s opinion for this Court in *Carneal v. Banks*, dealt with the issue at hand—the power of appellate courts to grant motions to dismiss dispensable nondiverse parties.”); *id.* at 835 (arguing that the Court in *Carneal* “itself dismissed the nondiverse parties while acting in an appellate capacity”). For similar misreadings of *Carneal*, see *Dodson & Pucillo*, *supra* note 81, at 1338 (arguing that “the Court [in *Carneal*] recognized that diversity-destroying parties could be dismissed to salvage complete diversity”); Edward A. Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 *FORDHAM L. REV.* 1099, 1111 (1995) (citing *Carneal* for the proposition that “if a plaintiff filed a bill in equity that included a non-indispensable defendant outside the court’s jurisdiction, the court, even on appeal, would only dismiss that defendant, not the entire case”).

133. *Carneal*, 23 U.S. at 188 (emphasis added). The modern reading of *Carneal* as granting appellate courts the power to save diversity jurisdiction by dismissing jurisdictional spoilers also seems inconsistent with Chief Justice Marshall’s remark that a separate non jurisdictional error assigned for the Court’s review “ha[d] more weight.” *Id.* Even if the Supreme Court had the power to save the day, it is hard to imagine a weightier error than a lower court’s failure to recognize that it lacked subject-matter jurisdiction in connection with the party against whom it entered judgment.

134. *Carneal*, 23 U.S. at 187–88. The opinion reads in relevant part:

From this decree both parties have appealed; and the counsel for Carneal’s heirs assign for error,

1. That the Circuit Court had no jurisdiction.

...

1. The objection to the jurisdiction of the Court is founded on this; that Banks states himself, in his bill, to be a citizen of Virginia, and does not state the heirs of Harvie to be citizens of Kentucky. They are, in truth, citizens of Virginia.

If the validity of this objection, so far as respects Harvie’s heirs, be unquestionable, it cannot

Those reading *Carneal* today often focus on the Court's remark that the "bill, therefore, as to Harvie's heirs may be dismissed."¹³⁵ But the opinion's Rosetta Stone is its insistence that the lack of diversity jurisdiction over Harvie's heirs had no effect on jurisdiction with respect to *Carneal*'s heirs. As one authority on federal equity practice explained in citing *Carneal*:

The defect arising from the improper joining of a party not interested in the controversy can be cured by formally dismissing as to that party, or by striking out his name with the consent of the court. *But where parties who are joined in a bill have no real interest in the result of the controversy, their presence may, for jurisdictional purposes, be disregarded.*¹³⁶

In other words, because Harvie's heirs had no interest in the dispute,¹³⁷ their joinder could have no effect on the jurisdiction of the circuit court with respect to Banks's claims against *Carneal*'s heirs.¹³⁸

affect the suit against *Carneal*'s heirs, unless it be indispensable to bring Harvie's heirs before the Court, in order to enable it to decree against *Carneal*'s heirs. This is not the case. . . .

Id.

135. *Id.* at 188.

136. STREET, *supra* note 100, § 529 at 330 (footnotes omitted) (emphasis added) (citing *Carneal*).

137. The Court's focus on the fact that Harvie's heirs had "no real interest" in the resolution of the controversy suggests that *Carneal* is related to earlier decisions on "formal" or "nominal" parties. Indeed, *Carneal* cited to *Wormley v. Wormley*, 21 U.S. 421 (1823), a key case on formal parties. See *Carneal*, 123 U.S. at 188 n.a. Hugh Wormley had been made a defendant in a suit brought on behalf of his wife and minor children by a next friend. Although Mr. Wormley, his wife, and children were all citizens of the same state, he was arrayed on the opposite side of the suit from the rest of his family. But the Court held that his presence in the suit should be disregarded for jurisdictional purposes. The husband, the Court said, "is but a nominal defendant, joined for the sake of conformity in the bill, against whom no decree is sought. . . . This Court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties. . . ." *Wormley*, 21 U.S. at 451. The Court's earliest decision concluding that the citizenship of formal or nominal parties should be disregarded was *Browne v. Strode*, 9 U.S. 303 (1809). The Court later described *Browne* as based on "the principle . . . that where the real and only controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had any interest in, or control over it, the courts of the United States will not consider any others as parties to the suit, than the persons between whom the litigation before them exists." *McNutt ex rel. Leggett v. Bland*, 43 U.S. 9, 14–15 (1844).

The principle that the citizenship of "nominal" or "formal" parties must be disregarded remains an acknowledged part of current law, but is rarely invoked because of the requirement that actions in federal court be prosecuted by the real party in interest. See 6A CHARLES WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1556 (2d ed. 1990) (discussing the interplay between the rules of diversity jurisdiction and the real-party-in-interest rule). The Court last invoked the doctrine in *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939), a case in which a plaintiff stakeholder interpleaded two defendant groups of rival claimants. The "implication" of the case is that a disinterested stakeholder is a nominal party whose citizenship may be disregarded. WRIGHT ET AL., *supra*, § 3636.

138. The dissent in *Newman-Green* argued that the Court in *Carneal* treated the claims against *Carneal*'s heirs and Harvie's heirs as giving rise to separate suits. See *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 842 (1989) (Kennedy, J., dissenting) ("The more plausible interpretation of *Carneal* is that the Court did not dismiss the nondiverse parties in a single action and then proceed to

Thus, it is a mistake to read *Carneal* as authority for the proposition that an appellate court may cure defects in diversity jurisdiction. Rather, the Court in *Carneal* invoked the principle that a defendant who is not a proper party to a suit in equity “cannot affect the jurisdiction” of a federal court over those properly made parties to the suit.¹³⁹ Because improper parties by definition lack a joint interest with proper parties, the lack of jurisdiction over the former could not affect jurisdiction over the latter.

c. *Curing Defects in Diversity Jurisdiction*

As discussed above, the Marshall Court—even in equity suits—looked to the rules of common-law joinder in applying the diversity-of-citizenship requirement. Those rules determined the extent to which a party who lacked diverse citizenship would destroy diversity jurisdiction over claims by others in the suit. But the Court also recognized that defects in diversity jurisdiction could be cured by dismissing parties over whom the Court lacked diversity jurisdiction. This generally made it unnecessary to consider whether parties on the same side of the “v.” in an equity suit should be treated as if they were part of separate suits in applying the diversity-of-citizenship requirement.

The Court first recognized that jurisdictional defects could be cured in *Conolly v. Taylor*.¹⁴⁰ Subjects of a foreign sovereign and a citizen of Pennsylvania had joined together to bring suit against citizens of Kentucky and Ohio in the circuit court for the District of Kentucky.¹⁴¹ The Judiciary

the merits, but rather dismissed the suit against the nondiverse parties for want of jurisdiction and went on to decide the merits of the separate suit that met the requirement of complete diversity.”). See also *Newman-Green, Inc. v. Alfonzo-Larrain*, 854 F.2d 916, 921 (7th Cir. 1988) (en banc) (suggesting that the Supreme Court in *Carneal* “treated the suit as if it were two suits”), *rev’d*, *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). Characterizing *Carneal* as involving two separate suits would have been sound if Harvie’s heirs and Carneal’s heirs had had distinct and separate interests. But the Court in *Carneal* found that Harvie’s heirs had *no* interest in the subject matter of the suit. Cf. *Smith v. Rines*, 22 F. Cas. 639, 643 (C.C.D. Mass. 1836) (“The distinct and separate interest referred to in *Strawbridge v. Curtis* is one, which constitutes the sole interest in the cause, all the other parties being merely nominal; or a distinct and separate interest, in no sense and under no circumstances connected with that of other persons.”).

139. *Carneal*, 23 U.S. at 188.

140. *Conolly v. Taylor*, 27 U.S. 556 (1829).

141. At issue was whether Conolly’s heirs had “equitable title to a large tract of land in right of colonel John Conolly.” *Id.* The aliens were Mr. Conolly’s heirs under the will, and Samuel Mifflin, the Pennsylvanian, apparently had certain powers and rights under the will in connection with the property at issue. Cf. JAMES HILL, A PRACTICAL TREATISE ON THE LAW RELATING TO TRUSTEES: THEIR POWERS, DUTIES, PRIVILEGES AND LIABILITIES: WITH NOTES AND REFERENCES TO AMERICAN DECISIONS, BY FRANCIS J. TROUBAT 229–36 (1846) (explaining that where real property is concerned, the power and rights of the trustee depend upon the testator’s intention, as interpreted from the will).

