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Debra Lyn Bassett
Southwestern Law School, dbassett@swlaw.edu

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Statutory Interpretation in the Context of Federal Jurisdiction

Debra Lyn Bassett*

Introduction

The jurisdictional power of the federal courts is prescribed both by Article III of the United States Constitution¹ and by the statutory architecture set out in the Judicial Code.² By longstanding and deeply entrenched interpretive practice, federal courts have erected a singular approach to statutory interpretation involving the primary statutory grants of judicial power. This singular schema rests importantly on two distinctive features unique to the historical and structural context that created and regulate our federal judicial system.

In terms of historical context, a first principle in interpreting the Judicial Code—ingrained in judges, lawyers, and legal academics—is the understanding that although textually a statute, the First Judiciary Act³ was drafted by a Congress that included many of the original Framers.⁴ As a result, these statutory provisions have been ascribed a stature near that enjoyed by Article III itself.⁵

This deference to the First Judiciary Act perhaps makes some sense as applied to the fundamental grants of judicial power found today in 28 U.S.C. §§ 1331 and 1332, which are imperfect mirrors—but mirrors nevertheless—of the constitutional statements in Article III, Section 2.⁶

* Professor of Law and Judge Frank M. Johnson, Jr., Scholar, University of Alabama School of Law. Many thanks to Ed Cooper, John Oakley, and Rex Perschbacher for their helpful comments.

¹ U.S. CONST. art. III.

² 28 U.S.C. (2000).

³ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (codified in scattered sections of 28 U.S.C.) (also known as the First Judiciary Act or the Judiciary Act of 1789).

⁴ See *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (“[The Judiciary Act of 1789] was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.”).

⁵ See CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 1, at 4 (6th ed. 2002).

⁶ See *infra* notes 18–21 and accompanying text (discussing diversity jurisdiction); *infra* notes 207–208 and accompanying text (discussing arising-under jurisdiction). Interestingly, although the First Judiciary Act created a diversity jurisdiction statute, it contained no arising-under statute. See WRIGHT & KANE, *supra* note 5, § 1, at 5 (“Except for a grant in 1801 that lasted little more than a year, not until 1875 was there a general grant of federal-question jurisdiction; those cases could only be brought in the state courts.”).

But such deference makes considerably less sense as applied to the judicial powers granted by that first Congress that are found nowhere in Article III, notably the removal power⁷ and elements of the judicial power that differ from or tamper with federal court powers found in Article III. And certainly any deference to the First Judiciary Act would not justify an ongoing deference to congressional enactments more generally.

In terms of structural context, separation-of-powers principles impose exceptional interpretive constraints on federal courts' constructions of their own judicial power. The heart of this special relationship is one that invokes caution beyond even the prudential constraints required when federal courts review actions of the other two branches of government: here the federal courts operate in the most blatant conflicts of interest; they must interpret the scope of their own powers. This is a structural difficulty from which there is no escape—and one familiar since *Marbury v. Madison*.⁸ Whatever deference was appropriate in interpreting statutes passed by the first Congress in the late 1700s, and whatever structures bind federal courts in interpreting the congressionally created boundaries of their own powers—operating under the dual constraints of conflict of interest and general separation-of-powers principles—the context of federal jurisdiction raises distinctive statutory interpretation issues.

Recently, the Supreme Court has suggested that despite the distinctive nature of jurisdictional statutes, such statutes implicate only traditional notions of statutory construction. Indeed, the Court's most recent decision involving jurisdictional statutory interpretation, *Exxon Mobil Corp. v. Allapattah Services, Inc.*,⁹ seemed to suggest that there is nothing special about jurisdictional statutes. The *Allapattah* majority stated that with respect to jurisdictional statutes, “[o]rdinary principles of statutory

⁷ See WRIGHT & KANE, *supra* note 5, § 1, at 5 (“The First Judiciary Act introduced the device of removal from state to federal courts, a device not mentioned in the Constitution.”).

⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–80 (1803) (authorizing judicial review of legislative acts, but also concluding that some questions are not justiciable even if they would appear to come within the judicial power).

[I]f the Court's political weakness necessitated an order dismissing Marbury's petition, it certainly did not determine the rationale for the dismissal. That task fell to John Marshall, and he performed it with great political flair. En route to a jurisdictional dismissal, the Chief Justice gave voice to lasting restrictions on the political branches of the federal government, branches then firmly within the control of the Jeffersonians. While the decision also disabled the judicial branch to some extent, Marshall worked hard to limit these consequences for his department.

JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION § 2.2, at 14–15 (2006).

⁹ *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

construction apply,”¹⁰ and such statutes should be read neither broadly nor narrowly. But, as this Article explains, this has not been, and is not, true.

The distinctive nature of federal jurisdiction statutes demands a more constitutionally oriented interpretive approach. Traditional methods of statutory interpretation are inadequate because they fail to take this unique character into account. Jurisdictional statutes are subject to unique interpretive difficulties not encountered in the judicial construction of ordinary congressional legislation ranging from the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”)¹¹ to the reach of the “No Child Left Behind Act of 2001” (“No Child Left Behind”).¹² These unique interpretive difficulties necessitate a wider range of considerations in the jurisdictional arena, including the traditional rules of statutory construction plus the Constitution itself as an interpretive document, all the while being cognizant of the potential for issues concerning separation of powers and conflicts of interest. In short, this Article proposes that in approaching their tasks of statutory construction in this area involving the reach of their own powers, federal courts should be guided by rules as understood and informed by the gravitational pull of Article III, and saving constructions are inappropriate. This Article explores these interpretive issues in the specific context of the interpretation of the 1988 amendment to 28 U.S.C. § 1332 pertaining to permanent-resident aliens,¹³ an odd and interesting

¹⁰ *Id.* at 558.

¹¹ Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2000).

¹² No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

¹³ Permanent-resident aliens are aliens who have attained official permanent resident immigration status, meaning that they have received a green card from the Immigration and Naturalization Service (“INS”). *See Foy v. Schantz, Schatzman & Aaronson, P.A.*, 108 F.3d 1347, 1349 (11th Cir. 1997); *Kato v. County of Westchester*, 927 F. Supp. 714, 716 (S.D.N.Y. 1996); *see also Chan v. Mui*, No. 92 Civ. 8258 (MBM), 1993 WL 427114, at *1 (S.D.N.Y. Oct. 20, 1993) (concluding that pending green card application is insufficient for permanent-resident-alien status); *Miller v. Thermarite Pty. Ltd.*, 793 F. Supp. 306, 308 (S.D. Ala. 1992) (holding that permanent-resident-alien status does not apply to nonimmigrant temporary workers).

Although permanent-resident aliens have received permission from the INS to remain permanently in the United States, they retain their foreign citizenship; they are not U.S. citizens. Accordingly, permanent-resident aliens have not sworn the oath of allegiance required of naturalized citizens, whereby naturalized citizens swear their allegiance to the United States and renounce any allegiance to any foreign country. Pursuant to the oath of allegiance, a naturalized citizen swears, in part:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same

provision that has generated three different interpretive results from the three circuit courts that have examined it,¹⁴ despite the unconstitutionality of the statute's unambiguous plain language.

I. Background

Federal jurisdiction—the power of the federal courts to hear a case—is given its outermost boundaries by Article III, Section 2 of the Constitution, which limits the federal courts' judicial power to specified types of cases and controversies.¹⁵ These constitutional boundaries form the parameters within which Congress may enact federal jurisdictional statutes.¹⁶ Assertions of federal jurisdiction must comply with a federal statute conferring such jurisdiction and must also fall within the constitutional parameters¹⁷—and the two typically are not coterminous. For example, traditional diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) requires complete diversity of citizenship¹⁸ and a controversy “exceed[ing] the sum or value of \$75,000, exclusive of interest and costs.”¹⁹ Constitutionally,

8 C.F.R. § 337.1(a) (2007). As a result, permanent-resident aliens do not have the rights of U.S. citizenship that are accorded to naturalized citizens. In particular, they cannot vote, hold public office, or serve on a jury. U.S. CITIZENSHIP AND IMMIGRATION SERVS., A GUIDE TO NATURALIZATION 3 (2007), <http://www.uscis.gov/files/article/M-476.pdf>. In addition, unlike naturalized citizens, permanent-resident aliens are subject to deportation. See 8 U.S.C. § 1227.

¹⁴ See *infra* Part III.

¹⁵ See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303–04 (1809) (finding that where the plaintiffs were aliens, the defendants' citizenship had to be shown because Article III does not provide for diversity jurisdiction between aliens); see also Richard A. Matasar, *Rediscovering “One Constitutional Case”: Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1408 (1983) (“[T]he nine categories of ‘cases’ and ‘controversies’ listed in [A]rticle III, [S]ection 2 define the scope of federal jurisdictional power.”).

¹⁶ See Matasar, *supra* note 15, at 1408 (“[I]t is a fundamental precept of our federal system that the jurisdiction of the federal courts is limited, not only by the Constitution, but by congressional provisions as well.”).

¹⁷ See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) (“The character of the controversies over which federal judicial authority may extend are delineated in Art. III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction.”); see also *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 (1799) (Chase, J., concurring) (“[T]he disposal of the judicial power, (except in a few specified instances) belongs to [C]ongress. If [C]ongress has given the power to this Court, we possess [sic] it, not otherwise . . .”).

¹⁸ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806), *overruled on other grounds by Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. 497 (1844).

¹⁹ 28 U.S.C. § 1332(a) (2000).

however, only minimal diversity of citizenship is required,²⁰ and the Constitution makes no mention of any jurisdictional amount whatsoever. In other words, § 1332(a)(1)—the statutory authority for traditional diversity jurisdiction—does not extend to the full limits permitted by the Constitution, but comes within those outermost constitutional boundaries.²¹

This overlap between statutory and constitutional jurisdiction without coextensiveness renders the statutory interpretation of federal jurisdiction statutes both commonplace and of critical importance.²² The courts must accord the federal jurisdiction statutes the full import that the statutory language will support, while simultaneously assuring that the reach of such statutes does not impermissibly extend beyond constitutional parameters.

Although courts routinely scrutinize laws for potential unconstitutionality, federal jurisdiction's combination of constitutional and statutory interpretation raises distinctive issues. This blend of constitutional and statutory interpretation suggests, among other things, that the "saving constructions" sometimes used in other contexts—whereby courts construe statutes in such a way as to avoid unconstitutionality and indulge in every presumption to favor the statute's validity—are often inappropriate in the context of federal jurisdiction statutes.

²⁰ See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967).

²¹ Several jurisdictional statutes serve as examples of failing to comply with the traditional diversity requirements of § 1332, yet falling within the outer constitutional boundaries. See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–12 (codified at 28 U.S.C. § 1332(d)) (authorizing jurisdiction when "any member of a class of plaintiffs is a citizen of a State different from any defendant"—constitutional minimal diversity rather than § 1332 complete diversity—and permitting aggregation of claims in satisfying a jurisdictional amount in excess of \$5 million); Federal Interpleader Act of 1936, Pub. L. No. 74-422, § 26, 49 Stat. 1096, 1096 (codified as amended at 28 U.S.C. § 1335) (requiring "[t]wo or more adverse claimants"—again constitutional minimal diversity rather than § 1332 complete diversity—and "money or property of the value of \$500 or more").

²² Little has been written about the overlap of, or the relationship between, constitutional and statutory interpretation as a general matter. See Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 2 (2004) ("Theories of constitutional and statutory interpretation abound, but they give little focused attention to the relationship between these forms of interpretation."); see also Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 15 n.47 (1998) (noting that "constitutional interpretation . . . provides a familiar reference point for the debate over statutory interpretation," but without elaborating on the relationship); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 889 (1996) ("[T]he interpretation of the Constitution has less in common with the interpretation of statutes than we ordinarily suppose."). But see Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 CORNELL L. REV. 1609, 1612–13 (2000) (examining practical implications of the effect of legislators' intentions on statutory and constitutional interpretation).

A current example of the unique nature of federal jurisdiction statutes—and the inappropriateness of saving constructions—arises in the context of an amendment to the federal diversity-jurisdiction statute that addresses the citizenship of permanent-resident aliens. In 1988, Congress added a sentence to the end of 28 U.S.C. § 1332(a): “For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.”²³ Although this sentence was enacted nearly twenty years ago, it continues to create confusion, which has resulted in a division among the circuit courts as to its proper interpretation. A full analysis of the implications of this provision requires an examination of both diversity jurisdiction and alienage jurisdiction, in addition to the permanent-resident-alien provision itself.

A. Diversity and Alienage Jurisdiction

Both diversity and alienage jurisdiction are founded upon Article III, Section 2 of the Constitution.²⁴ In its best-known formulation, diversity jurisdiction exists “between Citizens of different States,” and alienage jurisdiction is constitutionally authorized in cases “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”²⁵ The Supreme Court has long held that this constitutional authority (and Article III jurisdiction generally) also requires a specific congressional grant of jurisdiction—the Constitution sets the outer bounds of federal jurisdiction, but these jurisdictional provisions are not self-executing; the federal courts may exercise only the constitutional judicial power that is conferred by Congress within a statute.²⁶

In §§ 1332(a)(1) and (a)(2), Congress conferred federal court jurisdiction in cases between “citizens of different States,” as well as between “citizens of a State and citizens or subjects of a foreign state,” when the amount in controversy exceeds \$75,000.²⁷ Congress thus

²³ 28 U.S.C. § 1332(a).

²⁴ For the historical backgrounds to diversity and alienage jurisdiction, respectively, see Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 122–36 (2003), and Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT’L L. 1, 6–30 (1996).

