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THE *TIDEWATER* PROBLEM: ARTICLE III AND CONSTITUTIONAL CHANGE

*James E. Pfander**

INTRODUCTION

The Supreme Court's 1949 decision in *National Mutual Insurance Co. v. Tidewater Transfer Co.*[1] poses an enduring puzzle for students of the law of federal jurisdiction. The case began when the National Mutual Insurance Company—a District of Columbia corporation—brought suit in federal district court in Maryland. The plaintiff corporation invoked the federal court's diversity jurisdiction, relying upon a then recently enacted statute that defined citizens of the District (and other territories) as citizens of a State for diversity purposes.[2] This definition ran headlong into the restrictive terms of Article III itself, which provides for the assertion of jurisdiction over disputes between "citizens of different States."[3] It also bumped into an early Marshall

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My thanks to Thomas Lee, Ron Rotunda, and Jay Tidmarsh for helpful comments, and to the editors of the *Notre Dame Law Review* for the invitation to participate in the *Federal Courts, Practice and Procedure* Issue. Special thanks to David Shapiro, for his many contributions to the field, for his comments on this Article, and for his kind words along the way.

1 337 U.S. 582 (1949).

2 As amended, the 1940 diversity statute extended the jurisdiction of the district courts to civil actions between citizens of different states "or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory." *See* Act of Apr. 20, 1940, ch. 117, 54 Stat. 143 (codified as amended at 28 U.S.C. § 1332 (2000)). For the legislative history of the statute, see *infra* notes 178–82 and accompanying text.

3 The diversity grant of jurisdiction, as it has come to be known, extends the judicial power of the United States to controversies "between Citizens of different States." U.S. CONST. art. III, § 2. Of an immense literature, see, Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979); and David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317 (1977). Corporations have been deemed citizens of their state of incorporation, and more recently of the state in which they have their principal place of business. For more on corporate citizenship, see *infra* Part IV.

Court opinion, *Hepburn v. Ellzey*,[4] in which the Chief Justice held that citizens of the District of Columbia were not citizens of any state within the meaning of the Judiciary Act of 1789 for purposes of invoking diversity jurisdiction.[5] Marshall's opinion, and subsequent developments, permitted specialized federal tribunals in the District of Columbia and territories to hear disputes involving territorial citizens, but consistently rejected the attempts of territorial citizens to bring diversity suits in federal courts located within the States themselves.[6]

Nearly 150 years later, after having reaffirmed *Hepburn* through the years,[7] the Court faced the question again in *Tidewater*. Although nothing in Article III had changed to support the new legislation, and although it refused to overrule *Hepburn*, the *Tidewater* Court nonetheless upheld the statute.[8] In permitting federal courts to exercise jurisdiction that most Justices appear to have regarded as exceeding the scope of the Article III grant, the Court created the *Tidewater* problem.

Two principal explanations have emerged in the literature for the decision to uphold Congress's power to expand federal jurisdiction beyond the boundaries of Article III, and both bristle with problems. The first, offered in the *Tidewater* plurality opinion of Justice Jackson, comes close to outright jurisdictional apostasy. Speaking for himself and two others, Justice Jackson argued that Article III does not specify an absolute ceiling on the scope of the judicial power of the federal courts.[9] Instead, Justice Jackson suggested, Congress may exercise its powers under Article I of the Constitution to give the federal courts jurisdiction over matters that do not come within the scope of Article III.[10] Although the remaining six Justices were quick to disavow Jus-

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4 6 U.S. (2 Cranch) 445 (1805).

5 *Id.* at 452–53.

6 *See id.* at 452 (refusing to permit District citizen to bring diversity action in federal trial court in Virginia); *see also* New Orleans v. Winter, 14 U.S. (1 Wheat.) 91, 94–95 (1816) (holding that federal district court for the State of Louisiana may not exercise diversity jurisdiction over dispute between citizen of Kentucky and citizen of Mississippi territory). *But cf.* Sere v. Pitot, 10 U.S. (6 Cranch) 332, 338 (1805) (holding that district court for the territory of Orleans may entertain diversity dispute between an alien and a citizen of the Orleans territory). On the history of Article I tribunals in the territories, see James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. (forthcoming 2004).

7 *See, e.g.*, Barney v. Baltimore City, 73 U.S. (6 Wall.) 280, 287 (1867).

8 Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 604 (1949) (plurality opinion).

9 *See id.* at 590–91 (plurality opinion).

10 *See id.* at 590–600 (plurality opinion). For an overview of the opinions, see *infra* Part I.

tice Jackson's view, it nonetheless represents a challenge to the accepted portrait of federal courts as courts of limited jurisdiction.

The leading alternative to Justice Jackson's account first appeared in *The Federal Courts and the Federal System,* the casebook of Professors Henry M. Hart, Jr. and Herbert Wechsler.[11] Building on a theory developed to defend a jurisdictional provision of the Taft-Hartley Act, Hart and Wechsler suggested that the federal courts might exercise a form of protective jurisdiction over claims involving District citizens.[12] Although it defies simple restatement, the theory of protective jurisdiction begins by identifying a field of regulatory interest over which Congress may exercise broad legislative power. The theory suggests that Congress may have authority to protect an area of federal interest from potentially hostile state court adjudication by shifting the litigation into the presumptively more friendly confines of a federal court, perhaps even where it fails to regulate the field through the passage of rules of federal substantive law to govern the disputes.[13] Though largely based upon state law, the resulting claims are said to arise under federal law for protective jurisdictional purposes.

Both explanations of the *Tidewater* Court's apparent willingness to press the outer limits of Article III have attracted their share of critical notices. One leading critic, Justice Felix Frankfurter, dissented in *Tidewater* itself and argued for the classic view that Congress may not extend diversity jurisdiction to any litigants who fail to meet the state-citizen test of Article III.[14] In a separate decision in *Textile Workers Union v. Lincoln Mills,*[15] Justice Frankfurter spelled out his opposition to the theory of protective jurisdiction. Justice Frankfurter suggested that the party-based jurisdictional grants in Article III operate in effect as sources of protective jurisdiction themselves and thus exhaust the category.[16] Partly as a result of Justice Frankfurter's critique, protective jurisdiction remains under something of a cloud and

11 *See* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953) [hereinafter HART & WECHSLER I]. When Hart & Wechsler wrote, the *Tidewater* problem was fresh, and the issue of protective jurisdiction that it raised bore closely on the constitutionality of the recently enacted labor contract provisions of the Taft-Hartley Act. *See infra* note 69. With the passage of time, and the acceptance of its result, if not its reasoning, the *Tidewater* problem has slipped into relative obscurity. *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 416–18 (5th ed. 2003) [hereinafter HART & WECHSLER V] (discussing the problem briefly).

12 *See infra* Part II.

13 *See* HART & WECHSLER V, *supra* note 11, at 840–55.

14 *Tidewater,* 337 U.S. at 650 (Frankfurter, J., dissenting).

15 353 U.S. 448 (1957).

16 *See id.* at 473–77 (Frankfurter, J., dissenting).

has attracted little support on the Court. The *Tidewater* problem thus remains to some extent unresolved.

Perhaps no solution will be forthcoming; the acceptance of minimal diversity as a tool of jurisdictional expansion may contribute to *Tidewater's* growing irrelevance. First formally approved in the context of interpleader actions,[17] minimal diversity holds that Congress may provide for federal jurisdiction over any dispute that involves at least two opposing parties from different states. In a world of modern, complex, multi-party disputes, minimal diversity provides a tool of federal jurisdictional expansion that seems to pose few constitutional problems, and nonetheless permits Congress wide discretion to shift state law claims into federal court. Recent evidence, moreover, suggests that Congress has come increasingly to rely upon minimal diversity for problems that it might have once addressed through some form of protective jurisdiction.[18] Pressed to its logical conclusion, minimal diversity could have solved both the *Tidewater* and *Lincoln Mills* problems; diversity of citizenship between union members and stockholders of the business corporation would support jurisdiction in virtually any conceivable case.[19]

This Article explores an alternative solution to the problem. Building upon a theory that Alexander Hamilton first sketched in the *Federalist Papers*, this Article examines a link between diversity jurisdiction and the enforcement of the "privileges and immunities" of state citizens as guaranteed in Article IV of the Constitution.[20] Hamilton's theory portrays the diversity jurisdiction as protecting out-of-state citi-

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17 *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531–33 (1967).

18 In two recent instances, Congress has relied upon minimal diversity as the vehicle for shifting state law claims into federal courts. In the Multiparty, Multiforum Trial Jurisdiction Act of 2002, Congress provided federal courts with minimal diversity jurisdiction over civil actions that arise from a single accident involving the death of at least seventy-five people. *See* Act of Nov. 2, 2002, Pub. L. No. 107-273, § 11,020, 116 Stat. 1758, 1826 (to be codified at 28 U.S.C. § 1369). In the Y2K Act, Congress gave the federal courts jurisdiction on the basis of minimal diversity over class action disputes growing out of any Y2K failure. *See* Act of July 20, 1999, Pub. L. No. 106-37, 113 Stat. 185 (codified at 15 U.S.C §§ 6601–6617 (2000)).

19 Jurisdictional rules today define the citizenship of a business corporation by reference to its state of incorporation and principal place of business, *see* 28 U.S.C. § 1332(c)(1) (2000), but define the citizenship of a union (and other unincorporated associations) to be that of the citizenship of each of its members. *See* United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 145 (1965). Although the standard grant of diversity jurisdiction continues to require complete diversity, Congress retains power to substitute regimes of minimal diversity. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, THE LAW OF FEDERAL COURTS 159–60 (6th ed. 2002) (citing the example of interpleader jurisdiction).

20 U.S. CONST. art. IV, § 2.

zens from subtle forms of state court discrimination by providing them with an alternative federal forum in which to litigate claims based upon what we would now characterize as state law.[21] Although it has drawn sharp attacks from such eminent observers as Henry Friendly,[22] Hamilton's account broadens our understanding of diversity jurisdiction and holds up rather well, even today. Over two hundred years have passed and the federal system has yet to find an effective appellate remedy for cases in which the parties suffer subtle forms of discrimination at the hands of state court judges or juries. Hamilton recognized that the diversity grant of Article III meant to address the problem by empowering Congress to provide litigants with an alternative original federal docket.

After developing the Hamiltonian link between diversity and the Privileges and Immunities Clause of Article IV, this Article considers the relevance of the Fourteenth Amendment. Although it accomplishes a good deal more, the Fourteenth Amendment provides that the states may not make or enforce laws that abridge the "privileges or immunities" of the citizens of the United States.[23] By picking up many of the same state law rights that lay at the heart of the original Privileges and Immunities Clause in Article IV, the Fourteenth Amendment seeks to ensure that all citizens of the United States, including its newest citizens, would enjoy the same rights to own property and make or enforce contracts that others had long enjoyed. The Reconstruction debates reveal some reluctance to guarantee all of the political rights of state citizenship, and thus create some uncertainty about the precise nature of protected privileges or immunities.[24] But its framers repeatedly drew connections between the Fourteenth Amendment and the enforcement of civil rights, including those that most citizens would enforce through suits at law and equity in the state courts.[25]

Although the *Slaughter-House Cases*[26] drained off much of the generative force of the clause and its partial restoration in *Saenz v. Roe* remains a work in progress,[27] the Privileges or Immunities Clause may offer a legitimate basis for the exercise of federal jurisdiction in cases

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21 *See infra* Part III.A.

22 *See infra* note 87 and accompanying text.

23 U.S. CONST. amend. XIV, § 1.

24 *See infra* note 118 and accompanying text.

25 See *infra* notes 143–46 and accompanying text.

26 83 U.S. (16 Wall.) 36 (1872).

27 *See* Saenz v. Roe, 526 U.S. 489, 503–04, 510–11 (1999) (relying on the Fourteenth Amendment's Privileges or Immunities Clause to invalidate state laws that discriminated against the right of citizens to travel freely).

such as *Tidewater*. The statute at issue in *Tidewater* provides District citizens with an opportunity to litigate claims based upon state law in federal court[28] but only in circumstances where the citizenship of the opposing party gives rise to a threat of state court bias similar to that which has long grounded diversity jurisdiction. Such state court bias also represents a potential violation of privileges and immunities, as Hamilton's account of the jurisdiction makes clear. One can thus reconceptualize the *Tidewater* statute less as a grant of diversity jurisdiction than as permissible legislation, adopted pursuant to Section 5 of the Fourteenth Amendment, to enforce the Privileges or Immunities Clause. On such an account, District citizens (as citizens of the United States) enjoy the same right to protection against biased state decisionmaking as all other citizens of the United States. Claims like those in *Tidewater* would depend on state law, but the suits themselves (like suits brought under a protective jurisdiction theory) would arise under federal law for jurisdictional purposes under Article III.

On this account, the *Tidewater* statute would be seen as operating as something akin to protective jurisdiction. Instead of the legislative power of Congress over citizens of the District of Columbia, as in Hart and Wechsler's account, the Fourteenth Amendment account portrays the statute as protecting the privileges or immunities of national citizens from biased state court law enforcement. Such an account has the advantage of linking the scope of jurisdiction rather closely to the traditional confines of diversity jurisdiction, and thus establishes limits on the potential scope of the doctrine. Such an account also has the virtue of linking the new interpretation in *Tidewater* to a change in the text of the Constitution. Although the Fourteenth Amendment did not amend the diversity grant in Article III of the Constitution, it did make a fundamental change in the Privileges and Immunities Clause, shifting from an emphasis on state citizenship as the trigger of protection under Article IV to an emphasis on citizenship in the United States. Thus, the fact that citizens of the District enjoy all of the privileges and immunities of national citizenship, including a right to freedom from state court bias in litigation with the citizens of an interested state, can operate to provide a constitutional predicate for the federal statute that the *Tidewater* Court upheld.

28 To be sure, claims based upon the law of the District of Columbia—which a Maryland federal district court might apply under the rule of *Klaxon v. Stentor*, 313 U.S. 487 (1941)—are not, strictly speaking, state law claims. But though it emanates from an Act of Congress, the law of the District of Columbia does not operate like much federal law. It will not support the federal question jurisdiction of the federal courts, either originally or on appeal to the Supreme Court. For an account, see Pfander, *supra* note 6. For present purposes, then, it can be analogized to state law.

While Congress thus has power under the Fourteenth Amendment to enact legislation offering District citizens protection against biased state court adjudication with citizens of other states, it need not exercise that power under Section 5. Nor should the Court itself feel obligated by the recognition of legislative power to insist as a matter of constitutional law that Congress must supply District citizens with a diversity docket. The Fourteenth Amendment, in general, does not bind Congress. But just as the diversity jurisdiction arose initially as a solution to subtle forms of bias, rather than the overt instances of State discrimination that would themselves support federal question jurisdiction, so too can subtle bias be seen as bringing congressional enforcement powers into play to remedy expected or feared violations of the Privileges or Immunities Clause of the Fourteenth Amendment. Although the remedial powers of Congress have been downsized in recent years,[29] the Court has continued to recognize their existence in circumstances where Congress might reasonably conclude that state actions threaten federal rights.[30] Here, the traditional view that potential bias justifies diversity jurisdiction as a preventative measure could help support the exercise of remedial power.

This Article develops its Fourteenth Amendment account of protective jurisdiction in five parts. Part I of the Article takes a closer look at the opinions in the *Tidewater* case, examining with some care both Justice Jackson's plurality opinion and Justice Frankfurter's dissent. Part II shifts to consider the leading alternative account, the Hart and Wechsler theory of protective jurisdiction. Part III explores Hamilton's account of diversity jurisdiction and its link to the Privileges and Immunities Clause of Article IV. Part IV examines the history of the Fourteenth Amendment, demonstrating a surprisingly strong historical case for the connection between the enforcement of rights at common law and the protection of privileges and immunities. Part V answers predictable objections, and considers other applications to the law of federal jurisdiction. In the end, the Article concludes that the Fourteenth Amendment account offers an explanation of the result in *Tidewater* that fits better with jurisdictional law and practice than its two principal competitors.

I. The *Tidewater* Decision

Part of the puzzle of *Tidewater* lies in understanding what all the fuss was about. The nine Justices divided sharply, writing four separate opinions that ran over sixty pages in the U.S. Reports, presenting

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29 *See infra* Part IV.