Act authorized suit between “aliens” and citizens of a state.¹⁴² But in a suit between citizens of a state, a circuit court could exercise diversity jurisdiction only if one side of the “v.” was comprised of citizens of the state in which suit was brought.¹⁴³ Thus, “[h]ad the cause come on for a hearing on this state of parties, a decree could not have been made in it for want of jurisdiction.”¹⁴⁴ The Court nonetheless held that the jurisdictional “defect” had been “cured” because the Pennsylvanian’s name “was struck out of the bill before the cause was brought before the court.”¹⁴⁵ As the Court explained, “though the court could not exercise its jurisdiction while the defect in the bill remained; yet, it might, as is every day’s practice be corrected at any time before the hearing, and the court would not hesitate to decree in the cause.”¹⁴⁶

Vattier v. Hinde,¹⁴⁷ which built on *Conolly*, more sweepingly permitted jurisdictional defects to be cured *before entry of the decree*. The suit was brought in the circuit court for the District of Ohio to resolve rival claims to the same piece of land. The facts are complicated, but in simplified form, the heirs of Belinda Hinde sought a decree directing conveyance of the land to them.¹⁴⁸ Hinde’s heirs were citizens of Kentucky and all but one of the defendants were citizens of Ohio.¹⁴⁹ The out-of-state defendant, Abraham Garrison, was a citizen of Illinois.¹⁵⁰ Because Garrison disclaimed all title or interest in the property and because he was a citizen of Illinois, the plaintiffs consented to his dismissal.¹⁵¹

After entry of a decree on the merits, Vattier appealed and assigned as error “that the court had no jurisdiction, the defendant Garrison being a citizen of the state of Illinois.”¹⁵² He argued that in “suits between citizens

142. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (authorizing diversity jurisdiction when “an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State”).

143. See *id.*

144. *Conolly*, 27 U.S. at 564. The attorney representing Conolly’s heirs in the Supreme Court characterized Mr. Mifflin as “a mere trustee” in arguing that he should be viewed as a nominal party. *Id.* at 559–60. Had the Court accepted that characterization, Mr. Mifflin’s joinder as a complainant would have had no jurisdictional significance. See *supra* note 137 (explaining that the citizenship of nominal parties was disregarded).

145. *Id.* at 564.

146. *Id.* at 565.

147. 32 U.S. 252 (1833).

148. *Id.* at 254–60.

149. The Court’s opinion does not state the citizenship of Hinde’s heirs. Nor does it expressly state the citizenship of any defendant but Abraham Garrison (who is identified as a citizen of Illinois). *Id.* at 261. But the caption of an earlier, related decision by the Court expressly identified Thomas Hinde and his wife, Belinda Hinde, as citizens of Kentucky, and the overlapping defendants as citizens of Ohio. See *Findlay v. Hinde*, 26 U.S. 241 (1823).

150. *Vattier*, 32 U.S. at 261.

151. *Id.* at 258–59.

152. *Id.* at 260–61.

of the United States, all the parties on one side must be citizens of the state in which the suit is brought, and that the jurisdiction of the court depends on the state of parties at the institution of the suit.”¹⁵³

The Court again rejected the argument that “the jurisdiction of the court depend[s] on the state of parties at the institution of the suit.”¹⁵⁴ The Court had previously held in *Conolly v. Taylor* that a jurisdictional “defect” could be “cured” by striking out the name of a plaintiff who was not competent to sue.¹⁵⁵ And the Court in *Vattier* recognized that the same principle authorized striking out Garrison’s name as a defendant. Less obviously, after quoting in full the Court’s two-sentence jurisdictional ruling in *Cameron v. McRoberts*, the Court explained that *Cameron* “applie[d] to the state of parties at the time of the decree.”¹⁵⁶ Recall that the first sentence of the ruling stated: “If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause.”¹⁵⁷ Thus, *Vattier* read *Conolly* and *Cameron* as indicating that so long as a party who cannot be sued in diversity is dismissed before entry of the decree, neither *Strawbridge* nor *Winter* requires dismissal of co-parties who share the joint interest.¹⁵⁸

Cameron had also indicated that dismissal of parties who are not liable to be sued in diversity is unnecessary to preserve diversity jurisdiction provided the interests of the competent and incompetent defendants are distinct rather than joint.¹⁵⁹ And because *Vattier*’s interest in the land at issue was distinct from Garrison’s interest, whether Garrison had been dismissed from the suit could not affect the circuit court’s jurisdiction to enter a decree against *Vattier*. Chief Justice Marshall apparently saw no need to dwell on this point given that Garrison had been dismissed from the suit. Focusing instead on the facts of the case, the Court simply declared: “The incapacity of the court to exercise jurisdiction over Garrison, could not affect their jurisdiction over other defendants whose interests were not connected with his, and from whom he was separated, by dismissing the bill

153. *Id.* at 261.

154. *Id.*

155. See *supra* text accompanying notes 141–146.

156. *Vattier*, 32 U.S. at 262 (emphasis added).

157. *Cameron*, 16 U.S. at 593.

158. The Court implicitly reaffirmed this aspect of *Vattier* in *Horn v. Lockhart*, 84 U.S. 570 (1873). As the statement of facts in *Horn* explains, an objection was made to subject-matter jurisdiction in the circuit court which “in its final decree directed the bill to be dismissed” as to the nondiverse defendants after concluding that they were not “essential parties to the suit by the complainants.” *Id.* at 574. The Supreme Court concluded that “[t]he objection to the jurisdiction of the court, that two of the defendants were residents of Texas, the same State with the complainants, was met and obviated by the dismissal of the suit as to them.” *Id.* at 579.

159. See *supra* notes 108–109 and accompanying text.

as to him.”¹⁶⁰ The upshot was that so long as an incompetent party was dismissed before entry of the decree in circuit court, whether the incompetent party had a joint interest with or a distinct interest from others on his side of the suit had no effect on subject-matter jurisdiction.

Thus, after *Vattier*, courts and counsel—in analyzing diversity of citizenship—had no need to assess whether an equity suit was comprised of multiple suits for jurisdictional purposes. Dismissing nondiverse parties before judgment was all that was required to ensure compliance with the diversity-of-citizenship requirement.

d. A Brief Summary of the Marshall Court's Jurisprudence

Strawbridge expressly held that it was not enough for one party who shares a joint interest with others on his side of the suit to be competent to sue or liable to be sued in diversity. *Strawbridge* thus rejected the argument that diversity jurisdiction exists over a civil action on the basis of minimal diversity, i.e., that it is enough for one person on each side of the “v.” in a civil action to satisfy the diversity-of-citizenship requirement if others do not. This conclusion was based on the Court’s determination to give the diversity jurisdiction provision of Section 11 a strict reading. Put simply, a suit that includes citizens of Massachusetts on both sides of the “v.” is not a suit between citizens of different states even if a citizen of Vermont is a co-party of one of the Massachusetts citizens.

Because it was the *suit itself* that was jurisdictionally defective, how the suit was defined for purposes of diversity jurisdiction mattered. And although joinder was more broadly available in suits in equity than in suits at common law, the Marshall Court looked to common-law rules of joinder to define the scope of a suit for purposes of applying the diversity-jurisdiction requirements of Section 11.¹⁶¹ Those rules authorized the

160. *Vattier*, 32 U.S. at 263.

161. The scope of a “suit” subject to removal under § 12 appears to have been broader than the scope of a suit for the purpose of determining the existence of diversity jurisdiction under § 11. This should not be surprising. The same respect for federalism that led the Court to define the scope of a suit narrowly for purposes of applying the amount-in-controversy and diversity-of-citizenship requirements also suggests—at a minimum—that an equity suit should not be removed from state court unless (1) all the defendants who shared a joint interest were competent to remove and (2) the suit could also be removed with respect to any other party in whose absence complete justice could not be done. See *Ward v. Arredondo*, 29 F. Cas. 167, 168 (C.C.D.N.Y. 1825) (Thompson, J.) (denying removal when an indispensable party defendant was a citizen of the same state as the plaintiff); *New Jersey v. Babcock*, 18 F. Cas. 82, 83 (C.C.D.N.J. 1823) (Washington, J.) (remanding removed suit on the ground that the court had no jurisdiction over New Jersey and piecemeal removal would “baffle[]” New Jersey “in her efforts to assert her right to the land in controversy”). The scope of the suit under § 12 may have been even broader, encompassing any claims that could be filed as a package in state court. Justice Harlan writing for the Court in *Barney v. Latham*, 103 U.S. 205 (1880), claimed—without citing any authority—

joinder of multiple persons on the same side of the “v.” only if they shared a joint interest. Thus, persons on the same side of the “v.” who lacked a joint interest were treated as if they were part of separate suits for purposes of assessing diversity jurisdiction.

The Court’s decision that defects in diversity jurisdiction could be cured by dismissing dispensable, non-diverse parties before entry of a decree nonetheless laid the groundwork for the modern assumption. The ability to cure defects in diversity jurisdiction meant that it was usually unnecessary to conceptually segregate distinct interests on the same side of an equity proceeding into separate suits for purposes of analyzing diversity of citizenship. So long as a dispensable person who lacked diverse citizenship was dismissed before judgment, it made no difference whether that person had a joint interest with one or more persons on the same side of the suit.¹⁶² Similarly, if a party who lacked diverse citizenship was indispensable, what mattered was not whether—for purposes of subject-matter jurisdiction he should be deemed part of a separate suit vis-à-vis others on his side of the litigation—but whether the litigation should be dismissed in his absence.

Thus, the key before entry of judgment in circuit court was whether *any* person in an equity proceeding lacked diverse citizenship. Such a person, if dispensable, should be dismissed before entry of judgment. And because judges and counsel tend to be practical people, it should not be surprising that discussions of diversity jurisdiction focused, not on the subtleties of the complete-diversity requirement as articulated by the Marshall Court, but on ensuring that all persons on one side of a proceeding in circuit court be of diverse citizenship from persons on the other. That focus in turn is at least in part responsible for the modern assumption that the suit for purposes of the complete-diversity requirement is measured not by the principles of common-law joinder, but by the joinder rules established by the applicable law of procedure.

that from the enactment of the Judiciary Act of 1789 to the Separable Controversy Act of 1866, the law had prohibited the removal of only part of an action filed in state court. And Edward Hartnett, while relying in part on *Barney*, also read three early circuit court decisions as confirming the proposition that removal of part of a state court action was impermissible prior to the Separable Controversy Act of 1866. Hartnett, *supra* note 132, at 1114 & n.69, 1112–15 (quoting *Barney* in support of the proposition that § 12 of the Judiciary Act of 1789 barred piecemeal removal and so construing *Smith* and *Ward*).