²⁵ U.S. CONST. art. III, § 2.

²⁶ See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973) (“Congress may impart as much or as little of the judicial power as it deems appropriate and the Judiciary may not thereafter on its own motion recur to the Article III storehouse for additional jurisdiction.”); see also *supra* note 17 (same).

²⁷ 28 U.S.C. § 1332(a).

expressly elected to confer federal jurisdiction under circumstances falling short of the full constitutional authorization, omitting the initial reference to a state in the constitutionally authorized alienage jurisdiction and adding a monetary prerequisite that, constitutionally, was not required. In addition, the phrase “citizens of different States” within § 1332(a) historically has been read differently from the identical phrase in Article III, with § 1332(a) requiring complete diversity of citizenship rather than merely the minimal diversity required by Article III.²⁸ Accordingly, “*each* defendant [must be] a citizen of a different State from *each* plaintiff.”²⁹

Diversity and alienage jurisdiction typically are lumped together under the diversity label.³⁰ Treating both with the same label perhaps would seem to follow naturally from the inclusion of both within the same statute—a statute entitled “Diversity of citizenship; amount in controversy; costs” without mention of alienage jurisdiction.³¹ Alienage jurisdiction and its analysis, however, differ from traditional diversity jurisdiction in several significant respects.

Traditional diversity jurisdiction under § 1332(a)(1) emphasizes the necessity of complete diversity of state citizenship, scrutinizing the citizenships of the parties—whether individuals or entities—for a disqualifying overlap. Co-parties may have the same citizenship, but opposing parties may not. Accordingly, much of the discussion and analysis of traditional diversity jurisdiction turns on ascertaining citizenships, resulting in such familiar concepts and rules as domicile (including the prerequisites for acquiring a domicile and the retention of one’s old domicile until a new one is acquired),³² the statutorily created dual citizenship of corporations³³ and subsequently developed rules for determining corporations’ principal places of business;³⁴ the individual-membership rules for determining the citizenship of entities other than corporations, such as partnerships and unincorporated associations;³⁵ the statutory prohibition against creating diversity jurisdiction through improper or collusive joinder;³⁶ and the judicially created rule permitting

²⁸ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806); see also *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967).

²⁹ *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978).

³⁰ See *Johnson*, *supra* note 24, at 3.

³¹ 28 U.S.C. § 1332.

³² See *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974).

³³ 28 U.S.C. § 1332(c).

³⁴ See *Tubbs v. Sw. Bell Tel. Co.*, 846 F. Supp. 551, 553–54 (S.D. Tex. 1994).

³⁵ See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187–96 (1990).

³⁶ 28 U.S.C. § 1359 (2000).

the realignment of parties to reflect the litigants' actual interests and purposes.³⁷

Alienage jurisdiction shifts the focus away from party status, focusing instead on party alignment. By statute, alienage jurisdiction is authorized in cases between “citizens of a State and citizens or subjects of a foreign state.”³⁸ With “citizens of a State” on one side of a lawsuit, and “citizens or subjects of a foreign state” on the other side, ascertaining state citizenships—central to establishing the complete diversity essential to traditional diversity jurisdiction—never comes into play. With “citizens of a State” confined to one side of the lawsuit, and because co-parties may have the same citizenship without violating the complete diversity rule, notions of state domiciles, states of incorporation, principal places of business, and the like, are largely nonissues. Instead, it is alignment that becomes crucial.

The significance of alignment in alienage jurisdiction is not immediately apparent from the statutory language, but rather derives from two related provisions—one statutory and one constitutional. The related statutory provision, § 1332(a)(3), authorizes federal court jurisdiction in cases between “citizens of different States and in which citizens or subjects of a foreign state are additional parties.”³⁹ This provision confers jurisdiction in a limited circumstance, and is an outgrowth of traditional diversity jurisdiction under § 1332(a)(1): when traditional diversity exists—when, and only when, there is complete diversity of citizenship between citizens of different states as opposing parties—§ 1332(a)(3) then permits the joinder of aliens as parties in the litigation, to one or both sides, and without regard to whether the aliens are from the same or different countries. The reach of § 1332(a)(3) and the reach of alienage jurisdiction both stem from the same source—a related constitutional provision.

Article III, Section 2 provides a very specific list of the cases and controversies to which the federal judicial power extends; all others are reserved to the states.⁴⁰ Accordingly, unless a lawsuit's configuration is on the constitutional list, federal court jurisdiction cannot exist. Each of the subsections of § 1332 discussed thus far is, of course, expressly authorized by Article III, Section 2. But lurking behind both alienage jurisdiction and § 1332(a)(3)—and, as this Article explores later, the provision concerning

³⁷ See *U.S. Fid. & Guar. Co. v. A & S Mfg. Inc.*, 48 F.3d 131, 132–33 (4th Cir. 1995).

³⁸ 28 U.S.C. § 1332(a)(2).

³⁹ *Id.* § 1332(a)(3).

⁴⁰ See *supra* note 15 and accompanying text; see also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 225 (2005) (describing Article III, Section 2 as providing a “judicial roster”).

permanent-resident aliens⁴¹—is the potential for constructing jurisdictional authority that crosses into constitutionally unauthorized territory.

Regardless of the approach taken to constitutional interpretation—whether textualist,⁴² originalist,⁴³ intratextualist,⁴⁴ minimalist,⁴⁵ or some other approach—the starting point is the text of the Constitution.⁴⁶ The text of the Constitution recognizes federal jurisdiction in cases “between Citizens of different States” and “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects,” but does not contain language that recognizes federal jurisdiction in cases simply between aliens.⁴⁷ Accordingly, the Constitution’s text indicates that cases solely between aliens must be avoided due to the lack of constitutional authorization.⁴⁸ Alienage jurisdiction under § 1332(a)(2) protects against this problem by restricting federal jurisdiction to cases with a state citizen on one side and an alien on the other, exactly as constitutionally authorized. Section 1332(a)(3) is an interesting variant on traditional diversity and alienage jurisdiction: alienage jurisdiction permits a suit between a state citizen on one side of the lawsuit, and an alien on the other side; § 1332(a)(3) permits a suit between citizens of different states in which aliens are additional parties. Although § 1332(a)(3) permits aliens as additional parties on either

⁴¹ See *infra* notes 57–69 and accompanying text (discussing the permanent-resident-alien provision).

⁴² A textualist approach looks solely at the plain meaning of the constitutional text. See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1665 (2004) (arguing for a textualist approach to constitutional interpretation).

⁴³ An originalist approach is a variant of textualism that seeks the Constitution’s original meaning, looking to the original intent of the Framers. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997).

⁴⁴ An intratextualist approach is another variant of textualism that reads the language in a particular constitutional clause by comparing and contrasting that language with other similar language within the Constitution. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

⁴⁵ A minimalist approach looks to decide cases on narrow grounds while promoting democratic ideals. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT*, at ix–x (1999).

⁴⁶ See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 706 (2007) (“[T]he text is the traditional starting point of any constitutional interpretation.”).

⁴⁷ U.S. CONST. art. III, § 2.

⁴⁸ See *id.*; *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (holding that the Judiciary Act of 1789, purporting to confer federal jurisdiction in all suits in which an alien was a party, could not extend jurisdiction beyond the limits of the Constitution); see also *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 491 (1983); *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136, 136 (1829).

side, or even both sides, of the lawsuit, federal jurisdiction is not authorized in the circumstance where both state citizens and aliens appear on one side of the lawsuit but the other side has only aliens.⁴⁹ This latter limitation is statutory in nature, not constitutional; it is an unauthorized exercise of federal jurisdiction because Congress has not included language in § 1332 to encompass this situation. Thus, alignment or configuration is crucial to evaluating the existence of federal subject-matter jurisdiction when the litigating parties include aliens.

A textualist approach to constitutional interpretation would stop after scrutinizing the constitutional provision's text, but in the interest of comprehensiveness (and other potential approaches to constitutional interpretation), it is worth looking at the historical purpose of alienage jurisdiction. Historically, "[s]everal states had failed to give foreigners proper protection under the treaties concluded with England at the end of the Revolution,"⁵⁰ and there was great animosity against British creditors. James Madison observed: "We well know . . . that foreigners cannot get justice done them in [the state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."⁵¹ Fairness and foreign peace appear to have been the motivating considerations behind the Framers' inclusion of alienage jurisdiction.⁵² Indeed, it appears that some of the Framers would have been willing to extend alienage jurisdiction

⁴⁹ See *Dresser Indus., Inc. v. Underwriters at Lloyd's of London*, 106 F.3d 494, 499 (3d Cir. 1997); *Bank of N.Y. v. Bank of Am.*, 861 F. Supp. 225, 228 n.4 (S.D.N.Y. 1994).

⁵⁰ See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 n.6 (1928).

⁵¹ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Jonathan Elliot ed., J. B. Lippincott Co. 2d ed. 1891) (1836) [hereinafter DEBATES] (James Madison). See generally John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMPORARY PROBLEMS 3, 24 (1948) ("There can be no doubt . . . of direct bias in the administration of justice against British creditors in Virginia.").

⁵² See 2 DEBATES, *supra* note 51, at 492–93 (James Wilson).

[I]n order to restore credit with those foreign states, that part of the article is necessary. I believe the alteration that will take place in their minds when they learn the operation of this clause, will be a great and important advantage to our country; nor is it any thing but justice: they ought to have the same security against the state laws that may be made, that the citizens have; because regulations ought to be equally just in one case as in the other. Further, it is necessary in order to preserve peace with foreign nations.

Id.; see also THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[I]t is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign . . .").

more broadly due to these two basic concerns.⁵³ Despite some apparent support for a more comprehensive provision, the language adopted by the Constitution only covered lawsuits between a state citizen and an alien. And although the Supreme Court has consistently read Article III's jurisdictional provisions broadly,⁵⁴ the constitutional language severely curtails the options for interpreting the alienage jurisdiction provision.⁵⁵ Article III's limitations on alienage jurisdiction underlie the concerns regarding the permanent-resident-alien amendment to § 1332, which is discussed in the next Part.

B. *The 1988 Permanent-Resident-Alien Provision*

This review of the constitutional and statutory landscape provides a lens for examining the unusual provision concerning permanent-resident aliens.⁵⁶ The legislative history behind this provision is scant.⁵⁷ The permanent-resident-alien provision was part of the Judicial Improvements and Access to Justice Act of 1988 ("1988 Act"),⁵⁸ and this Act's basic purpose was clear: it aimed to restrict the reach of diversity jurisdiction.⁵⁹

⁵³ See, e.g., THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[T]he federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."); see also 3 DEBATES, *supra* note 51, at 527 (James Mason) ("Cannot we trust the state courts with disputes between a Frenchman, or an Englishman, and a citizen; or with disputes between two Frenchmen?").

⁵⁴ See *supra* notes 18–21 and accompanying text (comparing constitutional and statutory diversity provisions); see also *infra* notes 207–208 and accompanying text (comparing constitutional and statutory arising-under provisions).

⁵⁵ Indeed, the option that comes to mind most quickly is to interpret aliens—"citizens or subjects of a foreign state"—in a different manner. However, given two centuries of judicial precedent dealing with aliens, it would be difficult at this late date to contend that Article III's reference to aliens should be interpreted broadly, and that § 1332 interprets the meaning of aliens more narrowly.

⁵⁶ See 28 U.S.C. § 1332(a) (2000) ("For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.").

⁵⁷ See Johnson, *supra* note 24, at 25 ("There was precious little debate and even less critical analysis of the need for and consequences of the amendment changing the citizenship rules for noncitizens domiciled in a state.").

⁵⁸ Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended in scattered sections of 28 U.S.C.).

⁵⁹ See 134 CONG. REC. 31,051 (1988) ("The provisions of this title make modest amendments to reduce the basis for Federal court jurisdiction based solely on diversity of citizenship."); *id.* at 31,054 ("[The Act] make[s] modest adjustments to the scope of diversity jurisdiction to relieve the caseload pressures on the Federal courts . . ."); H.R. REP. NO. 100-889, at 45 (1988), as reprinted in 1988 U.S.C.A.N. 5982, 6006 (noting that the Act was expected to reduce the number of federal diversity cases by as much as forty percent).

The centerpiece of the Act was an increase in the requisite amount-in-controversy for diversity cases from \$10,000 to \$50,000.⁶⁰ The permanent-resident-alien provision was added to the Act late in the process, during the Senate debate, which perhaps explains why little legislative guidance exists.⁶¹ From the limited evidence of congressional intent that is available, it appears that, consistent with the Act's general purpose, the permanent-resident-alien provision was intended to restrict the availability of diversity jurisdiction.⁶² The basic concern seems to have been that, prior to the enactment of this provision, two individuals—one a state citizen and the other a permanent-resident alien—could invoke alienage jurisdiction under § 1332(a)(2) to have their dispute heard in federal court, despite living in the same state.⁶³

The problems with the permanent-resident-alien provision are threefold, encompassing constitutional, statutory, and policy concerns. The constitutional issue lies in the reality that a permanent-resident alien is still an alien, and the Constitution does not contain language that recognizes federal diversity jurisdiction in lawsuits between aliens. By treating permanent-resident aliens as citizens of the state in which they are domiciled, the potential exists for permanent-resident aliens residing in different states to sue each other in a federal court, in violation of the Constitution's jurisdictional boundaries. The potential also exists for a permanent-resident alien, because she is deemed a citizen of her state of domicile, to sue or be sued by an alien who is not a permanent-resident alien, again resulting in aliens suing each other in a federal court in

⁶⁰ See 134 CONG. REC. 31,051 (1988).

