COMPLETE DIVERSITY AND THE CANON AGAINST JURISDICTIONAL PRIVILEGE: A RESPONSE TO PROFESSOR MOLLER

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Mark Moller's recent article, *Complete Diversity: The Origin Story*,[1] makes an important contribution to our understanding of diversity jurisdiction. It does so by tying the complete-diversity requirement to an English canon of construction that predates the U.S. Constitution: the canon against jurisdictional privilege. As Professor Moller explains, that canon of construction—which applied unless expressly disclaimed—required construing royal grants of jurisdiction based on party status "against jurisdiction when a party lacking the requisite status was joined alongside someone possessing that status."[2]

The canon against jurisdictional privilege was well-established in English law when the Judiciary Act of 1789 was enacted.[3] And there is good reason to think that Chief Justice Marshall and other members of the Court were familiar with the canon and may have relied on it in developing what we now call the complete-diversity requirement.[4] Professor Moller's

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1. 76 FLA. L. REV. 1221 (2024).
2. *Id.* at 1221.
3. *Id.* at 1238–51.
4. *Id.* at 1259 ("Because recent research into Chief Justice Marshall's commonplace books indicates he learned the law principally through the study of precisely these treatises [by Matthew Bacon and Charles Viner that discussed the canon against jurisdictional privilege] it is plausible, indeed I think likely, Marshall drew on these works when thinking through how to analyze diversity jurisdiction.").

Until the Judiciary Act of 1875 was enacted, "complete diversity" was insufficient to satisfy the diversity-of-citizenship requirement. That was because diversity jurisdiction before then required that a suit be "between a citizen of the State *where the suit is brought,* and a citizen of another State." *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (1789) (current version at 28 U.S.C. § 1332(a)(1)) (emphasis added). Thus, rather than speaking in terms of complete diversity, courts more precisely asked whether all parties in a diversity action "[were] competent to sue or liable to be sued." Patrick Woolley, *Diversity Jurisdiction and the Common-Law Scope of the Civil Action*, 99. WASH. U. L. REV. 573, 587 (2021). Indeed, the term "complete diversity" did not even appear in the Court's opinions until 1925. *Id.* at 587 & n.57.

For the sake of simplicity, the term "complete diversity" is sometimes used herein to refer to any action in which all parties were competent to sue or be sued in diversity, "diverse party" to refer to a party who is competent to sue or be sued in diversity, and "nondiverse party" to refer to a party who is *not* competent to sue or be sued in diversity.

excavation of the canon thus illuminates a possible reason the Court has for so long insisted that the general statutory grant of diversity jurisdiction be strictly construed,[5] an insistence reflected in the complete-diversity requirement. Of course, in the absence of direct evidence,[6] we cannot know for sure why the complete-diversity requirement emerged, but Professor Moller makes a compelling case that the canon against jurisdictional privilege played a role.

Professor Moller, however, also relies on the canon against jurisdictional privilege to make claims about the proper construction of the statutory and constitutional grants of diversity jurisdiction that are not supported by the evidence he marshals.[7] As explained in the two parts that follow, neither his argument that the statutory grant of diversity jurisdiction *always* requires complete diversity between *all* the plaintiffs and defendants joined as parties in the complaint, nor his suggestion that Article III might be understood to require the same, is sound.

I. The Statutory Argument

Professor Moller argues that the complete-diversity requirement of 28 U.S.C. § 1332(a) must be assessed by looking to the "whole complaint."[8] The whole-complaint approach—to which I referred in earlier work as "the modern assumption"[9]—requires that all plaintiffs who join in a complaint be completely diverse from all defendants joined in the complaint.[10] This way of understanding the complete-diversity requirement is premised on the view that the scope of the "civil action" to which

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5. *See* Dudley O. McGovney, *A Supreme Court Fiction: II*, 56 HARV. L. REV. 1090, 1109–11 (1943) (relying on decisions of the Marshall Court to argue that "[t]he general tenor of the Court's construction of statutes granting diversity jurisdiction has been to regard this concurrent jurisdiction . . . as exceptional and extraordinary, calling for narrow construction of the grants").

6. Moller, *supra* note 1, at 1236 ("There is strong circumstantial evidence that Chief Justice Marshall relied on period treatments of the canon to decide *Strawbridge*.").

7. *Id.* at 1227 (arguing that the canon against jurisdictional privilege vindicates application of the complete diversity rule to the "whole complaint" and "raises major questions about the constitutional status of complete diversity").

8. *Id.*

9. *See* Woolley, *supra* note 4, at 576 ("The modern assumption is that the relevant civil action for purposes of the complete-diversity requirement is the civil action authorized by the Federal Rules of Civil Procedure, but that each plaintiff generally must have claims against each defendant that satisfy the amount-in-controversy requirement.").

10. Moller, *supra* note 1, at 1227.

the complete-diversity requirement applies is defined by the same rules of procedure that govern the litigation.[11] I refer to this approach as the modern assumption because most lawyers and judges today simply take it for granted, even though it has never been written into law by the U.S. Supreme Court.[12]

Professor Moller seeks to buttress the modern assumption with the claim that the canon against jurisdictional privilege defined the scope of the relevant action as including all the plaintiffs and defendants who could sue or be sued under the procedural rules that would govern the litigation under English law.[13] But whatever the English practice may have been, the historical understanding of the complete-diversity requirement was different. As explained below, determining whether the complete-diversity requirement was satisfied required looking

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11. *See* Woolley, *supra* note 4, at 620.

12. Professor Moller argues that the whole-complaint approach was written into law by the Court's decision in Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005). Moller, *supra* note 1, at 1234, 1273 (arguing that *Allapattah* reads 28 U.S.C. § 1332(a) as requiring complete diversity among the plaintiffs who join and the defendants who are joined in the complaint). But Professor Moller overreads *Allapattah*.