162. See *Horn*, 84 U.S. at 579 (“[T]he question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented, they are indispensable parties, for if their interests are severable and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them.”). Because joinder rules at common law were more limited and more rigid, the opportunity to cure defects of jurisdiction in such cases generally did not arise. For a very late, nineteenth-century case nonetheless upholding dismissal of a party to cure a defect in diversity jurisdiction in a suit at common law, see *Mason v. Dullaghan*, 82 F. 689, 690 (7th Cir. 1897) (“This [trover] action was joint and several, and, if the court below erred in its ruling, the error was cured by the dismissal of King from the suit after verdict and before judgment.”).

2. *A New Construction of the Judiciary Act of 1789?*

The grant of diversity jurisdiction in Section 11 of the Judiciary Act of 1789 remained unchanged until 1875.¹⁶³ Thus, even after Chief Justice Marshall's death in 1835,¹⁶⁴ the Court continued to decide cases construing the diversity jurisdiction language of Section 11. The most important of those decisions for our purposes is *Coal Co. v. Blatchford*,¹⁶⁵ decided in 1870.

Writing for the Court in *Blatchford*, Justice Field explained that "if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and, if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."¹⁶⁶

This formulation might be read to suggest that complete diversity should be determined by reference to all the parties in the suit whether their joinder is consistent with common-law joinder rules or not. The 1973 update to *Moore's Federal Practice* so read the decision, arguing that it established that the complete-diversity requirement applies even when the interests at stake in a suit are "several" rather than "joint."¹⁶⁷

163. See 15A MOORE'S FEDERAL PRACTICE—CIVIL § 102 App. 04[2] (detailing the history of diversity jurisdiction from the Judiciary Act of 1789 to the Act of 1875, including the short-lived expansion of diversity jurisdiction in the Judiciary Act of 1801).

Moore's discussion appears to misinterpret an 1839 statute, An Act in Amendment of the Acts Respecting the Judicial System of the United States, 5 Stat. 321, § 1. Although the statute had the effect of making diversity jurisdiction more easily available, it did not modify the *requirements* of subject-matter jurisdiction, as the treatise appears to suggest. Rather, it authorized a circuit court to hear a case when it could not exercise jurisdiction over persons who would otherwise be required parties. *Id.* As the Court explained in connection with a successor statute:

Section 50, which embodies without substantial change the Act of February 28, 1839, c. 36, § 1, 5 Stat. 321, makes provision for enforcing a cause of action which exists against several persons, although one of them is neither an inhabitant of nor found within the district in which suit is brought and does not voluntarily appear. It does so by permitting the court to entertain jurisdiction without prejudice to the rights of the party not regularly served nor voluntarily appearing.

Camp v. Gress, 250 U.S. 308, 313 (1923). See also *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 556-57 (1844) (noting that the Act authorized proceeding against fewer than all required parties if some would destroy diversity jurisdiction); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA (4th ed. 1848) § 79 at 104 & n.2 (citing the Act for the proposition that "it is a general rule in the Courts of the United States to dispense, if consistently with the merits of the case it can possibly be done, with all parties, over whom the Court would not possess jurisdiction").

164. See Herbert A. Johnson, *Chief Justice John Marshall (1801-1835)*, 1998 J. SUP. CT. HIST. 3, 17 (noting the death of Marshall in 1835).

165. *Coal Co. v. Blatchford*, 78 U.S. 172 (1870).

166. *Blatchford*, 78 U.S. at 174-75. Cf. *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806) ("[W]here the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.").

167. JAMES W. MOORE & HOWARD P. FINK, MOORE'S FEDERAL PRACTICE JUDICIAL CODE PAMPHLET 502 (1973). The treatise states:

But *Blatchford* should not be read in that way. The plaintiffs in *Blatchford* were co-trustees in connection with a mortgage contract. Co-trustees who join together to enforce a contract have a joint interest. And because one of the plaintiffs with a joint interest was a citizen of the same state as the defendant, the circuit court lacked diversity jurisdiction. Just three years later, the Court in the *Sewing Machine Companies* read *Blatchford* precisely in this way, citing it and other cases for the proposition that “each of the plaintiffs, *if the interest be joint*, must be competent to sue each of the defendants in the Circuit Court to sustain the jurisdiction under the eleventh section”¹⁶⁸ of the Judiciary Act of 1789.

3. The Complete-Diversity Requirement and the Judiciary Act of 1875

The Judiciary Act of 1875 substantially broadened the availability of diversity jurisdiction by deleting the requirement that a suit between citizens of U.S. states be brought by or against citizens of the state in which suit was brought. Specifically, the Act authorized the circuit courts to exercise diversity jurisdiction in “all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . in which there shall be a controversy *between citizens of different States*”¹⁶⁹ The italicized language—taken directly from Article III—has remained unaltered since then.¹⁷⁰

The change from the more restrictive language of the Judiciary Act of 1789 to the words used in the diversity jurisdiction clause of Article III immediately posed the question of whether Congress had legislatively

Subject to [the proposition that in determining whether diversity exists, the citizenship of formal parties is wholly immaterial] and to an alignment of parties that reflects their actual interest, under the rule of *Strawbridge v. Curtiss* (1806) 3 Cranch 267, 2 L ed 435 (“where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued”) and *Coal Co. v. Blatchford* (1871) 11 Wall 172, 20 L ed 179 (principle of *Strawbridge* applied to case involving several interests), governing *original jurisdiction* (other than statutory interpleader under §1335), there must be complete diversity between the plaintiffs on the one hand and the defendants on the other, *i.e.*, each plaintiff must be able to sue each defendant.

Id. at 502–03 (brackets and emphasis in original; internal cross-references omitted). A commentator writing in 1899 also singled out *Blatchford* as supporting that proposition:

The court in [*Strawbridge*] expressly declined to give an opinion as to a case in which it should appear that the interest of the parties on one side of the controversy were several and not joint, but this distinction has never been developed, and in *Coal Co v. Blatchford*, the rule is broadly stated by Mr. Justice Field. . . .

CARTER, *supra* note 91, at 120.

168. Case of the *Sewing Mach. Cos.*, 85 U.S. 553, 575 (1873) (emphasis added) (footnote omitted) (citing *Blatchford*, among other cases).

169. Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470 (emphasis added).

170. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1413–14 (2015).

overruled *Strawbridge*. In *Peninsular Iron Co. v. Stone*,¹⁷¹ the Court held that *Strawbridge* remained good law.¹⁷² Specifically, the Court held that the Judiciary Act of 1875—like the Judiciary Act of 1789—required that *all* persons suing or being sued in diversity satisfy the diversity-of-citizenship requirement even if they shared a joint interest with others who were competent to sue or liable to be sued in diversity.¹⁷³

The plaintiffs in *Stone*, citizens of Michigan and Ohio, sought an accounting from Andros Stone, a citizen of New York, and Dan Eels, a citizen of Ohio, under a “contract made by Stone . . . by which he was to purchase [property] about to be sold under a decree of foreclosure, and hold the same in trust.”¹⁷⁴ Even though the complainants, if successful, would be entitled to different sums, they shared a joint interest in an accounting under the contract between Eels (the trustee) and themselves for the purchase of property. Because one of the complainants—like Eels—was a citizen of Ohio, the complete-diversity requirement was not satisfied. As the Court explained:

In the present case the rights of each and all of the parties depend on the alleged contract with Stone, and although, *as between themselves*, they have separate and distinct interests, they join in a suit to enforce an obligation which is common to all. *There is but a single cause of action*; and, while all the complainants need not have joined in enforcing it, they have done so; and this, under the rule in *New Orleans v. Winter*, controls the jurisdiction.¹⁷⁵

Thus, for the same reason the complainants’ claims could be aggregated, if necessary, to satisfy the amount-in-controversy requirement,¹⁷⁶ they failed

171. *Peninsular Iron Co. v. Stone*, 121 U.S. 631, 632–33 (1887). Although *Stone* was decided after the Judiciary Act of 1887 became effective, the case itself was governed by the Judiciary Act of 1875. See Judiciary Act of 1887, ch. 373, § 6, 24 Stat. 552, 555 (stating that the Act does not affect any suit removed from a state court or commenced in circuit court before enactment of the legislation except as otherwise provided).

172. *Stone*, 121 U.S. at 632–33.

173. *Id.* For a different view, see *The Removal Cases*, 100 U.S. 457, 481 (1879) (Bradley, J., concurring in the judgment).

174. *Stone*, 121 U.S. at 631–32. According to the bill, “Eels became a trustee of the proceeds of a sale of the purchased property, made by Stone for the benefit” of the complainants and others “which he has misappropriated and claims to hold in connection with Stone, adversely to the claimants and others in like interest.” *Id.* at 632.