30 *See infra* Part IV.

interpretive issues that have kept scholars busy for several years. Justice Jackson tried to downplay the opinion's importance; it was after all not a case about "[fundamental] rights and freedoms" but dealt only with the power of Congress to adapt the machinery of government to the needs of changing times.[31] Writing in 1949, Justice Jackson had participated in many such adaptations, joining with others to permit Congress to exercise a broader range of legislative powers.[32] But Justice Jackson's disclaimer did not impress his brethren. Justice Frankfurter's dissent argued that the provisions relating to the judicial power in Article III were among the least subject to adaptation to account for changing times.[33] They were instead technical matters, expressed with a definiteness and precision of phrasing, that defied expansive interpretation on the basis of new experience.[34] Even Chief Justice Vinson, who had little perhaps to add to the debate, felt constrained to write separately because of "the importance of these questions to the administration of the federal court system."[35]

Tidewater thus presents the questions of constitutional change and original meaning as they relate to the judicial power of the United States. The continuing relevance of the original meaning stems in part from Article III's capacity to accommodate changes in federal legislative power. Article III confers judicial authority over cases arising under the Constitution, laws and treaties of the United States[36]—terms deliberately framed to encompass litigation over any question of federal constitutional or statutory law, whenever adopted. But the principle of coextensivity that underlies this flexible grant of judicial power does little to expand the federal judiciary's authority over matters that fail to present a federal question. As a consequence, the Justices in *Tidewater* faced the question of constitutional change in perhaps its least appealing guise: a statute that purported to expand the diversity jurisdiction of the federal courts beyond the scope set forth in Article III.

31 Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 585–86 (1949) (plurality opinion).

32 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 125 (1942) (upholding power of Congress, under the Commerce Clause, to regulate wheat a farmer grew and withheld from the market; adopting the theory that wheat withheld from the market might, if aggregated over many similar transactions nationwide, produce a "substantial economic effect on interstate commerce"). On the significance of *Wickard's* aggregation approach to the modern expansion of the Commerce power, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 254–55 (2d ed. 2002).

33 *See Tidewater*, 337 U.S. at 646 (Frankfurter, J., dissenting).

34 *See id.* at 654 (Frankfurter, J., dissenting).

35 *Id.* at 627 (Vinson, C.J., dissenting).

36 U.S. CONST. art. III, § 2.

Justice Frankfurter's dissent in *Tidewater* gave voice to this concern with the expansion of federal diversity jurisdiction. To be sure, Justice Frankfurter expressed the classic position that, under principles of respect for the reserved powers of the states, Congress lacks power to expand the jurisdiction of federal courts beyond the limits of Article III.[37] But Justice Frankfurter also drew upon the progressive critique of diversity jurisdiction as federal judicial interference in the rightful lawmaking power of the state courts.[38] Justice Frankfurter shared the view of his student and protege, Henry Friendly, that diversity jurisdiction had no obvious role to play in a federal system in which state courts provided an acceptable forum for the enforcement of state law and out-of-state citizens no longer faced the same threat of biased decisionmaking that had grounded the jurisdiction as an original matter.[39]

Progressives like Justice Frankfurter also worried that corporate access to diversity dockets enabled the modern business enterprise to escape state court regulation.[40] Justice Brandeis's opinion in *Erie Railroad Co. v. Tompkins*[41] had reduced the threat of federal judicial intervention into the realm of state common law. But the rise of the business corporation, and its recognition as a citizen of its state of incorporation for purposes of diversity, had facilitated a great expansion of federal diversity dockets that in some ways anticipated and fueled the *Lochner* era.[42] *Tidewater* involved a dispute between two corporations, one a citizen of Virginia and one of the District.[43] While a contest over state contract law between corporate parties may have had little significance for individual rights and freedoms, it implicated the progressive worry about the changing function of federal diversity courts from an alternative forum to address bias against those living outside a particular state to a forum for corporate litigants.

Out of this stew of jurisdictional issues emerged an original and deeply conflicted set of opinions.[44] Speaking for two others, Justice

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37 *Tidewater*, 337 U.S. at 648 (Frankfurter, J., dissenting).

38 *See id.* at 650–52 (Frankfurter, J., dissenting).

39 *See id.* (Frankfurter, J., dissenting).

40 *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 143 (2000).

41 304 U.S. 64 (1938).

42 *See* PURCELL, *supra* note 40, at 143; *cf.* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997) (tracing the rise of diversity jurisdiction as a vehicle for enforcement of federal rights).

43 *Tidewater*, 337 U.S. at 582 (plurality opinion).

44 Indeed, recent writing about the opinion has tended to focus on the problem of determining what the Court held as an illustration of the more general problem of

Jackson purported to reaffirm *Hepburn* as to the meaning of Article III,[45] but concluded that Congress had power under Article I to create courts for the adjudication of disputes involving District of Columbia citizens and power to authorize the Article III courts to hear such claims.[46] Justice Jackson drew on two different lines of authority in making this claim. He first noted that congressional power over citizens of the District and their affairs includes the power to create a legislative court system for the District that enjoys all of the powers of state courts, as well as the power to conduct Article III business.[47] Congress could empower such courts, Justice Jackson noted, to summon defendants from throughout the country and compel them to appear at the suit of District plaintiffs.[48] Congress might instead permit existing federal district courts in states such as Maryland, the venue of the *Tidewater* litigation, to hear Article I judicial business along with their Article III work.[49]

Justice Jackson also invoked a number of analogous situations in which the Court had permitted Congress to assign Article I judicial business to Article III courts. First, Justice Jackson pointed to claims involving the United States, claims that the Court had previously described as Article I business but had permitted Congress to assign to Article III courts. Second, Justice Jackson pointed to the bankruptcy cases, which recognize the power of Congress to assign to federal courts the adjudication of a variety of state law claims. Justice Jackson argued that such matters did not arise under federal law and thus depended on the power of Congress under Article I to ground the jurisdiction of Article III courts. In the end, Justice Jackson proposed a fundamental revision of the nature of Article III judicial power, as his sweeping conclusion makes clear. So long as the dispute was justiciable, and so long as Congress finds it necessary in the exercise of its Article I powers to provide a tribunal for its resolution, Justice Jackson's approach would permit Congress to open the federal courts to

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explicating decisions that involve closely divided plurality opinions. *See* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 135–36 (1999); Suzanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 WM. & MARY L. REV. 865, 898 (1998).

45 *See Tidewater*, 337 U.S. at 586–88 (plurality opinion). Jackson emphasized that the District was unlikely to have attracted the attention of the framers; it was "nonexistent in any form, much less as a state" and was not admitted to statehood either at the time of ratification or thereafter. *Id.* at 588 (plurality opinion).

46 *See id.* at 592 (plurality opinion).

47 *See id.* (plurality opinion)

48 *Id.* at 90 (plurality opinion).

49 *See id.* at 590, 592 (plurality opinion).

the claim, even where it arises under state law and does not satisfy the requirements of diversity.[50]

Justice Jackson's opinion challenged his colleagues either to strike down the statute or to rethink their jurisdictional assumptions.[51] Justices Rutledge and Murphy did neither. Although they joined Justice Jackson's judgment to uphold the statute, Justices Rutledge and Murphy did so on the basis that *Hepburn* had been wrongly decided and should be overruled.[52] They proposed to reinterpret Article III's reference to state citizens on the ground that the exclusion of District citizens was both unjust and discriminatory, and denied to U.S. citizens living in the District access to federal courts that other citizens and even aliens enjoyed.[53] Building on this claim of injustice, they noted that Chief Justice Marshall had premised his claim in *Hepburn* on the argument that the Constitution invariably used the word "State" to mean a formal member of the Union.[54] But time had undermined that claim; citizens of the District might not enjoy all of the political rights of state citizens, but they could fairly claim civil rights.[55] Thus, a decision to overrule *Hepburn* would "remove highly unjust discrimination from a group of our citizens larger than the population of several states of the Union."[56] It was a case about individual rights after all, and the solution to the temporal problem was to reinterpret the limits of Article III to avoid perceived injustice to a group of citizens in a federal city that did not exist at the time of the framing.

Although Justices Rutledge and Murphy supplied the votes to sustain the statute, they joined with the remaining four Justices in rejecting Justice Jackson's mode of analysis. A variety of common themes unite the opinions of the six Justices who rejected Justice Jackson's theory. First, the dubious six worried about preserving the long-

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50 *See id.* at 600 (plurality opinion). Justice Jackson went on to note the necessary limits of his formulation, indicating that the plenary power of Congress over the jurisdiction of the federal courts depended on the existence of some delegation of power to the federal government in Article I. *Id.* at 602 (plurality opinion). In *Tidewater*, congressional power over the citizens of the District met this requirement.

51 By reaffirming the *Hepburn* limits of diversity, Justice Jackson's opinion confronted the problem of constitutional change. Congress had conferred on District citizens an equal right of access to federal courts that the Framers of the Constitution had seemingly denied them. Seeking to uphold a sensible statute, Justice Jackson proposed a sweeping revision of the theory of the limits of judicial power.

52 *See Tidewater*, 337 U.S. at 617–18 (Rutledge, J., concurring).

53 *Id.* at 617 (Rutledge, J., concurring).

54 *Id.* at 619 (Rutledge, J., concurring).

55 *Id.* at 623 (Rutledge, J., concurring).

56 *Id.* at 625 (Rutledge, J., concurring).

standing notion that Article III defined the outer limits of federal court jurisdiction.[57] Second, they simply rejected Justice Jackson's proposed reinterpretation of recent jurisdictional lore. The Justices noted that the cases involving the powers of Article III courts to conduct Article I business primarily arose within the District itself, and did not apply to federal district courts elsewhere in the country.[58] They also resisted Justice Jackson's attempt to enlist the support of cases involving bankruptcy and U.S.-party jurisdiction; all such matters were said to present questions that implicated the broad scope of Article III and offered no support for an Article I approach.[59]

Only Justice Frankfurter delivered an extended peroration against diversity. Justice Frankfurter described the jurisdiction as tenuously founded and unwillingly granted, picking up a theme that Friendly had sounded in his article some twenty years earlier.[60] As Justice Frankfurter observed, the jurisdiction failed to implicate any substantive rights created by Congress, and had been more continuously under fire than any other.[61] Although *Erie* had happily eliminated many of the practical but indefensible reasons for its retention, Justice Frankfurter saw the retention of diversity jurisdiction as a product of legislative inertia.[62] Better Congress should repeal the grant entirely, Justice Frankfurter believed, than extend its pernicious effects beyond the stated boundaries of Article III as it had done in this case.[63]

To summarize, the opinions in *Tidewater* offer two solutions to the problem of jurisdictional boundaries, neither one of which attracted much support from the Court. Justice Jackson's opinion offers an ambitious reconstruction of the scope of congressional power that

57 *See id.* at 647, 652 (Frankfurter, J., dissenting) (noting that Article III marks the "outer limits of federal judicial power" and emphasizing the "whole history" of the federal courts in arguing for the preservation of jurisdictional limits); *id.* at 628–29 (Vinson, C.J., dissenting) (noting that Article III spells out precise boundaries of judicial power and reserving all other powers to the states).

58 *See id.* at 608–11 (Rutledge, J., concurring) (distinguishing *O'Donaghue v. United States*, 289 U.S. 516 (1929), as arising under federal law); *id.* at 638 (Vinson, C.J., dissenting) (same).

59 *Id.* at 611–13 (Rutledge, J., concurring) (distinguishing the bankruptcy cases as arising under federal law); *id.* at 652 n.3 (Frankfurter, J., dissenting) (same).

60 *Id.* at 650–51 (Frankfurter, J., dissenting).

61 *Id.* at 651 (Frankfurter, J., dissenting). Frankfurter did acknowledge that Congress had power to confer substantive rights on the citizens of the District, but noted that any claims over the enforcement of such rights would arise under the laws of the United States for jurisdictional purposes. *Id.* at 650 (Frankfurter, J., dissenting).

62 *Id.* (Frankfurter, J., dissenting).

63 *Id.* (Frankfurter, J., dissenting).

would enable Congress to authorize federal judicial resolution of any dispute over which it enjoys Article I lawmaking authority. But six Justices rejected Justice Jackson's approach. Similarly, Justices Rutledge and Murphy would have overruled *Hepburn*, essentially on grounds of fairness to District citizens, and thus reinterpreted Article III's proper borders.[64] But seven Justices voted to retain *Hepburn*, unfairness and all, and its longstanding interpretation of the scope of diversity jurisdiction.[65] Although something of a jurisdictional backwater, *Tidewater* thus continues to pose the question how the federal courts can hear disputes that, by hypothesis, exceed the scope of Article III and, parenthetically, how best to adapt its terms to a changing world.

II. THE HART AND WECHSLER ALTERNATIVE

Perhaps the best-known solution to the *Tidewater* problem appears in the Hart and Wechsler casebook on federal courts.[66] The casebook's authors begin by expressing doubt about the scope of Congress's powers to expand federal jurisdiction through the exercise of its powers under Article I. Instead, Hart and Wechsler suggest reliance upon the power of Congress to address the problem with a grant of protective jurisdiction, relying not upon the diversity grant but on a form of federal question jurisdiction under Article III.[67] The theory of protective jurisdiction made its debut during discussions of the legality of the Taft-Hartley Act of 1947,[68] as section 301 of that act provides for the assertion of federal jurisdiction over contracts between firms and labor unions.[69] Some who viewed Taft-Hartley as a purely

64 *See supra* notes 52–57 and accompanying text.

65 *See Tidewater*, 337 U.S. at 587 (Jackson, Black & Burton, JJ.) (plurality opinion); *id.* at 652–53 (Frankfurter & Reed, JJ., dissenting); *id.* at 645 (Vinson, C.J. & Douglas, J., dissenting).

66 *See* HART & WECHSLER I, *supra* note 11, at 371–72.

67 *Id.* at 372.

68 *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 189 (1953). Some lower federal court opinions adopted such theories in upholding the jurisdictional grant. *See, e.g.*, Textile Workers Union v. Am. Thread Co., 113 F. Supp. 137, 140 (D. Mass. 1953).

69 29 U.S.C. § 185(a) (2000). Section 301 simply provides that suits for violation of contracts between an employer and a labor organization may be brought in federal district court. The Supreme Court upheld this jurisdictional grant, not by relying upon the doctrine of protective jurisdiction but by finding that Congress had empowered the federal courts themselves to fashion federal common law to govern the enforcement of labor contracts. *See* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). On the merits of this conclusion, compare Alexander M. Bickel & Harry H.

jurisdictional statute (one that largely failed to specify substantive federal rules of decision) defended the statute as an appropriate exercise of the commerce power of Congress to shift certain disputes into federal court for resolution in accordance with state law.

Hart and Wechsler suggest that protective jurisdiction might help to solve the *Tidewater* problem. As they note, Congress has ample power to regulate and protect citizens of the District of Columbia.[70] With these powers over the District and its citizens, Congress could presumably establish a regime of nationwide service of process to allow such citizens to sue outsiders in courts set up within the District. Moreover, as Justice Jackson noted in his lead opinion, Congress might well create Article I legislative courts throughout the land in which citizens of the District could litigate claims against the rest of the country.[71] With these powers, Hart and Wechsler suggest that Congress might also establish the substantive rules of decision that would govern the legal relations between District citizens and others. An action brought to enforce such rights would plainly arise under the laws of the United States.

This power to fashion rules of substance lies at the center of the protective jurisdiction solution. Instead of legislating rules of substance into existence, Hart and Wechsler suggest, Congress might instead simply exercise its protective power over citizens of the District by providing them with a federal "haven" in which to litigate their claims against noncitizens.[72] The authors note that certain cases (those involving bankruptcy estates[73]) flow into federal court as cases arising under federal law, even where federal law does not supply the rule of decision. In effect, then, the greater power to fashion rules of federal law may carry with it the lesser power simply to shift matters of

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Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1 (1957) (arguing that there exists no basis for finding such a legislative purpose), with James E. Pfander, *Judicial Purpose and the Scholarly Process: The* Lincoln Mills *Case*, 69 WASH. U. L.Q. 243–315 (1991) (defending Justice Douglas's widely criticized decision that Congress meant federal law to control the determination of labor-contract issues).

