
THE POLITICAL REALITY OF DIVERSITY JURISDICTION

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TABLE OF CONTENTS

INTRODUCTION	1084
I. DIVERSITY JURISDICTION IN SUBSTANTIVE CONSTITUTIONAL CONTEXT	1087
II. LEGISLATION OF 1875 AND A BROADER VISION OF THE BIAS RATIONALE.....	1091
III. THE EMERGENCE OF THE EFFICIENCY RATIONALE	1097
IV. INSTITUTIONAL LIMITS AND THE INTERACTION OF CONGRESS AND THE COURTS.....	1101
V. INCONSISTENT DOCTRINE, CONSTITUENCIES, AND REALPOLITIK.....	1105
A. THE IMPOSSIBILITY OF CONSISTENCY	1105
B. PERIPHERAL PLAYERS: ACADEMICS AND FEDERAL JUDGES	1106
C. THE PRIMARY CONSTITUENCY: THE ORGANIZED BAR	1112
1. Political Power	1112
2. Why the Bar Embraces Diversity Jurisdiction	1113
D. THE LEGAL CULTURE OF DIVERSITY JURISDICTION.....	1118
CONCLUSION.....	1121

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INTRODUCTION

Support for diversity of citizenship jurisdiction has ebbed and flowed.¹ From the 1960s through the 1980s, the prevailing wind blew strongly against it.² A determined group, led mostly by academics and federal appellate judges, spearheaded an effort to have Congress abolish the general form of federal subject matter jurisdiction.³ These critics were confident that diversity jurisdiction had outlived its need, which, they said, was to provide a federal court for out-of-state litigants who feared bias in the local state courts. Advances in travel and communication, critics asserted, had homogenized American culture and rid us of any reasonable fear of bias at the hands of local courts.⁴ Abolishing diversity jurisdiction would free busy federal judges from the nettlesome requirement of divining and applying state law and allow them more time for limning and developing federal law.⁵

1. Congress granted diversity jurisdiction upon the federal trial courts in the original Judiciary Act of 1789. It did not confer general federal question jurisdiction until 1875. Thus, until 1875, diversity cases were the staple of the federal civil docket. In the late nineteenth century, increasing federal caseloads and invocation of diversity jurisdiction by corporations led to some calls for restriction. In the twentieth century, an increasing number of federal judges, including Justices Frankfurter and Jackson, and later Chief Justices Warren and Burger, attacked diversity jurisdiction as wasteful of federal judicial resources. The anti-diversity momentum gathered throughout the 1970s and peaked with the REPORT OF THE FEDERAL COURT STUDY COMMITTEE ("FCSC") in 1990 [hereinafter REPORT, FCSC]. For an outstanding treatment of this history (from which the foregoing is gleaned), see James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RESV. L. REV. 179, 180–98 (2006). The REPORT, FCSC is discussed *infra* Section V.B.

2. The American Law Institute's STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) was particularly influential. The American Law Institute ("ALI") undertook the study in response to a 1959 request by Chief Justice Warren. The study concluded that diversity jurisdiction should be curtailed for two general reasons: that local bias was less pronounced than in earlier years and that the limited resources of the federal courts would better be expended on federal question cases. See John W. Reed, *The War on Diversity*, 18 INT'L SOC'Y BARRISTERS Q. 291, 291–92 (1983) ("Over the past decade or more there have been strong pressures to abolish the diversity jurisdiction of the federal courts. . . . The attack on diversity jurisdiction has its most distinguished formulation in a major study sponsored by the American Law Institute.").

3. By the "general form" of diversity jurisdiction, I mean cases invoking § 1332(a)(1). Technically, no one favors the total abolition of federal jurisdiction based on the diversity power. For instance, all support retaining federal interpleader jurisdiction, which is, of course, based upon the diversity power. And no one advocates curtailing alienage jurisdiction under § 1332(a)(2). This Article addresses efforts to abolish or to curtail significantly this general form of diversity jurisdiction. Throughout this Article, my references to diversity are to its general form.

4. Such arguments date to the late nineteenth century, with the assertion that the advent of steam and electric power, and the Civil War, had so unified the country as to justify abolition of diversity. Alfred Russell, *Avoidable Causes of Delay and Uncertainty in Our Courts*, 25 AM. L. REV. 776, 795–96 (1891). Justice Frankfurter favored abolition in the 1920s, saying "the mobility of modern life has greatly weakened state attachments. Local prejudice has ever so much less to thrive on than it did when diversity jurisdiction was written into the Constitution." Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 521 (1928).