175. *Id.* at 633 (emphasis added).

176. Plaintiffs who join together to assert a common and undivided interest in a joint right or title may aggregate their claims for purposes of the amount-in-controversy requirement, *See supra* note 14 and accompanying text. As the Court emphasized the same year *Stone* was decided, “when property or money is claimed by several persons suing together, the test [for determining the matter in dispute] is whether they claim it under one common right, the adverse party having no interest in its apportionment or distribution among them, or claim it under separate and distinct rights, each of which is contested by

to satisfy the complete-diversity requirement. Because the citizen of Ohio had not been dismissed from the bill while the suit was in circuit court, the Court ordered the suit dismissed in its entirety for lack of jurisdiction.¹⁷⁷

Stone was described by the Court less than ten years later as standing for the proposition that “[t]he voluntary joinder of the parties has the same effect for purposes of jurisdiction as if they had been compelled to unite.”¹⁷⁸ The Court’s cases relying on this shorthand are consistent with the historical understanding:¹⁷⁹ *Winter* holds that *Strawbridge* governs diversity jurisdiction with respect to joint interests, even if the plaintiff or plaintiffs could have elected to sue severally. But the shorthand is imprecise at best and can easily mislead those focused, not on the existence of joint interests, but on the broad joinder of parties encouraged by modern procedure.

II. MODERN PRACTICE AND THE HISTORICAL UNDERSTANDING

The modern assumption supposes that all of the plaintiffs in the civil action authorized by the Federal Rules must be diverse from all of the defendants.¹⁸⁰ Thus, a nondiverse plaintiff or defendant destroys diversity

the adverse party.” *Gibson v. Shufeldt*, 122 U.S. 27, 30 (1887). If the former rather than the latter is true, the plaintiffs’ claims may be aggregated for the purpose of satisfying the amount-in-controversy requirement.

177. *Stone*, 121 U.S. at 633.

178. *Merch.’s Cotton Press & Storage Co. v. Ins. Co. of N. Am.*, 151 U.S. 368, 384 (1894). In comparing the case to *Stone*, the Court wrote:

In the present case, as in *Peninsular Iron Co. v. Stone*, the rights of each of the complainants and of other marine insurance companies occupying the same position, depend, as against the petitioners for removal, on the alleged right of the marine companies to hold the railroad company liable, by way of subrogation, upon its bills of lading, and, as an incident to that liability, to collect the fire insurance fund to the extent of the railroad company’s share therein.

Id.

179. See *Fla. Cent. & Peninsular R.R. Co. v. Bell*, 176 U.S. 321, 334–35 (1900) (holding there was no diversity jurisdiction because “the plaintiffs elected to assert a joint claim and title to the land in dispute, and recovered a joint judgment for their undivided interests therein”); *Hooe v. Jamieson*, 166 U.S. 395 (1897) (holding that the circuit court lacked diversity jurisdiction when not all of the plaintiffs who claimed to be owners of an undivided one-fourth of the lands and premises described in the complaint could sue in diversity); *supra* note 178.

180. There are two caveats. First, Section 1332(a)(3) apparently permits citizens of foreign states to be on both sides of the “v.” provided complete diversity exists between citizens of different states. See *infra* note 238. Second, before *Allapattah* was decided, John Oakley forcefully argued that diversity jurisdiction was only nominally action-specific and that the most coherent reading of precedent indicated that the complete-diversity requirement was a limit on *supplemental* jurisdiction. See Oakley, *supra* note 2. Cf. James E. Pfander, *The Simmering Debate over Supplemental Jurisdiction*, 2002 U. ILL. L. REV. 1209, 1221 (2002) (arguing that the requirement in Section 1367(a) that there be original jurisdiction over a civil action as a predicate for supplemental jurisdiction “appears to suggest that district courts must determine the existence of their jurisdiction by initial reference to all of the claims in the complaint and not just to a single claim that itself fits within the court’s jurisdiction”). Courts grappling with the supplemental jurisdiction statute were split before *Allapattah* about whether the complete-diversity requirement should be understood as a limit on supplemental jurisdiction or as a requirement of diversity

jurisdiction over *all* claims by plaintiffs against defendants in the civil action authorized by the Federal Rules. As explained in the previous Part, this assumption is inconsistent both with the well-settled principles that govern the amount-in-controversy requirement and with the Marshall-Court cases establishing the complete-diversity requirement. Under the historical understanding, a nondiverse plaintiff or defendant destroys diversity jurisdiction only with respect to the civil action as defined by the rules of party joinder at common law. In other words, a jurisdictional defect need not destroy jurisdiction over *all* claims by plaintiffs against defendants in the civil action authorized by the Federal Rules.

The distinction between the modern assumption and the historical understanding has important implications for modern subject matter jurisdiction. But it is often a distinction without a difference. That is because the remedy for a jurisdictional defect is now the same *even on appeal* whether the historical understanding or the modern assumption is applied: In either case, the defect—with one important exception—can be remedied by using Federal Rule 21 or some other procedural mechanism to dismiss the claims by or against the nondiverse party.¹⁸¹ It is only if the criteria set forth in Rule 19 would require dismissal that a court may be required to dismiss the claims of the diverse parties.¹⁸²

The choice between the historical understanding and the modern assumption makes a crucial difference in some circumstances, however, as at least one modern federal district court has expressly recognized.¹⁸³ The

jurisdiction. *See id.* at 1215–17. But it has been taken for granted by courts and commentators that if the complete-diversity requirement is in fact action-specific, the relevant “civil action” is that authorized by the Federal Rules.

181. *See* 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1685 (3d ed. 1998) (district courts); *id.* at § 1688.1 (noting that the Court in *Newman-Green* authorized dismissal of non-diverse parties on appeal to preserve diversity jurisdiction). Although *Newman-Green* misinterpreted *Carneal*, *see supra* notes 132–139 and accompanying text, the Court did not rely exclusively on its mistaken conclusion that the Marshall Court had authorized appellate courts to cure defects in diversity jurisdiction. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989) (identifying a pragmatic rationale for the decision).

182. Because lack of subject-matter jurisdiction may be raised at any time, *see* FED. R. CIV. P. 12(h)(3), and the failure to join a party in whose absence the suit must be dismissed may only be raised at trial or before, *see* FED. R. CIV. P. 12(h)(2), the choice between the historical understanding and the modern assumption may make a difference in some cases in which it would be appropriate to dismiss a civil action for failure to join a required party.

183. *See Caldwell-Clements, Inc. v. Cowan Publ'g Corp.*, 130 F. Supp. 326 (S.D.N.Y. 1955). The district court there held that the lack of complete diversity in the civil action authorized by the Federal Rules did not require dismissal of the state-law claims asserted only by the diverse plaintiff:

While the rule usually applicable to a multiple party situation is that there must be complete diversity between the plaintiffs, on the one hand, and the defendants, on the other hand, *Strawbridge v. Curtis[s]*, this rule is inapplicable to a situation where the co-citizen plaintiff does not have a ‘joint’ interest with the other plaintiff in the state-created claim. Only the individual plaintiff is asserting the state-created libel claim against both defendants; the

choice, for example, matters to a proper understanding of (1) supplemental jurisdiction under Section 1367 and (2) diversity jurisdiction under Section 1332(a)(3). For reasons discussed in detail below, accepting the authoritativeness of the historical understanding of a civil action would expand supplemental jurisdiction and constrict diversity jurisdiction under Section 1332(a)(3).

I accordingly turn in this Part to the proper construction of the complete-diversity requirement in the context of modern practice. Subpart A begins by discussing the relevance of the historical understanding to modern practice. Subpart B then argues that the Court's modern diversity cases should be read consistently with the historical understanding. Subpart C applies the historical understanding to supplemental jurisdiction in diversity cases and to diversity jurisdiction under Section 1332(a)(3).

A. *The Relevance of the Historical Understanding to Modern Practice*

The modern Court has provided no policy reason for the complete-diversity requirement beyond a single, wholly unfounded suggestion in *Exxon Mobil Corp. v. Allapattah Services, Inc.* that “[t]he presence of parties from the same State on both sides of a case dispels th[e] concern” about local bias.¹⁸⁴ But as explained in detail above, the complete-diversity requirement—even if applied only when parties on the same side of the “v.” allegedly share a joint interest—does no such thing.¹⁸⁵ And there is no basis for concluding that the Marshall Court relied on that rationale in articulating the complete-diversity requirement.¹⁸⁶ Moreover, *neither* decision cited by *Allapattah* for the proposition that the complete-diversity requirement dispels concern over local bias in state court is even remotely on point.¹⁸⁷ Both cases take the complete-diversity requirement as a given and make no effort to identify, let alone explore, a policy rationale for the requirement. The decisions simply make the point that joinder of a nondiverse party spoils diversity jurisdiction over claims by diverse parties who are part of the same civil action.

Putting the wholly unfounded suggestion in *Allapattah* to the side, the modern Court has focused exclusively on *Strawbridge*—that is, on pedigree

corporate co-citizen plaintiff is not a party to the libel claim. The libel claim, if it had been brought as an independent action in this court would have had a jurisdictional basis.

Id. at 329 (citation omitted).

184. 545 U.S. 546, 554 (2005).