The Court in *Allapattah* held that "[w]hen the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and *there are no other relevant jurisdictional defects*, the district court, beyond all question, has original jurisdiction over that claim." 545 U.S. at 559 (emphasis added). The Court made clear that the lack of complete diversity between plaintiffs and defendants in a civil action creates a jurisdictional defect. *Id.* at 564 ("A failure of complete diversity, unlike the failure of some claims to meet the requisite amount in controversy, contaminates every claim in the action."). But the cases the Court cited in support of the complete-diversity requirement are consistent with defining the scope of a civil action by looking to the rules of party joinder at common law. *See* Woolley, *supra* note 4, at 620 (noting that *Allapattah* cited Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), and Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978), for the complete-diversity requirement and explaining that "neither [decision] mandates that all plaintiffs in the civil action authorized by the Federal Rules be completely diverse from the defendants"); *see also id.* at 615–16 (explaining that *Kroger* is consistent with using the rules of party joinder at common law to define the scope of a civil action under § 1332(a)).

In any event, *Allapattah* did *not* decide how to determine the scope of the civil action to which the complete-diversity requirement applied. Nor did the Court need to do so to resolve the two consolidated cases before it. The complete-diversity requirement was satisfied in both cases whatever the proper scope of a civil action for purposes of § 1332(a). *Allapattah*, 545 U.S. at 550–51.

For detailed discussion of the Court's decision in *Allapattah*, see Woolley, *supra* note 4, at 617–21.

13. Moller, *supra* note 1, at 1273 (arguing that the canon against jurisdictional privilege as applied in England meant that "non-privileged persons" could not "appear[] in the same pleading as privileged parties" without "contaminat[ing] and destroy[ing]" jurisdiction "over the privileged parties").

not to the whole complaint but to the scope of an action at common law.[14] This historical understanding continues to govern the proper construction of § 1332(a) because Congress has left the definition of a "suit" or "civil action" unchanged since the Marshall Court first read the complete-diversity requirement into section 11 of the Judiciary Act of 1789.[15]

"[T]he common law authorized the joinder of more than one plaintiff in a suit only if the plaintiffs shared a joint right and authorized the joinder of more than one defendant only if the defendants shared a joint obligation to the plaintiff or plaintiffs."[16] The joinder of plaintiffs and defendants under the *Federal Rules of Civil Procedure*, by contrast, is *not* premised on the existence of a joint right or obligation.[17] For that reason, a civil action authorized by the *Federal Rules of Civil Procedure* may include more than one civil action as that term was defined at common law, and thus more than one civil action within the meaning of § 1332(a). Consider, for example, a suit for negligence brought by a driver and passenger against the driver of another automobile. Although both the driver and passenger may join together as plaintiffs under Federal Rule of Civil Procedure 20(a),[18] the rules of party joinder at common law would have required the plaintiffs to bring separate actions because they do not share a joint right against the defendant driver.[19] For that reason, the diversity-of-citizenship and the amount-in-controversy requirements would apply separately to the claims of each plaintiff, even though they were joined together in one civil action as permitted by the *Federal Rules of Civil Procedure*.

The differences between the whole-complaint and the common-law approaches should not be exaggerated. § 1332(a)

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14. *See infra* text accompanying notes 29–94; *see also* Woolley, *supra* note 4, at 585–603.

15. *Id.* at 614 ("[T]here is no evidence that Congress has ever modified the common-law scope of a civil action in connection with the complete-diversity requirement [of § 1332(a) and its predecessors]."); *id.* at 614 n.191 (discussing use of the term "suit" and "civil action" in section 11 of the Judiciary Act of 1789 and its statutory successors).

16. *Id.* at 576; *see also id.* at 576 n.6, 594 n.85 (citing authorities supporting this understanding).

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

18. *Id.*

19. *See* Woolley, *supra* note 4, at 576–78.

and its predecessors have been construed to reject *minimal* diversity as a basis for diversity jurisdiction.[20] For that reason, a court may not exercise diversity jurisdiction over a claim by a plaintiff against a nondiverse defendant on the ground that there are *also* claims in the action between *diverse parties*.[21] In addition, the lack of complete diversity in a civil action—*however a civil action is defined for that purpose*—destroys diversity jurisdiction even over claims between diverse parties in that action. That is the essence of the complete-diversity requirement and of the similar canon against jurisdictional privilege. Thus, under *both* the whole-complaint and common-law approaches, if a Texas plaintiff sues two jointly liable defendants who respectively are citizens of Texas and Oklahoma, diversity jurisdiction would be lacking over *all* of the plaintiff's claims.[22]

There are nonetheless important differences between the whole-complaint and common-law approaches. As discussed in detail elsewhere,[23] the common-law approach to defining the relevant civil action for purposes of diversity jurisdiction has the effect—*vis-à-vis* the whole-complaint approach—of broadening the availability of supplemental jurisdiction under 28 U.S.C. § 1367 and of constricting the availability of alienage jurisdiction under § 1332(a)(3). Diversity jurisdiction over a civil action within the meaning of § 1332(a) is a predicate for the exercise of supplemental jurisdiction over other claims.[24] And the common-law approach to defining a civil action means that a federal district court may sometimes be able to exercise supplemental jurisdiction over claims by nondiverse plaintiffs

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20. *See id* at 606 ("*Strawbridge* . . . rejected the argument that diversity jurisdiction exists over a civil action on the basis of minimal diversity, i.e., that it is enough for one person on each side of the "v." in a civil action to satisfy the diversity-of-citizenship requirement if others do not."); *id.* at 610 ("[T]he Court [in Peninsular Iron Co. v. Stone, 121 U.S. 631, 632–33 (1887)] held that the Judiciary Act of 1875—like the Judiciary Act of 1789—required that *all* persons suing or being sued in diversity satisfy the diversity-of-citizenship requirement even if they shared a joint interest with others who were competent to sue or liable to be sued in diversity."); *id.* at 613–14 & n.188 (noting that "the modern Court [in interpreting § 1332(a)] has focused exclusively on *Strawbridge* . . . to justify the complete-diversity requirement").