⁶¹ The permanent-resident-alien provision was added to the Senate version of the Judicial Improvements and Access to Justice Act of 1988, and therefore does not appear in the House version of the bill. Moreover, there is no Senate Report discussing the provision. Apparently the provision was added upon the recommendation of the Judicial Conference of the United States sometime after September 14, 1988, and before October 14, 1988. The only mention of the permanent-resident-alien provision within the Congressional Record is on October 14, 1988—the day the Senate passed the bill. See 134 CONG. REC. 31,055 (1988).

⁶² See 134 CONG. REC. 31,055 (1988) (“There is no apparent reason why actions between persons who are permanent residents of the same State should be heard by Federal courts merely because one of them remains a citizen or subject of a foreign state.”); John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 741–42 (1991) (noting the permanent-resident-alien provision’s “modest legislative objective to rid the federal diversity docket of a small category of essentially localized lawsuits”).

⁶³ See *Saadeh v. Farouki*, 107 F.3d 52, 60 (D.C. Cir. 1997) (“[T]he Senate[] focus[ed] on the incongruity of permitting a permanent resident alien living next door to a citizen to invoke federal jurisdiction for a dispute between them while denying a citizen across the street the same privilege” (internal quotation marks omitted)).

contravention of the limits of Article III.⁶⁴

The statutory issue lies in the provision's potential interpretations. Under the statute's plain language, a permanent-resident alien is deemed to be a citizen solely of the state in which the alien is domiciled.⁶⁵ The language could also be read, however, as giving a permanent-resident alien dual citizenship, holding both her foreign citizenship and her "deemed" citizenship of the state in which she is domiciled.⁶⁶ This matter of statutory interpretation also implicates the constitutional concerns described previously.

The policy issues lie in the peculiar ascription of a different status to one category of aliens qualifying as permanent-resident aliens. In particular, the permanent-resident-alien provision applies only to those aliens who have attained official status as permanent residents under the immigration laws, commonly referred to as a "green card."⁶⁷ Yet the articulated concerns motivating this legislation included restricting the availability of federal jurisdiction generally, and specifically preventing aliens from suing, in the federal courts, citizens domiciled in the same state for nonfederal claims. The resulting statutory language is curious when compared to the supposed concerns animating the law's passage. The legislative record contains no statistics indicating that permanent-resident aliens were generating significant or frivolous litigation in the federal courts.⁶⁸ In light of the continued existence of alienage jurisdiction more

⁶⁴ Thus the constitutional issue lies not in the actual violation of a specific constitutional provision in the sense that we think of, for example, an infringement of the First Amendment. Rather, the constitutional issue emanates from the absence of anything in the Constitution providing Congress with the authority to pass a statute that would exceed Article III's authority. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 704 (1974) ("The question, here as with respect to any other question of federal power, was whether anything in the Constitution provided a basis for the authority being exerted—and the answer was no: . . . [N]o clause in the Constitution purports to confer such a power upon the federal courts.").

⁶⁵ See *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1042 (7th Cir. 2006) ("[The provision] could mean that a permanent-resident alien 'shall be deemed a citizen [exclusively] of the State in which such alien is domiciled.'"); *Singh v. Daimler-Benz AG*, 9 F.3d 303, 306 (3d Cir. 1993).

⁶⁶ See *Intec*, 467 F.3d at 1042 ("Or [the provision] could mean that the alien 'shall be deemed a citizen of the State in which such alien is domiciled [in addition to his foreign citizenship].'"); *Singh*, 9 F.3d at 305.

⁶⁷ See *supra* note 13 (defining permanent-resident alien and distinguishing between permanent-resident aliens and naturalized citizens).

⁶⁸ The legislative record notes only that there are many permanent-resident aliens living in the United States. See 134 CONG. REC. 31,055 (1988) ("As any review of the immigration statistics indicates, large numbers of persons fall within [the permanent-resident-alien] category.").

generally, and of aliens living in the United States who do not have the official status of “permanent-resident aliens,” together with the reality that the permanent-resident-alien provision only prohibits the exercise of diversity jurisdiction between such official permanent-resident aliens and citizens of the same state—but not between permanent-resident aliens and citizens of other states—“one must wonder whether Congress adopted the best means to accomplish this modest end.”⁶⁹ The next Part analyzes how the circuit courts have resolved the statutory interpretation issues raised by the permanent-resident-alien provision.

II. *The Case Law’s Interpretations of the Permanent-Resident-Alien Provision*

The singular nature of jurisdictional statutes raises distinctive interpretive issues: the statutory language mirrors that of the Constitution, and the judicial construction of such language arises in a context where federal courts are interpreting their own power, thus invoking potential issues of separation of powers and conflicts of interest. The unique issues of statutory interpretation in federal jurisdiction are illustrated within the cases addressing the permanent-resident-alien provision—litigation that has resulted in a division among the circuits in applying the provision.

A. *The Third Circuit: Singh v. Daimler-Benz AG*

The Third Circuit was the first to address the permanent-resident-alien provision, in *Singh v. Daimler-Benz AG*.⁷⁰ The Singhs, a mother and a son who were both permanent-resident aliens, sued individually and as the administrators of the husband/father’s estate, alleging that automobile design and manufacturing defects caused the husband/father’s death.⁷¹

The Singhs filed their lawsuit in Pennsylvania state court, and the defendants removed the case to federal court on the basis of diversity jurisdiction.⁷² The Singhs argued that removal was improper because both they and Daimler-Benz were aliens—the Singhs were citizens of India and Daimler-Benz was a citizen of Germany.⁷³ The district court denied the motion to remand, holding that, pursuant to the 1988 permanent-resident-alien provision, the Singhs were deemed to be citizens of Virginia, their

⁶⁹ Oakley, *supra* note 62, at 742.

⁷⁰ *Singh*, 9 F.3d at 304.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

state of domicile.⁷⁴ In addition to the German Daimler-Benz, the Singhs had also sued Mercedes-Benz of North America, Inc., a Delaware corporation with its principal place of business in New Jersey.⁷⁵ Relying expressly on the plain language of the permanent-resident-alien provision, the district court observed that complete diversity existed between the Singhs, who were citizens of Virginia, and the U.S. defendant, which was a citizen of Delaware and New Jersey.⁷⁶ The Third Circuit affirmed both the plain-language approach to the provision and the district court's analysis, concluding that "[b]ecause in this case there is a deemed citizen of Virginia suing an alien and a citizen of Delaware and New Jersey, the district court properly found that there is the requisite diversity of citizenship."⁷⁷

The Third Circuit's approach in *Singh* was consistent with the plain-language approach taken by the majority of the district courts that had addressed this issue at that time.⁷⁸ Despite the early leanings toward a plain-language approach, however, a number of subsequent cases have taken a different approach.⁷⁹ In particular, the Seventh Circuit and the District of Columbia Circuit declined to adopt the Third Circuit's plain-language approach to the permanent-resident-alien provision, but for different reasons.⁸⁰

⁷⁴ *Id.* at 304–05.

⁷⁵ *Id.* at 304.

⁷⁶ *Id.*

⁷⁷ *Id.* at 312.

⁷⁸ See, e.g., *Iscar, Ltd. v. Katz*, 743 F. Supp. 339, 345 (D.N.J. 1990) (permanent-resident alien was “a citizen of New Jersey . . . [and t]hus the parties are completely diverse”); see also *Syed v. Syed*, No. 91 C 2411, 1991 WL 70851, at *1 (N.D. Ill. Apr. 30, 1991) (dismissing the complaint and stating, in dicta, that if the plaintiff and the defendant were both permanent-resident aliens, “the last sentence of [§] 1332(a) . . . [would] requir[e] that they be domiciled in different states”); *D’Arbois v. Sommelier’s Cellars*, 741 F. Supp. 489, 490 (S.D.N.Y. 1990) (noting, in dicta, that where an alien plaintiff was suing, among others, a defendant who was a permanent-resident alien, although the permanent-resident-alien provision could not be applied retroactively, its application in this case would have cured the jurisdictional issue by deeming the defendant permanent-resident alien to be a citizen of his state of domicile); *Nakanishi v. Kanko Bus Lines, Inc.*, No. 88 Civ. 2073 (JMW), 1989 U.S. Dist. LEXIS 7994, at *6 (S.D.N.Y. July 14, 1989) (noting, in a lawsuit where the plaintiff was a permanent-resident alien domiciled in New Jersey and one of the several defendants was a permanent-resident alien domiciled in New York, that the “recent amendment may remove the jurisdictional bar”).

⁷⁹ See, e.g., *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1042–43 (7th Cir. 2006) (interpreting the provision to mean that “permanent-resident aliens have both state and foreign citizenship”); *Saadeh v. Farouki*, 107 F.3d 52, 57–61 (D.C. Cir. 1997); *Buti v. Impresa Perosa, S.R.L.*, 935 F. Supp. 458, 463 (S.D.N.Y. 1996); *A.T.X. Export, Ltd. v. Mendler*, 849 F. Supp. 283, 284 (S.D.N.Y. 1994); *Lloyds Bank PLC v. Norkin*, 817 F. Supp. 414, 419 (S.D.N.Y. 1993); *Arai v. Tachibana*, 778 F. Supp. 1535, 1540 (D. Haw. 1991).

⁸⁰ See *Intec*, 467 F.3d at 1042–43; *Saadeh*, 107 F.3d at 57–61.

B. *The Seventh Circuit: Intec USA, LLC v. Engle*

In the most recent decision—*Intec USA, LLC v. Engle*⁸¹ from the Seventh Circuit—Intec was a limited liability company, and thus its citizenship was that of each of its members.⁸² Intec had five members, one of whom was a permanent-resident alien,⁸³ and Intec was suing an individual defendant who was a citizen of New Zealand, as well as seven corporate defendants who were citizens of New Zealand, Australia, Brazil, and the United Kingdom.⁸⁴ The Seventh Circuit concluded that “the best reading of the text” was that permanent-resident aliens have dual citizenships, meaning that for purposes of diversity jurisdiction, they retain their foreign citizenship, and they are also deemed citizens of the state in which they are domiciled.⁸⁵ The dual-citizenship approach, pursuant to which aliens were parties as both plaintiffs and defendants in *Intec*, precluded the exercise of diversity jurisdiction.⁸⁶

This leads us to the District of Columbia Circuit decision, which bears some similarities to both the Third and Seventh Circuit approaches, but is unlikely to be considered a compromise position.

C. *The D.C. Circuit: Saadeh v. Farouki*

The District of Columbia Circuit, in *Saadeh v. Farouki*,⁸⁷ adopted yet another approach. Saadeh, an alien domiciled in Greece,⁸⁸ sued four defendants, including Farouki, a permanent-resident alien domiciled in Maryland;⁸⁹ L.R. Holdings, a District of Columbia corporation;⁹⁰ and two other defendants who were dismissed before trial,⁹¹ for breach of contract and an accounting in connection with Farouki’s alleged failure to repay a

⁸¹ *Intec USA, LLC v. Engle*, 467 F.3d 1038 (7th Cir. 2006).

⁸² *Id.* at 1041; *see also* *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998) (concluding that the citizenship of a “limited liability company” is the citizenship of its members); *cf.* *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189, 195 (1990) (“While the rule regarding the treatment of corporations as ‘citizens’ has become firmly established, we have . . . just as firmly resisted extending that treatment to other entities. . . . [Instead,] diversity jurisdiction in a suit by or against [a noncorporate] entity depends on the citizenship of ‘all the members.’”).

⁸³ *Intec*, 467 F.3d at 1041–42.

⁸⁴ *Id.* at 1039.

⁸⁵ *Id.* at 1043.

⁸⁶ *Id.* at 1044.

⁸⁷ *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997).

⁸⁸ *Id.* at 55.

⁸⁹ *Id.* at 53–54.

⁹⁰ *Id.* at 55.

⁹¹ *Id.* at 56.

commercial loan.⁹² The trial court awarded Saadeh \$758,470⁹³; on appeal, the D.C. Circuit requested supplemental briefing on the issue of subject-matter jurisdiction.⁹⁴ The court observed:

A literal reading of the 1988 amendment to § 1332(a) would produce an odd and potentially unconstitutional result. It would both partially abrogate the longstanding rule of complete diversity, and create federal diversity jurisdiction over a lawsuit brought by one alien against another alien, without a citizen of a state on either side of the litigation. The judicial power of the United States does not extend to such an action under the Diversity Clause of Article III.⁹⁵

The D.C. Circuit then traced the amendment's available legislative history, noting that the permanent-resident-alien provision was part of the Judicial Improvements Act aimed at "reducing the caseload of the federal courts by contracting the scope of diversity jurisdiction."⁹⁶ The D.C. Circuit concluded that a plain-language reading of the statute conflicted with congressional intent by expanding rather than contracting diversity jurisdiction, and also implicated serious constitutional issues.⁹⁷ These considerations, the court held, precluded a plain-language approach: "[T]he 1988 amendment to § 1332 did not confer diversity jurisdiction over a lawsuit between an alien on one side, and an alien and a citizen on the other side, regardless of the residence status of the aliens."⁹⁸ Thus, the court concluded, federal subject-matter jurisdiction did not exist because both Saadeh and Farouki were aliens.⁹⁹

The different analyses used by each of the three circuit courts to address the permanent-resident-alien provision could have several causes. The next Part explores the issues raised by these different approaches, as well as two potential alternative approaches.

III. Interpreting the Interpretations: Analyzing the Permanent-Resident-Alien Provision

The distinctive issues arising in the interpretation of jurisdictional statutes create a navigational challenge for the federal courts—one that

⁹² *Id.* at 53.