185. See *supra* notes 63–66 and accompanying text.

186. See *supra* notes 67–77 and accompanying text.

187. See *Allapattah*, 545 U.S. at 553–54 (citing *Wisconsin Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998), and *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 (1989)).

rather than policy—to justify the complete-diversity requirement.¹⁸⁸ But the modern assumption ignores what *Strawbridge* actually held: Parties sharing a joint interest must *all* satisfy the diversity-of-citizenship requirement, or there is no diversity jurisdiction with respect to that joint interest.¹⁸⁹ This holding was consistent with the understanding that the Judiciary Act of 1789 looked to the rules of party joinder at common law to define the scope of a civil action for the purpose of diversity jurisdiction. Congress has sometimes expanded the scope of a “civil action” when enacting a particular jurisdictional provision.¹⁹⁰ But there is no evidence that Congress has ever modified the common-law scope of the civil action in connection with the complete-diversity requirement.¹⁹¹

188. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 82 (2005) (“Since *Strawbridge v. Curtiss* . . ., this Court has read the statutory formulation ‘between . . . citizens of different States,’ . . . to require complete diversity between all plaintiffs and all defendants.”); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996) (“In *Strawbridge v. Curtiss* . . ., this Court construed the original Judiciary Act’s diversity provision to require complete diversity of citizenship. . . . We have adhered to that statutory interpretation ever since.”); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990) (“Since its enactment, we have interpreted the diversity statute to require ‘complete diversity’ of citizenship. See *Strawbridge v. Curtiss*”); *Newman-Green*, 490 U.S. at 829 (citing *Strawbridge* for the proposition that “[w]hen a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for *each* defendant or face dismissal”); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978) (citing *Strawbridge* for the proposition that Section 1332(a) “and its predecessors have consistently been held to require complete diversity of citizenship”). The Court similarly has looked to pedigree in defending the rules governing the amount-in-controversy requirement. See *Snyder v. Harris*, 394 U.S. 332, 339 (1969) (“This judicial interpretation has been uniform since at least the 1832 decision of this Court in *Oliver v. Alexander*.”).

189. The Court has not quoted *Strawbridge* since a 1919 case in which subject-matter jurisdiction was not even at issue. See *Camp v. Gress*, 250 U.S. 308, 312 (1919) (stating that in *Strawbridge* “this court construed the phrase ‘where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State,’ as meaning ‘that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts [courts of the United States].’”).

190. Two examples are particularly relevant to this Article. First, 28 U.S.C. § 1367—the supplemental jurisdiction statute—explicitly expanded the scope of a civil action over which a federal district court may exercise subject-matter jurisdiction. See *infra* note 203 and accompanying text. Second, the “civil action” that may be removed from state to federal court under § 1441(a)—the general removal provision—includes *all* of the claims properly asserted as a package in state court at the time of removal. Giving the term “civil action” a narrower scope in the context of § 1441(a) would run afoul of a longstanding Congressional policy against splitting between state and federal courts claims properly brought in state court unless Congress has expressly authorized splitting such claims. See *infra* note 210.

191. The term “suit of a civil nature, in law and equity” was used to describe the original jurisdiction of the federal circuit and district courts from the Judiciary Act of 1789 to the 1948 Revision of the Judicial Code. The 1948 Revision substituted the term “civil action” for “suit of a civil nature in law and equity.” But there is no indication in the legislative history of the 1948 Revision that Congress or the Revisers sought to change the scope of the relevant unit for determining the subject-matter jurisdiction of the federal courts for purposes of Section 1332(a). Instead, the change was a cosmetic one intended to “conform to Rule 2 of the Federal Rules of Civil Procedure.” Revisers’ Notes to 28 U.S.C. § 1332 (1948). Nor have the Court’s cases suggested that the Revisers’ attempt to modernize the language of the jurisdictional statutes was intended to or did have any substantive effect on the subject-matter jurisdiction of the federal courts. In fact, the opposite is true. See *Finley v. United States*, 490 U.S. 545, 555 (1989) (noting that the insertion in 1948 of “civil action” in the provisions of Title 28 addressing the jurisdiction of the federal district courts “is more naturally understood as stylistic”).

B. *Rethinking the Court's Modern Diversity Jurisdiction Cases*

It is generally accepted today that the Court's modern diversity jurisdiction cases require complete diversity between all the plaintiffs and all the defendants in the civil action authorized by the Federal Rules of Civil Procedure. There is no reason to doubt that recent Supreme Court Justices—like other members of the contemporary legal culture—have imbibed this modern assumption. Indeed, four of them would have written the assumption definitively into law had their dissent in *Exxon Mobil v. Allapattah* prevailed. The Court's modern diversity jurisdiction cases, however, may be construed consistently with the historical understanding. And the Court's decision in *Allapattah* takes a decisive step away from the modern assumption by holding that a civil action within the meaning of Section 1332(a) may include fewer claims than those asserted by all the plaintiffs against all the defendants in the civil action authorized by the Federal Rules.

1. *Kroger and Newman-Green*

Putting aside *Allapattah*, the two most important modern cases cited for the complete-diversity rule are *Owen Equipment & Erection Co. v. Kroger and Newman-Green, Inc. v. Alfonzo-Larrain*. But neither case compels the conclusion that the civil action over which Section 1332(a) grants jurisdiction is the civil action authorized by the Federal Rules.¹⁹² The *Kroger* Court, for example, emphasized that it was “clear” that Kroger “could not originally have brought suit in federal court naming Owen and OPPD as codefendants, since citizens of Iowa would have been on both

192. The same can be said of *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941), a case that predates the 1948 Revision of the Judicial Code. Chase, a citizen of New York, had filed suit against three Indiana defendants, Indianapolis Gas Company, Citizens Gas Company, and the City of Indianapolis. The Supreme Court concluded that only one question “permeat[ed] this litigation: Is the lease whereby Indianapolis Gas in 1913 conveyed all its gas plant property to Citizens Gas valid and binding upon the City?” *Id.* at 72. “Everything else in the case,” *id.*, the Court insisted, was “window-dressing designed to satisfy the requirements of diversity jurisdiction,” *id.* Concluding that Indianapolis Gas Company shared an interest with Chase in sustaining the validity of the lease against the City, the Court held that Indianapolis Gas should have been aligned with Chase as a plaintiff for purposes of diversity jurisdiction. Although the Court did not expressly state that the interest that Chase and Indianapolis Gas shared was joint, that fact is apparent from the case. The lease Chase was seeking to enforce was one between the Indianapolis Gas Company and the Citizens Gas Company. Chase's right to enforce the lease derived from its position as the “trustee under a mortgage deed to secure a bond issue executed by Indianapolis Gas.” *Id.* at 70. Thus, both Chase and Indianapolis Gas were suing on the identical promise made to Indianapolis Gas. *Cf.* *Jones v. Parks*, 78 Ind. 537, 539 (1881) (stating that “the holder of a mortgage or other obligation may sue upon the promise of a third party made to the debtor, to assume and pay the debt” and that the debtor may sue on the same).

sides of the litigation.”¹⁹³ But because Owen and OPPD allegedly were jointly and severally liable in tort, a dismissal for lack of jurisdiction would have been required under the historical understanding had Kroger initially joined both as defendants. Similarly, in *Newman-Green*, the joinder of a U.S. citizen who lacked the required state citizenship created a jurisdictional defect.¹⁹⁴ And because all of the defendants allegedly were jointly and severally liable to the plaintiff, the joinder of the U.S. citizen lacking state citizenship spoiled diversity jurisdiction over the action in its entirety under the historical understanding.

The rule that jointly and severally liable defendants voluntarily joined together by a plaintiff share a joint interest for purposes of diversity jurisdiction is settled law.¹⁹⁵ And it continues to make sense analytically. If found liable, each defendant will be “liable for *all* of the plaintiff’s damages.”¹⁹⁶ Their proportionate fault is simply irrelevant vis-à-vis the plaintiff. Because each defendant would be liable to the plaintiff for the entirety of the damages, they are liable as a unit and share a joint interest.

The fact that such defendants share a joint interest is nonetheless easy for modern lawyers to overlook. Joint rights or obligations are important under the modern assumption only to the extent that the rules of aggregation make it easier to satisfy the amount-in-controversy requirement by looking to the *entire* value of a joint right or obligation rather than at the *portion* attributable to *each* party.¹⁹⁷ There is nothing to aggregate when persons

193. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Kroger filed suit against the Omaha Public Power District (OPPD) to recover for the death of her husband. OPPD impleaded Owen Equipment & Erection Co. (“Owen”). Kroger then amended her complaint to add a claim against Owen. OPPD was later dismissed from the case on summary judgment. The federal district court lacked diversity jurisdiction over Kroger’s claims against Owen because Kroger was a citizen of Iowa and Owen was a citizen of Iowa and Nebraska. The Court held that supplemental jurisdiction was unavailable because the exercise of supplemental jurisdiction in these circumstances would permit evasion of the complete-diversity requirement.

194. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 (1989). The plaintiff, a citizen of Illinois, brought a state-law contract suit against a Venezuelan corporation, four Venezuelan citizens, and a citizen of the United States domiciled in Venezuela. The plaintiff had entered into a licensing agreement with the Venezuelan corporation, and the other defendants were “joint and several guarantors” of royalty payments due under the agreement. *Id.* at 826.