21. *See id.* at 576–78.

22. Jointly liable defendants were sometimes jointly and severally liable, but if joined together in one suit, they were deemed to have been sued on the joint obligation. *See id.* at 592–93.

23. *Id.* at 617–25.

24. *Id.* at 617–18. This is true, of course, only when § 1332(a) provides the basis for an exercise of supplemental jurisdiction.

who are named in the complaint without the presence of the nondiverse plaintiffs destroying complete diversity over the civil action on which supplemental jurisdiction depends.[25] Thus, the common-law approach to defining a civil action—when compared to the whole-complaint approach—expands the scope of supplemental jurisdiction. By contrast, using the rules of party joinder at common law to define a civil action reins in the scope of alienage jurisdiction under § 1332(a)(3).[26] A citizen of a foreign state will be able to join or be joined as an additional party to an action under § 1332(a)(3) *only* if the foreign citizen shares a joint right or a joint obligation with citizens of diverse states.[27]

But putting aside the proper construction of § 1367 and § 1332(a)(3), the choice between the common-law and whole-complaint approaches generally should be of only theoretical interest under current law. That is because even when complete diversity would otherwise be destroyed, diversity jurisdiction typically may be salvaged *even on appeal* by dismissing a nondiverse party who would have destroyed complete diversity.[28] Moreover, a nondiverse party, by definition, does not qualify for diversity jurisdiction. So unless there is some other basis for subject matter jurisdiction, a nondiverse party must be dismissed even if she would not destroy diversity jurisdiction over claims between diverse parties. Thus, whether or not diverse and nondiverse plaintiffs and defendants are part of the same civil action, the remedy for the presence of claims by or against a nondiverse party remains the same: dismissal of the nondiverse party. That is why the choice between the two approaches is—with the exception of § 1367 and § 1332(a)(3)—now largely of theoretical interest.

The understanding that a defect in diversity jurisdiction may be cured even on appeal is relatively new, however. Historically, federal law permitted a lack of complete diversity to be cured only if the nondiverse party was dismissed or dropped from the suit *before* entry of judgment in the circuit

25. *Id.* at 621–22.

26. 28 U.S.C. § 1332(a)(3) (2024) (authorizing diversity jurisdiction when the amount-in-controversy requirement is satisfied and the civil action is between "citizens of different States and in which citizens or subjects of a foreign state are additional parties").

27. Woolley, *supra* note 4, at 622–25 (discussing § 1332(a)(3)).

28. *See* Newman-Green, Inc. v. Alfonzo Larrain, 490 U.S. 826, 837 (1989) (holding that "the courts of appeals have the authority to dismiss a dispensable nondiverse party").

court.[29] The Marshall Court first expressly recognized that a defect in diversity jurisdiction could be cured in *Conolly v. Taylor*.[30] As Chief Justice Marshall explained: "Though the court could not exercise its jurisdiction while a defect in the bill remained; yet it might, as is every day's practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the case."[31] In *Conolly* itself, the Court held that the defect had been "cured" because the non-diverse party's name "was struck out of the bill before the cause was brought before the court."[32] The Court in *Vattier v. Hinde*[33] later held that a defect in diversity jurisdiction may be cured *before* entry of the decree in the circuit court. As Chief Justice Marshall explained, what mattered was "the state of parties *at the time of the decree*."[34] The understanding that a defect in complete diversity must be cured before entry of judgment in the circuit court was not confined to the Marshall Court. As late as 1887, the Court reversed the decree of a circuit court and ordered that the bill be dismissed for lack of subject matter jurisdiction even though the defect in complete diversity could have been cured in the circuit court.[35]

The fact that defects in diversity jurisdiction once had to be cured before entry of judgment in the circuit court sheds crucial light on how the Marshall Court understood the meaning of "suit" or "civil action" for purposes of what is now § 1332(a). By the time a case reached the Supreme Court, judgment often had been entered in the circuit court. In such situations, dismissal of the nondiverse party alone—rather than dismissal of the suit

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29. Woolley, *supra* note 4, at 603–06, 610–11. The lack of complete diversity could be cured in an equity case when the plaintiffs had elected to sue on a joint right or joint obligation, but the right or obligation was *both* joint and several. *Id.* at 592–93. It was also possible in some circumstances to cure a defect in complete diversity in an equity case even when the right or obligation was not joint and several, but simply joint. *Id.* at 600 n.120. The circuit courts had original jurisdiction over diversity cases under the Judiciary Act of 1789. *See infra* note 94 (quoting relevant portions of the Act).

30. 27 U.S. 556 (1829).

31. *Id.* at 565.

32. *Id.* at 564. The Court went on to explain that "the question [was] whether the original defect was cured by this circumstance." The Court answered in the affirmative. *Id.* at 564–65. For additional discussion of *Conolly*, see Woolley, *supra* note 4, at 603–04.

33. 32 U.S. 252 (1833).

34. *Id.* at 262 (emphasis added). For a detailed discussion of *Vattier*, see Woolley, *supra* note 4, at 604–06.

35. *See* Peninsular Iron Co. v. Stone, 121 U.S. 631, 633 (1887); *see also* Woolley, *supra* note 4, at 610–11 (discussing *Stone* in greater detail).

in its entirety—would be appropriate only if the nondiverse party was deemed part of an action separate from the action in which parties who satisfied the complete-diversity requirement were a part. Otherwise, the presence of the nondiverse party would have irretrievably destroyed complete diversity *before* the case got to the Court.