70 *See* HART & WECHSLER I, *supra* note 11, at 372.

71 *Id.*

72 *Id.*; *see also* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

73 *See* Williams v. Austrian, 331 U.S. 642 (1947) (upholding bankruptcy jurisdiction over action governed by state law); Schumacher v. Beeler, 293 U.S. 367 (1934) (same). *See generally* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743 (2000) (attempting to construct a comprehensive and unifying theory of federal bankruptcy jurisdiction).

federal concern into Article III courts for resolution in accordance with the body of state law that *Erie* makes applicable in such cases.

Such a solution to *Tidewater* presents problems of its own, as the authors recognize. Justice Frankfurter noted one such problem in his dissent from the approval of labor-contract jurisdiction in *Textile Workers Union v. Lincoln Mills*.[74] There, in an extended consideration of protective jurisdictional theories, Justice Frankfurter portrayed the party-based heads of jurisdiction, including the diversity grant itself, as grants of protective jurisdiction authorizing federal courts to act as neutral tribunals in applying the law of the states to noncitizens who might not receive a fair shake in state court.[75] Justice Frankfurter argued that the party-based provisions of Article III exhaust the appropriate bases of protective jurisdiction.[76] Hart and Wechsler also note that protective jurisdiction presents a problem of circularity. If Congress can shift litigation to federal court through a simple grant of jurisdiction, then it would enjoy "virtually limitless" power to channel disputes over state law into federal court on the basis of any interest that implicates congressional power.[77]

Although the authors suggest some limits,[78] the doctrine of protective jurisdiction has a bootstrapping quality that has made it an unlikely candidate for further development. The doctrine also proposes to recognize an expansion in congressional power over federal jurisdiction not too dissimilar from the Article I theory that Justice Jackson propounded in *Tidewater*. This absence of limits to the power of Congress presents a serious problem, especially today, at a time when the Court's struggle to reinvigorate federal restraints on congressional power in its sovereign immunity and Commerce Clause cases has emphasized the need for limits.[79] Whatever the success of its recent line-drawing efforts, the Court seems quite unlikely to abandon the limits

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74 353 U.S. 448, 472–73 (1957) (Frankfurter, J., dissenting).

75 *Id.* at 475 (Frankfurter, J., dissenting).

76 *Id.* (Frankfurter, J., dissenting).

77 *See* HART & WECHSLER I, *supra* note 11, at 372.

78 Most notably, commentators have suggested that one might limit protective jurisdiction to situations in which Congress has in fact exercised its power by enacting legislation that at least partly occupies the relevant field. *See* Mishkin, *supra* note 68, at 192–93 (suggesting that jurisdiction in such a case would protect a legislative program rather than a particular suitor); *cf.* HART & WECHSLER V, *supra* note 11, at 847–48 (suggesting a similar limit).

79 *See* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 685–90 (1995) (noting the importance of limit-setting in the Court's federalism jurisprudence); *cf.* Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1012–15 (2000) (linking the Court's sovereign immunity cases to a doctrine of federalism that seeks to limit congressional power).

of Article III and enable Congress to deploy an expansive version of federal protective jurisdiction, particularly where such expansion would come at the expense of state courts. Indeed, in its most recent opportunity to discuss the issue, in *Mesa v. California*, the Court pointedly refrained from relying upon the doctrine of protective jurisdiction to uphold an exercise of federal judicial power.[80] The Court's diffidence in *Mesa* suggests that protective jurisdiction may not provide a reliable tool of jurisdictional expansion, and suggests the need for an alternative account.

III. PRIVILEGES, IMMUNITIES, AND THE SCOPE OF DIVERSITY JURISDICTION

This Article proposes an alternative solution to the *Tidewater* problem. The solution proposed here has a number of advantages, but is not entirely without difficulties of its own. One advantage lies in the linkage suggested between expanded access to federal court and a founding-era perception that diversity served to secure the enforcement of the privileges and immunities of state citizenship. This Hamiltonian conception of diversity[81] provides a foundation for seeing the statute at issue in *Tidewater* as one that enforces the privileges and immunities of national citizenship within the meaning of the Fourteenth Amendment. Such an understanding connects most strongly with the opinion of Justices Rutledge and Murphy who saw the statute as removing an unjust form of discrimination against District citizens.[82] But rather than an argument for a reinterpretation of Article III, as in Justice Rutledge's opinion, the claim made here on behalf of District citizens connects to their status as citizens of the United States and to the threat of discrimination that they face, in common with citizens throughout the country, when left to litigate in a potentially biased state court. Thus, the proffered justification for the statute would lie in Congress's desire to prevent, under Section 5 of the Fourteenth Amendment, the biased adjudications that District citizens might face if left to enforce their state law rights in state courts.

Apart from supplying a plausible textual hook for Congress's decision to extend the bias-preventing benefits of diversity dockets to District citizens, the Fourteenth Amendment account of constitutional change corresponds in many of its particulars to the antebellum experience. While the framers of the Fourteenth Amendment did not

80 489 U.S. 121, 137–38 (1989).

81 For an elaboration of Hamilton's view, see *infra* note 96.

82 *See supra* note 56 and accompanying text.

say in so many words that they meant to expand the rights of District citizens in this particular, antebellum Americans had come to view access to a federal diversity docket as one of the privileges and immunities of national citizenship.[83] It was precisely that privilege that Chief Justice Roger Taney had pointedly refused to extend to Dred Scott on grounds of citizenship[84] and precisely that restrictive view of the scope of national citizenship that the Fourteenth Amendment sought to correct. The decision of Congress that the Court upheld in *Tidewater* can thus claim stronger roots in the Reconstruction amendments than one might initially suppose.

This part of the Article lays the foundation for a Fourteenth Amendment account of the power of Congress to confer jurisdiction on federal courts to protect District citizens from presumptively biased state courts in litigation with out-of-state citizens. After sketching Hamilton's early suggestion of the linkage between diversity and the Privileges and Immunities Clause, this Part explores the manner in which Congress codified diversity jurisdiction in 1789. It concludes that Hamilton's "subtle bias" account provides a much better explanation of the early contours of the jurisdiction than the idea of simple diversity.

A. *Hamilton and the Origins of Diversity Jurisdiction*

Jurisdiction over disputes between citizens of different states was, as Justice Frankfurter noted in *Tidewater*, tenuously founded and unwillingly granted. Anti-Federalists attacked the jurisdiction in the debates over the ratification of the Constitution, seeing it as an invasion of the role of the state judiciaries.[85] Federalists replied that the jurisdiction would provide outsiders with an unbiased alternative to the state courts.[86] Despite what Henry Friendly famously described as the comparative "apathy" of this Federalist defense,[87] the states ratified Article III and Congress promptly included grants of diversity jurisdiction in the Judiciary Act of 1789,[88] where it has remained in the face of a succession of repeal movements.[89]

83 *See infra* note 177 (collecting authorities).

84 *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 403–04 (1856).

85 *See* Henry J. Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 HARV. L. REV. 483, 489–92 (1928).

86 *Id.* at 492.

87 *Id.* at 487.

88 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

89 One wave of opposition crested in 1932, with the failure of the Progressives to secure repeal of a jurisdiction that they saw as supporting a federal judicial lawmaking role that benefited corporate interests. *See* PURCELL, *supra* note 40, at 143. Another

The progressive critique of diversity jurisdiction has drained the jurisdiction of much of its apparent justification.[90] Consider the neutral tribunal account that Friendly dismissed as apathetic nearly seventy-five years ago. On this account, federal tribunals offer out-of-state litigants a neutral forum for the adjudication of their disputes with in-state citizens, and thus avoid the problems of bias that might otherwise attend the adjudication of such disputes by the state courts.[91] But surely, as Friendly noted, state court bias against out-of-state citizens no longer presents a serious problem, if indeed it ever did. The rise of national markets and a more mobile population have made the ties of state citizenship a good deal weaker than they were in the republic's early years and have reduced the threat of bias against outlanders. Moreover, *Erie* leaves the federal courts with relatively few tools to combat such bias, even if it still existed.[92] To be sure, federal courts can invalidate state rules that overtly discriminate against outsiders, deploying the federal Constitution and its manifold prohibitions against such localism. But they perform this work in tandem with their state court colleagues, and in the exercise of their jurisdiction over federal question cases; they have no power to ignore otherwise applicable (i.e., constitutional) state law simply on the basis that the dispute involves diverse citizens. This portrait of federal diversity courts as forums for the application of state law that they do little to shape or influence seems hard-pressed to explain the jurisdiction's stubborn resistance to repeal or restriction.

One intriguing, alternative account with solid historical antecedents links diversity jurisdiction and the need for an impartial tribunal to the Privileges and Immunities Clause of Article IV of the Constitu-

wave came in the 1960s, after Justice Brandeis's decision in *Erie Railroad Co. v. Tompkins* had drained much of the life out of diversity jurisdiction by requiring federal courts to apply state law as the rule of decision in such litigation. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). In recent years, the Judicial Conference of the United States has joined the critics' ranks, supporting proposals to cut back on diversity or repeal it altogether. *See* COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 29–30 (1995) (setting forth proposals to curtail diversity jurisdiction).

90 For the details of the critique, see PURCELL, *supra* note 40, at 66–67 (contending that Brandeis's opinion in *Erie* sought to cut back on the scope of corporate access to diversity dockets and the federal judicial lawmaking power that such courts enjoyed under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

91 *See* Friendly, *supra* note 85, at 492.

92 Recall that in *Erie* the Supreme Court ruled that federal courts must apply state law to diversity cases. *See Erie*, 304 U.S. at 78.

tion.[93] The clause declares that the "citizens of each State shall be

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93 The Federalist critique of the Articles of Confederation provides an appropriate introduction to the origins of the diversity jurisdictional grant in Article III and its connection to the Privileges and Immunities Clause of Article IV. On the Federalist account, the crowning failure of the Articles of Confederation was its requirement that the central government rely upon the states to carry national measures into effect. As Hamilton explained, state particularism had everywhere produced a "strong predilection in favor of local objects" and a disregard of federal obligations. THE FEDERALIST NO. 15, at 97 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton thus argued in favor of a power on the part of the central government to carry its agency to the "persons of the citizens" without reliance upon state intermediaries. THE FEDERALIST NO. 16, *supra*, at 102 (Alexander Hamilton). As Hamilton elaborated, "[The national government] must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the Courts of Justice." *Id.* To Hamilton, and other Federalists, the key solution to the imbecility of the Confederation was the ratification of a Constitution that would make existing federal obligations enforceable against the citizens themselves, through the medium of federal courts. *See id.*

One such underenforced (con)federal obligation was the interstate comity provision of Article IV of the Articles of Confederation, which read as follows:

> [T]he free inhabitants of each of these States, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each state shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state . . . .

ARTICLES OF CONFEDERATION art. IV (U.S. 1781). Although the interstate comity provision did not appear in the formal terms of the Virginia Plan of the Constitution, *see* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–22 (Max Farrand ed., 1911) [hereinafter FARRAND], the Committee of Detail added Article IV to its draft of the Constitution, which required each state to afford those from elsewhere "all privileges and immunities of free citizens in the several states," and the convention accepted the addition as a matter of no controversy whatever. *See* 2 FARRAND, *supra*, at 173–74, 443 (reporting lopsided approval of the provision in convention and noting opposition from South Carolina's delegate, who argued for the inclusion of a provision in favor of the right of slave owners to travel with their slaves).

Taken from Blackstone and the territorial accession treaties of the day, the language of the precursor to the Constitution's own Privileges and Immunities Clause sought to secure an economic union of the states by assuring citizens everywhere the rights to travel, and to participate on an equal basis in the commercial life of the nation. *See infra* note 95. Such free commercial participation required that out-of-state citizens enjoy rights to own property, and enforce their contracts on an equal basis with in-state citizens. In theory, such a right of free participation foreclosed states from adopting laws that would discriminate against noncitizens. It also assured nonresident merchants and creditors a right of access to state tribunals for the enforcement of the debts of in-state citizens.

entitled to all the privileges and immunities of the citizens in the several States."[94] Famously ambiguous, the clause offers an assurance of equal treatment to in-state and out-of-state citizens alike. In light of its territorial accession connotations,[95] one can reasonably read the clause as an assurance that outsiders are to enjoy the same right as insiders to own property, enforce their contracts, and secure the en-

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Under the Articles of Confederation, enforcement of the privileges and immunities clause, like all other judicial functions that fell outside the limited jurisdiction of the national court of appeals in prize cases, had been left entirely in the hands of the state courts. *See* ARTICLES OF CONFEDERATION art. IX, para. 2 (U.S. 1781) (describing Congress's function as the "last resort on appeal in all disputes and differences . . . between two or more States concerning boundary, jurisdiction or any other causes whatever"); *id.* art. II (reserving to the states "every power, jurisdiction, and right" that was not "expressly delegated to the United States, in Congress assembled"). Under the new Constitution, which uncontroversially carried forward a somewhat streamlined version of the old privileges and immunities clause, federal courts were to have a clearer enforcement role. Article III provided for the creation of one Supreme Court and authorized Congress to establish additional inferior federal courts to hear claims within federal jurisdiction. U.S. CONST. art. III, § 1. Article III also set forth a provisional grant of appellate jurisdiction that extended to cases arising under the Constitution, laws, and treaties of the United States. *Id.* § 2, cl. 1. Under this initial distribution of jurisdiction, violations by the state courts of any of the prohibitions in the Constitution would give rise, at a minimum, to the possibility of appellate jurisdiction in the Supreme Court of the United States. In addition, Congress might give the lower federal courts jurisdiction in the first instance or on appeal to remedy state violations of the Constitution. Either way—this was Friendly's essential point—state violations of the Privileges and Immunities Clause would amply support an assertion of federal judicial power.

94 U.S. CONST. art. IV, § 2, cl. 1.

95 The language of the Privileges and Immunities Clause resembles the assurances of privileges and immunities that appeared in many treaties of the day regarding territorial accession. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 167–69 (1998) (giving examples of treaties that gave such assurances). Interestingly, one finds a rather close correspondence between such treaties and the expansion of diversity jurisdiction following the ratification of the Louisiana Purchase. The treaty with France that sealed the Purchase declared that "[t]he inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States." Treaty Between the United States of America and the French Republic, U.S.-Fr., Apr. 30, 1803, art. III, 8 Stat. 200, 202. This assurance of "rights, advantages, and immunities" may have helped to persuade Congress to create a federal district court for the Territory of Orleans and to invest that court with jurisdiction over diversity claims. It may also have persuaded the Court to take an expansive view of the scope of congressional power. *See* Sere v. Pitot, 10 U.S. (6 Cranch) 332, 336–38 (1810) (upholding power of Congress to confer jurisdiction on federal district court for the Territory of Orleans in cases involving citizens of the territories, not just those involving citizens of a state).

forcement of their rights through the courts. The clause's commercial overtones and its emphasis on enforcement of rights at common law explain why prominent supporters of the Constitution, including James Wilson and Alexander Hamilton,[96] argued that diversity jurisdiction would "secure the full effect" of the Privileges and Immunities Clause by enabling outsiders to litigate common law questions of contract, tort and property on the dockets of impartial federal tribunals.[97]

Yet Hamilton's Article IV account of diversity jurisdiction has seemed to many to suffer from insuperable difficulties. To begin with,

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96 Immediately after describing the Privileges and Immunities Clause as the "basis of the union," Hamilton explained the importance of diversity jurisdiction to upholding this clause:

> And if it be a just principle that every government *ought to possess the means of executing its own provision by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

THE FEDERALIST NO. 80, *supra* note 93, at 537–38 (Alexander Hamilton). For Hamilton, then, diversity operated as a jurisdictional predicate for "the inviolable maintenance" of the principle of equality among the citizens of different states in the Privileges and Immunities Clause.