195. See *supra* notes 78–84 and accompanying text.

196. RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 285 (13th ed. 2020).

197. The rules of aggregation “allow two [or more] plaintiffs holding a joint right to use the total value of that right as the measure of the amount in controversy and likewise permit a single plaintiff with a claim for joint liability against multiple defendants to base jurisdiction on the total value of the plaintiff’s claim.” Rensberger, *supra* note 6, at 960. Consider, for example, the joint ownership of a piece of land. If two individuals jointly own the land in equal shares, they would each be entitled to half of the sales price if the land is sold. But neither owner could effectively convey the land without the other. If a party who contracts to purchase the land brought suit against the joint owners for specific performance, the amount-in-controversy will be determined by looking to the sales price as a whole

with joint and several liability are joined together in one suit. But the existence of a joint right or obligation does not depend on the availability of aggregation.¹⁹⁸

2. Allapattah

Neither *Kroger* nor *Newman-Green* discusses the meaning of “civil action” as that term is used in Section 1332(a). By contrast, the Court’s decision in *Allapattah* expressly turns on that question. *Allapattah* decided two consolidated cases. The more important for our purposes is *Rosario Ortega v. Star-Kist Foods, Inc.*¹⁹⁹ That case arose when Beatriz Blanco-Ortega, a nine-year-old girl, was seriously injured.²⁰⁰ The girl, her parents, and her sister jointly filed suit against Star-Kist. The plaintiffs were all diverse from the defendant, but only Beatriz had claims in excess of the amount-in-controversy requirement.²⁰¹ The question posed by the case was whether the federal district court could exercise supplemental jurisdiction over claims by plaintiffs who did not satisfy the amount-in-controversy requirement.²⁰²

The supplemental jurisdiction statute is among the most explicit in identifying the scope of the civil action over which it grants jurisdiction, and that scope is substantially broader than the historical understanding of a civil action. Specifically, the statute (with specified exceptions) provides:

rather than the half share of the price to which each of the joint owners is entitled. Thus, if the parties to the suit are completely diverse, a federal district court would have diversity jurisdiction if the land had been sold for \$80,000. It would make no difference that each joint owner would be entitled to only \$40,000 from the sale. Because the owners share a joint interest, their individual portions of that joint interest may be aggregated to meet the amount-in-controversy requirement.

198. See *supra* note 14. Another source of confusion may be Rule 19. Before the 1966 Amendment, Rule 19 provided that “persons having a joint interest shall be made parties,” FED. R. CIV. P. 19(a) (1938), but that was not the case with respect to persons who were jointly and severally liable. See *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (citing authority). But the distinction between “joint interests” and joint and several liability for purposes of Rule 19 has no bearing on federal subject-matter jurisdiction.

199. 370 F.3d 124, 138 (1st Cir. 2004), *rev’d sub nom.* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005). The other case, *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003), is less important because of the unusual way in which complete diversity is defined in the context of a class suit: specifically, only the named plaintiffs must be completely diverse from the defendants. Although this definition was developed before the Rule 23(b)(3) class action was created in 1966, the definition makes sense if one accepts that only the citizenship of an authorized representative counts in a civil action, unless Congress provides otherwise. To the extent a (b)(3) class action is conceptualized for purposes of subject matter jurisdiction as an aggregation of individual civil actions brought by class representatives for the benefit of absent class members, there is no reason the citizenship of the absent class members should count. But each individual civil action would nonetheless have to meet the amount-in-controversy requirement to establish original jurisdiction under Section 1332(a).

200. *Rosario Ortega*, 370 F.3d at 126.

201. *Id.* at 127.

202. *Id.*

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.²⁰³

Section 1367, in other words, makes clear that the civil action over which jurisdiction is authorized may *include* claims over which a court may not exercise federal question or diversity jurisdiction.²⁰⁴ But although the statute could have been drafted with greater precision,²⁰⁵ the reference to “any civil action of which the district courts have original jurisdiction”²⁰⁶ *first* requires reference to federal subject-matter jurisdiction statutes such as Section 1332(a) that provide an independent basis for the exercise of original subject-matter jurisdiction over a civil action. There can be no supplemental jurisdiction without an independent basis of subject-matter jurisdiction to which the supplemental claims can attach. Thus, the Court in *Allapattah* first had to decide what constitutes a “civil action” within the meaning of Section 1332(a) in order to determine whether supplemental jurisdiction could be exercised over other claims in the civil action authorized by the Federal Rules.

The four dissenting Justices in *Allapattah* relied on the notion that a “civil action” within the meaning of Section 1332(a) is the civil action initiated by the plaintiff(s) in accordance with the Federal Rules. Thus, the dissenters concluded that supplemental jurisdiction exists only if “a complaint” first satisfies the requirements of diversity jurisdiction.²⁰⁷ In other words, there is diversity jurisdiction over a civil action only if (1) all of the plaintiffs suing in the complaint are completely diverse from the defendants sued therein, and (2) at least in the absence of a basis for aggregation, “each plaintiff’s stake . . . independently meet[s] the amount-in-controversy specification.”²⁰⁸

203. 28 U.S.C. § 1367(a) (emphasis added).

204. “Civil actions” or “suits” within the meaning of Section 1332(a) and its predecessors historically did not include what would now be considered supplemental claims. See Mary Brigid McManamon, *Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History*, 46 WASH. & LEE L. REV. 863, 903–04 (1989) (noting that the scope of the “suit” over which Congress had granted diversity jurisdiction traditionally had been separate from the scope of ancillary jurisdiction).

205. See Oakley, *supra* note 2, at 599 (“[S]upplemental jurisdiction is not distinct from, but rather is a form of the original jurisdiction of the district courts.”); see also Steinman, *supra* note 2, at 1612 (“The widely-held understanding is that the term ‘original jurisdiction’ embraces (trial court) jurisdiction over both freestanding claims and supplemental claims, that is, claims within supplemental jurisdiction.”).

206. § 1367(a).

207. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 589 (2005) (Ginsburg, J., dissenting).

208. *Id.* at 585.

The dissent believed that its construction of the diversity jurisdiction statute was the construction that Section 1332(a) and its predecessors had received “from the start.”²⁰⁹ But as this Article has explained in detail, the dissent’s reading of *Strawbridge* is overly broad. Moreover, the dissent errs in suggesting that diversity jurisdiction is lacking over the entirety of the civil action authorized by the Federal Rules if one plaintiff in that action fails to satisfy the amount-in-controversy requirement. As explained above, the scope of a “civil action” historically was determined by the rules of joinder at common law. Thus, the failure of one plaintiff to satisfy the amount-in-controversy requirement cannot spoil diversity jurisdiction with respect to the claims of *other* plaintiffs who meet the amount-in-controversy requirement.²¹⁰

For these reasons, the majority in *Allapattah* appropriately rejected the view that the failure of one plaintiff to satisfy the amount-in-controversy requirement destroys jurisdiction with respect to the claims of other plaintiffs who meet that requirement. As the Court held: “If the [federal district] court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a ‘civil action’ . . . , even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint.”²¹¹ This represents a deserved repudiation of the

209. *Id.* at 584.

210. The dissent also argued that applying the requirements of diversity jurisdiction to the *entire* civil action authorized by the Federal Rules would harmonize diversity jurisdiction with the law of removal. *Id.* at 591–92. But the principle that a civil action authorized by state law cannot be removed unless a federal district court can exercise subject-matter jurisdiction over every part of the action implements a distinct Congressional policy: a policy against splitting between state and federal court an action properly brought in state court unless Congress has expressly authorized splitting such a suit. Compare, e.g., § 1441(a) (“Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants . . .”), with § 1441(c) (expressly authorizing removal of a civil action over which a federal district court would not have original jurisdiction if the civil action includes a federal-question claim and requiring the remand to state court of claims over which the federal district court lacks jurisdiction). Indeed, this general policy against splitting state suits has been embedded in the law of removal since at least 1880. See *Barney v. Latham*, 103 U.S. 205 (1880) (construing the second sentence of § 2 of the Judiciary Act of 1875 as requiring removal of the suit filed in state court *in its entirety* even if a federal court would have had original jurisdiction over a “separable controversy” in the suit). But see *Pacific Railroad Removal Cases*, 115 U.S. 1, 23 (1885) (holding in a decision of uncertain scope that a “separate and distinct” controversy subject to federal question jurisdiction was “to all intents and purposes” a separate “suit” removable by the concerned defendant under the Judiciary Act of 1875). See generally Hartnett, *supra* note 132, at 1108–31 (discussing removal provisions from the Judiciary Act of 1789 to the Judicial Improvements Act of 1990). Thus, the policy that claims asserted in state court generally must be removed as a unit sheds no light on the scope of a civil action under statutes granting federal district courts to hear cases originally filed in federal court. Rather, in diversity cases, the state action that must be removed in its entirety from state court may consist of one or more civil actions within the meaning of §§ 1332(a), 1367, or both.

211. *Allapattah*, 545 U.S. at 559. It was unnecessary for the Court to note that the amount-in-controversy requirement may sometimes be satisfied only by aggregating (1) claims by or against multiple persons with a joint interest or (2) claims of a plaintiff against a defendant.

understanding that “civil action” as that term is used in Section 1332(a) means the claims asserted by all the plaintiffs against all the defendants in accordance with the Federal Rules.