It is for this reason that early Supreme Court cases such as *Cameron v. McRoberts*[36] and *Carneal v. Banks*[37] are so instructive in understanding the scope of a suit or civil action for purposes of diversity jurisdiction. A careful analysis of the cases indicates that the common-law approach to defining a suit or civil action was, in fact, the Marshall Court's approach.[38]

Consider the Court's decision in *Cameron*, for example. John McRoberts, a citizen of Kentucky, had filed a suit in equity against Charles Cameron, a citizen of Virginia, and other defendants whose citizenship was not alleged in the bill.[39] All the defendants appeared and answered the bill, and the circuit court entered a final decree in favor of McRoberts.[40] Cameron later moved in circuit court to set aside the decree for lack of subject matter jurisdiction because the citizenship of the other defendants had not been alleged.[41] The Supreme Court was asked by the circuit court to weigh in on whether the decree should be set aside.[42] Having concluded that the motion filed in circuit court was untimely,[43] the Court proceeded to provide guidance on how the separate bill of review should be resolved in circuit court:

> If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so

36. 16 U.S. (3 Wheat.) 591 (1818).

37. 23 U.S. (10 Wheat.) 181 (1825).

38. Professor Moller disagrees with my reading of these cases. *See, e.g.*, Moller, *supra* note 1, at 1231 & n.38 (citing *Cameron* for the proposition that, after Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), "the Court would eventually embrace the rule that complete diversity was always required whether claims in a complaint are joint or several"). Our different understanding of these cases appears to flow in significant part from Professor Moller's failure to recognize that defects in diversity jurisdiction could be cured by dismissing a non-diverse party only *before* entry of judgment in the circuit court.

39. 16 U.S. (3 Wheat.) at 592–93. Because their citizenship was not alleged in the bill, these defendants were deemed not competent to be sued.

40. *Id.*

41. *Id.* at 593.

42. *See id.*

43. *Id.*

> that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.[44]

The first sentence recognizes that all parties who share a joint interest must be competent to sue or liable to be sued, or the circuit court lacks jurisdiction to adjudicate the joint interest. In modern parlance, the Court insists that parties who share a joint interest must be completely diverse from those on the other side of the joint interest. That rule of diversity jurisdiction governs even if it is clear that the nondiverse party is not a necessary party in whose absence the suit should be dismissed.

By contrast, the second sentence indicates that a nondiverse defendant does *not* destroy diversity jurisdiction over claims with respect to which he does not share a joint interest. While dismissal of the nondiverse defendant is required in any event, the suit should be dismissed in its entirety only if substantial justice could not be done in the absence of the nondiverse party.[45] Such a dismissal would be premised not on subject matter jurisdiction but on the necessary party rule, a rule that did "not affect the jurisdiction"[46] of a court. Had the circuit court, in fact, lacked power to exercise diversity jurisdiction over McRoberts's claim against Cameron, it would have made no difference whether substantial justice could be done in the absence of the other defendants. As stated in the first sentence of the Court's ruling, the action as a whole would have had to be dismissed for lack of subject matter jurisdiction.

Professor Moller cites *Cameron* for the proposition that "severance of the nondiverse party could save federal jurisdiction."[47] But that assertion thoroughly misconceives the procedural posture of the case. By the time the case reached the U.S. Supreme Court, it was far too late for even the circuit court to cure a defect in complete diversity by dismissing nondiverse defendants. The Marshall Court permitted defects in complete diversity to be cured through severance only *before* entry of judgment in circuit court.[48] Indeed, Chief Justice Marshall later cited *Cameron* for the proposition that what matters is "the

44. *Id.* at 593–94 (1818).
45. *Id.*
46. Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 166 (1825).
47. Moller, *supra* note 1, at 1257.
48. *See supra* notes 29–34 and accompanying text.

state of parties *at the time of the decree*."[49] And the decree in the *Cameron* case had been entered in the circuit court years before the Supreme Court heard the case.[50]

Indeed, the only vehicle that remained available to set aside the circuit court's decree in *Cameron* was the bill of review that had been filed in circuit court.[51] The two grounds on which Cameron could seek relief on a bill of review were (1) lack of jurisdiction on the face of the record and (2) the nonjoinder of a party interested in the subject matter *if* the nonjoinder had injured the rights of those before the court.[52] And it is with respect to these limited grounds that the Court provided guidance when the case came before it. As the Court indicated, the decree should be set aside if either (1) Cameron and the other defendants had a joint interest, thereby destroying complete diversity, or (2) if substantial justice could not have been done vis-à-vis Cameron in the absence of the other defendants, thereby requiring dismissal under the necessary party rule.[53]

Carneal v. Banks similarly indicates that the presence of a nondiverse party does not necessarily destroy diversity jurisdiction over every claim in the complaint. The *Carneal* case involved a suit in equity brought by Henry Banks against the heirs of Thomas Carneal and those of John Harvie.[54] Banks's bill against Carneal's heirs alleged that Carneal had defrauded Banks by "pretending to have good title" and by misrepresenting the value of the land that Carneal had agreed to transfer to Banks.[55] Banks accordingly sought rescission of the contract and title to the lands he had exchanged as consideration.[56] Banks also joined Harvie's heirs as defendants based on the *mistaken* understanding that Harvie's heirs retained title to the lands that Banks had agreed to transfer to Carneal.[57]

The jurisdictional question before the Court was whether the lack of diversity between Banks and Harvie's heirs had affected the circuit court's jurisdiction over Banks's claim against

49. Vattier v. Hinde, 32 U.S. 252, 262 (emphasis added).
50. *See Cameron*, 16 U.S. (3 Wheat.) at 592.
51. *See id.* at 593.
52. Woolley, *supra* note 4, at 596 n.100.
53. For further discussion of *Cameron*, see *id.* at 595–600.
54. Carneal v. Banks, 23 U.S. (10 Wheat.) 181, 182 (1825).
55. *Id.* at 182–83.
56. *Id.* at 183.
57. *Id.* at 183–84.