97 A surprisingly broad, and well informed, range of observers appear to have shared Hamilton's understanding of the linkage between diversity and the Privileges and Immunities Clause. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1684, at 561–62 (Boston, Hilliard, Gray & Co. 1833) (indicating that the diversity jurisdiction of the federal courts operated "to carry into effect some of the privileges and immunities conferred, and some of the prohibitions upon states expressly declared, in the constitution" and illustrating the point by emphasizing the ability of the national tribunals to avoid the application of state legislation that "grant[s] unconstitutional preferences to its own citizens"); 4 THE FOUNDER'S CONSTITUTION 251 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting James Monroe's explanation that an outsider should not be forced to "seek redress in the tribunals of that state, wherein he received the injury[;] he might not obtain it, from the influence of his adversary"). In the Virginia ratification debates, Edmund Pendleton noted that the diversity jurisdiction might be left to state tribunals, particularly in view of the Privileges and Immunities Clause which he evidently saw as creating a federal right to appellate review of discriminatory state laws. However, Pendleton nonetheless defended diversity jurisdiction on the basis that bias in state courts might evade effective appellate review. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 549 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott 1836) (quoting Edmund Pendleton's defense of diversity).

the Privileges and Immunities Clause creates a federal right in all citizens to equal treatment at the hands of other states. A state that abridges such a right has violated the Constitution and such a violation gives rise to federal question jurisdiction, either in a federal court of first instance (to review discriminatory action on the part of the state executive) or in the Supreme Court (to review state judicial discrimination). Thus, as Henry Friendly noted in dismissing the Article IV account as "specious,"[98] violations of the Privileges and Immunities Clause will themselves ground the jurisdiction of the federal courts without regard to the citizenship of the parties. Moreover, as Professor Wright noted,[99] the Supreme Court has summarily rejected the argument that citizens of the United States enjoy a right, under the Privileges and Immunities Clause, to a federal diversity docket.[100] Indeed, as Professor John Hart Ely reminded us, the Clause does not bind Congress,[101] and thus could not well provide individuals with a right of access to a federal diversity tribunal that would trump a federal legislative restriction. That Congress enjoys plenary control over the jurisdiction of the lower federal courts, including jurisdiction based upon diversity, seems in the end to undermine the notion that diversity might serve as a tool for the enforcement of rights under Article IV.

B. *Understanding Hamilton's Account*

These problems diminish in size, however, with a more complete understanding of what Hamilton may have had in mind in describing diversity as a jurisdiction meant to secure the full effect of the Privileges and Immunities Clause against all "evasion and subterfuge." As Hamilton knew, a state stopping short of facial discrimination might develop at the trial level certain customs or practices that, though fair in form, nonetheless disadvantage outsiders. State juries might give voice to local prejudice, state judges might comment unfavorably on the evidence or deny the admission of certain testimony, and state appraisals of property tendered in satisfaction of a judgment might operate in fact to produce a less than fully compensatory award. Such subtle forms of discrimination, to the extent that they disproportionately targeted out-of-state citizens, may have seemed inconsistent with the spirit of the Privileges and Immunities Clause, and its assurance of

98 Friendly, *supra* note 85, at 492 n.44.

99 *See* WRIGHT & KANE, *supra* note 19, at 150.

100 *See* Chase Manhattan Bank v. South Acres Dev. Co., 434 U.S. 236, 238 (1978).

101 *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 713 n.115 (1974).

evenhanded justice. Yet federal courts would find them extremely difficult to remedy through the exercise of federal question jurisdiction, either in the first instance or on appeal. We might understand diversity of citizenship jurisdiction as operating to address these subtle problems by providing likely victims with access to an alternative forum.

To see a role for diversity in enforcing its provisions, one must understand something about the constitutional protection of privileges and immunities in Article IV. Like many provisions of the Constitution, the Privileges and Immunities Clause assumes that the states of the Union have well functioning judicial systems in which the common law, as modified to fit local conditions, provides the measure of the citizen's rights and obligations. The common law defined the rights of individuals to enter into contracts, to own real property, and to enforce their rights through actions brought in the local tribunals. The common law also provided writs of habeas corpus to test the legality of confinement, and to assure access to bail in appropriate cases. Common law thus promised judicial protection for the rights to life, liberty, and property that the founding generation viewed as their birthright.

With its focus on contract and property rights, the clause stopped well short of guaranteeing out-of-state citizens all of the political rights associated with full in-state citizenship. While the Constitution assigned Congress the power to fashion uniform rules for the naturalization of aliens, and thus nationalized citizenship to that extent, it left the states free to determine the conditions on which the newly arrived citizens of another state might obtain full state citizenship.[102] Often, the states required new arrivals to reside in the state for a period of time, and take an oath of allegiance to the state. So, as the early decisions noted, the clause might confer a limited species of national citizenship on outsiders, by enabling them to enforce contract rights and property rights in state courts, but did not assure them full political rights to vote and hold office in a particular state.[103] Thus, much the

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102 *See, e.g.*, ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 137–52 (1997).

103 *See* Abbot v. Bayley, 23 Mass. (6 Pick.) 89, 92 (1827) (noting that the privileges and immunities of citizens apply upon "removal from one state into another" and that such removal makes them "citizens of the adopted State without naturalization [and with] a right to sue and be sued as citizens," but explaining that "this privilege is qualified and not absolute, for they cannot enjoy the right of suffrage or of eligibility to office, without such term of residence as shall be prescribed by the constitution and laws of the State"); Murray v. M'Carty, 16 Va. (2 Munf.) 393, 398 (1811) (acknowledging that the Privileges and Immunities Clause gives the individual a right to own

same distinction between civil rights and political rights that was to crop up in debates over the Fourteenth Amendment had also shaped the antebellum understanding of Article IV.

The Privileges and Immunities Clause thus focuses on assuring outsiders free access to well functioning common law systems and to the rights that they secure. Under the classic antebellum formulation in *Corfield v. Coryell*, the Privileges and Immunities Clause assures each citizen the right to travel through and reside in any state and to pursue certain "fundamental" economic ends while there, including "trade, agricultural, and professional pursuits."[104] To make good on this promise, the Privileges and Immunities Clause forecloses the states from treating outsiders differently from insiders at least with respect to those matters deemed to come within the protective ambit of the clause. Thus, as Justice Story explained in his *Commentaries*, the clause prohibits the states from treating the citizens of other states as aliens, and from denying them the right to take and hold real property in the state.[105] Or, as others have explained, the clause guarantees a citizen's right to "remove"—that is, to move, from one state to another—with the full local measure of protection for any property taken to or purchased in the new state.[106] Or, as still others explained, the clause empowers nonresident creditors to invoke common law remedies to collect debts owed by local debtors, free from

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lands outside his state of citizenship, but noting that an out-of-stater does not enjoy "those rights, which, from the very nature of society and of government, belong exclusively to citizens of that state," such as "the rights of election and of representation"); Campbell v. Morris, 3 H. & McH. 535, 554 (Md. 1797) (defining privileges and immunities clause as protecting the right of citizens to "acquir[e] and hold[ ] real as well as personal property" and requiring that "property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state," but noting that the clause does not confer "full and comprehensive" rights of citizenship, and in particular does not mean "the right of election, the right of holding offices, the right of being elected").

104 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

105 3 STORY, *supra* note 97, § 1800, at 674–75; *see also Abbot*, 23 Mass. (6 Pick.) at 92 (stating that citizens who have removed to a new state shall enjoy privileges and immunities and "they shall not be deemed aliens").

106 *See Abbot*, 23 Mass. (6 Pick.) at 92 (upholding the right of a woman to "remove" from New Hampshire to Massachusetts, following her abandonment by her husband, and to enjoy full rights to enter into contracts, own property, and sue or be sued without regard to the rule of coverture). Obviously, a state's right to ban slavery within its borders could not coexist with an untrammeled right in southerners to remove to the free states and retain a property interest in their slaves. But a free state, in denying the newly arrived southerner a continuing property in human beings, would not be discriminating against the out-of-state citizen; no one in the free state could own slaves.

any discriminating barriers that states might wish to erect to bar such litigation.[107] In all of these instances, the clause operates to foreclose states from discriminating against the out-of-state citizen as to matters of contract enforcement and property ownership.

Such a conception of the rights of noncitizens did more than rule out discrimination; it seemed to assure noncitizens equal access to state court enforcement of rights in accordance with common law. Thus, the *Corfield* court went on to define the privileges and immunities of state citizenship to include "[t]he right of a citizen . . . to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; [and] to take, hold and dispose of property."[108] This principle of equal access to the rights afforded individuals at common law—the common law core of the Privileges and Immunities Clause—does much to explain diversity jurisdiction. Diversity offers those who would presumptively suffer Article IV violations—out-of-state citizens—access to an alternative tribunal for the evenhanded enforcement of rights at common law. Diversity thus secures the state law core of the Privileges and Immunities Clause not by policing the quality of justice in state courts but by providing out-of-state citizens and aliens with a redundant or overlapping federal tribunal for the pursuit of claims against insiders.

One can best understand the enforcement problems that gave rise to diversity by considering a simple hypothetical that underscores the corrective limits of federal question jurisdiction. Suppose a New Jersey creditor wishes to collect a debt from a citizen of New York, but faces a New York law that expressly forbids out-of-state creditors from bringing suit in New York courts. Federal question jurisdiction might solve this sort of problem; presumably, the New Jersey plaintiff could attempt to invoke New York process, suffer a dismissal and appeal through the state courts to the Supreme Court of the United States, seeking an invalidation of a facially discriminatory law.[109] Alternatively, the New Jersey plaintiff might (at least today) bring an action in federal district court to enjoin the state from invoking the rule as a barrier to his debt-collection action. In either instance, federal question jurisdiction would appear to provide a satisfactory remedy, so

107 *See Campbell*, 3 H. & McH. at 554 (noting that the clause may also mean that, as creditors, out-of-state citizens "shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor").

108 *Corfield*, 6 F. Cas. at 552.

109 *See, e.g.*, Conner v. Elliot, 59 U.S. (18 How.) 591, 594 (1855) (entertaining appellate jurisdiction on the basis of a claim under the Privileges and Immunities Clause, but concluding on the merits that no such violation had been established; finding no improper discrimination).

long as the New York state courts otherwise offered a well functioning tribunal for the enforcement of rights based upon state law.

But federal question jurisdiction would perform much less effectively if, as the Framers of Article III feared, the state judges and juries were seen as prone to engage in subtle forms of discrimination against out-of-state citizens. For starters, subtle forms of discrimination may be quite difficult to isolate and identify as such for purposes of seeking federal relief. The process of litigation demands a special combination of expert knowledge and tenacity and carries the ever-present possibility that minor missteps and misfortune may result in a loss of one's claims. Given the complexity of the process and the inherent risks of failure, rooting out instances of discrimination on the part of state courts and making them a part of the record may prove quite difficult. Even if one were to succeed in showing prejudice, moreover, federal judicial intervention might come too late to help, as Madison explained with customary pithiness in explaining why appellate review could not remedy a denial of federal rights: "What was to be done after improper Verdicts in State tribunals obtained under the biassed direction of a dependent Judge, or the local prejudices of an undirected jury. To remand the cause for a new trial would answer no purpose."[110] Even assuming (somewhat heroically) that an appellant could make the jury's bias a part of the record and thus preserve it for appellate review, Madison suggests that appellate review would not provide effective relief. A remand would simply put the appellant back before the biased state court and jury that had rendered the tainted verdict in the first place, and further back in the queue of creditors.

Just as appellate review seems hard-pressed to remedy subtle state-court discrimination, the prospects for securing relief in federal trial courts on the basis of a posited state court violation of privileges and immunities seem quite remote. Suppose our New Jersey creditor initiates a claim in New York state court to collect the debt, and suffers a subtle form of discrimination. Established principles of federal-state comity, as expressed in the Anti-Injunction Act of 1793,[111] and in the more modern doctrine of equitable restraint, forbid federal courts from enjoining a violation of federal constitutional rights committed

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110 *See* 1 FARRAND, *supra* note 93, at 124 (statement of James Madison) (arguing in favor of inferior federal courts).

111 For the current text of the Anti-Injunction Act, see 28 U.S.C. § 2283 (2000). On its operation to prevent intervention in most pending state civil proceedings, see Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 B.Y.U. L. REV. 289, 295–97.

in the course of an ongoing state court proceeding.[112] Moreover, the Rooker-Feldman doctrine precludes federal trial courts from conducting the functional equivalent of appellate review of such state court proceedings both before and after they have run their course.[113] Finally, preclusive effect attaches to the state court disposition after it becomes final, and forecloses any attempt to relitigate the issues in a subsequent proceeding in federal court.[114]

Apart from these doctrines of judicial federalism, of which Hamilton and the Framers of Article III obviously knew nothing, federal trial courts have historically struggled to enforce federal constitutional or statutory rights to evenhanded state court recognition of rights based upon state law. One problem stems from the difficulty of making federal jurisdiction turn on the inadequacy of state court processes. Federal courts have struggled in such cases both in defining the jurisdictional trigger of state court inadequacy and in deciding what to do with the case once it arrives in federal court.[115] The civil rights removal statute represents one illustration of the problem of defining an appropriate trigger.[116] Once the case comes to federal

112 In *Younger v. Harris*, 401 U.S. 37 (1971), the plaintiff brought suit to enjoin a criminal prosecution, claiming that the criminal syndicalism statute under which he was indicted violated his First Amendment rights. *Id.* at 39. The Court rejected the claim, holding that federal district courts should ordinarily abstain from considering suits to enjoin pending state criminal prosecutions. *Id.* at 53. Subsequent decisions extend *Younger* abstention to federal court applications for declaratory relief, *see* Samuels v. Mackell, 401 U.S. 66, 68–69 (1971), and to federal actions still in their early stages when state criminal proceedings were filed. *See* Hicks v. Miranda, 422 U.S. 332, 348–50 (1975). Equitable restraint applies, of course, to pending state criminal proceedings, and would not necessarily prevent federal interference in a civil matter, such as a debt proceeding.

113 The doctrine limits the jurisdiction of the federal district courts and takes its name from the leading cases, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). On its growth in recent years, see HART & WECHSLER V, *supra* note 11, at 1436–41.

114 *See* DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS (Foundation Press 2001).

115 *See, e.g.*, Act of Mar. 2, 1867, ch. 195, 14 Stat. 558, 559 (entitling both the plaintiff and the defendant to remove the action from state to federal court upon a showing of local prejudice or improper influence). On the interpretive difficulties with the statute, see *C. & G. Cooper v. Condon*, 15 Kan. 430 (1875) (rejecting sufficiency of affidavit in support of removal under statute). *See generally* JOHN F. DILLON, REMOVAL OF CAUSES FROM STATE COURTS TO FEDERAL COURTS §§ 24–25 (5th ed., St. Louis, Central Law Journal Co. 1889) (explaining the background of and justifications for the Act).

116 On the difficulties with the civil rights removal jurisdiction, which authorizes removal when a person "cannot enforce" civil rights in state court, 28 U.S.C. § 1443(1), see *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975) (refusing to permit

court, it raises the question of what remedy to fashion. May the federal court simply correct the error in state process and send the case back for further proceedings, a course of action that may the leave the problem of ongoing discrimination largely unremedied? Or must the federal court retain the case and proceed to adjudicate the rights of the parties as an unbiased state tribunal would have done? Predicating federal jurisdiction on a finding of state-court inadequacy thus represents a messy basis on which to proceed.[117]

Diversity jurisdiction avoids many of the problems associated with litigation to establish subtle state violations of federal rights in either state or federal court. By making party identity the test of jurisdiction, diversity avoids any official inquiry into problems with the quality of justice in state court. By obviating such inquiries, diversity offers a cleaner jurisdictional test and one that avoids any direct clash between the state and federal courts over quality of justice issues. To be sure, in the task of calibrating the scope of the jurisdiction, Congress and the Supreme Court must decide how broadly to write and interpret diversity statutes, and issues of state court competency may inform such determinations. But such assessments will likely focus on institutional impressions of the state systems as a whole, rather than on an assessment of the adequacy of particular courts in particular states.

Instead of requiring federal decisionmakers to assess the strained quality of state court justice, diversity simply creates an alternative en-

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removal on the ground that a showing of likely bias is not sufficient to support removal; finding that petitioner must show a denial of rights in a formal statement of state law); and *Georgia v. Rachel*, 384 U.S. 780, 803–04 (1966) (refusing to permit removal while distinguishing between legal deprivations of civil rights, which support removal, and customary or subtle policies of discrimination by judge or jury, which do not).