⁹³ *Id.* at 54.

⁹⁴ *Id.*

⁹⁵ *Id.* at 58.

⁹⁶ *Id.* at 58–59.

⁹⁷ *Id.* at 60.

⁹⁸ *Id.* at 61.

⁹⁹ *Id.*

must be guided ultimately by the compass of Article III. The divergent rationales and results of the circuit courts that have examined the permanent-resident-alien provision reflect both these interpretive difficulties and the likelihood that courts will go astray when they veer from an Article III compass. The three circuit court approaches to the permanent-resident-alien provision might be labeled the “plain-language” approach, the “dual-citizenship” approach, and the “narrow-construction” approach. This Part examines each in turn, as well as two other approaches, which I have labeled the “Article I” approach and the “unconstitutionality” approach.

A. *The Plain-Language Approach*

The plain-language approach, exemplified by the Third Circuit’s *Singh* decision, is always the starting point in statutory interpretation under basic principles of statutory construction. “[W]hen a statute speaks clearly to the issue at hand we ‘must give effect to the unambiguously expressed intent of Congress’”¹⁰⁰ The key, of course, is whether the statute is indeed unambiguous—and as one commentator has observed, adherents to the plain-language approach rarely seem to find the ambiguity that is the necessary prerequisite to examining legislative intent.¹⁰¹ Traditionally, even absent ambiguity, courts typically reviewed a statute’s legislative history to confirm that their interpretation of the plain language was indeed what Congress intended.¹⁰²

In recent years, the plain-language approach has become associated with textualism.¹⁰³ Traditionally, the first step of examining the plain language could also become the final step when the statutory language was

¹⁰⁰ *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); *see also* *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (“As in all statutory construction cases, we begin with the language of the statute. The first step ‘is to determine whether the language at issue has a plain and unambiguous meaning’” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997))); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 231 (2d ed. 2006) (noting that the goal of statutory interpretation is to discern the text’s plain meaning).

¹⁰¹ *See* Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 *HASTINGS L.J.* 1039, 1074–75 (1993) (“Plain meaning adherents often find that statutory language is clear, even when others argue that the same statutory language is ambiguous. Thus, they are seldom confronted with an opportunity to explore legislative intent or legislative history.”).

¹⁰² *See generally* ESKRIDGE ET AL., *supra* note 100, at 211–22 (discussing intentionalist theory).

¹⁰³ *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. REV.* 621 (1990).

unambiguous and did not lead to an absurd result—although, as previously mentioned, the courts commonly examined the legislative history as a supplemental, confirming step.¹⁰⁴ A textualist “plain-meaning” approach—which is ascribed to the current Supreme Court generally¹⁰⁵ and to Justice Scalia specifically¹⁰⁶—contrary to the traditional plain-language approach, considers legislative history largely irrelevant.¹⁰⁷ One commentator has gone so far as to posit that even the so-called absurdity doctrine, whereby a patent absurdity relieves the court from following the statutory language, should be abandoned.¹⁰⁸

While the enacted text is generally considered the best evidence of [legislative] intent, Congress does not always accurately reduce its intentions to words [T]he precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision.¹⁰⁹

The plain language of the permanent-resident-alien provision clearly commands that permanent-resident aliens be treated as citizens of their state of domicile for purposes of diversity jurisdiction. There is no ambiguity—a reality recognized not only by the Third Circuit,¹¹⁰ but by

¹⁰⁴ See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:01, at 127–29 (6th ed. 2000) (“[E]ven if the words of the statute are plain and unambiguous on their face the court may still look to the legislative history in construing the statute if the plain meaning of the words of the statute is a [sic] variance with the policy of the statute or if there is a clearly expressed legislative intention contrary to the language of the statute. . . . [I]n the absence of compelling reasons to hold otherwise, it is assumed that the plain and ordinary meaning of the statute was intended by the legislature.”).

¹⁰⁵ See MICHAEL SINCLAIR, A GUIDE TO STATUTORY INTERPRETATION 109 (2000) (observing that the current Supreme Court tends to interpret statutes using a “plain-meaning” approach).

¹⁰⁶ See ESKRIDGE ET AL., *supra* note 100, at 235 (“Justice Scalia has defended a hard-hitting ‘new textualism’ as the best, and perhaps only legitimate, approach to statutory interpretation.”); Moore, *supra* note 101, at 1074 (observing that the current “plain-meaning” approach is “most commonly attributed to Justice Scalia”); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment) (“[I]f the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.”).

¹⁰⁷ See Eskridge, *supra* note 103, at 623 (“The new textualism posits that once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.”).

¹⁰⁸ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

¹⁰⁹ *Id.* at 2389–90.

¹¹⁰ See *Singh v. Daimler-Benz AG*, 9 F.3d 303, 306 (3d Cir. 1993) (“There is no ambiguity in the [permanent-resident-alien provision].”).

every prominent commentator to address the issue.¹¹¹

The hazard of the plain-language approach in the context of the permanent-resident-alien provision is the risk that the statutory interpretation will overshadow the underlying constitutional issue—which is precisely what happened in *Singh v. Daimler-Benz AG*.¹¹² *Singh* posed the constitutional peril directly: the plaintiffs were permanent-resident aliens and one of the defendants was a German citizen. Yet the Third Circuit upheld the district court’s assertion of federal diversity jurisdiction by adhering to the plain language of the statute and deeming the permanent-resident aliens to be citizens solely of their state of domicile.¹¹³

The plain-language approach, although guiding *Singh*’s rationale, did not, however, mandate its ultimate result. The same plain-language approach, due to the complete absence of statutory ambiguity, would also justify the conclusion that the statute is unconstitutional—an alternative explored in Part III.E *infra*.¹¹⁴ Either way, under the plain-language approach, permanent-resident aliens are considered citizens only of their state of domicile—an approach that raises no particular issue when all opposing parties are U.S. citizens, but an approach that is unconstitutional when any opposing party is not.

Thus, *Singh* relied exclusively, and literally, on the plain language of the permanent-resident-alien provision, and by failing to look beyond traditional canons of statutory interpretation, reached an unconstitutional result. The next Part examines the “dual-citizenship” approach, which avoids some of *Singh*’s pitfalls by moving beyond a literal “plain-language” interpretation, thereby averting an unconstitutional outcome.

B. The Dual-Citizenship Approach

The dual-citizenship approach, exemplified by the Seventh Circuit’s decision in *Intec USA, LLC v. Engle*, attempts to save the permanent-

¹¹¹ See, e.g., WRIGHT & KANE, *supra* note 5, § 24, at 156 (“Unfortunately the plain language of the statute . . . clearly purports to give jurisdiction of a suit by an alien permanently resident in one state against an alien permanently resident in another state.”); OAKLEY, *supra* note 62, at 743–45 (noting that pursuant to the permanent-resident-alien provision, “[a]n individual who is not a citizen of the United States but who has been admitted to the United States for permanent residence (a ‘permanent resident alien’) is for diversity purposes deemed a citizen of the state in which that person is domiciled. . . . Such a person is not considered an ‘alien’ for purposes of the ‘alienage’ species of diversity jurisdiction. . . . [The provision] facially authoriz[es] . . . suits between aliens . . .”).

¹¹² *Singh v. Daimler-Benz AG*, 9 F.3d 303 (3d Cir. 1993).

¹¹³ *Id.* at 312.

¹¹⁴ See *infra* notes 170–175 and accompanying text (positing an unconstitutionality approach to the permanent-resident-alien provision).

resident-alien provision from unconstitutionality by reading in an intention that such aliens keep their foreign citizenship.¹¹⁵ Thus, much like the citizenship of corporations under § 1332(c), permanent-resident aliens are deemed to have two citizenships—they are citizens both of a foreign state and of the state in which they are domiciled.

In *Intec*, the Seventh Circuit went beyond a plain-language approach, stating that “th[e] statute is not self-contained” and does not expressly state “whether the deemed citizenship replaces, or adds to, the alien’s actual citizenship.”¹¹⁶ The Seventh Circuit is correct that the statute does not specify whether permanent-resident aliens are to be treated solely as citizens of their state of domicile, or whether this ascribed state citizenship is in addition to their citizenship in a foreign country. But the latter interpretation goes beyond the statute’s plain language.

In particular, interpreting the statute to mean that a permanent-resident alien retains his alien citizenship and adds his state of domicile requires reading language into the statute that does not exist. The statute’s plain language confers citizenship of the state of domicile exclusively. The statute makes no mention of retaining foreign citizenship, of dual citizenship, or of limiting the applicability of this provision to situations in which all opposing parties are U.S. citizens.

The dual-citizenship approach itself raises some interesting issues; it is not an easy fix. In no other circumstance does a natural person have two citizenships for purposes of diversity jurisdiction. Individuals who own homes in more than one state, individuals who have recently moved from one state to another, and individuals who have temporarily relocated to another state to attend college or to accept a temporary job assignment are all subject to rules that accord one—and only one—state citizenship.¹¹⁷ The dual-citizenship approach also alters longstanding case law imposing two prerequisites to be classified a “citizen” of a state, requiring both U.S. citizenship and domicile in a state.¹¹⁸ Even individuals who in fact hold

¹¹⁵ *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041–44 (7th Cir. 2006).

¹¹⁶ *Id.* at 1042.

¹¹⁷ This is because an individual’s state citizenship is determined by her domicile, and although an individual may have more than one residence, she is ascribed only one domicile. See *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006) (“Citizenship is synonymous with domicile, and the domicile of an individual is his true, fixed and permanent home and place of habitation.” (internal quotation omitted)); *Palazzo ex rel. Delmage v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000) (“At any given time, a person has but one domicile.”); *Whitehouse v. Comm’r*, 963 F.2d 1, 1–2 (1st Cir. 1992) (“A person can have only one domicile at a time.”).

¹¹⁸ See *Sun Printing & Publ’g Ass’n v. Edwards*, 194 U.S. 377, 383 (1904) (noting that if plaintiff, who was domiciled in Delaware, were a citizen of the United States, he would

dual citizenship—who are citizens of both the United States and of another country—do not hold dual citizenship for purposes of diversity jurisdiction. Instead, only their U.S. citizenship is considered.¹¹⁹ Accordingly, because dual citizenship is such an unusual approach in the context of natural persons, such an approach should require express congressional language rather than judicial implication.

Unlike natural persons, business entities frequently hold dual or multiple citizenships for purposes of diversity jurisdiction. Partnerships and unincorporated associations hold the citizenships of each of their partners or members,¹²⁰ and corporations, by statute, hold the dual citizenship of state of incorporation and state of principal place of business.¹²¹ The corporation, however—the only business entity that is considered a unitary entity rather than an amalgam of its members—has encountered an interpretive issue interestingly similar to the permanent-resident-alien provision. This issue has arisen in situations where one of the corporation’s statutory citizenships—either its place of incorporation or its principal place of business—is in the United States, but the other is abroad. In this context, the circuit courts have grappled with, and are divided in their decisions regarding, the impact of a corporation’s dual citizenship on diversity jurisdiction.¹²² The circuit courts generally have reached different conclusions depending on whether the corporation is incorporated in the United States with a principal place of business abroad, or is incorporated abroad with a principal place of business in the United States.¹²³

When a corporation is incorporated abroad but has a principal place of business in the United States, most courts follow the literal dual-citizenship language of § 1332(c) and treat the corporation as both an alien (due to its foreign incorporation) and as a citizen of the state of its principal place of business.¹²⁴ The ultimate conclusion changes when the corporation is

also be a citizen of Delaware); *Lew v. Moss*, 797 F.2d 747, 749 (9th Cir. 1986) (“To demonstrate citizenship for diversity purposes a party must (a) be a citizen of the United States, and (b) be domiciled in a state of the United States.”); *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (same).

¹¹⁹ See *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 711 (9th Cir. 1992) (“Dual citizenship . . . does not defeat jurisdiction.”); *Sadat v. Mertes*, 615 F.2d 1176, 1187 (7th Cir. 1980) (“[O]nly the American nationality of the dual citizen should be recognized under 28 U.S.C. § 1332(a).”).

¹²⁰ See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195–96 (1990).

¹²¹ 28 U.S.C. § 1332(c)(1) (2000).

¹²² See *infra* notes 124–125 and accompanying text.

¹²³ See *infra* notes 124–125 and accompanying text.

¹²⁴ See, e.g., *Danjaq, S.A. v. Pathe Commc’ns Corp.*, 979 F.2d 772, 773–74 (9th Cir.

incorporated in the United States but its principal place of business is abroad. In the latter situation, the courts have concluded that the corporation does not hold dual citizenship for purposes of diversity jurisdiction, but instead is a citizen only of its domestic state of incorporation.¹²⁵

The treatment of corporations incorporated abroad but having a principal place of business in the United States is inconsistent with the dual-citizenship approach to the permanent-resident-alien provision. It makes little sense to recognize that a corporation incorporated in a foreign country is an alien, but not always to recognize that an individual who is a citizen of a country other than the United States is also an alien. For reasons that are unclear, courts have more readily concluded that an alien is an alien in the corporate context.¹²⁶

Despite the desirability of concluding that permanent-resident aliens are additionally ascribed their foreign citizenship for purposes of diversity jurisdiction—because such an interpretation would avoid any potential constitutional issue—several factors conspire to preclude this easy fix. The initial hurdle, as previously mentioned, is that the dual-citizenship approach to the permanent-resident-alien provision runs contrary to the plain-language approach by implying additional language that Congress did not include in § 1332(a). Furthermore, the legislative history contains no suggestion Congress intended that permanent-resident aliens would have dual citizenship for purposes of diversity jurisdiction.¹²⁷ Finally, a dual-

1992); *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148, 1152 (5th Cir. 1985); *Vareka Invs., N.V. v. Am. Inv. Proprs., Inc.*, 724 F.2d 907, 909 (11th Cir. 1984); *Jerguson v. Blue Dot Inv., Inc.*, 659 F.2d 31, 35 (5th Cir. 1981); *Petroleum & Energy Intelligence Weekly, Inc. v. Liscom*, 762 F. Supp. 530, 532–34 (S.D.N.Y. 1989); *Se. Guar. Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1005–07 (N.D. Ill. 1973). *But see* *Trans World Hosp. Supplies, Ltd. v. Hosp. Corp. of Am.*, 542 F. Supp. 869, 878 (M.D. Tenn. 1982) (treating such a corporation as solely a citizen of the state of its principal place of business).