Carneal's heirs.[58] The Court held that because Harvie's heirs had no real interest in the controversy in which they had been joined, their joinder as nondiverse parties could not destroy diversity jurisdiction over Banks's claim against Carneal's heirs.[59] As the Court explained:

> If the validity of this [jurisdictional] objection, so far as respects Harvie's heirs, be unquestionable, it cannot affect the suit against Carneal's heirs, unless it be indispensable to bring Harvie's heirs before the Court, in order to enable it to decree against Carneal's heirs. This is not the case. . . . The bill, . . . as to Harvie's heirs, may be dismissed, without in any manner affecting the suit against Carneal's heirs. That [Harvie's heirs] have been improperly made defendants in his bill *cannot affect* the jurisdiction of the Court as between those parties who are properly before it.[60]

Modern lawyers often misread *Carneal* as suggesting that an appellate court may dismiss nondiverse parties when necessary to cure a defect in diversity jurisdiction.[61] But this is wrong. The Marshall Court authorized severance to cure a lack of complete diversity only *before* the entry of judgment in the circuit court.[62] And because Harvie's heirs lacked a joint interest with Carneal's heirs, their joinder could not have destroyed diversity jurisdiction with respect to Banks's claim against Carneal's heirs.[63] Thus, the dismissal of Harvie's heirs would have had no effect on whether jurisdiction existed over Banks's claim against Carneal's heirs. As one noted American authority on federal equity practice explained:

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58. *Id.* at 187.

59. *Id.* at 188.

60. *Id.* (emphasis added). A careful reading of the opinion makes clear that "the Court" in this quotation refers to the circuit court. *See* Woolley, *supra* note 4, at 601.

61. *See, e.g.*, Newman-Green, Inc. v. Alfonzo Larrain, 490 U.S. 826, 834–35 (1989) ("Chief Justice Marshall's opinion for this Court in *Carneal v. Banks* . . . dealt with the issue at hand—the power of appellate courts to grant motions to dismiss dispensable nondiverse parties."). For other authorities making this error, see Woolley, *supra* note 4, at 601 n.132 (providing citations). *Newman-Green*'s holding that defects in diversity jurisdiction may be cured even on appeal is defensible on a different ground. *See Newman-Green, Inc.*, 490 U.S. at 837 (articulating a pragmatic rationale for the holding).

62. *See supra* notes 29–34 and accompanying text.

63. Woolley, *supra* note 4, at 603 ("Because improper parties by definition lack a joint interest with proper parties, the lack of jurisdiction over the former could not affect jurisdiction over the latter.").

> The defect arising from the improper joining of a party not interested in the controversy can be cured by formally dismissing as to that party. *But where parties who are joined in a bill have no real interest in the result of the controversy, their presence may, for jurisdictional purposes, be disregarded.*[64]

Professor Moller nonetheless suggests that *Carneal* should be understood to hold that diversity jurisdiction over Banks's claim against Carneal's heirs *depended* on the dismissal of Harvie's heirs.[65] That would accord with the whole-complaint approach. But that reading of the Court's jurisdictional decision—while linguistically possible—does not square with the disposition in *Carneal*. The circuit court had *not* dismissed Harvie's heirs.[66] And there is *no* evidence that the Court itself dismissed Harvie's heirs on appeal.[67] That no such evidence exists is not surprising; a dismissal by the Supreme Court to salvage diversity jurisdiction would have been inconsistent with the Court's understanding that defects in complete diversity must be cured *before* entry of judgment.[68] So, if dismissal of Harvie's heirs had been required to salvage jurisdiction over Banks's claim against Carneal's heirs, the Court would have reversed the circuit court's decree for lack of

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64. THOMAS ATKINS STREET, FEDERAL EQUITY PRACTICE 330 (1909) (citing *Carneal*) (emphasis added).

65. Moller, *supra* note 1, at 1258 n.155 ("Marshall's statement in *Carneal* that an improperly joined nondiverse party does not 'affect' jurisdiction over the remaining parties should be read in light of the preceding sentence in which Marshall emphasizes the spoiler may be 'dismissed' without 'affecting' the diverse parties."); *id.* at 1257 n.155 (relying as an interpretive guide on English "authorities explicating the canon" against jurisdictional privilege that "clearly envision the severance of the nonprivileged party was necessary to enforce the other party's privilege to the privileged jurisdiction," and stating that these authorities "note that while the spoiler remains in the case, the privileged party is 'ousted' of his privilege").

66. *See Newman-Green, Inc.*, 490 U.S. at 835.

67. The Court in *Newman-Green* concluded that the Supreme Court itself must have dismissed Harvie's heirs: "[A] review of the Circuit Court's opinion in *Carneal* reveals that the lower court never dismissed the nondiverse parties. *Thus*, this Court itself dismissed the nondiverse parties while acting in an appellate capacity." *Id.* (emphasis added). As this line of reasoning implicitly confirms, there is no evidence that the Court itself dismissed Harvie's heirs. The sole basis for *Newman-Green*'s conclusion that the Court in *Carneal* itself dismissed the non-diverse parties is the incorrect assumption that the Marshall Court looked to the whole complaint in applying the complete-diversity requirement and, for that reason, could not have addressed the merits without first dismissing the non-diverse parties.

68. *See supra* notes 29–34 and accompanying text.

subject matter jurisdiction.[69] But the Court reversed on other grounds.[70] That fact makes clear that the *Carneal* Court did not rely on the whole-complaint approach in construing the complete-diversity requirement.