117 In addition to problems of complexity, a jurisdictional test that focuses on the inadequacy of state court processes invites the creation of a record of state judicial bias. Cases arising under the Tax Injunction Acts, 28 U.S.C. § 1341, and civil rights removal, *id.* § 1443, offer an illustration. By linking access to a federal docket to a showing that the plaintiff cannot enforce her rights in state courts, both statutes invite litigants to disparage the quality of the state courts. *See* California v. Grace Brethren Church, 457 U.S. 393, 398–99 (1982) (considering challenge to the adequacy of state court remedies in cases involving a federal attack on state taxes); Georgia v. Rachel, 384 U.S. 780, 782–83 (1966) (considering a removal petition based upon a claim that Georgia courts practiced racial discrimination). To be sure, the state courts have often richly deserved the critical reviews that they may receive in such litigation. But one can nonetheless understand why Congress and the federal courts might prefer to construct a body of jurisdictional law that would avoid the repeated public airing of such laundry. Perhaps as a result, both *Georgia v. Rachel* and *California v. Grace Brethren* adopt rules that make it difficult for petitioners to reach federal court by disparaging the adequacy of state remedies.

try point into the federal system and relies upon the parties themselves to assess state court competence. Our regime of concurrent jurisdiction does have costs, as overlapping court systems provide litigants with a rich array of choices among judges, courts and bodies of law, and encourage forum shopping. But a system that provides broad opportunities for forum shopping also places jurisdictional wrangling at the level of lawyers' tactics rather than at that of formal judicial decisionmaking. Lawyers thus make the choices about the competence of state and federal courts based on their own expert knowledge of the tribunals in question and with the incentive provided by the usual desire to secure the best possible result for their clients. While the system of concurrent jurisdiction avoids any requirement that the lawyers in question actually prove their intuition about the relative competence of the two court systems, we can learn something about their perception of those questions by watching them express their jurisdictional inclinations through their behavior in the selection of available forums.

This preference for overlapping and concurrent jurisdiction has been a part of our federal system from the beginning. The Senator from Connecticut, Oliver Ellsworth, explained as much in a letter to a constituent that he wrote during the drafting of the Judiciary Act of 1789. In defending the creation of a separate federal court system, Ellsworth explained that without such courts

> there must be many appeals or writs of error from the supreme courts of the States, which by placing them in a Subordinate situation, & Subjecting their discussions to frequent reversals, would probably more hurt their feelings . . . than to divide the ground with them at first & leave it optional with the parties entitled to federal jurisdiction, where the causes are of considerable magnitude to take their remedy in which line of courts they pleased.[118]

In proposing to divide the work between state courts and lower federal courts as an original matter, Ellsworth defended a system of concurrent jurisdiction that defines judicial federalism today. Parties retain an option to choose between the two court systems in a wide range of instances, and the Court has sharply curtailed its review of state court decisions.

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118 Letter from Oliver Ellsworth, U.S. Senator, to Richard Law (Aug. 4, 1789), *quoted in* Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 13, 20 (Maeva Marcus ed., 1992).

C. *Codification of a Bias Approach in the Judiciary Act of 1789*

If the Framers of the diversity grant in Article III of the Constitution worried about subtle bias on the part of state courts, much the same concern appears to have informed the codification of diversity jurisdiction in the Judiciary Act of 1789.[119] To see how provisions of the Act selectively operated to provide out-of-state citizens a somewhat limited right to choose a federal forum, consider the example of a dispute between citizens of New York and Virginia. Section 11 of the Act would have permitted the New York citizen to bring suit against the Virginia defendant in a federal circuit court in Virginia.[120] In thus supplying a federal alternative, the Act regarded the Virginia state court as presumptively biased against the New York plaintiff. If, by contrast, the Virginia citizen brought suit in the first instance against the New York citizen in Virginia state court, section 12 of the Act authorized the New Yorker to remove the action to the federal circuit court of Virginia.[121] In both instances, the law permitted the New Yorker to opt into federal court as an alternative to litigation with a Virginian in Virginia state courts.

While the Act thus gave the out-of-state litigant a federal option, several features of the Act operated to limit access to a federal tribunal even though the threshold requirement of diverse citizenship was satisfied. To begin with, the right of original access to a federal tribunal came into play only where one of the two opposing parties was litigating in the state of her own citizenship and would have enjoyed a presumptive home-court advantage in state court. In our example, then, a diversity docket was made available to the out-of-state citizen as an alternative to state court litigation in either New York or Virginia. But the parties could not litigate in federal court, either originally or on removal,[122] if suit was contemplated, say, within the borders of Rhode Island.[123] One can probably best understand such a restriction as reflecting a recognition that the Rhode Island state courts, at least in

119 *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73.

120 *See id.* § 11, 1 Stat. at 78 (providing for original jurisdiction in the circuit courts where the amount in controversy exceeded $500 and the "suit is between a citizen of the State where the suit is brought, and the citizen of another State").

121 *See id.* § 12, 1 Stat. at 97 (providing for removal of actions where the matter in dispute exceeds $500 and the suit was commenced in a state court "by a citizen of the state in which suit is brought against the citizen of another state").

122 *See supra* note 121 and accompanying text.

123 *See* Kitchen v. Strawbridge, 14 F. Cas. 692, 693 (C.C.D. Pa. 1821) (No. 7854) (finding diversity jurisdiction unavailable in a Pennsylvania federal court in a case where there was diversity between citizens from Massachusetts and Georgia); White v. Fenner, 29 F. Cas. 1015, (C.C.D.R.I. 1818) (No. 17,547) (refusing to assert diversity

suits between New York and Virginia litigants, were unlikely to favor either party in the subtle ways that would justify the provision of an alternative docket.

Removal, moreover, was available only for those defendants who were sued away from their home. As noted above, the Act permitted a New York citizen, if made a defendant in a Virginia state court action, to invoke federal diversity jurisdiction by removing the action to federal court.[124] But the Act limited removal to defendants who were out-of-state citizens. As a consequence, if the Virginia plaintiff sued the New Yorker in the New York state courts, the Act gave the defendant no right of removal. Here again, the Judiciary Act appears to have provided the New York defendant with a right to opt into federal court only if sued before a presumptively biased (Virginia) state court system. Just as the removal statute does today,[125] the Act of 1789 refused to make the federal option available to a New York defendant sued in her own state court system.

The removal provisions highlight the Act's more general decision to let the presumptively disadvantaged out-of-state litigants themselves choose between the federal tribunal and a possibly biased state court. In general, the Act required the out-of-state citizen to take some affirmative action to secure the federal docket. If the out-of-state citizen chose the state court, either by filing there originally or by failing to remove the action, the Act treated the presumption of bias as rebutted, and foreclosed access to federal court.[126] Thus, the venerable rule of defendant unanimity, which remains a part of removal law today,[127] grew out of the Act's decision to make federal diversity jurisdic-

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jurisdiction in a Rhode Island federal court over dispute between citizens of New York and Virginia).

124 *See supra* note 121 and accompanying text (removal provision applies only where suit is brought by an in-state citizen against an out-of-state citizen).

125 *See* 28 U.S.C. § 1441(b) (2000) (refusing to permit removal in diversity cases where the defendant has been sued in the defendant's state of citizenship).

126 If, for example, a New York plaintiff chose to sue a Virginia citizen in Virginia state court, thereby expressing confidence in the fairness of the Virginia tribunal, the Virginia defendant could not remove to federal court. Similarly, if the Virginia plaintiff brought suit against two or more out-of-state defendants, early cases interpreting the Act required all of the defendants to join in removing the action to federal court. *See* HENRY CAMPBELL BLACK, A TREATISE ON THE LAWS AND PRACTICE GOVERNING THE REMOVAL OF CAUSES FROM STATE COURTS TO FEDERAL COURTS 114 n.100 (St. Paul, West 1898) (collecting cases). If one of the defendants failed to join in the removal, and thus expressed confidence in the fairness of the state court, federal jurisdiction was unavailable even to the diverse parties who preferred the federal tribunal.

127 WRIGHT & KANE, *supra* note 19, at 244 n.9.

tion available primarily to those out-of-state parties who affirmatively chose the federal option.[128]

In light of the Act's otherwise consistent decisions to place the choice between state and federal court in the hands of the out-of-state party, its provision for an in-state plaintiff to invoke federal diversity jurisdiction seems somewhat anomalous. Section 11 of the Act permitted a New York citizen to bring suit in a New York federal court against a Virginia citizen, even though the logic of the state bias account suggests that the New York plaintiff had no cognizable interest in a federal alternative to New York state court.[129] Such in-state plaintiff invocations of diversity jurisdiction remain controversial today, for much the same reason, and have been the subject of a variety of repeal or curtailment proposals.[130] At the time of the Act, however, the practical consequences of such in-state plaintiff invocations of diversity jurisdiction would have been a good deal more limited than today, in light of the then prevailing restrictions on the territorial jurisdictional power of the New York courts.[131]

A New York federal court, sitting in diversity in 1790, could assert judicial or personal jurisdiction over a Virginia defendant only in cases where the defendant was "found," or personally served with process, in New York or where the dispute involved title to real property in New York.[132] Before the advent of long-arm statutes in the twenti-

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128 On the rule of defendant unanimity, see *id.* at 244 nn.9–12.

129 *See supra* note 120.

130 For a criticism of in-state plaintiff diversity jurisdiction, see WRIGHT & KANE, *supra* note 19, at 155. For its proposed repeal, see AM. LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 123–25 (1969).

131 The principles of territorial jurisdiction in place in the early nineteenth century permitted plaintiffs to serve process (through *capias* or arrest) while the defendant was present within the territory of the state. *See generally* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 191–99 (2004) (tracing the origins and early operation of the rule requiring service of process within the territory as the predicate for judicial jurisdiction). In addition, states had begun to experiment with the process of foreign attachment by which the plaintiff caused the state to seize the defendant's property, and used the threat of forfeiture to compel the defendant to enter an appearance. *See* Picquet v. Swan, 19 F. Cas. 609, 610 (C.C.D. Mass. 1828) (No. 11,134). Circuit Justice Story concluded that such foreign attachment jurisdiction was available in federal court only where the defendant was otherwise amenable to suit in the state as an inhabitant or resident. *See id.* at 615.

132 The Judiciary Act of 1789 itself declared that, in civil actions, the federal courts were to issue original process to inhabitants of the United States only within the district (or state) where they resided or were found at the time of service of process. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79. No less a figure than Justice Story declared that these prohibitions against issuance of process beyond the boundaries of

eth century, and the increased mobility they signal, New York plaintiffs would have had but few opportunities to sue Virginia defendants in New York courts. In-state plaintiff jurisdiction would have applied most frequently to situations where the out-of-state defendant owned an interest in in-state property,[133] had an ongoing business relationship to the in-state forum,[134] or consented to the jurisdiction of New York.[135] In-state plaintiff jurisdiction may have reflected a desire to make in personam litigation somewhat more geographically convenient by permitting the New York plaintiff to offer a Virginia defendant a New York federal court alternative to litigation in Virginia.[136]

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the district simply restated the principles of territoriality by which the federal courts were bound in any case. *See Picquet*, 19 F. Cas. at 611–12.

133 *See, e.g.*, Logan v. Patrick, 9 U.S. (5 Cranch) 288, 288–89 (1809) (illustrating federal judicial reliance on the presence of property within the district to justify an assertion of in rem jurisdiction that necessarily obliged defendants claiming an interest in the property to appear and litigate).

134 *See* Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 348 (1850).

135 *See, e.g.*, Gracie v. Palmer, 21 U.S. (8 Wheat.) 699, 699–700 (1823) (treating the Act's territorial limits on federal issuance of process as subject to waiver through defendant's entry of a voluntary appearance and refusing to treat such restrictions as limits on the federal courts' subject matter jurisdiction); *Logan*, 9 U.S. (5 Cranch) at 288–89 (illustrating the principle that a defendant, though served with process outside the federal district, might nonetheless consent to personal jurisdiction within the district by entering a voluntary appearance).

136 The possibility that an out-of-state defendant might have agreed to consent to the personal jurisdiction of the New York federal courts may help to explain in-state plaintiff diversity jurisdiction in the Judiciary Act of 1789. A New York citizen could have sued a Virginia defendant in New York state court, and hoped to perfect service of process on the Virginia defendant either by personal service in the state or by consent. On the realistic prospect of such a consensual or voluntary appearance, see *Harrison v. Rowan*, 11 F. Cas. 657, 658 (C.C.D.N.J. 1818) (No. 6140) (describing the statute as meant to offer the nonresident defendant an opportunity to consent to the personal jurisdiction of the federal circuit court so long as the requisite diversity of citizenship be established). Yet Virginia defendants may have been understandably reluctant to consent to the jurisdiction of New York state courts, lest such a consent act as a waiver of their right to remove to a federal circuit. The removal statute required defendants to remove at the time of their first appearance in state court, and courts quickly interpreted this provision to mean that a defendant's voluntary appearance in state court operated as a waiver of his right to remove. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. at 79 (requiring the removing defendant to file a petition for removal at the time of "entering his appearance" in state court); *see also* DILLON, *supra* note 115, § 108 (noting that the defendant must promptly exercise his right of removal and collecting judicial decisions under which a defendant was said to have waived his right to remove if he "demurs, or pleads, or answers, or otherwise submits himself to the jurisdiction of the State court"). In-state plaintiff diversity jurisdiction allowed a New York plaintiff to offer a Virginia defendant some assurance that a consent to litigate in New York would occasion litigation only on the docket of the federal circuit court to which the Virginia defendant was entitled. Early nineteenth century

As these early examples of the operation of the diversity statute demonstrate, Congress did not provide a straightforward grant of diversity jurisdiction, but provided instead an opportunity for the out-of-state citizen to opt into federal court when facing an opponent that would enjoy a home-court advantage in state court. Not diversity, but presumptive bias, explains the early contours of the jurisdiction.

IV. THE FOURTEENTH AMENDMENT AND DIVERSITY

If still contested, the story of the Privileges or Immunities Clause of the Fourteenth Amendment has a familiar set of chapters. Most everyone agrees that it broadens and extends the guarantees that had previously appeared in the Privileges and Immunities Clause of Article IV, making them applicable to citizens of the United States as well as to citizens of the several states.[137] The switch to a focus on the rights of national citizenship corresponded to an emphasis on national citizenship in the opening sentence of the Fourteenth Amendment and its declaration that all persons born or naturalized in the United States are citizens of both the United States and the state in which they reside.[138] The combined language of the Citizenship Clause and the Privileges or Immunities Clause seeks to ensure that all citizens of the nation enjoy access to the rights that the Taney Court had pointedly denied African-Americans in the *Dred Scott* decision.[139] Chief Justice Taney had deployed privileges and immunities to illustrate the unthinkable consequences of Mr. Scott's quest for freedom and citizenship;[140] the Fourteenth Amendment invested Mr. Scott and other

in-state plaintiff diversity litigation, at least in actions in personam that depended on defendant's consent to service of process, would thus have preserved an element of choice for that out-of-state defendant.

137 *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 503 n.15 (1999) (describing the Privileges or Immunities Clause of the Fourteenth Amendment as modeled on that in Article IV); John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385, 1398–401 (1992) (same).

138 The Fourteenth Amendment reads, in part, as follows: "All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

139 *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 416–17 (1856). *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 335–64 (1978) (considering Chief Justice Taney's treatment of citizenship for purposes of defining the scope of diversity jurisdiction and of the Privileges and Immunities Clause).