¹²⁵ See, e.g., *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543–44 (5th Cir. 1997); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989); *Lebanese Am. Univ. v. Nat'l Evangelical Synod of Syria & Leb.*, No. 04 Civ.5434 RJH, 2005 WL 39917, at *7 (S.D.N.Y. Jan. 6, 2005); *Willems v. Barclays Bank D.C.O.*, 263 F. Supp. 774, 775 (S.D.N.Y. 1966).

¹²⁶ See *supra* note 124 and accompanying text.

¹²⁷ During its 2005–2006 session, Congress considered legislation entitled the Federal Courts Jurisdiction Clarification Act, which would have adopted a dual-citizenship approach with respect to the permanent-resident-alien provision. See Federal Courts Jurisdiction Clarification Act of 2006, H.R. 5440, 109th Cong. § 2 (2006), available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-5440> (last visited Sept. 9, 2007). However, this legislation, proposed seventeen years after enactment of the permanent-resident-alien provision, cannot serve as evidence of the original legislative intent. More importantly, Congress failed to pass this proposed legislation, which precludes any

citizenship interpretation is inconsistent with the language of § 1332(a) more generally: § 1332(a) is very specific when ascribing foreign citizenship, in every instance using the phrase “citizens or subjects of a foreign state.”¹²⁸ Only in situations involving U.S. citizens is the individual’s nationality left unspoken, as in “citizens of different States.”¹²⁹

Thus, relying solely on basic canons of statutory construction and undertaking a literal reading of the permanent-resident-alien provision leads to an unconstitutional result, but the dual-citizenship approach—although deserving credit for recognizing the constitutional issue—goes too far in attempting to save the provision. The dual-citizenship approach, in essence, rewrites the statute in a manner that constructs undesirable inconsistencies in existing understandings of citizenship. The next Part examines the “narrow-construction” approach, which skirts the drawbacks of the “plain-language” and “dual-citizenship” approaches by acknowledging the provision’s plain language yet recognizing the constitutional issue, and by avoiding an unconstitutional outcome without judicially rewriting the statute.

C. *The Narrow-Construction Approach*

The narrow-construction approach, perhaps exemplified in the D.C. Circuit’s decision in *Saadeh v. Farouki*,¹³⁰ recognizes the unconstitutional implications of the plain language of the permanent-resident-alien provision, and accords a correspondingly limited interpretation. *Saadeh* observes that a plain-language, “literal reading of the [permanent-resident-alien provision] would produce an odd and potentially unconstitutional result.”¹³¹ *Saadeh* also observes that the legislative history does not support a plain-language reading.¹³² Indeed, *Saadeh* concludes, “this appears to be one of those rare cases where the most literal interpretation of a statute is at odds with the evidence of Congressional intent and a contrary construction is necessary to avoid ‘formidable constitutional difficulties.’”¹³³ *Saadeh*’s specific holding was that “the 1988 amendment to § 1332 did not confer diversity jurisdiction over a lawsuit between an alien on one side, and an alien and a citizen on the other side, regardless of

inference of congressional intent, past or present.

¹²⁸ 28 U.S.C. § 1332(a)(2)–(3) (2000).

¹²⁹ *Id.* § 1332(a)(1), (3); *see also id.* § 1332(a)(2) (“citizens of a State”); *id.* § 1332(a)(4) (“citizens of a State or of different States”).

¹³⁰ *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997).

¹³¹ *Id.* at 58.

¹³² *Id.* at 60.

¹³³ *Id.* (quoting *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 466 (1989)).

the residence status of the aliens.”¹³⁴

Under a narrow-construction approach, the permanent-resident-alien provision is construed sufficiently narrowly to avoid any application that is of questionable constitutionality or that is not otherwise authorized, but without formally according dual citizenship to permanent-resident aliens. When a permanent-resident alien domiciled in one state sues a citizen of the same or another state, no constitutional issue is implicated, and in such an instance, the narrow-construction approach would lead a court to apply the permanent-resident-alien provision straightforwardly. But in other instances, such as when a permanent-resident alien sues another permanent-resident alien, or when a permanent-resident alien sues both a U.S. citizen and a permanent-resident alien, or when a permanent-resident alien sues both a U.S. citizen and an alien, the narrow-construction approach would lead a court to decline to honor the provision’s literal plain language.¹³⁵

This narrow-construction approach differs from the dual-citizenship approach in rationale, if not result. A dual-citizenship approach would always ascribe two citizenships to permanent-resident aliens—that of an alien and that of the state of domicile—whereas the narrow-construction approach would initially treat the permanent-resident alien as a citizen solely of the state of domicile. When treating a permanent-resident alien solely as a citizen of the state of domicile would result in an unconstitutional or unauthorized exercise of subject-matter jurisdiction, the 1988 amendment would be declared unenforceable in that particular scenario.

Although the outcome generally will be the same under both a dual-citizenship approach and a narrow-construction approach, there are two, perhaps subtle, differences in the approaches. First, the narrow-construction approach attempts to honor the provision’s plain language to the degree possible, whereas the dual-citizenship approach, precisely by ascribing dual citizenship from the outset, never comports with the provision’s plain language. Second, the narrow-construction approach would expressly find the unenforceable constructions of the plain language to be unconstitutional, whereas the dual-citizenship approach avoids any finding of unconstitutionality by retaining the permanent-resident alien’s foreign citizenship from the outset. Finally, of course, the narrow-

¹³⁴ *Id.* at 61.

¹³⁵ *See, e.g.,* *China Nuclear Energy Indus. Corp. v. Arthur Andersen, LLP*, 11 F. Supp. 2d 1256, 1260 (D. Colo. 1998) (holding that diversity jurisdiction did not exist where alien corporation sued partnership whose partners included permanent-resident aliens).

construction approach avoids the several inconsistencies in the dual-citizenship approach explained in the previous Part.¹³⁶

Thus, the narrow-construction approach offers several improvements over the plain-language and dual-citizenship approaches by crediting the plain language of the permanent-resident-alien provision, while simultaneously recognizing that the plain language is constrained by Article III. However, *Saadeh* itself highlighted the weakness of a narrow construction when it observed that the provision's language "is at odds with the evidence of Congressional intent and [that] a contrary construction is necessary to avoid 'formidable constitutional difficulties.'"¹³⁷ In other words, the narrow-construction approach is, in essence, a saving construction—the provision is given a distorted interpretation to save it from abject unconstitutionality. The next Part examines the "Article I" approach, which would eliminate any lingering constitutional issue by anchoring jurisdictional authority in Article I rather than Article III.

D. The Article I Approach

No circuit court decision has adopted an Article I approach to the permanent-resident-alien provision. On a few limited occasions, however, the Supreme Court has found a basis for jurisdiction through a reliance on Congress's authority under Article I.¹³⁸ An Article I approach asserts that pursuant to Article I, Congress may, at least in some circumstances, grant power to the federal courts to hear types of cases and controversies that are outside the scope of Article III. There are few cases in this area, and this Article concludes that Article I cannot jurisdictionally support the permanent-resident-alien provision. This Article, however, addresses the issue because one commentator has suggested that *National Mutual Insurance Co. v. Tidewater Transfer Co.*¹³⁹ potentially provides a framework for evaluating the permanent-resident-alien provision because courts "must either expansively redefine the limits of Article III or resort to concepts outside of Article III to justify the broad grant of jurisdiction Congress has conferred."¹⁴⁰ Accordingly, this Part examines two prominent cases for potential analogies to the permanent-resident-alien

¹³⁶ See *supra* notes 115–129 and accompanying text.

¹³⁷ *Saadeh*, 107 F.3d at 60 (quoting *Pub. Citizen*, 491 U.S. at 466).

¹³⁸ U.S. CONST. art. I.

¹³⁹ *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

¹⁴⁰ Courtney J. Linn, *Diversity Jurisdiction and Permanent Resident Aliens: A Look at the Constitutional and Policy Implications of the 1988 Amendments to 28 U.S.C. § 1332*, 38 FED. B. NEWS & J. 284, 286 (1991).

provision.¹⁴¹

I. *Verlinden, B.V. v. Central Bank of Nigeria*

In *Verlinden, B.V. v. Central Bank of Nigeria*,¹⁴² the Supreme Court examined whether the Foreign Sovereign Immunities Act of 1976¹⁴³ violated Article III “by authorizing a foreign plaintiff to sue a foreign state in a [federal] court on a nonfederal cause of action.”¹⁴⁴ The problem, as originally presented, was that neither arising-under jurisdiction nor diversity jurisdiction seemed to cover such a situation: arising-under jurisdiction did not appear available due to the nonfederal nature of the claims, and diversity jurisdiction was not available because the list of “cases and controversies” in Article III does not include cases between aliens.¹⁴⁵

Despite the initial seeming lack of federal subject-matter jurisdiction, the Supreme Court upheld the Foreign Sovereign Immunities Act provision.¹⁴⁶ In reaching this conclusion, the Court noted that the constitutional reach of arising-under jurisdiction is set by *Osborn v. Bank of the United States*,¹⁴⁷ rather than by the more restrictive § 1331 statutory provision.¹⁴⁸ The Court declined to decide “the precise boundaries” of arising-under jurisdiction under Article III,¹⁴⁹ although the *Osborn* test is commonly characterized as an “ingredient” test, whereby arising-under jurisdiction comes within the Constitution’s parameters so long as some element of federal law is an ingredient of the cause of action.¹⁵⁰

¹⁴¹ One of these cases, *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), is sometimes discussed in the context of protective jurisdiction. See PFANDER, *supra* note 8, § 5.3, at 92–93 (discussing protective jurisdiction and *Verlinden*); WRIGHT & KANE, *supra* note 5, § 20, at 125 (same). Protective jurisdiction posits that “Congress may have the power to protect an area of federal interest from the vagaries of state court litigation by providing for federal jurisdiction over litigation that touches an identified area of federal concern.” PFANDER, *supra* note 8, § 5.3, at 93. The permanent-resident-alien provision does not come within the notion of protective jurisdiction. Cf. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 475 (1957) (Frankfurter, J., dissenting) (stating that protective jurisdiction does not create “an independent source for adjudication outside of . . . Article III”).

¹⁴² *Verlinden, B. V. v. Cent. Bank of Nig.*, 461 U.S. 480 (1983).

¹⁴³ Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330(a) (2000).

¹⁴⁴ *Verlinden*, 461 U.S. at 482.

¹⁴⁵ See *supra* notes 48–49 and accompanying text (discussing the constitutional limits on alienage jurisdiction).

¹⁴⁶ *Verlinden*, 461 U.S. at 497.

¹⁴⁷ *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824).

¹⁴⁸ See *Verlinden*, 461 U.S. at 492–95.

¹⁴⁹ *Id.* at 493.

¹⁵⁰ See WRIGHT & KANE, *supra* note 5, § 17, at 104.

The *Verlinden* Court explained that Congress, in enacting the Foreign Sovereign Immunities Act, was exercising its Article I “authority over foreign commerce and foreign relations, [pursuant to which] Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States.”¹⁵¹ The Foreign Sovereign Immunities Act is a comprehensive federal statute that must be examined and applied in every action against a foreign state because the existence of federal subject-matter jurisdiction turns on whether the suit comes within one of the specific exceptions to foreign sovereign immunity listed in the Act.¹⁵²

At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Article III jurisdiction.¹⁵³

In summary, according to the *Verlinden* Court, in the Foreign Sovereign Immunities Act, Congress was regulating foreign commerce. The jurisdictional provisions are merely one part of the Act’s comprehensive scheme, and because the Act and its exceptions—a body of federal substantive law—must always be applied in such cases as an initial step to determine whether the lawsuit may proceed, there is a sufficient federal ingredient to satisfy Article III’s constitutional parameters of arising-under jurisdiction.

Although the *Verlinden* case involved aliens, there is no other particular connection between *Verlinden* and the permanent-resident-alien provision. The permanent-resident-alien provision does not involve the Foreign Sovereign Immunities Act, but instead involves a direct amendment to § 1332, the traditional diversity-jurisdiction statute. Accordingly, distinguishing language in *Verlinden* comes into play, in which the Court noted that it had rejected statutes that attempted merely to grant a new form of jurisdiction over a particular class of cases without any regulation of commerce.¹⁵⁴ *Verlinden* thus suggests that an attempt to save

¹⁵¹ *Verlinden*, 461 U.S. at 493.

¹⁵² See 28 U.S.C. § 1330(a) (2000); *id.* §§ 1605–1607.

¹⁵³ *Verlinden*, 461 U.S. at 493–94.

¹⁵⁴ See *id.* at 496.