5. See, e.g., David Crump, *The Case for Restricting Diversity Jurisdiction: The Undeveloped Arguments, from the Race to the Bottom to the Substitution Effect*, 62 ME. L. REV. 1, 5 (2010) ("[A]bolition [of diversity jurisdiction] would preserve a federal forum for those with federal claims."); Larry Kramer, "The One-Eyed Are Kings": *Improving Congress's Ability to Regulate the Use of Judicial*

The effort was so successful that the House of Representatives overwhelmingly passed a bill abolishing diversity jurisdiction in 1978.⁶

But that effort and another determined frontal assault on diversity jurisdiction in 1990 failed. Now, a generation and more later, one sees little support for abolishing diversity. Even as its place on the federal docket grows—now accounting for more than one-third of the civil cases filed in district courts—one does not find academics or federal judges urging that these state-law-based cases be taken from the federal court docket.⁷ On the other hand, diversity is now becoming a topic of increasing scholarly interest. The current commentary, however, is focused mostly on rationalizing diversity doctrine, making it consistent with its presumed purpose, rather than on curtailing it.⁸ The accepted wisdom seems to be that diversity jurisdiction is here to stay, but that it might be recalibrated here and there.

What accounts for diversity's survival and apparent acceptance? In retrospect, those who sought to abolish diversity jurisdiction failed to appreciate three fundamental characteristics about diversity jurisdiction. These characteristics should not be overlooked in our new era; they should guide efforts to rationalize diversity doctrine.

First, critics failed to understand that diversity jurisdiction is not something to be considered in vacuo, as a freestanding grant of judicial authority. It is instead an integral part of the economic engine of interstate commerce. Its function, ultimately, is to support the policies underlying the

Resources, 54 L. & CONTEMP. PROBS. 73, 77 (1991) (discussing reducing federal court workload by “reduc[ing] the scope of federal jurisdiction by eliminating unimportant categories of cases so that judges can devote more time to the cases that remain”). Dean Kramer served as a reporter of the FCSC, which concluded that no case had a “weaker claim” on the federal court docket than diversity jurisdiction. See *infra* note 130.

6. H.R. 9622, 95th Cong. (1978) (proposing “to abolish diversity of citizenship as a basis of jurisdiction of Federal district courts”). The measure passed the House by a roll call vote of 266 to 133 on February 28, 1978.

7. The most recent calls for abolishing diversity jurisdiction appear to be Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 138–45 (2003) and Crump, *supra* note 5, at 22 (concluding that “[t]oday, more than ever, there are persuasive arguments for the abolition or retrenchment of the general diversity statute”). For discussion of Professor Bassett’s proposal, see *infra* note 176 and accompanying text.

8. Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 309 (2019) (noting contemporary justification of diversity jurisdiction on efficiency grounds); Steven Gensler & Roger Michalski, *The Million Dollar Diversity Docket*, 47 BYU L. REV. (forthcoming 2022) (studying a broad range of docket effects of increasing amount in controversy in diversity cases); Daniel E. Klerman & Jonathan R. Nash, *Aligning Diversity Jurisdiction with Its Bias Rationale* (2021) (unpublished manuscript on file with author) (calling for rationalization of diversity doctrine in line with its traditional bias rationale); Patrick Woolley, *Diversity Jurisdiction and the Common-Law Scope of the Civil Action*, 99 WASH. U. L. REV. (forthcoming 2022) (asserting that diversity doctrine should be understood against the backdrop of common law joinder rules).

commerce, full faith and credit, and privileges and immunities clauses of the Constitution.⁹ One should alter the availability of diversity jurisdiction only after considering the impact of such a change on this broader constitutional mission.

Second, those who attempted to abolish diversity understated the policy bases for diversity jurisdiction. Though the traditional “bias rationale” was indeed fear of bias against out-of-state litigants in state courts, today diversity jurisdiction is more broadly grounded in at least two ways. One is subtle and based in jurisdictional legislation of 1875: that the fear backing diversity jurisdiction is not *state*-based bias, but *region*-based bias.¹⁰ The other, an “efficiency rationale,” developed over time with the Supreme Court’s jurisprudence regarding the Fourteenth Amendment’s restriction on state-court personal jurisdiction. Specifically, it is that diversity jurisdiction facilitates efficient joinder in complex cases in ways that state courts (hemmed in by the Supreme Court’s restrictive interpretation of the Fourteenth Amendment) simply cannot.¹¹ This rationale led to a resurgence of jurisdictional grants based upon diversity jurisdiction in the early part of this century so that there are now more diversity-based grants of subject matter jurisdiction than ever before.