140 *See Scott*, 60 U.S. (19 How.) at 416–17 (noting the possibility that the recognition of citizenship for African-Americans might entail rights of gun ownership, free

newly freed slaves with rights of citizenship and the privileges that citizenship had come to entail.[141]

While the extension of rights of citizenship gave former slaves access to the federal diversity dockets that Chief Justice Taney's opinion had denied Mr. Scott,[142] justifying the expansion of diversity jurisdiction approved in *Tidewater* requires a somewhat more intricate argument. Citizens of the District of Columbia enjoy rights of national citizenship and the privileges or immunities that accompany such status but do not become citizens of any state by virtue of their residence in the District.[143] An expansion of diversity jurisdiction for the benefit of District citizens thus rests not on the express command of the Fourteenth Amendment but on the combined weight of the Privileges or Immunities Clause and the Section 5 power of Congress to enforce the clause "by appropriate legislation."[144] The enforcement power, much debated in recent years, permits Congress to adopt remedial and preventive legislation to address perceived violations of the Fourteenth Amendment by the states. By common agreement, states that discriminated against out-of-staters were seen throughout the antebellum period as violating privileges and immunities;[145] diversity jurisdiction was seen as a remedy, not for the explicit acts of dis-

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speech, property ownership, and contract enforcement in keeping with the right of citizens to the protection of their privileges and immunities).

141 On the Fourteenth Amendment's reversal of *Scott v. Sandford*, see 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1089–95 (1953).

142 Chief Justice Taney's opinion equates citizenship for diversity purposes with citizenship for purposes of privileges and immunities, however problematically. *Cf.* FEHRENBACHER, *supra* note 139, at 356 (criticizing this aspect of Chief Justice Taney's opinion).

143 Citizens of the District thus lack the right to elect representatives to the House and Senate, and their participation in presidential electoral politics rests on the ratification of the Twenty-Third Amendment. *Cf.* District of Columbia v. Carter, 409 U.S. 418, 432 (1973) (holding that the District is not a "state or territory" within the meaning of federal civil rights law that empowers citizens to sue officials who violate federal rights).

144 U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce by appropriate legislation, the provisions of [the Fourteenth Amendment]."). On the scope of the enforcement power after recent decisions cutting back on its apparent reach, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Polycentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003).

145 *See, e.g.*, Walling v. Michigan, 116 U.S. 446 (1886) (holding a Michigan tax statute unconstitutional because it discriminated against those whose primary place of business was out-of-state, thereby depriving them of their rights under the Privileges and Immunities Clause).

crimination, but for subtle "evasion and subterfuge" that might evade effective remediation through the exercise of federal question jurisdiction.[146] District citizens can be seen, after the Fourteenth Amendment's ratification, as enjoying the same right to enforce state law rights in the courts of the several states that state citizens had enjoyed under the terms of Article IV, free from in-state bias.[147] The extension of diversity jurisdiction, as a concurrent federal docket available to District citizens on an equal basis with other national citizens, may deserve approval as a remedial or preventive measure to ward off any subtle bias or discrimination that such citizens might experience in state court litigation.

This Part sketches the argument in favor of a Fourteenth Amendment account of *Tidewater*, focusing on two major elements. First, the Part shows that a discriminatory refusal on the part of a state court to enforce the rights of District citizens at common law would violate the Privileges or Immunities Clause. Second, the Part examines the scope of Congress's enforcement powers under Section 5. It concludes that, despite a series of restrictive pronouncement in recent years, the remedial or preventive purpose underlying a grant of diversity jurisdiction would justify the exercise of the power. Third, the Part considers a series of predictable objections.

A. *Discrimination Against District Citizens*

Imagine that the state of Maryland (the state involved in the *Tidewater* litigation) passed laws that imposed a series of disabilities on citizens of the District of Columbia. These disabilities might include prohibitions (1) against commercial fishing in the waters of the state, (2) against the practice of law within the state, or (3) against any receipt of welfare benefits by District citizens who have moved to the state. My claim is that all such disabilities should fall to a challenge

146 THE FEDERALIST No. 80, *supra* note 93, at 537–38 (Alexander Hamilton):

> In order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state and its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will likely to be impartial between the different states and their citizens . . . .

147 *See* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 603 (1949) ("To put federally administered justice within the reach of District citizens, in claims against citizens of another state, is an object which Congress has a right to accomplish.").

based upon the Privileges or Immunities Clause of the Fourteenth Amendment.

At first blush, such an argument might seem to ignore the fact that the Privileges or Immunities Clause has a richly deserved reputation as the "least significant of the provisions . . . of the Fourteenth Amendment."[148] This lack of significance derives importantly from the Court's decision in the *Slaughter-House Cases.*[149] In *Slaughter-House,* the Court faced a challenge to laws by which the city of New Orleans had created a local monopoly in the business of slaughtering animals for food. Butchers, seeking to ply their trade free from the constraints of local legislation, invoked the Fourteenth Amendment.[150] Butcher work was said to be a privilege, and one that the restrictive local laws abridged in violation of the Constitution.[151] Not so, the Court concluded. Worried lest such an expansive conception of the privileges of trade and business would too broadly involve the federal courts in policing the commercial life of the states, the Court limited the clause's application to a narrowly drawn set of "privileges" of national citizenship.[152]

While many have expressed dissatisfaction with this interpretation of the Privileges or Immunities Clause, the clause itself has shown little growing power. In the most recent case, *Saenz v. Roe,*[153] the Court applied the clause to invalidate a California state law that limited the welfare benefits available to those who had recently moved to, and established citizenship in, the state. Although somewhat innovative, the Court based its invalidation of the law on a finding that the privileges of national citizenship in the Fourteenth Amendment in-

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148 GERALD GUNTHER, CONSTITUTIONAL LAW 281 n.3 (12th ed. 1991).

149 83 U.S. (16 Wall.) 36 (1872).

150 *Id.* at 45.

151 *Id.*

152 *See id.* at 76. The Court noted that the Privileges and Immunities Clause protects

> those privileges and immunities which are fundamental, which belong of right to the citizens of all governments, and which have at all times been enjoyed by citizens of the several states," including "protection by the government, with the right to acquire and possess property . . . and to pursue and obtain happiness and safety . . . .

Id. For a representative criticism of this interpretation of the Fourteenth Amendment's Privileges or Immunities Clause, in tone if not in content, see CROSSKEY, *supra* note 141, at 1119 (describing the decision as rendering the clause "completely nugatory and useless").

153 526 U.S. 489 (1999).

cluded a right to travel through, and relocate in, a new state.[154] Thus, the decision went off on a national citizen's right to travel—a right that already enjoyed constitutional protection, and one that even the narrow version of the Fourteenth Amendment espoused in *Slaughter-House Cases* had seemed to confirm.[155] Even this, the dissenters decried as too adventuresome.[156]

Despite these limits, the posited instances of discrimination by the state of Maryland would appear to come squarely within the terms of the prohibition against state laws that abridge the privileges of national citizens. The argument goes like this. The Court has already invalidated discrimination against out-of-state citizens of the kinds posited as violations of the privileges and immunities clause of Article IV. Thus, in *Toomer v. Witsell*,[157] the Court invalidated a license fee that discriminated against nonresidents in the "privilege" of trawling for shrimp; in *Supreme Court of New Hampshire v. Piper*,[158] the Court struck down a rule that prohibited nonresident lawyers from becoming members of the New Hampshire bar; and in a series of cases involving welfare and other benefits, the Court has invalidated restrictions (like those in *Saenz*) that were seen as burdening the right to travel.[159] Similar forms of discrimination targeting citizens of the District would not, of course, violate Article IV. District citizens lack citizenship in a state for purposes of pursuing claims under that provi-

154 *See id.* at 499–500 (citing Shapiro v. Thompson, 394 U.S. 618 (1969)). Previous decisions had recognized a right to travel, and some freedom from the denial of welfare benefits to travelers newly arrived in the state. *Saenz* innovated by basing a new right to travel on rights of national citizenship, finding that citizens of the state of California were entitled to challenge durational restrictions on their welfare benefits that limited their freedom to move to California and become citizens of that state.

155 *See id.* at 503–04 (citing *Slaughter-House* as having established the right of national citizens to travel and establish citizenship in a new state).

156 *See id.* at 513–04 (Rehnquist, C.J. & Thomas, J., dissenting).

157 334 U.S. 385 (1948); *cf.* Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (upholding New Jersey's discriminatory refusal to permit a nonresident to harvest oysters in the state and holding that oyster harvesting was not a fundamental right within the meaning of Article IV).

158 470 U.S. 274 (1985).

159 *See, e.g.*, Atty. Gen. of N.Y. v. Soto Lopez, 476 U.S. 898 (1986) (invalidating a state employment preference to veterans requiring residence in the state at the time the veterans entered the military as a violation of the right to travel); United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208 (1984) (invalidating as unconstitutional a municipal ordinance requiring at least forty percent of employees on city construction projects to be city residents); Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating as unconstitutional provisions denying welfare assistance to residents of a state who had not resided within the jurisdiction for at least two years immediately preceding their applications for assistance).

sion. But such forms of discrimination against the District citizen should still violate the Constitution, as action that abridges the privileges and immunities of national citizenship within the meaning of the Fourteenth Amendment. District citizens, in principle, should enjoy the same protection from in-state favoritism and discriminatory burdens that other citizens of the United States enjoy.

Once we accept the principle that District citizens enjoy the same right as other citizens of the United States to freedom from discriminatory state action that favors insiders, then the foundation for an expansion of diversity appears relatively straightforward. If discriminatory favoritism violates the Constitution, then the exclusion of District citizens from access to the Maryland courts for the enforcement of state law rights would do so as well. Indeed, as we see in the early interpretations of Article IV, the core feature of the Privileges and Immunities Clause was to eliminate disabilities based upon nonresidence in the state, and to ensure that outsiders would enjoy access to well functioning state court systems for the enforcement of state law rights.[160] Fear that outsiders might suffer both explicit and subtle forms of discrimination explains both the provisions of Article IV and the grant of diversity jurisdiction. These concerns surely apply with equal force to citizens of the District of Columbia, who lack state citizenship but whose national citizenship entitles them to Fourteenth Amendment protection from discriminatory state action.

B. *The Scope of Congressional Enforcement Power*

Establishing that discrimination by the state of Maryland against District citizens in the enforcement of state law rights would violate the Fourteenth Amendment represents but the first step toward the defense of *Tidewater* jurisdiction. We must also consider the scope of Congress's enforcement power under Section 5, and whether such power permits Congress to remedy such discrimination by providing an alternative federal diversity docket for the adjudication of claims in which bias against District citizens might predictably arise. Here, the challenge lies in bringing the extension of diversity jurisdiction to District citizens within the somewhat restrictive framework that the Court has created for the assessment of Section 5 power.

In evaluating the argument for Section 5 power, the starting point lies with the Court's much debated distinction between laws that interpret or modify existing constitutional principles, and those that seek to remedy or prevent constitutional violations. In *City of Boerne v.*

160 *See supra* notes 103–08.

Flores,[161] the Court considered the Religious Freedom Restoration Act, which proposed to reshape the test by which the courts would determine whether particular state action operated as an actionable burden on the free exercise of religion. This, the *Boerne* Court ruled, Congress could not do. While Section 5 authorizes preventative or remedial legislation, it does not give Congress a role in the interpretation of constitutional provisions.[162] Thus, the statute fell upon the Court's finding that Congress set out to redraw the line between the permissible and impermissible.

But while the *Boerne* Court invalidated laws seen as reshaping the constitutional free-exercise test, it was careful to reaffirm the validity of prior cases that upheld Congress's power to prevent and remedy constitutional violations.[163] Thus, *Boerne* cited with approval the Court's earlier statements to the effect that Congress can sometimes enact remedial legislation that "prohibits conduct which is not itself unconstitutional."[164] The key to the adoption of such remedial legislation, according to the Court, lies in a demonstration that the legislation satisfies the twin requirements of "congruence" and "proportionality."[165] Congruence requires the legislation to correspond to an identified problem of state constitutional violations; proportionality requires Congress to take steps that match the nature of the problem at hand. The proportionality prong of the test reflects a concern with statutes that might sweep too broadly, that might pervasively prohibit constitutional state action. Statutes more carefully tailored to the problem at hand by including geographic restrictions or other limitations thus enjoy a stronger likelihood of surviving proportionality scrutiny.

A grant of diversity jurisdiction for citizens of the District may satisfy the twin requirements of congruence and proportionality. To be sure, Congress did not make a record of substantial and pervasive

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161 521 U.S. 507 (1997).

162 *See id.* at 519:

> Congress' power under [Section 5], however, extends only to 'enforcing' the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial.' The design of the Amendment and the text of [Section 5] are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.

Id. (citation omitted).

163 *See id.* at 518–20 (citing with approval Rome v. Georgia, 446 U.S. 156 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966)).

164 *Id.* at 518.

165 *Id.* at 520 ("There must be a congruence and proportionality between the injury to be prevented . . . and the means adapted to that end.").

discrimination against District citizens as a predicate for the adoption of the law extending diversity jurisdiction to them. Rather, Congress acted to extend the benefits of diversity jurisdiction on an even-handed basis to all citizens of the United States.[166] The justification for the statute thus lies in the perception that an overlapping and redundant federal diversity docket provides an effective tool to prevent the possibility of state court bias against nonresidents that might otherwise occur. As with the case of diversity generally, the provision of a diversity docket for District citizens rests on the intuition that the docket will prevent subtle bias by enabling litigants to escape state court processes when the threat of such bias seems evident to them. If accurate, the intuition suggests that relatively few examples of overt bias will appear in the cases.

The *Tidewater* statute also appears to satisfy the proportionality prong. Congress simply drew upon two hundred years of experience with the use of diversity as a remedy for possible bias against out-of-state citizens in fashioning a remedy for similar bias against District citizens. The remedy sweeps no more broadly than necessary to deal with the problem; indeed, it applies with some precision to the problem at hand. In addition, the statute does not seem to suffer from problems of overbreadth in prohibiting state action that would otherwise be constitutionally valid. State dockets remain available for the enforcement of rights at common law, subject only to the possibility of removal to federal court in appropriate cases. Notably, all such claims will be governed, under *Erie*,[167] by the rules of common law that the states courts themselves develop.

Erie's application thus helps to distinguish the diversity statute in *Tidewater* from the federal right of action that the Court invalidated in *United States v. Morrison*.[168] In *Morrison*, Congress amassed a substantial record of gender-based discrimination on the part of state justice systems.[169] The record was offered in support of a statute that created a new private right of action enabling individuals to recover damages

166 Of course, the literature reflects a wide divergence of views about the benefits and costs of diversity jurisdiction, and whether the original bias-preventing conception of the diversity grant can still justify the jurisdiction today. *Compare* Shapiro, *supra* note 3, at 330–32 (suggesting reasons to believe that bias-prevention may still have a role in supporting diversity jurisdiction), *with* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 210–21 (1996) (considering the possible benefits of diversity, including bias-prevention, and the consequences of abolition).

167 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

168 529 U.S. 598 (2000).

169 *Id.* at 628–36 (Souter, J., dissenting).

for gender-related violence.[170] The perceived problem in *Morrison* stemmed from the fact that the federal statute went beyond providing remedies against state actors for state constitutional violations, and established a new federal standard of conduct for private parties who have committed criminal acts motivated by gender bias.[171] The *Tidewater* statute, by contrast, does not prescribe any new federal rights of action, and does not regulate private parties, but simply shifts state law rights of action into federal court for decision in accordance with *Erie*.[172] The statute thus applies no more broadly than necessary to address the problem of possibly subtle state court bias against citizens of the District.

C. *Advantages of a Section 5 Account of* Tidewater

A Section 5 account of the diversity statute upheld in *Tidewater* enjoys some advantages over its closest competitors. Like a theory of protective jurisdiction, the Section 5 account posits that claims brought by or against District citizens on the diversity dockets of federal courts in the several states actually arise under federal law for jurisdictional purposes under Article III, even though state law would determine their resolution. The main difference lies in the source of federal power. Under a theory of protective jurisdiction, Congress obtains its power to regulate from its plenary control over the territories and the District of Columbia.[173] But such control, while it goes a long way to justify federal legislation in the territories, has greater difficulty in justifying an expansion of federal judicial power outside the District.

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170 *See* 42 U.S.C. § 13981 (2000).

171 The Court's decision in *Morrison* was thus driven in part by the perception that Congress had set out to regulate private conduct under the Commerce Clause, but had exceeded recently articulated bounds in doing so. *See Morrison*, 529 U.S. at 608–19. As with other recent limits on the scope of Section 5, the *Morrison* Court acted in part to prevent an end-run around its restrictions on the Commerce Power. *See also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78–91 (2000) (coupling a finding that Congress lacked power to regulate under the Commerce Clause with a finding that the particular statute exceeded the boundaries of proper Section 5 legislation under the Fourteenth Amendment).