As the Court stated in *The Propeller Genesee Chief* [*v. Fitzhugh*, 53 U.S. (12 How.) 443, 451–52 (1851)]: “The law . . . contains no regulations of commerce It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. . . . It is evident . . . that Congress, in passing [the law], did not

the permanent-resident-alien provision as within Congress's Article I powers likely would fail. Accordingly, the next Part looks at a second case—the *Tidewater* case¹⁵⁵—to see if it might offer more compelling arguments for an Article I approach to the permanent-resident-alien provision.

2. National Mutual Insurance Co. v. Tidewater Transfer Co.

National Mutual Insurance Co. v. Tidewater Transfer Co., the other case relevant to an Article I discussion, approaches Congress's Article I power from a different perspective. In 1940, Congress amended the diversity-jurisdiction statute to permit citizens of the District of Columbia to invoke diversity jurisdiction in the same circumstances as state citizens.¹⁵⁶ Relying on this amendment, a citizen of the District of Columbia sued a citizen of another state in federal court on the basis of diversity of citizenship.

The Constitution, of course, authorizes diversity jurisdiction “between Citizens of different States,”¹⁵⁷ and the Judiciary Act of 1789 provided for diversity jurisdiction “between a citizen of the State where the suit is brought, and a citizen of another State.”¹⁵⁸ A previous Supreme Court decision had held that a citizen of the District of Columbia was not the requisite citizen of a “State” within the meaning of the 1789 Judiciary Act.¹⁵⁹ Despite this earlier precedent, the five-Justice *Tidewater* majority upheld the 1940 amendment, although the Justices were divided as to the rationale for doing so.

Three Justices in the *Tidewater* majority did not view citizens of the District of Columbia as being citizens of a state, but were willing to uphold the amendment on the basis of Congress's Article I power to enact legislation for the District of Columbia.¹⁶⁰ The remaining six Justices

intend to exercise their power to regulate commerce”

. . . .

In contrast, in enacting the Foreign Sovereign Immunities Act, Congress expressly exercised its power to regulate foreign commerce, along with other specified Art[icle] I powers.

Id.

¹⁵⁵ Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

¹⁵⁶ Act of Apr. 20, 1940, ch. 117, 54 Stat. 143 (amending 28 U.S.C. § 41(1)(b) (1934)).

¹⁵⁷ U.S. CONST. art. III, § 2.

¹⁵⁸ Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (also known as the First Judiciary Act or the Judiciary Act of 1789).

¹⁵⁹ Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 452–53 (1805).

¹⁶⁰ *Tidewater*, 337 U.S. at 600; see also U.S. CONST. art. I, § 8, cl. 17 (giving Congress the power “[t]o exercise exclusive Legislation in all Cases whatsoever, over such District

objected vigorously to this Article I approach. However, two of those Justices, although rejecting the Article I argument,¹⁶¹ concurred in the result by rejecting the prior Supreme Court precedent and interpreting Article III to include the citizens of the District of Columbia.¹⁶²

Not only have prominent commentators described *Tidewater* as “very unusual,”¹⁶³ and as “enjoy[ing] a certain infamy in jurisdictional circles,”¹⁶⁴ but invoking *Tidewater* to uphold the permanent-resident-alien provision requires an analytical stretch for no compelling underlying reason. *Verlinden* could take an Article I approach because Congress expressly relied on Article I in enacting the Foreign Sovereign Immunities Act; in *Tidewater*, the Article I opportunity came from Article I’s conferral of exclusive power to Congress to legislate “in all Cases whatsoever” over the District of Columbia. In the context of the permanent-resident-alien provision, however, the Article I connection is much more attenuated: although Article I indeed authorizes Congress “[t]o regulate Commerce with foreign Nations,”¹⁶⁵ amending the diversity-jurisdiction statute to treat permanent-resident aliens as state citizens rather than aliens has a less obvious relationship to regulating foreign commerce. The applicability of this foreign-commerce clause is much more apparent in addressing the Foreign Sovereign Immunities Act—a comprehensive act setting the limits as to how foreign nations can be sued in the courts of the United States—than in the amendment addressing permanent-resident aliens. As individuals holding citizenship in a foreign country, litigation involving permanent-resident aliens potentially implicates foreign relations, which conceivably could have an impact on foreign commerce, but the connection is an attenuated one.

Perhaps most importantly, *Tidewater*’s Article I approach—an approach, remember, endorsed by only three Justices—is one that the courts should be hesitant to revisit. “If Article III were no longer to serve as the criterion of district court jurisdiction, I should be at a loss to understand what tasks, within the constitutional competence of Congress, might not be assigned to district courts.”¹⁶⁶ There is simply no reason to

(not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . .”).

¹⁶¹ See *Tidewater*, 337 U.S. at 607 (Rutledge, J., concurring in the result) (“Article III courts in the several states cannot be vested, by virtue of other provisions of the Constitution, with powers specifically denied them by the terms of Article III.”).

¹⁶² See *id.* at 617–26.

¹⁶³ WRIGHT & KANE, *supra* note 5, § 24, at 157.

¹⁶⁴ PFANDER, *supra* note 8, § 5.7, at 108.

¹⁶⁵ U.S. CONST. art. I, § 8, cl. 3.

¹⁶⁶ *Tidewater*, 337 U.S. at 616 (Rutledge, J., concurring in the result).

resort to a contorted Article I approach to uphold an ill-conceived, hastily-added amendment lacking any evidence of serious congressional consideration.

An example highlights the disparity that would result by stretching to save the permanent-resident-alien provision. It is well established that when a U.S. citizen is domiciled abroad, that individual, by virtue of her foreign domicile, is not domiciled in a state and, therefore, is not a citizen of a state for diversity purposes.¹⁶⁷ Accordingly, such an individual can neither sue nor be sued in federal court on the basis of diversity jurisdiction. Moreover, because such an individual is still a U.S. citizen, she is not an alien and therefore cannot invoke alienage jurisdiction to access the federal courts.¹⁶⁸

In one sense, this jurisdictional treatment of U.S. citizens domiciled abroad is consistent with the permanent-resident-alien provision in that in both instances domicile is elevated over citizenship: because the U.S. citizen is domiciled abroad, she is deemed a noncitizen, and because the alien is domiciled in a state, he is deemed a state citizen. Perhaps it is appropriate to inquire, however, whether elevating domicile over citizenship is desirable. As discussed earlier, precisely the opposite approach is taken with respect to corporations.¹⁶⁹ Certainly citizenship tends to indicate a greater affiliation and allegiance than mere residence. Moreover, stretching to uphold the permanent-resident-alien provision would create the anomaly of insisting on both U.S. citizenship and state citizenship for U.S. citizens to invoke diversity jurisdiction, but permitting permanent-resident aliens—citizens of other countries—to invoke diversity jurisdiction based solely on state domicile.

In sum, although *Tidewater* discusses an Article I approach as a supplement to Article III jurisdiction, only three of the *Tidewater* Justices signed onto such an approach; the other six Justices rejected an Article I rationale, stating that the federal courts have no power outside of Article III. Both because *Tidewater* implicitly rejects an Article I approach, and because, in any event, the permanent-resident-alien provision can only be brought within the reach of Article I through an attenuated connection, Article I is an unpersuasive approach to validating the permanent-resident-

¹⁶⁷ See *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F. Supp. 913, 914 (S.D.N.Y. 1965) (holding that the inclusion of actress Elizabeth Taylor, a U.S. citizen domiciled in England, as a defendant destroyed diversity because she was not a citizen of any state).

¹⁶⁸ See *id.* at 914, 918–20.

¹⁶⁹ See *supra* notes 124–125 and accompanying text (discussing corporate citizenship when the corporation is either incorporated in, or has its principal place of business in, a foreign country).

alien provision.

Accordingly, Article I cannot be substituted for Article III's jurisdictional boundaries in the context of the permanent-resident-alien provision, and thus the lurking Article III issues remain. The next Part examines the "unconstitutionality" approach, which acknowledges the provision's plain language and recognizes the constitutional issue, but refuses to distort the statute's interpretation through a saving construction.

E. *The Unconstitutionality Approach*

The unconstitutionality approach, suggested by several early commentators¹⁷⁰ but not yet employed by a circuit court, is an extension of the plain-language approach whereby permanent-resident aliens are considered only as citizens of their state of domicile. The unconstitutionality approach, however, recognizes that the plain-language interpretation has unconstitutional applications,¹⁷¹ and accordingly the provision is expressly deemed unconstitutional. An analogous Supreme Court decision provides arguable precedent for such an approach—indeed, the case similarly involved congressional overreaching in the context of alienage jurisdiction¹⁷²—but several factors combine to prevent the bold assertion that this case controls the interpretation of the permanent-resident-alien provision.¹⁷³ Even if there is no direct or controlling precedent for an unconstitutionality approach, there are nevertheless compelling reasons for examining such an approach.

Finding the permanent-resident-alien provision unconstitutional has some specific benefits with only one detriment—that detriment being the courts' general reluctance to declare a legislative enactment

¹⁷⁰ See, e.g., Linn, *supra* note 140, at 288 ("The Act is likely to be deemed unconstitutional.").

¹⁷¹ Courts have already repeatedly acknowledged this point. See, e.g., Saadeh v. Farouki, 107 F.3d 52, 61 (D.C. Cir. 1997) (noting the permanent-resident-alien provision's "potential constitutional problem"); Singh v. Daimler-Benz AG, 9 F.3d 303, 311 (3d Cir. 1993) (noting "the potential unconstitutional application of the deeming provision as to the citizenship of permanent resident[] [aliens]").

¹⁷² *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); see also *infra* notes 220–224 and accompanying text (discussing *Hodgson*).

¹⁷³ These factors include the age of the *Hodgson* case, the argument that *Hodgson* merely interpreted the statute narrowly rather than expressly finding the statute unconstitutional outright, and the truncated nature of the *Hodgson* opinion. See Linn, *supra* note 140, at 286 ("*Hodgson* is an early Marshall opinion, distinguished from his many others by its brevity and ambiguity."); Dennis J. Mahoney, *A Historical Note on Hodgson v. Bowerbank*, 49 U. CHI. L. REV. 725, 739 (1982) ("The weight of the evidence is against the position . . . that there was a holding of unconstitutionality in *Hodgson v. Bowerbank*.").

unconstitutional.¹⁷⁴ This is not to suggest that the courts should find statutes unconstitutional more eagerly or by employing a less stringent evaluation. But as explained below, in the specific context of the permanent-resident-alien provision, a finding of unconstitutionality carries no serious detriment.

Despite the general desirability of avoiding findings of unconstitutionality, the permanent-resident-alien provision's plain language, legislative history, and practical ramifications all point decidedly against the analytical stretch that would be required to save it.¹⁷⁵ As explained earlier, the plain language of the permanent-resident-alien provision confers the citizenship of the state of domicile exclusively, and the legislative history does not offer any explanation that would save the provision from its unconstitutionality. To the extent that the legislative history indicates a legislative intent to curtail diversity jurisdiction, the provision is contrary to that intent because its plain language expands, rather than restricts, the exercise of diversity jurisdiction. In terms of practical ramifications, there is nothing to suggest that constitutionally invalidating the provision would cause a sharp spike in the filing of diversity suits.¹⁷⁶ Moreover, in light of the very late introduction of the provision into the 1988 Act, and the accompanying problems in drafting, or in understanding issues of alienage jurisdiction¹⁷⁷ (or perhaps in understanding concepts of federal subject-matter jurisdiction more

¹⁷⁴ See *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Id.

¹⁷⁵ See *ESKRIDGE ET AL.*, *supra* note 100, at 363 (“When the canon [of avoiding constitutional issues] is invoked, the best interpretation of the statute is jettisoned in favor of any alternative that is ‘fairly possible,’ a slippery requirement that in the hands of lazy or willful judges might provide little barrier to truly implausible attributions of statutory meaning.”).

¹⁷⁶ See *Johnson*, *supra* note 24, at 25 (“Neither Congress nor the chief proponents of the provision considered any empirical evidence suggesting that such noncitizens were involved in many alienage cases.”); *Linn*, *supra* note 140, at 288 (“Removing suits by permanent resident aliens from alienage jurisdiction reduces federal caseloads only minimally . . .”).

¹⁷⁷ See *Johnson*, *supra* note 24, at 26 (“There is no evidence that Congress *considered* [the full ramifications of the permanent-resident-alien provision], much less that it intended to allow a select group of aliens to sue other aliens in the federal courts.” (emphasis added)); *Linn*, *supra* note 140, at 288 (“The real difficulty with the Act is Congress’[s] poor understanding of alienage jurisdiction.”).

generally),¹⁷⁸ any attempt to stretch to avoid invalidating the provision as unconstitutional cannot be justified.

Thus, the unconstitutionality approach encompasses traditional principles of statutory interpretation, examining the plain language, legislative history, and practical considerations, as well as a careful consideration of Article III. Under the unconstitutionality approach, however, a court would refuse to manipulate the permanent-resident-alien provision's validity; instead, it would reject a saving construction and would find the statute unconstitutional. The next Part explores the Supreme Court's most recent decision involving jurisdictional statutory interpretation for its potential application to the permanent-resident-alien provision.

IV. *Allapattah's Predictive Analysis*

The Supreme Court's most recent incursion into statutory interpretation in the context of federal jurisdiction was its 2005 decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.*¹⁷⁹ In *Allapattah*, the Court resolved a division among the circuit courts regarding the proper interpretation of 28 U.S.C. § 1367, the supplemental-jurisdiction statute. *Allapattah's* interpretive issues may have appeared more statutory than constitutional, but the five-to-four decision, with its animated dissent, reflects the interpretive difficulties of this jurisdictional statute. Although the configuration of the Court today differs from that at the time of the *Allapattah* decision,¹⁸⁰ there is no ready reason to expect any change in the approach taken by the majority.