Third, those who attempted to abolish diversity failed to appreciate that jurisdiction is ultimately a political issue. Whatever the policy bases for diversity jurisdiction, Congress retains it because the practicing bar wants it. The point was demonstrated in 1978. After the House passed its bill to abolish diversity jurisdiction, the organized bar leapt into action and defeated the effort in the Senate.¹² Thus, even if critics can show that diversity jurisdiction has outlived its *need*, they cannot show that it has overstayed its *welcome*, at least not in the eyes of the politically powerful group that wants it and uses it.

These characteristics should guide any efforts to make sense of, to render consistent, the various threads of the diversity canon. In addition, these efforts should take into account two other considerations. One, that canon is the result of complex interactions between Congress, which passes jurisdictional statutes, and federal courts, which interpret them. The bench is understandably concerned about docket control and holds considerable power in shaping jurisdiction with that as one consideration. Two, a national legal culture has evolved over our 230 years of experience with diversity

9. See *infra* Part I.

10. See *infra* Part II.

11. See *infra* Part III.

12. Indeed, the matter never came to a vote in the Senate. S. 2389, 95th Cong (1978). See Underwood, *supra* note 1, at 199 n.91.

jurisdiction. That culture includes the dynamic of intersystemic federalism, by which the federal and state courts engage in an ongoing dialogue about the development of the substantive law and of civil procedure.

It is unlikely that Congress will ever abolish diversity jurisdiction. At most, the legislature will tinker with some aspect of diversity in an effort to ensure that the federal court caseload does not get out of hand. As long as we maintain a rough equilibrium between the practicing bar's desire to retain diversity jurisdiction and the federal bench's desire to keep caseloads manageable, the status quo is fine—as a matter of political reality.

I. DIVERSITY JURISDICTION IN SUBSTANTIVE CONSTITUTIONAL CONTEXT

Critics of diversity tend to treat the grant of diversity jurisdiction in vacuo, without considering its role in the Constitution. They embrace the traditional view that diversity jurisdiction is based upon a “bias rationale”: it provides a neutral federal forum as an escape from the reality, or at least the fear, of bias in state courts. I will argue in Parts II and III that the bias rationale as stated by critics is sclerotic and ignores other policy justifications for diversity jurisdiction. For now, however, the point is to determine why the Founders were concerned about bias, or fear of bias, in state courts.

Article III of the Constitution allows Congress to establish lower federal courts.¹³ It also establishes nine potential bases of federal subject matter jurisdiction, of disputes that may be heard by federal courts.¹⁴ One of those is the diversity clause, which permits jurisdiction over controversies “between Citizens of different States.” This grant is not self-executing; federal courts are empowered to hear diversity cases only if Congress passes a jurisdictional statute vesting such cases in the lower federal courts it creates. After some uncertainty, it became clear that Congress is not required to vest the whole of Article III authority in the federal courts and, therefore, that statutory grants can be narrower than their constitutional counterparts.¹⁵

Congress wasted no time in establishing federal trial courts and vesting them with diversity jurisdiction. Both were accomplished in the Judiciary Act of 1789.¹⁶ On its face, the statutory grant of diversity was narrower than the Article III authority. First, it required one of the litigants to be a citizen

13. U.S. CONST. art III, § 1 (stating “such inferior Courts as the Congress may from time to time ordain and establish”).

14. U.S. CONST. art. III, § 2, para. 1.

15. *See, e.g.*, *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (holding that power to grant diversity jurisdiction includes the power to limit it by the assignee clause).

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

of the forum state.¹⁷ Second, it imposed an amount in controversy requirement.¹⁸

Beyond that, however, the original statutory grant of diversity jurisdiction used the same operative language as Article III: the dispute must be “between . . . citizen[s] of different state[s].” No one knew it at the time, but the Court would interpret this phrase to mean different things in the two contexts. Under the 1806 decision in *Strawbridge v. Curtiss*, the diversity statute required (and still requires) complete diversity: every plaintiff must be of diverse citizenship from every defendant.¹⁹ The diversity clause of the *Constitution*, in contrast, requires only “minimal diversity”: jurisdiction is permitted if any plaintiff is a citizen of a different state from any defendant.²⁰