172 *See* 28 U.S.C. § 41 (1946), *construed in* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). *Erie*, of course, permits federal courts to apply their own procedural rules, but compels them to respect and enforce the rules of decisions that have been articulated by the state courts. *See Erie*, 304 U.S. at 78. *Erie*'s application helps to clarify that the expansion of federal jurisdiction would comply with the requirement that Section 5 legislation make "no substantive change in the governing law." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

173 *See* Palmore v. United States, 411 U.S. 389, 397–98 (1973).

The Section 5 account, by contrast, links the theory of jurisdiction more directly to the work being done. Congress already enjoys power to provide courts for the territories, and for the District, and to enable citizens to litigate a range of matters in those courts, including disputes with the citizens of other states. The problem for diversity jurisdiction in cases involving District citizens and state citizens has always arisen in cases in which District citizens file suit in other states: in *Hepburn*, the District plaintiff sued in Virginia federal court;[174] in *Tidewater*, the District citizen sued in Maryland.[175] By portraying diversity as a remedy for subtle bias on the part of state courts against citizens of the District (bias that would violate the Fourteenth Amendment if overtly discriminatory), the Section 5 account offers a more straightforward rationale for the provision of a federal alternative to state court litigation.

The Section 5 account also has the advantage of linking jurisdictional expansion to a relevant change in the scope of federal power. Since Marshall's decision in *Hepburn*, neither the text of Article III nor the nature of Congress's power over the District of Columbia has changed in relevant ways. But the addition of the Fourteenth Amendment expands the Constitution's protection against state abridgement of privileges and immunities to encompass the rights of both state and national citizens.[176] Citizens of the United States living in the territories and the District of Columbia, who lack a domicile and citizenship in one of the states, nonetheless enjoy the same immunity from discriminatory denial of their rights as citizens of the United States living within one of the states. By extending the possibility of diversity jurisdiction to national citizens living in the territories, moreover, the Section 5 account picks up a common theme of antebellum jurisprudence. Many jurists from the era, including Chief Justice Taney, had come to view the right to a federal diversity docket as one of the privileges of citizenship within the meaning of Article IV.[177] A

174 Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 445 (1805).

175 *Tidewater*, 337 U.S. at 583.

176 U.S. CONST. amend. XIV, § 1.

177 *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 403 (1856) (asking in a diversity case whether a person of African descent can become a member or citizen of the United States, entitled as such to "all the rights, privileges, and immunities" accorded to such citizens, including as one such right "the privilege of suing in a court of the United States"); Dodge v. Woolsey, 59 U.S. (18 How.) 331, 355 (1855) (noting that "[w]ithout [a federal court with diversity jurisdiction], the citizens of each State could not have enjoyed all the privileges and immunities of citizens in the several States, as they were intended to be secured" by Article IV of the Constitution); Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 326 (1853) (specifically endorsing Hamilton's suggested linkage between Article IV's Privileges and Immunities Clause and

Fourteenth Amendment devoted to overturning *Scott v. Sandford* by expanding the definition of citizenship could plausibly expand access to diversity.

Although Congress did not articulate a Section 5 theory in so many words, the House Judiciary Committee report that accompanied the proposed legislation in 1940 points in somewhat the same direction.[178] After tracing the development of the *Hepburn* line of cases,[179] the report turned to develop an affirmative case for the existence of legislative power, and here the argument grew more intricate. It noted the broad scope of Congress's power over the District of Columbia, and cited the Court's recognition that citizens of the District enjoy "rights, guaranties, and immunities" under the Constitution that include a "right" to the determination of their disputes at the seat of government before an independent judiciary.[180] Seeing access to federal court as a right available to the citizens of the District, the report explained as follows:

> For example, a citizen of a State may [demand access to federal court] when involved in a case or controversy with a citizen of another State. The mere fact that the Constitution guarantees this right to the citizens of a State in no way prohibits the Congress from

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Article III's diversity provision). To modern eyes, the suggested equation of the right to sue in diversity with a privilege of state citizenship looks odd; we see diversity as a source of judicial power that Congress may confer on the federal courts, or not, as it sees fit. Treating diversity itself as a constitutional privilege might appear to threaten congressional control over federal jurisdiction, and the widely acknowledged right of Congress to do away with the jurisdiction altogether. *Cf.* Sheldon v. Sill, 49 U.S. (8 How.) 441, 448–49 (1850) (upholding congressional power to qualify diversity jurisdiction). In my Section 5 account, citizens enjoy a privilege of freedom from discrimination that Congress may implement through the extension of diversity jurisdiction. Diversity thus remedies a subtle violation of the rights of citizens, rather than acting itself as such a right. Such an approach avoids any conflict with the Supreme Court's recognition that the citizens of a territory have no constitutional right to a diversity docket, even where the privileges and immunities of citizenship apply to them. *See* Chase Manhattan Bank v. S. Acres Dev. Co., 434 U.S. 236, 238–39 (1978) (rejecting claim that privileges and immunities clauses prohibit Congress from withholding or restricting diversity jurisdiction).

178 *See* H.R. REP. NO. 76-1756 (1940). The Senate adopted the provision without debate and did not contribute anything meaningful to the provision's legislative history.

179 The report began by tracing the origins of the *Hepburn* rule and its extension to cases involving both citizens of the District and citizens of the territories. *Id.* at 1–2. The report noted that the rule had been often criticized but never overturned, despite language in Marshall's opinion suggesting that the matter was one for Congress to address. *Id.* at 2.

180 *Id.* (quoting O'Donoghue v. United States, 289 U.S. 516 (1933)).

extending that same privilege to others who are not technically citizens of a State.[181]

Although somewhat inartful,[182] the report links diversity to the privileges and immunities of citizenship, and suggests that Congress can extend the right to citizens of the District on the same terms as citizens of the several States. A Section 5 account thus fits tolerably well with the legislative impulse that seemingly informed the enactment of the law that the *Tidewater* Court upheld.

D. The Scope of a Section 5 Account

Apart from linking the expansion of diversity to a claim about the rights that citizens of the District hold in common with citizens of the several states, the 1940 Act raises questions about the scope of congressional power. At the same time it brought citizens of the District within the diversity jurisdiction, Congress also made provision for diversity jurisdiction over claims involving citizens of what were then the territories of Alaska and Hawaii.[183] Such an expansion of authority raises questions about the scope and limits of a Section 5 defense of the jurisdictional expansion approved in *Tidewater*.

The first puzzle—that presented by the inclusion of the citizens of the territories—seems relatively easy to solve. Section 5 power should enable Congress to protect any citizen of the United States from the subtle discrimination they might face in state court litigation with an in-state citizen by enabling the territorial citizen to secure access to a federal diversity docket as an alternative. Congress might thus offer a diversity docket to the citizen of Hawaii (during its territorial phase) when litigating in the state courts of the contiguous United States. Similarly Congress could offer a diversity docket to citizens of Puerto Rico today (as it has done).[184] The only restriction on such power would flow from the requirements that Congress act on behalf of citizens of the United States and that it act to prevent possible state discrimination. So long as the territorial citizen enjoyed rights as a citizen of the United States, extension of diversity for their benefit would come within the ambit of the Section 5 account.

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181 *Id.* at 3.

182 Thus, the report glosses over the notion that Article III sets the outer boundaries of the judicial power and over the fact that Congress can decide, within such boundaries, whether to confer diversity jurisdiction on the lower federal courts, or not, as it sees fit.

183 For the text of the statute, see *supra* note 2.

184 *See* 28 U.S.C. § 1332(d) (2000) (defining "States" for purposes of diversity to include the Territories, the District of Columbia and Puerto Rico).

Such an account suggests certain limits on the power of Congress under Section 5 to broaden diversity jurisdiction within the territories themselves. A plaintiff from California cannot plausibly claim access to a diversity docket in the District of Columbia on the ground that she will otherwise suffer possibly biased decisions on the part of the local state court. The court system in the District, itself a creature of Congress, operates as part of the federal government. However biased the local courts in the District, the bias could not fairly be seen as state discrimination against an outsider, and would not appear to bring into play enforcement powers conferred to deal with state discrimination. But the absence of Section 5 authority would not affect the legality of diversity jurisdiction in the District. The Court has long held that Congress may give territorial courts the functional equivalent of diversity jurisdiction in disputes involving outsiders as part of Congress's plenary power over the District and the territories.[185] Both Congress, in providing for the jurisdiction upheld in *Tidewater*,[186] and the Court in permitting its exercise,[187] acknowledged that Article I territorial courts could exercise jurisdiction over disputes between territorial citizens and citizens of a State. So despite the fact that the Section 5 account would not apply, Congress faces no real obstacle in providing for the exercise of diversity jurisdiction by the courts of the District and the territories.

The focus on national citizenship as the trigger of Congress's Section 5 power raises a final question about the scope of the suggested account. Could Congress provide a citizen of the United States, domiciled abroad, with authority to invoke the diversity dockets of the federal courts? Under a long line of cases, the Court has ruled that U.S. citizens must be citizens of a state to invoke diversity jurisdiction, and that state citizenship turns on an inquiry into domicile as the test of residence under the Fourteenth Amendment.[188] On such an approach, Americans domiciled abroad lack state citizenship and access

185 *See supra* note 96 (citing Sere v. Pitot, 10 U.S. (6 Cranch) 332 (1810)).

186 *See supra* note 180 and accompanying text (referring to the power of federal courts at the seat of the government to hear claims involving citizens of the District and citizens of other States).

187 *See* Nat'l Ins. Co. v. Tidewater Co., 337 U.S. 582, 590 (1948) (plurality opinion) (noting the availability of Article I courts in the District of Columbia to hear claims similar to that in *Tidewater*, and suggesting that Congress might establish similar Article I courts for the benefit of District citizens throughout the country).

188 *See, e.g.*, Reynolds v. Alden, 136 U.S. 348, 351–53 (1890). Domicile, in turn, depends on a finding that the individual in question has established a fixed and permanent home, to which she intends to return. *See* WRIGHT & KANE, *supra* note 19, at 163.

to diversity dockets.[189] The Section 5 account would seemingly permit Congress to reverse that conclusion, and to expand diversity to encompass the claims of expatriate Americans. Their status as national citizens would trigger Congress's power to offer them the protections of a diversity docket anytime litigation would otherwise go forward before a state court that might view the expatriate as an outsider, and target of possible discrimination. On this view, the outsider status of a U.S. citizen, whether based on domicile in the District of Columbia, on domicile in a territory of the United States, or on domicile in a foreign state, would trigger the protective Section 5 authority.[190]

E. *Criticisms of a Section 5 Account of* Tidewater

1. Trivializing the Fourteenth Amendment?

Critics may worry that this suggested use of the Section 5 enforcement power trivializes the Fourteenth Amendment by placing it in the service of Congress's power to expand diversity jurisdiction. To some extent, that may be so. But three other factors deserve consideration. First, we can see some evidence that Congress expanded diversity jurisdiction during Reconstruction, in an effort to provide broader protection to out-of-state litigants before presumptively hostile state courts.[191] Such evidence provides some historical support for a diver-

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189 *See, e.g.*, Twentieth Century Fox Film Corp. v. Taylor, 239 F. Supp. 913, 922–23 (S.D.N.Y. 1965) (concluding that Taylor, a citizen of the United States, was domiciled in England; such domicile meant that she lacked state citizenship within the United States for diversity purposes).

190 One might also question the power of Congress to provide a diversity docket in a state that might be expected to be neutral as between two contending parties from other states (or territories). As originally enacted, diversity applied only to cases brought in the federal court of a state that was expected to lack neutrality. Thus, in a dispute between citizens of New York and Virginia, for example, the Judiciary Act made no provision for diversity jurisdiction in the neutral forum of Maryland. *See supra* notes 120, 123 and accompanying text. But while such a limit may have appealed to the drafters of the Judiciary Act, Congress has long since abandoned that limit and has made diversity turn on citizenship. Thus, although the Maryland state court might appear to be neutral in a dispute between corporations from New York and Virginia, that neutrality does not now bar diversity jurisdiction. Yet the fact of neutrality might be seen as limiting Congress's enforcement power under Section 5 when the case happens to involve a Maryland court, a District corporation and a New York corporation instead.

191 Two statutes in particular expanded diversity shortly after the Civil War. *See* Act of July 27, 1866, ch. 288, 14 Stat. 306 (permitting removal of a separable controversy and thus overruling the traditional rule that required all defendants to join together in a petition for removal); Act of Mar. 2, 1867, ch. 196, 14 Stat. 558 (permitting either the plaintiff or defendant to petition for removal upon a showing that "from

sity expanding conception of Reconstruction. Second, norms of equality seem to have informed Congress's decision in 1940 to expand diversity for the benefit of District citizens.[192] Third, the suggested argument does not foreclose other claims that courts and scholars might wish to make on behalf of the Fourteenth Amendment and its Privileges or Immunities Clause. The clause might well provide a vehicle for the incorporation of the Bill of Rights, as many have argued,[193] and still perform the more prosaic function of securing access to a diversity docket for a group of citizens whose lack of formal state citizenship might otherwise stand in the way. Providing support for an expansion of diversity on this view need not be seen as cheapening the currency of the Fourteenth Amendment.

2. Corporate Citizenship

A second important criticism might point to the fact that the definition of citizenship in the Fourteenth Amendment excludes the single most important beneficiary of diversity jurisdiction, the American business corporation. Corporations are generally regarded, for purposes of diversity jurisdiction, as citizens of both the state of their incorporation and the state of their principal place of business.[194] But while corporations frequently appear as litigants on federal diversity dockets,[195] the Court has consistently ruled that corporations are not citizens within the meaning of the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment.[196] Whatever work the

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prejudice or local influence, he will not be able to obtain justice in such State court"). Both statutes were enacted before the general grant of federal question jurisdiction in 1875, and both applied to diversity jurisdiction.

192 *See supra* notes 178–82 and accompanying text (discussing the equal treatment rationale that informed the legislation's enactment).

193 *See* AMAR, *supra* note 95, at 166–67. *But cf.* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) (rejecting argument that the Reconstruction Congress intended to incorporate the Bill of Rights into the Fourteenth Amendment). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 196–97 n.59 (1980) (considering the privileges or immunities clause of the Fourteenth Amendment as a textual basis for incorporation).

194 *See* 28 U.S.C. § 1332(c)(1) (2000).

195 Indeed, in *Tidewater* itself, the plaintiff was a corporation, organized under the laws of the District of Columbia, and had brought suit in a Maryland federal district court against a Virginia firm.

196 *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 514 (1939) (holding that natural persons *alone* are entitled to privileges or immunities under the Fourteenth Amendment); Hemphill v. Orloff, 277 U.S. 537 (1928); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177–78 (1868) (holding that corporations are not citizens with the meaning of the Privileges and Immunities Clause of Article IV).

privileges and immunities of citizenship might do to support the congressional expansion of diversity upheld in *Tidewater*, its inapplicability to corporations might seem to limit its effectiveness as a tool of jurisdictional expansion.

One answer to this critique may lie in doctrinal developments that extend constitutional protections from state discrimination to corporations under the Equal Protection Clause of the Fourteenth Amendment. Corporations may, of course, challenge discriminatory state legislation that forecloses them from local markets under the dormant Commerce Clause.[197] Even where Commerce Clause protections do not apply, the Court has adopted an expansive conception of equal protection to safeguard corporate insurance firms from state economic discrimination.[198] Because corporations are "persons" for purposes of the Equal Protection Clause,[199] state discrimination against them would bring the enforcement powers of Congress into play under Section 5 of the Fourteenth Amendment. One might thus work around the corporate gap in the Privileges and Immunities Clause by relying upon this equal protection-based limit on discrimination against out-of-state corporations.

Even if it poses a problem for reliance upon Congress's Section 5 power, this criticism from corporate citizenship brings into sharp focus the theme of constitutional change that underlies this Article's analysis of the *Tidewater* problem. Early authorities closely linked the privileges of citizenship under Article IV to the scope of diversity jurisdiction in Article III. Chief Justice Marshall resisted any expansion of diversity to reach cases in which nondiverse plaintiffs might join with diverse plaintiffs to enforce a joint liability.[200] He also resisted any extension of diversity to corporate bodies, taking the view that the "cit-

197 For a general introduction to the dormant Commerce Clause as a check on discriminatory state legislation, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.1 (6th ed. 2000).