The *Allapattah* majority, in an opinion authored by Justice Kennedy, declined from the outset to accord any special status to the interpretation of jurisdictional statutes, stating that “[o]rdinary principles of statutory construction apply.”¹⁸¹ Although some prior Court decisions had expressed favor for interpreting jurisdictional statutes narrowly,¹⁸² *Allapattah* opined

¹⁷⁸ It is otherwise difficult to explain how Senator Heflin, the bill's sponsor, could characterize the 1988 Act's amendments as “modest amendments to reduce the basis for Federal court jurisdiction based solely on diversity of citizenship.” 134 CONG. REC. 31,051 (1988).

¹⁷⁹ *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

¹⁸⁰ Since the issuance of the *Allapattah* decision, Chief Justice Rehnquist passed away and Justice O'Connor retired; Chief Justice Roberts and Justice Alito now sit on the Court in their stead.

¹⁸¹ *Allapattah*, 545 U.S. at 558.

¹⁸² See *Finley v. United States*, 490 U.S. 545, 549 (1989) (“[We] will not read jurisdictional statutes broadly.”); Brian E. Foster, *Serious Mischiefs: Exxon Mobil Corp. v. Allapattah Services, Inc., Supplemental Jurisdiction, and Breaking the Promise of Finley*, 81

that jurisdictional statutes should presumptively be read neither broadly nor narrowly.¹⁸³

The two consolidated cases in *Allapattah* were both diversity cases in which some, but not all, of the plaintiffs satisfied the amount-in-controversy requirement. In both cases, the plaintiffs sought to use supplemental jurisdiction to fold in the claims that could not independently satisfy the jurisdictional amount. One case was a class action suit under Federal Rule of Civil Procedure 23 in which some of the class members did not satisfy the amount-in-controversy requirement;¹⁸⁴ the other case involved an injured nine-year-old girl and her family members suing as Rule 20 plaintiffs where the child herself, but not her family, asserted damages satisfying the jurisdictional amount.¹⁸⁵

A court applying an historical approach to the cases presented in *Allapattah* would have refused the exercise of jurisdiction in both cases over the claims that did not satisfy the jurisdictional amount. The Supreme Court had previously held that all class members, whether named or unnamed, had to satisfy individually and independently the amount-in-controversy requirement¹⁸⁶—even though only the citizenship of the named class representatives is considered in evaluating the complete diversity requirement.¹⁸⁷ And the general rule against the aggregation of claims in federal court required each plaintiff individually to satisfy the jurisdictional amount.¹⁸⁸ These previous holdings with respect to the jurisdictional amount, however, predated Congress's 1990 enactment of the supplemental-jurisdiction statute, and the consolidated cases in *Allapattah* squarely raised the issue of whether these precedents would continue to be applied in light of the statutory enactment.

The *Allapattah* majority found that the supplemental-jurisdiction statute was not ambiguous and, accordingly, that the legislative history was

NOTRE DAME L. REV. 2013, 2016 & n.13 (2006) (citing cases that interpreted the scope of statutory grants of jurisdiction very narrowly).

¹⁸³ *Allapattah*, 545 U.S. at 558 (“We must not give jurisdictional statutes a more expansive interpretation than their text warrants; but it is just as important not to adopt an artificial construction that is narrower than what the text provides.” (citing *Finley*, 490 U.S. at 549, 556)).

¹⁸⁴ See *Allapattah*, 545 U.S. at 550.

¹⁸⁵ See *id.* at 551.

¹⁸⁶ See *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973).

¹⁸⁷ See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921).

¹⁸⁸ See *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939). The exceptions to the general rule of nonaggregation were limited to claims by a single plaintiff against a single defendant, and to claims in which the interests of multiple parties were joint rather than several. See *id.* at 588–90.

irrelevant to the statute's interpretation.¹⁸⁹ The Court thereby found unambiguous the language:

in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.¹⁹⁰

The *Allapattah* majority stated that it was presented with a single question: “whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other plaintiffs do not, presents a ‘civil action of which the district courts have original jurisdiction.’”¹⁹¹ The Court answered that question in the affirmative, stating that the district court has original jurisdiction so long as the well-pleaded complaint sets out at least one claim satisfying the jurisdictional amount.¹⁹² Although § 1367(b) provides exceptions to the broad grant of supplemental jurisdiction in § 1367(a), subsection (b) creates no exception for either Rule 23 or Rule 20 plaintiffs.¹⁹³ Accordingly, because at least one plaintiff in each of the two consolidated cases satisfied the amount-in-controversy requirement, the claims of the other plaintiffs—which did not satisfy the jurisdictional amount but *did* comport with the complete diversity requirement—could be heard using supplemental jurisdiction under § 1367.¹⁹⁴

Allapattah provides some potential insights into how the Court might approach issues of statutory construction in future federal jurisdiction contexts. In particular, the *Allapattah* majority insisted on taking a plain-language approach to § 1367, despite the potential for finding ambiguity

¹⁸⁹ *Allapattah*, 545 U.S. at 567 (rejecting any scrutiny of the legislative history “at the very outset simply because § 1367 is not ambiguous”).

¹⁹⁰ 28 U.S.C. § 1367(a) (2000).

¹⁹¹ *Allapattah*, 545 U.S. at 558.

¹⁹² *Id.* at 559.

¹⁹³ 28 U.S.C. § 1367(b) (“In any civil action of which the district courts have original jurisdiction founded solely on [§] 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.”).

¹⁹⁴ *Allapattah*, 545 U.S. at 566–67.

and thereby opening the door to examining the legislative history—although the four dissenting Justices found such ambiguity¹⁹⁵ and articulated a belief that the legislative history did not support the majority’s interpretation.¹⁹⁶ The Court’s plain-language approach to statutory construction has been noted, and often criticized, in the legal commentary.¹⁹⁷ Whatever the criticisms of a plain-language approach, this approach nevertheless honors the reality that only the statutory language itself is the voted-upon, approved law.¹⁹⁸

Despite language in *Allapattah* suggesting that jurisdictional statutes are no different than any other statute, this language should be read narrowly—the same paragraph also refers to congressional “modif[ications of] the rules of federal jurisdiction *within appropriate constitutional bounds*,”¹⁹⁹ and § 1367 expressly incorporates an Article III standard. Unlike the situation posed by the permanent-resident-alien provision, no Justice in *Allapattah* contended that § 1367 created the potential for constructing jurisdictional authority that crossed into constitutionally unauthorized territory. *Allapattah* most directly confronted issues concerning the amount-in-controversy and complete-diversity-of-citizenship requirements, which both go to statutory jurisdictional authority, as contrasted with constitutional jurisdictional authority—Article III, Section 2, contains no reference to an amount-in-controversy

¹⁹⁵ See *Allapattah*, 545 U.S. at 594 (Ginsburg, J., dissenting) (noting “§ 1367’s enigmatic text”).

¹⁹⁶ *Id.* at 575–77 (Stevens, J., dissenting) (stating that “the statute is ambiguous,” and that “the uncommonly clear legislative history” indicates that “the majority’s interpretation of § 1367 is mistaken”).

¹⁹⁷ See Eskridge, *supra* note 103, at 656 (noting that the Supreme Court has become “less willing to consult legislative history, either to confirm or to rebut [a statute’s] plain meaning”); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 572 (1992) (“Justice Scalia, . . . in counseling narrow readings of statutes, would require the legislature to enact statutes with a level of detail and specificity (and foresight) that threatens to impair its authority to formulate legislation on the wide variety of issues confronting the modern administrative state.”); Moore, *supra* note 101, at 1039, 1041 (noting that “the Supreme Court has become increasingly fond of using the plain meaning doctrine to interpret the Federal Rules of Civil Procedure,” and arguing for the rejection “of the plain meaning doctrine in interpreting the Federal Rules”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 416 (1989) (criticizing textualism for ignoring culture and context when interpreting the words of a statute).

¹⁹⁸ See Sunstein, *supra* note 197, at 416 (“[T]extualism contains an important and often overlooked truth. Statutory terms are the enactment of the democratically elected legislature and represent the relevant ‘law.’ Statutory terms—not legislative history, not legislative purpose, not legislative ‘intent’—have gone through the constitutionally specified procedures for the enactment of law.”).

¹⁹⁹ *Allapattah*, 545 U.S. at 558 (emphasis added).

requirement and historically has been read to require only minimal, rather than complete, diversity of citizenship.²⁰⁰ Although constitutional issues hovered in *Allapattah* due to the need for claims asserted under the jurisdictional authority of § 1367 to constitute part of “one constitutional case” within the judicial power of Article III, this constitutional prerequisite had been integrated into the statutory language.²⁰¹ This merger of the Article III standard into the statutory language creates some difficulty in parsing the Court’s analysis. Clearly the *Allapattah* majority relied on § 1367’s plain language to the exclusion of other traditional canons of statutory construction.²⁰² Equally clearly, the Court also undertook an examination of Article III, and only upon finding that § 1367 came within Article III’s jurisdictional parameters did the Court move forward with its ultimate conclusions.²⁰³ Thus, the Court did not ignore Article III, even if its interpretive analysis carried a statutory emphasis. Despite the assumption that the Court would have undertaken an Article III analysis in any event, this must remain merely an assumption due to the incorporation of the Article III standard within the language of § 1367.

The *Allapattah* majority’s emphasis on § 1367’s plain meaning—despite a reasonable argument for the existence of ambiguity and despite reasonably clear evidence of § 1367’s legislative intent—would seem to indicate the Court’s likely interpretive approach to the permanent-resident-alien provision. On its face, the permanent-resident-alien provision

²⁰⁰ See *supra* notes 18–21 and accompanying text (discussing the different readings of § 1332 and Article III).

²⁰¹ 28 U.S.C. § 1367(a) (2000) (“[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”); see *Allapattah*, 545 U.S. at 558 (discussing Article III’s “case or controversy” requirement). See generally *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966).

Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim “arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .,” U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional “case.” The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff’s claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

Id. at 725 (emphasis and citation omitted).

²⁰² See *Allapattah*, 545 U.S. at 558.

²⁰³ See *id.* at 556.

presents no ready ambiguity; instead, the provision is direct and clear. Moreover, the paucity of legislative history regarding the permanent-resident-alien provision largely eliminates any temptation to supplement the plain language with legislative background materials. These considerations suggest that the Supreme Court would adopt a plain-language interpretation of the permanent-resident-alien provision, which would bring the provision's unconstitutionality into sharp relief.

V. Of Constitutionality, Saving Constructions, and Distinctive Contexts

Contrary to *Allapattah's* suggestion, the judicial construction of jurisdictional statutes cannot rely solely on basic canons of statutory interpretation. Jurisdictional statutes necessarily implicate Article III's judicial power and potentially invoke separation-of-powers and conflict-of-interest concerns. The gravitational pull of Article III compels both a wider range of interpretive considerations and the rejection of saving constructions.

A. Constitutionality and Saving Constructions

The constitutionality of the permanent-resident-alien provision should be determined in accordance with its plain language. Interpreting the unambiguous plain language solely to dodge the constitutional issue would fly in the face of one of the purposes of a plain-language approach: to encourage Congress to craft its legislation with care.²⁰⁴ Additionally, it would inappropriately defer to an assumed congressional intention and meaning that would, in effect, give Congress the power to expand the Constitution. In the context of the permanent-resident-alien provision, where both the provision and its potential unconstitutionality are clear and where the legislative history is both nearly nonexistent and suggestive of haste, it is incongruous to engage in distorted analytical stretching to find the provision constitutional. A "saving" construction to preserve the provision's viability, despite its plain language, is inappropriate in the federal jurisdiction context.

Due to the broad interpretation given to the Constitution's jurisdictional provisions, there has been no need historically for saving constructions. The traditional diversity statute²⁰⁵ imposes more restrictions than required constitutionally, so its potential unconstitutionality was never an issue.²⁰⁶ The traditional arising-under statute²⁰⁷ similarly has been

²⁰⁴ See Eskridge, *supra* note 103, at 654–55.

²⁰⁵ 28 U.S.C. § 1332(a)(1) (2000).

²⁰⁶ See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (noting

interpreted as imposing more restrictions than required constitutionally.²⁰⁸ The federal interpleader statute,²⁰⁹ which requires “[t]wo or more adverse claimants, of diverse citizenship” (a form of minimal diversity) and \$500 in controversy, required only a perfunctory review to affirm its constitutionality.²¹⁰ Similarly, the diversity provision pertaining to the citizenship of corporations—which ascribes to corporations the citizenships of any state where the corporation is incorporated and the state of the corporation’s principal place of business²¹¹—easily survived constitutional challenge.²¹²

Moreover, again due precisely to the broad constitutional parameters of the federal courts’ judicial power, applying saving constructions to jurisdictional statutes generally is inappropriate. In light of the large constitutional target, less excuse exists for congressional misses, whether the miss is the result of congressional overreaching, congressional ineptitude at conducting research, or merely an unanticipated drafting ambiguity. In essence, to employ a saving construction in the context of a federal jurisdiction statute is to elevate the statutory over the constitutional.

Although the constitutionality of a statute arises in many contexts, the elevation of the statutory over the constitutional is a predicament particularly acute in federal jurisdiction.

Probably the most important of the constitutionally based canons is the rule that “[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [the

that the diversity statute requires complete diversity of citizenship, but the Constitution requires only minimal diversity).

²⁰⁷ 28 U.S.C. § 1331 (2000).