In the absence of any real evidence that diversity jurisdiction in *Carneal* depended on the dismissal of Harvie's heirs, Professor Moller must rely on the argument that *Carneal* is ambiguous.[71] He argues that the alleged ambiguity should be resolved consistently with the whole-complaint approach because that supposedly was how English authorities understood the canon against jurisdictional privilege.[72] But even assuming that the English courts would have used the whole-complaint approach in a case like *Cameron* or *Carneal*, his suggestion is not well taken. What should matter is not how the English courts might have applied the canon but how, if at all, the Marshall Court did. And to the extent the Court applied the canon, the Court focused on its essence: that all plaintiffs and defendants joined in a suit—however the term "suit or civil action" is defined for purposes of jurisdiction—must be competent to sue or be sued.

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69. *See, e.g.*, Corp. of New Orleans v. Winter, 14 U.S. 91 (1816) (reversing the judgment of the circuit court for lack of subject matter jurisdiction). The Court's decision in *Winter* makes sense only if it was too late to cure the defect in complete diversity. That is because a defect in diversity jurisdiction can easily be cured if the right or obligation at issue is *both* joint *and* several. *See supra* note 29. And the parties at oral argument had contested whether the plaintiffs had a joint and several right. 14 U.S. at 92–94. The Court nonetheless stated that it was unnecessary to determine whether the plaintiffs had a joint *and* several right to sue. *Id.* at 95 (explaining that "it has been doubted, whether the parties might elect to sue jointly or severally" but holding that "having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."). Had it not been too late to cure the defect in diversity jurisdiction, it would have been essential for the Court to decide whether the plaintiffs had asserted a joint *and* several right. For additional discussion of *Winter*, see Woolley, *supra* note 4, at 591–93.

70. *Carneal*, 23 U.S. 188–92 (reversing the decree on the basis of the second and third assignments of error). For a more thorough analysis of *Carneal* than provided in this Article, see Woolley, *supra* note 4, at 600–03.

71. The alleged ambiguity is created by reading the following two sentences from the Court's opinion in isolation: "The bill as to Harvie's heirs may be dismissed, without in any manner affecting the suit against Carneal's heirs. That [Harvie's heirs] have been improperly made defendants in his bill cannot affect the jurisdiction of the Court as between those parties who are properly before it." 23 U.S. at 188. For a concise restatement of Professor Moller's argument on this point, see *supra* note 65.

72. *See id.*

Had the Marshall Court considered itself bound by the whole-complaint approach, it would not have carefully limited its holding in *Strawbridge v. Curtiss* to the proposition that "where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued."[73] That the Court also went out of its way to disclaim that its ruling governed in *other* circumstances is instructive.[74] The Court's careful delineation of the scope of its ruling can easily be read as a rejection of the whole-complaint approach.[75] But, at a minimum, the limited scope of the Court's ruling suggests that *Strawbridge* assiduously avoided adopting the whole-complaint approach. And whether the Court in *Strawbridge* rejected the whole-complaint approach or simply avoided adopting it, the Court must have been aware of the problem the whole-complaint approach would have posed to a sound construction of section 11 of the Judiciary Act of 1789.

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

74. *Id.* at 267–68 ("But the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.").

Professor Moller reads this passage as evidence that the Court simply put off deciding whether a defect in complete diversity could be cured by severing non-diverse parties with distinct interests. Moller, *supra* note 1, at 1256–57. But the Court did not state that it was leaving open the question of whether defects in diversity jurisdiction could be cured. The Court in later decisions explained that such a defect could be cured by either striking out of a pleading the name of a non-diverse party or dismissing that party. Woolley, *supra* note 4, 603–06.

75. As one attorney lucidly explained in 1844:

> In *Curtiss v. Strawbridge*, . . . it was said that each distinct interest must be represented by persons, all of whom must be capable of suing, or liable to be sued in the federal courts . . . . [I]n order to understand the true meaning of the court, we must advert to the fact that the suit was on the equity side of the court, where there may be several defendants having distinct interests from each other, and where it may happen that a complete decree may be made between some of the parties without affecting the interests of others. Each party having an interest, is said to represent that interest. If several persons have the same interest, they jointly represent that interest, and if they all have the requisite citizenship, and a complete decree can be made as against them, without affecting other defendants having a different interest, notwithstanding such other defendants, or some of them, have not the requisite citizenship, the court will proceed to adjudicate between the complainant and the defendants, who have the requisite citizenship.

Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 532 (1844) (argument in reply to Mr. Mazyck for the plaintiff in error).

Specifically, imposing the whole-complaint approach on section 11 would have been at odds with the policy considerations that drove the drafting of the Act.[76] Suits in equity often involved the joinder of more than one plaintiff or defendant only when joint rights or obligations were at stake.[77] But, in contrast to the procedure at common law, equity procedure also permitted persons with several—as opposed to joint—interests to be part of the same equity suit in some circumstances.[78] Thus, the joinder rules of equity, coupled with the whole-complaint approach, would have had the effect of sometimes making it *easier* to satisfy the amount-in-controversy requirement in suits in equity than in actions at common law. That result would have ignored the historical context in which the Judiciary Act of 1789 was enacted. The historical record indicates that "[e]ven some proponents of diversity jurisdiction had concerns about the extent to which federal courts should have the power to decide equity cases under the grant of diversity jurisdiction."[79]

The substantial amount-in-controversy requirements imposed by the Judiciary Act of 1789 were, in any event, intended to keep all but the most significant cases out of federal court.[80] *Oliver v. Alexander*[81] provides an excellent example—albeit in the context of admiralty—of how applying the whole-complaint approach could undermine the policy of keeping all but the most significant cases out of federal court. The Court in that case construed a provision of the Judiciary Act that granted the Supreme Court appellate jurisdiction in admiralty cases if the amount in controversy exceeded the value or sum of $2,000.[82] As permitted by the procedural rules that governed actions by seamen for wages, a number of seamen had joined