198 Judicial limits on state localism under the Commerce Clause do not apply to the business of insurance, which Congress placed beyond the reach of the dormant Commerce Clause in the McCarran-Ferguson Act. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 414 (1946). Nonetheless, certain state tax laws in the insurance realm have been invalidated on equal protection grounds, notwithstanding their apparent similarity to a proscribed commerce challenge. *See, e.g.*, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 874–83 (1985) (invalidating, under the Equal Protection Clause, a state law that taxed out-of-state insurance companies at a discriminatory rate, and noting the inapplicability of both the dormant Commerce Clause and the Article IV Privileges and Immunities Clause, but nonetheless extending equal protection to reach discrimination).

199 *See Ward*, 470 U.S. at 881 n.9.

200 *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267–68 (1806).

izens" for purposes of diversity were the natural persons whose financial interests were at stake and not the inanimate corporate body that had come to personify those financial interests.[201] The combination of Chief Justice Marshall's complete diversity rule and his refusal to treat corporations as citizens imposed a dramatic restriction on the ability of business corporations to secure a federal diversity docket.[202]

Both doctrines have given way. The Taney Court overturned Chief Justice Marshall's view of corporate citizenship, creating a robust if fictional presumption that the citizenship of the shareholders corresponded to that of the state that had issued the firm's charter of incorporation.[203] Such a fictional presumption of shareholder citizenship in the state of incorporation lasted until 1958, when Congress expanded corporate citizenship by deeming the corporation's principal place of business to be an additional state of citizenship.[204] Today, we no longer think of the shareholders' states of citizenship as at all relevant to the inquiry into the citizenship of a corporation for diversity purposes. Similarly, Chief Justice Marshall's complete diversity rule gave way in *State Farm* to the argument that Congress may rely upon minimal diversity in expanding the jurisdiction of the federal courts over multi-party litigation.[205] Something very similar occurred in connection with class action litigation; the Supreme Court has held that the citizenship of the class representative determines the citizenship of the class for diversity purposes.[206]

201 *See* Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 67–70 (1809).

202 Any publicly held company would be denied access to diversity entirely if the citizenship of its many shareholders determined its citizenship for diversity purposes, and the law continued to insist on complete diversity. *Cf.* United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 152–53 (1965) (holding that the citizenship of an unincorporated association is to be determined by reference to the citizenship of all its members, practically foreclosing national labor unions from access to diversity dockets under the complete diversity rule).

203 *See* Marshall v. Balt. & Ohio R.R., 57 U.S. (16 How.) 314, 328 (1853); Louisville R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 552–56 (1844).

204 *See* 28 U.S.C. § 1332(c) (1958). For an account, see James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426 (1964) (examining the development of the corporate diversity fiction and the problems in its applications).

205 *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967). *State Farm* did not overrule *Strawbridge*, of course; the complete diversity rule remains applicable in litigation under § 1332. *State Farm* simply makes the minimal diversity option available to Congress.

206 *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366–67 (1921). The rule places diversity within the control of the lawyer, who can often choose a class representative that confers or defeats diversity jurisdiction in accordance with the lawyer's own preferences as to forum choice. As with the case of corporations, the citi-

Such changes sever the historic connection between the rights of citizenship in Article IV and the grant of diversity jurisdiction in Article III. They also suggest that the continuing justification for diversity jurisdiction in disputes involving corporate parties lies not in the possibility of state court bias against natural persons who happen to live out-of-state, but in a fear that local courts and local juries will exact a disproportionate share of the value of national business enterprises. Just as the Supreme Court has imposed constitutional limits on the imposition of punitive damages that reflect worries about disproportionate exactions,[207] so too has the Court limited the power of state legislatures to impose a disproportionate share of taxes on nationwide business entities.[208] The rhetoric that supports the adoption of the Class Action Fairness legislation, now pending in the Senate, relies less upon traditional theories of bias against out-of-state citizens than on bias against the Fortune 500.[209]

It seems odd, in 2004, that Congress would propose to address a problem of interstate commerce (excessive localism in class action awards) through the use of minimal diversity (expanding the scope of diversity jurisdiction over class actions, primarily to enable firms to remove such claims to federal court). Diversity preserves the application of state law under *Erie* and does not fit particularly well with problems of nationwide scope. In the class action context, for example, diversity preserves the conflicting bodies of state law that make the certification of nationwide class actions virtually impossible today in federal court. Ordinarily, when Congress perceives a problem of nationwide scope, it fashions a nationally uniform body of law to ad-

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zenship of the interested parties themselves has grown somewhat remote from the jurisdictional inquiry in many multi-party cases.

207 *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568, 578 (1996) (concluding that due process restricts the award of excessive punitive damages and basing decision in part on evidence that the firm had a nationwide compliance program aimed at complying with the standards of the most demanding state regulation); *cf.* State Farm Ins. Co. v. Campbell, 538 U.S. 408, 417–18 (2003) (suggesting the use of ratios between actual and punitive damages as one test of excessiveness).

208 The Court's dormant Commerce Clause line of cases can be understood as recognizing that states have incentives to advance the interests of insiders by shifting costs onto outsiders and onto federal instrumentalities. *See* NOWAK & ROTUNDA, *supra* note 197. The Court has extended the rule of fair treatment for outsiders to the tax field, where it precludes disproportionate exactions. *See, e.g.*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (establishing a four-part test, including fair apportionment, to determine the constitutionality of state taxation of interstate commerce).

209 *See* S. REP. NO. 108-123, at 5–28 (2003) (describing state court class action litigation as presenting a threat to interstate commerce and identifying excessive state court awards as the culprit).

dress the problem. In the proposed class action legislation, the only nationally uniform rules are the nominally procedural rules that govern the certification and consolidation of class action litigation; state law would continue to control the underlying questions of substance.[210]

All of which points out a fundamental disjunction between the national interests that seem to justify diversity jurisdiction today and the problem of discrimination against another state's citizens that grounded the jurisdiction in the Republic's early years. Chief Justice Marshall, perhaps not surprisingly, foresaw the change, and provided a jurisdictional tool to address the problem. In *Bank of the United States v. Deveaux*,[211] Chief Justice Marshall stuck closely to classic theory, taking both a narrow view of the scope of federal question jurisdiction over the claims of a private federal banking corporation and a narrow view of diversity jurisdiction as it applied to corporate affairs. But in *Osborn v. Bank of the United States*,[212] Chief Justice Marshall adjusted course, holding both that the second bank's charter conferred federal question jurisdiction through its sue-and-be-sued clause and that such jurisdiction was consistent with constitutional limits. Chief Justice Marshall's decision opened up the possibility that the federal government might charter business corporations (within the boundaries of its enumerated powers), and that the affairs of such corporations (both internal and external) would be subject to regulation through litigation in the federal courts. Marshall's purpose in doing so, nicely articulated in that other banking case, *McColluch v. Maryland*,[213] was to protect nationwide enterprises from the partial regulatory exactions of state governments.

Today, we have relatively few nationally chartered business corporations, and the *Osborn* rule applies only where the federal government owns a substantial share.[214] Corporate charter-making, especially for nationwide businesses, remains a task for state regulators, primarily those in Delaware. We have thus preserved the fiction

210 One might cynically suppose that the minimal diversity approach seeks to kill the nationwide class action by preserving conflicting state law and shifting litigation to federal courts known for their hostility toward the certification of such classes.

211 9 U.S. (5 Cranch) 61 (1809).

212 22 U.S. (9 Wheat.) 738 (1824).

213 17 U.S. (4 Wheat.) 316 (1819).

214 *See* 28 U.S.C. § 1349 (2000) (foreclosing federal question jurisdiction over the claims of federal corporations, except where the federal government owns the majority share). For a summary of federally chartered corporations, see Christina Maistrellis, Comment, American Red Cross v. S.G. & A.E.*: An Open Door to the Federal Courts for Federally Chartered Corporations*, 45 EMORY L.J. 771 (1996).

of state citizenship for corporations, even as we have fashioned rules (of constitutional law) that seek to protect national businesses from state localism. Congress might provide such protection more directly by taking over the business of corporate charter-making, at least for firms that operate throughout the country, and by enabling such enterprises to sue in federal court on an *Osborn* theory. Instead, Congress has deferred to the Delaware exception and has largely stayed away, at least since its Gilded Age experiment with federal railroad corporations.[215]

National corporations remain, as a consequence of our peculiar history, creatures of state law. But that need not foreclose their access to diversity dockets, as the minimal diversity legislation in the class action arena nicely illustrates. Just as minimal diversity legislation proposes to disaggregate the state class action by looking to the citizenship of the members of the class, so too might diversity take cognizance of the shareholders whose investments make up the modern corporation. On such an approach, minimal diversity of corporate shareholders and the opposing party would likely support jurisdiction in any case involving a publicly held corporation. *Tidewater* legislation that relied upon the Fourteenth Amendment to secure diversity jurisdiction over the claims of natural persons might rely instead upon minimal diversity to reach corporations organized under the laws of the District of Columbia.

CONCLUSION

As Professor Fallon has observed, federal jurisdictional law presents particularly acute problems of intertemporal synthesis.[216] Unlike many other provisions of the Constitution, Article III has not been amended since the Eleventh Amendment became law during the Constitution's first decade of existence. Many of the sweeping constitutional movements that have since left their mark on the document—movements like radical reconstruction, women's suffrage, and progressivism—did not produce any formal changes to the terms of Article III.[217] The great expansion of federal jurisdiction that fol-

215 For a discussion of the importance of possible federal regulatory oversight as a check on Delaware's monopoly in the incorporation business, see Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003).

216 Richard Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 980–83 (1994) (crediting 1 BRUCE ACKERMAN, WE THE PEOPLE (1991), for highlighting problems of intertemporal synthesis and exploring those problems in connection with Article III and Reconstruction).

217 The Fourteenth Amendment's failure to amend the "judicial power" makes the Court's sovereign immunity abrogation jurisprudence seem somewhat contrived, to

lowed the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments came about entirely as a result of statutory change and did not result from any direct constitutional tinkering with the judicial power. As a result, many continue to view the original understanding of Article III (as expressed in the Judiciary Act of 1789 and elsewhere)[218] as relevant to interpretive issues today, notwithstanding the great realignment of state and federal power that followed the Civil War and the growth of a national economy.

Tidewater poses these problems of intertemporal synthesis in classic terms. When the issue first arose in *Hepburn v. Ellzey*, the Supreme Court held that citizens of the District of Columbia were not citizens of a state for purposes of invoking the diversity jurisdiction of the federal courts. Although not entirely clear, Justice Marshall seemingly based his opinion on a reading of the Constitution, which he described as consistently using the term "State" to refer to a full-fledged member of the Union and as ruling out the possibility of state-like status for the District of Columbia. Short of a constitutional amendment that confers statehood upon the District of Columbia, or an amendment to Article III, *Hepburn* would have seemed to preclude the exercise of diversity jurisdiction in *Tidewater*.[219] Precisely that view informed Justice Frankfurter's dissent, and its emphasis on the relative specificity and concreteness of the terms of the judicial article.[220] This relative precision meant to Justice Frankfurter that Article III,

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say the least. *See* Seminole Tribe v. Florida, 517 U.S. 44, 95 (1996) (Stevens, J., dissenting) ("Except insofar as it has been incorporated into the text of the Eleventh Amendment, the doctrine [of sovereign immunity] is entirely the product of judge-made law.").

218 It would be interesting to test the hypothesis that the forms of originalism, including close attention to text, structure and history, play a more influential role in the federal courts' scholarship than in other fields of inquiry. A nickel says we cite Farrand with greater frequency than most.

219 Of course, one can treat *Hepburn* as leaving open the constitutional issue and basing its decision on the terms of the statute.

220 Frankfurter's distinction reads as follows:

> Great concepts like "Commerce . . . among the several States," "due process of law," "liberty," "property" were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged. But when the Constitution in turn gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the translation.

Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646–67 (1949) (Frankfurter, J., dissenting).

unlike the more open-ended assurances of equal protection and due process, would not support an evolving interpretation.[221]

One can, of course, challenge the specificity and concreteness thesis, although none of the Justices did so in *Tidewater*. The sheer number of competing theories of Article III gives some reason to doubt any claim of precision and technical clarity. But while Justice Jackson advanced an adventuresome theory of congressional power to step outside the boundaries of Article III altogether, it was a theory that few Justices, then or now, have seen as workable. The crucial votes of Justices Rutledge and Murphy rested on a decision to overturn Chief Justice Marshall's interpretation of Article III, rather than a theory of constitutional change or an agreement with Justice Jackson's proposed theory of Article I expansion. Most everyone else joined with Justice Frankfurter in decrying the potential breadth of Justice Jackson's formulation and joined the rejection of Justice Jackson's implicit claim that times had changed and required a new account of the scope of the judicial power. The majority's rejection of a loosely constructed Article III corresponds to the current Court's reluctance to espouse an expansive conception of protective jurisdiction as a tool of jurisdictional expansion.

Yet all of this insistence on the preservation of crisp jurisdictional boundaries seemingly came with little recognition of the enormous expansion that corporate citizenship has worked in the scope of diversity jurisdiction. Under Chief Justice Marshall's formulation in *Strawbridge* and *Deveaux*, the inability of corporations with widely dispersed shareholders to claim rights of citizenship would have foreclosed their access to diversity dockets altogether. Had such a doctrine prevailed, Congress may have taken over the business of providing charters for multi-state corporations and have empowered them to litigate in federal court on the basis of the federal question jurisdiction recognized in *Osborn*.[222] But instead, the Court invested corporations with state

221 For a depiction of the *Tidewater* problem in terms of interpretive changes over time, see PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISION-MAKING 204–06 (2d ed. 1992).

222 Such an approach prevailed briefly, following the grant of jurisdiction over disputes involving federal corporations, and the broad interpretation of that statute during the Gilded Age. *See* Pac. R.R. Removal Cases, 115 U.S. 1, 11 (1885):

> [C]orporations of the United States, created by and organized under acts of Congress . . . are entitled as such to remove into the Circuit Courts of the United States suits brought against them in the State courts . . . on the ground that such suits are suits 'arising under the laws of the United States.'

Id. But the broad availability of federal charters of incorporations for multi-state businesses probably had to await the expansion of the commerce power in the twentieth century.

citizenship for diversity purposes and fundamentally transformed the nature of the jurisdiction from one that sought to protect the civil rights and commercial interests of natural persons to one that offered protection to national business enterprises from state localism. By the time of *Tidewater*, this conception was so deeply ingrained that Frankfurter based his attack not on diversity as a jurisdiction of corporate protection but on Jackson's proposal to broaden the jurisdiction further. In arguing about the jurisdiction for citizens of the District of Columbia, no one seemed to have noticed that it was a corporate citizen of the District that sought access to the Maryland federal district court. In worrying about District citizens, the Court seems to have swallowed the camel and strained at the gnat.[223]

Too much has changed to permit a return to Hamilton's account of relationship between the privileges of citizenship and the grant of diversity jurisdiction. I do not advocate such an approach here. Instead, my Section 5 account seeks to solve one particular problem, deploying congressional power to prevent state court bias in violation of the Fourteenth Amendment as the justification for the extension of diversity jurisdiction for the benefit of citizens of the District and the other territories of the United States.[224] The account offers no general theory of intertemporal synthesis under Article III. But it does offer one way to think about constitutional change and the scope of the judicial power. By linking jurisdictional expansion to the changing definition of the rights of national citizenship that accompanied Reconstruction, the Section 5 account justifies jurisdictional change by reference to a watershed moment in our constitutional history.

223 *Cf. Tidewater*, 337 U.S. at 625–26 (Rutledge, J., concurring) (distinguishing between the "considerable importance" of the principle and the practical insignificance of the particular grant of jurisdiction).

224 The focus on rights of national citizenship suggests that citizens of territories who lack such citizenship would not enjoy access to a diversity docket under the account developed in this Article.