²⁰⁸ See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824) (noting that the Constitution authorizes federal jurisdiction when federal law “forms an ingredient of the original cause”); see also *Grable & Sons Metal Prods., Inc. v. Darue Eng’g. & Mfg.*, 545 U.S. 308 (2005) (explaining that statutory arising-under jurisdiction exists both when the cause of action is created by federal law and when “state-law claims . . . implicate significant federal issues”).

²⁰⁹ 28 U.S.C. § 1335 (2000).

²¹⁰ See *State Farm*, 386 U.S. at 531 (“Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens. Accordingly, we conclude that the present case is properly in the federal courts.” (footnote omitted)).

²¹¹ 28 U.S.C. § 1332(c)(1) (2000).

²¹² See *Eldridge v. Richfield Oil Corp.*, 247 F. Supp. 407, 410 (S.D. Cal. 1965) (rejecting arguments that infusing corporations with dual citizenship—through the additional statutory consideration of a corporation’s principal place of business—unconstitutionally divests the federal courts of jurisdiction that otherwise would exist if only the state of incorporation were considered), *aff’d*, 364 F.2d 909 (9th Cir. 1966).

Supreme] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”²¹³

The problem, with respect to the permanent-resident-alien provision, is that a ready alternative construction that would avoid the constitutionality issue simply does not exist.

The permanent-resident-alien provision’s interpretive issues are both constitutional and statutory. Considerations within constitutional interpretation can include the text, the Framers’ intentions, the structure of the Constitution, rules generated by court precedents, moral principles, and balancing of the costs and benefits of adopting a particular rule.²¹⁴ Yet despite these potential considerations, none provides a compelling rationale that readily salvages the permanent-resident-alien provision. Similarly, Justice John Paul Stevens once set forth five canons of statutory construction: (1) “[r]ead the statute,” (2) “[r]ead the *entire* statute,” (3) read the statute’s text “in its contemporary context,” (4) “consult the legislative history,” and (5) “use a little common sense.”²¹⁵ None of these canons throws a lifeline to the permanent-resident-alien provision. In other words, the federal courts would have to rewrite the provision to save it from unconstitutionality.

The interplay between constitutional and statutory interpretation that is inherent in federal jurisdiction rises to a critical level in the specific context of the permanent-resident-alien provision—raising concerns that we see far less commonly today than in the earlier days of our Republic. Congressional impositions of federal jurisdiction rising to the level of such obvious unconstitutionality were the phenomena of nearly 200 years ago, when our country was first negotiating this constitutional-statutory terrain.

The two cases arguably most analogous to the issues raised by the permanent-resident-alien provision are *Marbury v. Madison*²¹⁶ and *Hodgson v. Bowerbank*.²¹⁷ Both *Marbury* and *Hodgson* concerned congressional attempts to expand federal jurisdiction beyond constitutional authorization, both in the context of the Judiciary Act of 1789. *Marbury*, in stating that the Judiciary Act unconstitutionally attempted to expand the

²¹³ William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599 (1992) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

²¹⁴ See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–22 (1991).

²¹⁵ John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1374, 1376, 1379, 1381, 1383 (1992).

²¹⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²¹⁷ *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809).

Supreme Court's original jurisdiction, explained that Article III acts as a cap on federal jurisdiction.²¹⁸ Article III expressly gives Congress the power to make "[e]xceptions" to the Supreme Court's appellate jurisdiction, but makes no mention of a congressional ability to supplement the Court's original jurisdiction.²¹⁹

Similarly, *Hodgson v. Bowerbank* addressed section 11 of the Judiciary Act, which conferred federal jurisdiction in "all suits . . . [in which] an alien is a party."²²⁰ In *Hodgson*, the plaintiffs were aliens, and although the defendants were said to be "late of the district of Maryland," there was no allegation of state citizenship, which left open the possibility that the defendants were aliens.²²¹ The Court found the omission "fatal" because "the statute cannot extend the jurisdiction beyond the limits of the constitution."²²² Article III recognizes jurisdiction in cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"—not all cases in which an alien is a party.²²³ Therefore, even though the statute purported to confer jurisdiction, it could not constitutionally do so.²²⁴

In contrast to the early days of our Republic, jurisdictional statutes

²¹⁸ See *Marbury*, 5 U.S. at 138 ("Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution.")

²¹⁹ U.S. CONST. art. III, § 2.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id.

²²⁰ Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (also known as the First Judiciary Act or the Judiciary Act of 1789).

²²¹ *Hodgson*, 9 U.S. at 303.

²²² *Id.* at 304.

²²³ U.S. CONST. art. III, § 2.

²²⁴ A similar situation was presented in *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800), also addressing section 11 of the Judiciary Act of 1789, in which the plaintiff was a citizen of Great Britain, and the defendants were not averred to be citizens of the United States.

[T]he 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution. It says, it is true, in general terms, that the Circuit Court shall have cognizance of suits "where an alien is a party;" but as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*, we must so expound the terms of the law, as to meet the case, "where, indeed, an alien is one party," but a citizen is the other. Neither the constitution, nor the act of congress, regard, on this point, the subject of the suit, but the parties. A description of the parties is, therefore, indispensable to the exercise of jurisdiction. There is here no such description . . .

Id. at 14.

today are, in a sense, prosaic and commonplace because Congress regularly provides for jurisdiction over particular types of claims. Statutory conferrals of federal jurisdiction today, however, typically involve arising-under jurisdiction—because we are dealing with Congress and therefore with federal law—and there is a distinct difference between the Constitution’s authorization of arising-under jurisdiction versus diversity jurisdiction: as Professor Akhil Amar has explained, Article III extends to “‘all’ cases arising under federal law,” but not to all diversity cases.²²⁵

Diversity cases, by nature involving state-law claims, were less obviously fitting for a federal forum, so Article III’s specific list—reflecting situations with the potential for local bias—carries meaning and significance. Congressional restrictions on diversity jurisdiction traditionally have aimed to exclude insufficiently important claims through the imposition of the amount-in-controversy requirement. Such restrictions, of course, serve as a docket management device and preserve to the federal courts the claims that are more substantial, either with respect to federal law or the amount at stake. But however desirable these congressional goals may be, there are limits as a matter of constitutional law.

The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

.....

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.²²⁶

The distinctive nature of federal jurisdictional statutes demands a more constitutionally oriented interpretive approach. Traditional methods of statutory interpretation fail to take into account this unique character—and, in all fairness, have no need to do so when the statutory subject-matter

²²⁵ See AMAR, *supra* note 40, at 227–28.

[Article III’s] judicial roster contained two textually distinct tiers. In the roster’s opening words—the top tier—federal jurisdiction extended to “all” cases arising under federal law, to “all” cases involving foreign ambassadors and consuls, and to “all” admiralty cases. In this top tier, the word “all” popped up again and again. Yet lower down on the roster—the bottom tier—the word “all” suddenly dropped away.

Id. at 227.

²²⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

encompasses, as suggested earlier, such topics as FIFRA or No Child Left Behind.²²⁷ Although some might argue that a combination of existing constitutional and statutory interpretive approaches is sufficient for the interpretation of federal jurisdictional statutes, the cases strongly suggest otherwise. Three circuit courts have taken three different approaches to interpreting the permanent-resident-alien provision, with one reaching a blatantly unconstitutional result²²⁸ and another reaching a blatantly unauthorized result achieved only by reading the provision as containing language that does not appear in the statute.²²⁹ A more constitutionally oriented interpretive approach mandates a conclusion that the permanent-resident-alien provision unconstitutionally attempts to expand federal jurisdiction beyond Article III's cap, and for that reason, cannot stand. This conclusion is bolstered by some additional considerations unique to permanent-resident aliens, as explored in the next Part.

B. Distinctive Contexts

The permanent-resident-alien provision functions within a distinctive context. Furthermore, the permanent-resident-alien provision implicates some additional unique considerations that also weigh against upholding the provision.

Permanent-resident aliens have an interesting, highly equivocal place in the citizenship domain. Permanent-resident aliens are not U.S. citizens—as citizens of foreign countries, they are genuinely aliens. Yet because permanent-resident aliens live and work in the United States, their alienage is not readily apparent in the same manner as aliens who neither live nor work in the United States. Thus, the citizenship of permanent-resident aliens carries a fluidity of sorts—an ambiguity resulting from both their patent appearance as U.S. residents and their latent status as noncitizens. This fluidity is accentuated by traditional notions of citizenship, which tend to emphasize territorial boundaries, such that individuals within those territorial boundaries typically are assumed to share a common citizenship whereas individuals outside those territorial boundaries are assumed to be outsiders both literally and with respect to their citizenship.

This does not mean, however, that all residents of the United States are consistently treated equally—the initial sense of “we”-ness stemming from

²²⁷ See *supra* notes 11–12 and accompanying text (citing these statutes).

²²⁸ See *supra* Part II.A (discussing *Singh v. Daimler-Benz AG*, 9 F.3d 303 (3d Cir. 1993)).

²²⁹ See *supra* Part II.B (discussing *Intec USA, LLC v. Engle*, 467 F.3d 1038 (7th Cir. 2006)).

an assumed common citizenship can disintegrate almost before it is formed, especially when residents bear physical markers of a different race or ethnicity. As Professor Bill Hing wrote, “[d]e-Americanization is a twisted brand of xenophobia that is not simply hatred of foreigners, but also hatred of those who in fact may not be foreigners”²³⁰ The victims of such “de-Americanization” may be U.S. citizens born and raised in the United States, but they nevertheless are marginalized as “foreigners” due to their racial or ethnic characteristics.²³¹ Despite having characteristics of both citizens and noncitizens, the ultimate status of permanent-resident aliens as noncitizens should carry persuasive weight in the jurisdictional analysis. Unfortunately, xenophobia is prevalent in the United States, with fears, prejudices, and negative traits aimed at and ascribed to “outsider” noncitizens.²³² Bias against “outsiders” has traditionally been suggested as the original justification for the creation of diversity jurisdiction generally and alienage jurisdiction specifically.²³³ Treating permanent-resident aliens

²³⁰ Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 444 (2002).

²³¹ See *id.*

The domination of the Euro-centric culture and race—in no small part the result of immigration policies—has resulted in a Euro-centric sense of who is an American in the minds of many. Many of that mindset have developed a sense of privilege to enforce their view of who is an American in vigilante style. The de-Americanization of Americans of Muslim, Middle Eastern, and South Asian descent in the wake of September 11 is a manifestation of this sense of privilege and the perpetual foreigner image that Euro-centric vigilantes maintain of people of color in the United States—especially those whom the vigilantes identify with immigrant groups. The *privileged* perpetrators view themselves as “valid” members of the club of Americans, telling the victims that some aspect of their being—usually their skin color, accent, or garb—disqualifies them from membership.

Id. at 454.

²³² See Johnson, *supra* note 24, at 31 (“History has demonstrated that the political processes in the country are susceptible to antiforeign sentiment, sometimes of a particularly virulent strain, which necessitates a forum more politically insulated than that offered by most states.”); see also Hing, *supra* note 230, at 455 (noting “the sad process of unconscious and institutionalized racism that haunts our country”).

²³³ See Bassett, *supra* note 24, at 123 (“Two major theories occupy the consensus positions as to the historical purpose of diversity jurisdiction, both originating with the same general concept—that of local bias or prejudice.”); *id.* at 146 n.133 (“[T]he Framers’ concern with the potential for bias against foreigners is articulated clearly.”).

Alexander Hamilton’s *Federalist No. 80* offers the most comprehensive exposition of the need to authorize the national courts to hear cases and controversies involving noncitizens. In Hamilton’s opinion, federal judicial power should unquestionably include the ability to hear all cases “in which the State tribunals cannot be supposed to be impartial and unbiased.”

Johnson, *supra* note 24, at 10–11 (noting also that Hamilton elaborated specifically on

exclusively as state citizens divests such noncitizens of the federal forum otherwise available to them pursuant to alienage jurisdiction. Accordingly, the underlying concerns motivating the creation of federal diversity jurisdiction and present-day practical realities both weigh in favor of retaining an emphasis on actual citizenship rather than current residence. Moreover, the presence of noncitizens in a lawsuit implicates potentially sensitive issues of foreign relations and international trade—issues not implicated in traditional diversity jurisdiction between U.S. citizens.²³⁴

Conclusion

Federal jurisdictional statutes are distinctively different from traditional statutes and call for a more constitutionally oriented interpretive approach than is found in traditional methods of statutory interpretation. The failings of traditional statutory interpretation in the context of federal jurisdiction are vividly illustrated by the 1988 amendment to § 1332(a) concerning the citizenship of permanent-resident aliens. The permanent-resident-alien provision was a last-minute addendum with scant mention in the legislative history of the Judicial Improvements and Access to Justice Act of 1988 to explain or justify its inclusion. The provision's plain language treats permanent-resident aliens solely as citizens of the state in which they are domiciled, without regard to their foreign citizenship, and thereby permits the circumvention of the constitutional limitations on alienage jurisdiction. The current division among the circuit courts in interpreting the permanent-resident-alien provision suggests that any defining and conclusive resolution will have to come from the Supreme Court. A constitutionally oriented interpretive approach compels the conclusion that the permanent-resident-alien provision is unconstitutional and rejects any saving construction.

alienage jurisdiction).

²³⁴ It is for these reasons that although I have previously advocated the abolition of diversity jurisdiction generally, I specifically exempted alienage jurisdiction. See Bassett, *supra* note 24, at 146 n.133 (“[T]his Article’s call for the abolition of diversity jurisdiction applies only to controversies between citizens of different states; this Article does not call for the abolition of alienage jurisdiction.”); see also *id.* at 122 n.19 (“My proposal expressly excludes alienage jurisdiction.”).