76. Woolley, *supra* note 4, at 582–85.
77. *Id.* at 594.
78. *Id.* at 593–94.
79. *Id.* at 585.
80. *Id.* at 582–85.
81. 31 U.S. (6 Pet.) 143 (1832).
82. *Id.* at 147. *See* Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84–85 (1789) (providing that "final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs" may "be re-examined and reversed or affirmed in the Supreme Court . . . ."); *see also* Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 328 (1796) (explaining that causes in admiralty and maritime jurisdiction were "civil actions" subject to Supreme Court review under section 22 of the Act).

together to recover their wages.[83] But although the seamen in the aggregate were owed more than $32,000,[84] no seaman obtained a decree for more than $900, and most decrees were for less than $500.[85] Had the Court applied the whole-complaint approach, the Court would have had appellate jurisdiction. But the Court rejected that approach. Although the suit was "in *form* joint," what mattered, the Court insisted, was that each seaman had a distinct claim for damages and that "the whole proceeding" was "in reality a mere joinder of distinct causes of action by distinct parties."[86] The Court, in other words, relied on the rules of party joinder at common law to determine jurisdiction over an action that was not itself governed by common-law procedure. And the Court did the same when faced with suits in equity.[87]

Nor was there anything extraordinary about looking to the rules of party joinder at common law in this context. The suit at common law was the prototypical suit when the Judiciary Act of 1789 was enacted,[88] and the common law was more restrictive than equity with respect to rules of party joinder.[89] Thus, to the extent the Court sought a single definition of "suit" that could be uniformly applied to jurisdictional matters despite variations in procedure, it was natural to look to the suit at common law. As the Court once explained in applying the amount-in-controversy requirement to a suit in equity: "The theory is[] that although the proceeding is in form one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action."[90]

Professor Moller does not dispute that a suit may be defined by the rules of party joinder at common law for purposes of

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83. *Oliver*, 31 U.S. at 146.

84. *Id.* at 143.

85. *Id.* at 145.

86. *Id.* at 146–47 (emphasis added).

87. Woolley, *supra* note 4, at 581.

88. *See* Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 920 (1987) (noting that equity "provided a 'gloss' or 'appendix' to the more structured common law"); *see also* Jeffrey L. Rensberger, *The Amount in Controversy: Understanding the Rules of Aggregation*, 26 ARIZ. ST. L.J. 925, 934 (1994) (noting that Congress "likely had in mind the more familiar rules of common law joinder" when it included amount-in-controversy requirements in the Judiciary Act of 1789).

89. Woolley, *supra* note 4, at 593–94; *see also* Carla A. Neeley, *Permissive Joinder of Parties in Florida*, 28 FLA. L. REV. 534, 534 (1976).

90. Walter v. Ne. R.R. Co., 147 U.S. 370, 374 (1893) (citing Schwed v. Smith, 106 U.S. 188, 190 (1882)).

implementing the amount-in-controversy requirement.[91] He claims only that the whole complaint must define what constitutes a suit or civil action for purposes of the complete-diversity requirement.[92] There is no sound basis, however, for giving the term "suit" or "civil action" a different scope for purposes of the amount-in-controversy requirement than for the complete-diversity requirement.

Professor Moller contends:

> [T]extualists who require ambiguity as a predicate for applying a substantive canon might rely on the canon to require complete diversity across the whole complaint, but only at the price of requiring a like outcome for amount-in-controversy. Textualists in the other camps, who admit language-pushing substantive canons, can accept the divergent treatment of amount-in-controversy and complete diversity dictated by the canon.[93]

But the insistence that the amount-in-controversy and diversity-of-citizenship requirements look to the same definition of "suit" does not depend on whether a textualist accepts language-pushing substantive canons. The word "suit" as used in section 11 of the Judiciary Act of 1789 is not reasonably susceptible to one construction for purposes of the complete-diversity requirement and a different construction for purposes of the amount-in-controversy requirement.[94] And there is no need to ignore that fact to give the diversity-of-citizenship requirement the narrow construction reflected in the complete-diversity requirement.[95] That can be

91. Moller, *supra* note 1, at 1231–32 (acknowledging that "[t]he amount-in-controversy requirement is tested on a party-by-party basis, unless parties are asserting joint claims").

92. *Id.* at 1273 ("Because the various versions of the diversity statute, as well as the supplemental jurisdiction statute, are silent about complete diversity, the canon would accordingly dictate the complete diversity requirement applied to the whole complaint, not just a subset of it, making the requirement a condition for original diversity jurisdiction over any parties to that complaint.").

93. *Id.* at 1273–74 n.213.

94. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 ("That the circuit courts shall have original cognizance . . . of all *suits of a civil nature* at common law or in equity, *where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars*, *and* the United States are plaintiffs, or petitioners; or an alien is a party, or *the suit is between a citizen of the State where the suit is brought, and a citizen of another State*.") (emphasis added).

95. It should be emphasized that the complete-diversity requirement represents a narrow but entirely plausible reading of the text. *See* Woolley, *supra* note 4, at 590.

accomplished simply by insisting that all persons in a suit—however the term "suit" is defined for jurisdictional purposes—be competent to sue or be sued. And, as explained above, the Marshall Court apparently agreed.[96]

In short, whether or not the English canon against jurisdictional privilege looked to the whole complaint, the evidence indicates that the Marshall Court itself looked to the suit at common law as the appropriate jurisdictional unit for construing the statutory grant of diversity jurisdiction. Doing so ensured that the amount-in-controversy requirement retained its bite while also preserving the requirement that only diverse parties be permitted to sue or be sued in diversity and that parties on one side of a joint interest be completely diverse from parties on the other side.