With respect to the complete-diversity requirement, the Court noted that as matters stood in 1989, “absent complete diversity, the district court lacked original jurisdiction over all of the claims in the action. *Strawbridge*, 3 Cranch, at 267–268, *Kroger*, 437 U.S., at 373–374.”²¹² But neither *Strawbridge* nor *Kroger* mandates that all the plaintiffs in the civil action authorized by the Federal Rules be completely diverse from all the defendants. Nor does *Allapattah*.

That is not to say that Justice Kennedy, the author of the majority opinion in *Allapattah*, did not have the modern assumption in mind. Indeed, his contention that complete diversity in a case dispels concern about local bias in context was an effort to explain why requiring complete diversity between the plaintiffs and defendants in the civil action authorized by the Federal Rules would not be inconsistent with the Court’s holding that a “civil action” has a narrower scope for purposes of applying the amount-in-controversy requirement of Section 1332(a).²¹³ But *Allapattah* need not and should not be understood as reading the modern assumption into law.

The precise scope of the action to which the complete-diversity requirement must be applied simply was not at issue in *Allapattah*. Indeed, none of the parties had any incentive to challenge the modern assumption. Because the complete-diversity requirement was satisfied even under the modern assumption in both consolidated cases, it would not have served the proponents of supplemental jurisdiction in those cases to question the assumption. The briefs before the Court in *Allapattah* accordingly took for granted that diversity jurisdiction requires that all plaintiffs in the civil action authorized by the Federal Rules be completely diverse from the defendants.²¹⁴

212. *Id.* at 556.

213. For analysis of this contention, see *supra* notes 184–187 and accompanying text. There is other language in the opinion that can also be read as taking for granted that there must be complete diversity in the civil action authorized by the Federal Rules. See, e.g., *Allapattah*, 545 U.S. at 553 (“[W]e have consistently interpreted § 1332 as requiring complete diversity: In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action.”).

214. Brief for Petitioners (Rosario Ortega) at 24, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (No. 04-79), 2004 WL 2802974, at *24 (stating “claims between parties of diverse citizenship are only within the jurisdiction of the federal courts if the action is completely diverse, i.e., if no parties from the same State are on opposite sides of the lawsuit”); Brief for Respondent (Star-Kist Foods, Inc.) at 4, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (No. 04-79), 2005 WL 139840, at *4 (stating “Congress has ‘clearly demonstrated a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant’” (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373–74 (1978))).

Recognizing that *Allapattah* does not resolve the scope of the civil action for purposes of the diversity-of-citizenship requirement also avoids a construction of Section 1332(a) that would be flatly inconsistent with the statutory text. As discussed above, it makes no sense to suggest that the text of a statute that grants “original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 . . . and is between . . . citizens of different States”²¹⁵ has one definition of “civil action” for the amount-in-controversy requirement and a broader definition of the *same* term for the diversity-of-citizenship requirement. One might avoid this textual difficulty by positing that “complete diversity” is an extra-textual requirement. But there is no question that Chief Justice Marshall in *Strawbridge* construed the text of the statute,²¹⁶ and the Court had so recognized the year before *Allapattah* was decided.²¹⁷

Thus, *Allapattah*’s diversity jurisdiction holding is best understood as having no broader reach than the following declaration in the opinion: “When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question, has original jurisdiction over that claim.”²¹⁸ The vague reference to “jurisdictional defect” could be read to include a lack of complete diversity in the civil action authorized by the Federal Rules. But for the reasons discussed above, this would be a mistake. *Allapattah* need not and should not be read to incorporate unfounded assumptions about the complete-diversity requirement that none of the parties had any incentive to challenge and on which the Court had no need to rule.

C. Applying the Historical Understanding to Modern Practice

1. Supplemental Jurisdiction based on Diversity Jurisdiction

Implementing the historical understanding of complete diversity will expand the availability of supplemental jurisdiction. That is because the historical understanding of a “civil action”—when coupled with *Allapattah*’s construction of Section 1367—sometimes permits the exercise of supplemental jurisdiction over claims by nondiverse plaintiffs. Specifically, the historical understanding means that the inclusion of a nondiverse plaintiff in a complaint authorized by the Federal Rules will not

215. § 1332(a).

216. See *supra* notes 63–77 and accompanying text.

217. *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 583 (2004) (noting that Chief Justice “Marshall . . . derived the complete-diversity rule from the text of the 1789 Judiciary Act, and so stated in *Strawbridge v. Curtiss*.”).

218. *Allapattah*, 545 U.S. at 559.

necessarily destroy diversity jurisdiction over claims by the diverse plaintiffs. So long as there is diversity jurisdiction over an action defined by the rules of common-law joinder, Section 1367(a) permits a federal district court to exercise supplemental jurisdiction over claims that are part of the same case or controversy.²¹⁹ Section 1367(b) carves out certain exceptions to this grant of supplemental jurisdiction.²²⁰ But as construed by *Allapattah*, Section 1367(b) does not bar supplemental jurisdiction over claims by plaintiffs against a single defendant.²²¹

Assume, for example, that one of the parents in *Rosario Ortega* had been a citizen of the same state as *Star-Kist Foods*. Because Beatriz did not share a joint interest with her parents or sister and because her claim satisfied the requirements of diversity jurisdiction, her claim would have constituted a civil action over which a federal district court would have had original jurisdiction under Section 1332(a). Thus, under Section 1367(a), any other claims that were part of the same constitutional case or controversy could have been included as part of that civil action, unless barred by Section 1367(b). The claims by Beatriz and the non-diverse parent would have been part of the same case or controversy because all the claims arose out of the same accident. And because the claim of the non-diverse parent (a plaintiff joined under Rule 20) would have been asserted against *Star-Kist* (the sole defendant), Section 1367(b) would not have barred supplemental jurisdiction over the claim of the nondiverse parent.

2. Diversity Jurisdiction under Section 1332(a)(3)

Section 1332(a)(3) authorizes federal district courts to exercise diversity jurisdiction over “all civil actions where the matter in controversy exceeds the sum or value of \$75,000 . . . and is between . . . citizens of different States and in which citizens or subjects of a foreign state are additional parties.”²²² Applying the historical understanding of the scope of a civil action to Section 1332(a)(3) will have the effect of constricting the scope of jurisdiction under that provision when a citizen of a foreign state does not have a joint interest with a citizen of a U.S. state on the same side of the “v.”

219. See *supra* Part II.B.2.

220. § 1367(b).

221. The Court reasoned that the second clause of subdivision (b) references persons proposed to be joined as plaintiffs under Rule 19, or seeking to intervene as plaintiffs under Rule 24, but not plaintiffs joined under Rule 20. See *Allapattah*, 545 U.S. at 560. Although left unmentioned by the Court, the first clause of subdivision (b) also expressly bars supplemental jurisdiction over “claims by plaintiffs against persons made parties under Rule . . . 20.” § 1367(b). Because multiple defendants in a civil action are made parties under Rule 20, the Rule-20-plaintiff gap the Court identified in subdivision (b) closes up in all but single-defendant cases.

222. § 1332(a)(3).

It appears that Section 1332(a)(3) was added to the Judicial Code in 1948 to address confusion about the proper treatment of suits between citizens of different states that included a citizen of a foreign state on one side of the “v.”²²³ Since the Judiciary Act of 1875, Congress essentially had mimicked the language of the Constitution authorizing federal subject-matter jurisdiction in suits of a civil nature “between citizens of different states” and “between citizens of a state and foreign states, citizens, or subjects.”²²⁴ Some scholars argued that there could be no jurisdiction in a suit between citizens of a state in which a citizen of a foreign state was also a party.²²⁵ The argument in essence was that a suit between citizens of different states in which a citizen of a foreign state was also a party strictly speaking was neither a suit “between citizens of different states”²²⁶ or between “citizens of a state and foreign . . . citizens.”²²⁷ And federal law did not authorize the blending of these jurisdictional provisions.²²⁸

The statutory argument arguably had force before enactment of Section 1332(a)(3).²²⁹ In fact, it was precisely this sort of approach to the construction of jurisdictional statutes that apparently led Chief Justice Marshall to insist on complete diversity in *Strawbridge* and *Winter*.²³⁰ The argument nonetheless is unpersuasive in this context because (1) a suit between a citizen of a state and a citizen of a foreign state on one side of the “v.” and a citizen of a different state on the other could have been brought as two suits and (2) a federal court would have had jurisdiction over both.²³¹

223. For citations to relevant authority, see Nancy M. Berkley, Note, *Federal Jurisdiction Over Suits Between Diverse United States Citizens with Aliens Joined to Both Sides of the Controversy Under 28 U.S.C. § 1332(a)(3)*, 38 RUTGERS L. REV. 71, 89–90 n.82 (1985).

224. Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470.

225. For citations to relevant authority, see Berkley, *supra* note 223, at 89 n.80.

226. U.S. CONST. art. III, § 2; Judiciary Act of 1875 § 1.

227. Judiciary Act of 1875 § 1. The language of Article III was slightly different. See U.S. CONST. art. III, § 2 (granting jurisdiction in controversies “between a state, or the citizens thereof, and foreign states, citizens or subjects”).