II. THE CONSTITUTIONAL ARGUMENT

Professor Moller also suggests that Article III might be read in light of the canon against jurisdictional privilege to require that all plaintiffs who join in the complaint be diverse from all defendants who are joined in the complaint.[97] He then softens this conclusion by claiming that the Necessary and Proper Clause may provide a work-around.[98] But whatever usefulness the Necessary and Proper Clause may have with respect to subject matter jurisdiction, Article III should not be read as narrowly as Professor Moller argues might be appropriate under the canon against jurisdictional privilege.

The evidence discussed in the previous Part indicates that the Marshall Court did not believe that the canon against jurisdictional privilege—at least as understood by Professor Moller—had been written into the Article III grant of diversity jurisdiction. But there is a more fundamental problem with writing the canon against jurisdictional privilege into Article

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96. *See supra* notes 38–75 and accompanying text.

97. *See* Moller, *supra* note 1, at 1275 ("The canon's existence suggests we should also read Article III to require complete diversity."); *see also* Moller, *Supplemental Jurisdiction as Incidental Power* 22 (unpublished manuscript cited with permission) (stating that "the point . . . is not" that the canon against jurisdictional privilege "incontestably applied to Article III," but that its "existence . . . and confusion about [its] domain, created some major interpretive problems that threatened Congress's ability to give federal courts powers not obviously set forth on the face of Article III.").

98. Moller, *supra* note 1, at 1280 (explaining that even if the canon against jurisdictional privilege applies to Article III, "Congress still may be able to authorize jurisdiction over a suit exhibiting minimum diversity if another constitutional provision, outside Article III, overcomes the canon" and "[t]he Necessary and Proper Clause is a good possibility").

III. There was no question that the Crown, at least with the assent of Parliament, had the power to grant jurisdiction on the basis of party status.[99] The canon against jurisdictional privilege was a canon of construction that was used to construe royal grants of privilege jurisdiction; it was not a limit on the power of the sovereign to grant jurisdiction based on party status. Indeed, as Professor Moller himself noted, the sovereign, in granting jurisdiction on the basis of party status, had the power to disclaim the limits the canon would otherwise read into a royal grant of privilege jurisdiction.[100] Thus, Article III is best read to authorize Congress to grant jurisdiction on the basis of diverse citizenship without any artificial limits imposed by the canon against jurisdictional privilege.

From this perspective, the canon at most plays a role similar to other rules of construction that may be applied to valid Congressional enactments. Consider, for example, the presumption against the extraterritorial application of federal statutes.[101] That presumption will often lead to the conclusion that Congress did not intend for a statute it enacted to have extraterritorial effect.[102] But no one today doubts that Congress has authority under the Constitution to enact federal statutes with such effect.[103] Indeed, there is stronger authority for the proposition that the presumption against extraterritoriality has constitutional underpinnings than the proposition that Article III requires complete diversity. "Early Supreme Court decisions occasionally contained language suggesting that the Constitution forbade Congress from applying federal statutes

99. *Id.* at 1239–43.

100. *Id.* at 1226 (noting that the canon against jurisdictional privilege "operated unless it was expressly disclaimed by the jurisdictional grantor").

101. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335 (2016) (stating that the presumption against extraterritoriality is a "canon of statutory construction" that requires that "absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application").

102. *Cf.* Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption against Extraterritorial Application of American Law*, 40 SW. U. L. REV. 655, 655 (2011) (stating that the presumption against extraterritoriality as articulated in *Morrison* "cast[s] doubt on long-accepted practices of statutory construction and instruct[s] the lower courts to turn a deaf ear to indications of congressional intent any subtler than the proverbial meat axe").

103. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 688 (7th ed. 2023) ("It has long been accepted that federal legislation may constitutionally be applied to conduct outside the United States.").

outside U.S. territory."[104] The Supreme Court, by contrast, has never suggested that Article III requires complete diversity.

Thus, even assuming that the scope of Article III's diversity jurisdiction clause rests on English concepts of privilege jurisdiction, the canon against jurisdictional privilege does not impose limits on the proper construction of Article III. Indeed, because the complete-diversity requirement restricts the ability of courts to provide parties with an unbiased forum,[105] it would run counter to the very purpose of the Constitutional grant to read a complete-diversity requirement into Article III.[106]

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In summary, Professor Moller has done invaluable work in unearthing the potential relevance of the canon against jurisdictional privilege to the Marshall Court's construction of the statutory grant of diversity jurisdiction. But Professor Moller's conclusion that the canon requires that all plaintiffs who join in the complaint be completely diverse from defendants who are joined in the complaint is not supported by the decisions of the Marshall Court construing the statutory grant. The Marshall Court looked to the rules of party joinder at common law to define the scope of a suit for purposes of applying both the diversity-of-citizenship and the amount-in-controversy requirements. Nor is there a sound basis for deeming the canon against jurisdictional privilege a limit on the scope of the Article III grant of diversity jurisdiction. That Article III grant more closely corresponds to the power of the English sovereign to grant jurisdiction on the basis of party status, a power that was not limited by the canon against jurisdictional privilege.

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104. *Id.* That said, "[n]o decision appears to have held . . . that Congress lacked the constitutional authority to enact extraterritorial application." *Id.*

105. Woolley, *supra* note 4, at 589 (explaining that the complete-diversity requirement in fact "*restricts* the ability of federal courts to protect against local bias").

106. *Id.* at 588 & n.62 (noting that the Court, in Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809), "explained that diversity jurisdiction was included in the Constitution so that the federal government could protect against the possibility of local bias in state court").