228. See *supra* note 223.

229. Cf. J.C. ROSE, JURISDICTION AND PROCEDURE OF FEDERAL COURTS 245–46 (4th ed. 1931) (“Has the Federal Court Jurisdiction in a Suit Between a Citizen of a State and a Citizen of Another State and an Alien? . . . The doubt is as to whether the plaintiff in such a case can do in one suit what *if the liability of the defendants was not joint*, he admittedly could do in two.”) (emphasis added). The argument that the Constitution forbids the blending of these provisions is inconsistent with the Court’s later holding that the Constitution authorizes the exercise of jurisdiction on the basis of minimal diversity. See *supra* note 71.

230. See *supra* notes 69–77 and accompanying text.

231. The text assumes that it would make no difference if each suit—taken separately—failed to include a required party. A court presumably could address any required party problem through consolidation of both suits. See FED. R. CIV. P. 42; An Act Concerning Suits and Costs in Courts of the United States, ch. 14, § 3, 3 Stat. 21 (1813). As the Supreme Court recently noted: “From the outset, we understood consolidation not as completely merging the constituent cases into one, but instead as enabling more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them.” *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018).

It would put form over substance to conclude in such circumstances that jurisdiction was unavailable.²³² And since at least *Oliver v. Alexander*, the Court has favored substance over form in jurisdictional determinations.²³³

Indeed, the Court analogously permitted a blending of distinct jurisdictional provisions in *Romero v. International Terminal Operating Co.*²³⁴ In that case, one of the parties who allegedly was jointly and severally liable in tort would ordinarily have destroyed diversity jurisdiction.²³⁵ The Court nonetheless held that the district court could exercise federal-question jurisdiction over the nondiverse party and diversity jurisdiction over the remaining diverse defendants.²³⁶ Because the federal district court could have exercised subject-matter jurisdiction over both parts of the suit had it been split in two, there was no basis for dismissing the suit simply because there were citizens of a foreign state on both sides of the “v.” A few lower courts have reached the same result in other contexts.²³⁷

Thus, if Section 1332(a)(3) had merely resolved a dispute about whether two jurisdictional provisions could be blended together to provide jurisdiction over one suit, the provision could now be deemed a jurisdictional relic. What continues to give subdivision (a)(3) relevance is its apparent repeal in part of the complete-diversity requirement. Specifically, so long as there is complete diversity between citizens of

232. Cf. *Ladew v. Tennessee Copper Co.*, 179 F. 245, 256 (C.C.W.D. Tenn. 1910) (“And while it may be said from a somewhat metaphysical point of view, that in a suit brought by a citizen of one state against two defendants, one of whom is a citizen of another state, and the other an alien, the controversy, considered in its entirety, is neither wholly between citizens of different states nor between a citizen of a state and a foreign citizen, yet as such controversy in each and all of its elements as between the plaintiff and each of the defendants separately, clearly comes within the provisions of the act [of 1875].”)

233. See *supra* notes 24–33 and accompanying text. The Federal Rules, however, do provide a procedural tool that allows courts to avoid choosing between procedural form and jurisdictional substance. Consider the Fourth Circuit’s decision in *C.L. Ritter Lumber Co. v. Consolidation Coal Co.*, 283 F.3d 226 (4th Cir. 2002). Three of the plaintiffs and two of the defendants in that case were citizens of Texas. When the defendants—after judgment—objected that the court lacked diversity jurisdiction over the action, the district court granted the plaintiffs’ motion “to amend the judgment by splitting this suit into two separate cases, with one embracing the claims asserted by the Texas Plaintiffs and the other embracing the claims against the Texas Defendants.” *Id.* at 229. This was possible because none of the “Texas” plaintiffs had “asserted claims against any of the Texas [d]efendants.” *Id.* The Fourth Circuit held that the severance cured any defect in diversity jurisdiction, *id.* at 229–30, but did not address the argument that diversity jurisdiction would have been appropriate even without severance because that argument had not been raised, *id.* at 229 n.2.

234. 358 U.S. 354 (1959).

235. The plaintiff was a citizen of Spain, and the defendants were citizens of New York, Delaware, and Spain. See *id.* at 355–57.

236. *Id.* at 381 (“Since the Jones Act provides an independent basis of federal jurisdiction over the non-diverse respondent, Compania Trasatlantica, the rule of *Strawbridge v. Curtiss* . . . does not require dismissal of the claims against the diverse respondents.”).

237. See, e.g., *Harris v. Ill.-Cal. Express, Inc.*, 687 F.2d 1361, 1367 (10th Cir. 1982) (holding that when both plaintiffs individually “had independent bases for jurisdiction grounded in diversity,” diversity jurisdiction was not destroyed by the fact that one plaintiff had asserted claims against a defendant who was not diverse from the other plaintiff).

different states, subdivision (a)(3) appears to permit citizens of foreign states to be joined as parties on both sides of the “v.”²³⁸

Subdivision (a)(3) nonetheless is read too broadly if understood to authorize the joinder of citizens of foreign states on both sides of the “v.” in any civil action authorized by the Federal Rules. Section 1332(a)(3)—while apparently repealing the complete-diversity requirement in limited part—does not expand the scope of a civil action within the meaning of Section 1332(a). And as discussed in detail above, a civil action within the meaning of Section 1332(a) essentially has the scope of a suit at common law.²³⁹ Thus, unless the citizens of foreign states have a joint interest with citizens of a U.S. State on their side of the “v.,” jurisdiction should be unavailable under subdivision (a)(3).

CONCLUSION

There is no question that the historical understanding of the complete-diversity requirement will complicate the jurisdictional inquiry under Sections 1332(a)(3) and the supplemental jurisdiction statute. Courts would be required to distinguish between joint and several rights more frequently than is currently the case. And the distinction can be difficult to draw.²⁴⁰ But the real issue is not whether it is easy for courts and counsel to distinguish

238. See *Dresser Indus., Inc. v. Underwriters at Lloyd’s of London*, 106 F.3d 494 (3d Cir. 1997) (so holding and collecting circuit and district court authority); see also *Tango Music, LLC v. DeadQuick Music, Inc.*, 348 F.3d 244 (7th Cir. 2003) (holding that it makes no difference that citizens of the same foreign state are on both sides of the “v.”). The Supreme Court has not addressed this question.

239. The Fifth Circuit’s well-known decision in *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974), is consistent with this understanding. The case involved a married couple, a citizen of France and a citizen of Mississippi, who filed suit against a citizen of Louisiana. The husband and wife had distinct tort claims against the Louisianan. The Fifth Circuit held that diversity jurisdiction existed over the claim by the Frenchman under Section 1332(a)(2) and over the claim by the Mississippian under Section 1332(a)(1). The Fifth Circuit did not rely on—or even advert to—Section 1332(a)(3), the most obviously applicable provision if the plaintiffs’ claims were part of the same civil action for jurisdictional purposes.

240. Leading treatises have argued that this distinction is difficult to apply. See 15A MOORE’S FEDERAL PRACTICE—CIVIL § 102.108[3][b] (“Today, asking whether rights are properly characterized as joint or several rivals the question of how many angels dance on the head of a pin for both difficulty and practical significance.”). See also 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3704 (4th ed. 2006) (making a similar argument). But Professor Rensberger—after a thorough study of the amount-in-controversy cases—concluded that “the lower federal courts have done a surprisingly good job applying the aggregation rules consistently.” Rensberger, *supra* note 6, at 941. See also *Snyder v. Harris*, 394 U.S. 332, 341 (1969) (“[L]ower courts have developed largely workable standards for determining when claims are joint and common, and therefore entitled to be aggregated, and when they are separate and distinct and therefore not aggregable.”). Indeed, Professor Rensberger notes that the rules of aggregation “operate against a background of substantive law” and argues that “[f]or most cases, the substantive law is relatively clear.” Rensberger, *supra* note 6, at 960–61. To provide a simple but pervasive example, the concept of joint and several liability is one with which virtually all lawyers are familiar. And the correct application of the complete-diversity requirement in that context arguably has been apparent and easily applied since the Court decided *Winter* in 1816.

between joint and several rights, but whether it serves any purpose to require them to do so.

A jurisdictional test that relies on this distinction is undoubtedly anachronistic.²⁴¹ No one would seriously contend that the optimal jurisdictional policy can be discerned in discarded common-law procedures. The question with which courts are faced, however, is not whether the historical understanding reflects the optimal jurisdictional policy, but whether courts remain bound to apply the requirements of diversity jurisdiction against the background of common-law joinder rules.

The Court has properly insisted that the principles of party joinder at common law define the scope of the civil action for the purpose of applying the amount-in-controversy requirement, and there is no sound basis for defining the scope of the civil action differently with respect to the diversity-of-citizenship requirement. Thus, until Congress changes the relevant unit for jurisdictional analysis, common-law joinder principles must serve as the background against which *both* the amount-in-controversy and diversity-of-citizenship requirements of Section 1332(a) are applied.

241. See, e.g., Oakley, *supra* note 2, at 622 (endorsing the view “that the rules of aggregation are historical hand-me-downs in need of reform in order to provide a coherent framework for modern jurisdictional determinations.”); Rensberger, *supra* note 6, at 933 (“[W]hile originally explicable within the legal environment of their origin, [the rules of aggregation] stand as anachronisms when transported to the present day.”); Redish, *supra* note 66, at 1808 (“For the Supreme Court in the 1990s—or the 1960s, for that matter—to employ a rule that turns on the “joint” or “several” nature of the claims is similar to attempting to drive a Model T on a superhighway.”).