Diversity jurisdiction is essential to the Constitution’s creation of a free-trade zone amongst the states, an eighteenth-century common market within the nation. To that end several provisions support a policy of neutrality toward outsiders. The commerce clause prohibits states from burdening interstate commerce.²¹ The full faith and credit clause mandates that states respect and enforce the valid judicial decrees of other states.²² And the privileges and immunities clause mandates that states extend to citizens of other states the same basic rights they give to their own.²³ These provisions fit together to foster the robust interstate movement of persons and trade.²⁴

Where people and trade go, there will be disputes. Diversity jurisdiction contributes to the policy of neutrality toward the outsider by providing an independent federal forum for disputes between citizens of different states. Thus, Hamilton could speak in *Federalist No. 80* of diversity jurisdiction’s being “essential to the peace of the Union.”²⁵

In permitting diversity jurisdiction, the Founders appeared to be motivated by a desire to allow out-of-state *commercial* interests to avoid

17. *Id.* (“[T]he suit is between a citizen of the State where the suit is brought, and a citizen of another State.”).

18. The first of these provisions disappeared in 1875, as discussed *infra* Part II. The second has not disappeared, though the amount has changed, as discussed *infra* Part IV.

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

20. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967); see *infra* Part III.

21. U.S. CONST. art. I, § 8.

22. U.S. CONST. art. IV, § 1.

23. U.S. CONST. art. IV, § 2.

24. Other provisions are consistent with this mission. For example, the contracts clause was intended to prohibit states from interfering with contractual obligations. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”). See generally PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900 (1999) (noting contracts clause as facilitating interstate flow of capital).

25. THE FEDERALIST NO. 80, at 389 (Alexander Hamilton) (Dover ed., 2014).

litigation in state courts.²⁶ Under the Articles of Confederation, several states had enacted debtor-relief measures that prevented creditors from collecting on loans or for goods sold.²⁷ Diversity jurisdiction would allow commercial litigants to avoid the tribunals of such states. Though Article III is silent on removal jurisdiction, the original Judiciary Act provided for it,²⁸ ensuring a commercial entity—whether plaintiff or defendant—of access to federal court in a diversity case.

The importance of this access is emphasized by Article III's provision that judges serve during "good behaviour" and that their compensation "shall not be diminished during their Continuance in Office."²⁹ Federal judges enjoy life tenure, free from electoral supervision and free from legislative reprisal. The political insulation of Article III judges contrasted sharply with the manner in which state judges were appointed and retained. In the early nineteenth century, state judges generally were appointed and retained by the state political branches.³⁰ During the Jackson administration, states moved toward the election of state judges.³¹ Either way, the state judges concerned about job security had to look over their shoulders and worry about local reaction to their decisions. While it is true that federal judges would be appointed from the local bar, they would be beholden to no one for continued employment.

The prospect of access to a tribunal politically insulated from the local and state power structure could encourage investment across state lines. The Founders understood that the young nation needed to expand economically, to make capital available throughout the land. Among other things, this economic infusion could support the shift from an agrarian to an industrial economy.

And it worked. Chief Justice William Howard Taft reached a startling conclusion: the existence of diversity jurisdiction, he said, was the most important "*single element* in our governmental system . . . to secure capital

26. For the definitive discussion of business's use of diversity jurisdiction, see generally EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958* (1992).

27. This fact raises the possibility that the feared state bias was not of judicial, but rather of legislative, origin. See *infra* Part II.

28. Judiciary Act of 1789, ch. 20, 1 Stat. 73. See generally 14C CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3721 (rev. 4th ed. 2018).

29. U.S. CONST. art. III, § 1.

30. See RUSSELL R. WHEELER & CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* 8 (1989) (noting that Federalists supported diversity jurisdiction because "they worried about the potential for control over judges by state legislatures, which selected judges in most states and had the authority to remove them in over half the states").

31. See RICHARD H. FALLON, JOHN MANNING, DANIEL MELTZER & DAVID SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 301–02 (7th ed. 2015).

for the legitimate development of enterprises the West and South” United States.³² What a remarkable statement this is: a *jurisdictional grant* was indispensable in ensuring what the free-market provisions of the Constitution envisioned.

But there was more. An integrated commercial unit was important in itself but was indispensable to goal larger constitutional goal of forging a nation—in the words of its Preamble, a “more perfect Union.” Commerce is an important part of a nation, to be sure, but a focus, particularly of the full faith and credit and privileges and immunities clauses, was to bind citizens together into a single country.³³ Now, a New Yorker was not an alien in Georgia and could not be discriminated against as such. Now, a court judgment of South Carolina would be enforceable in Massachusetts.

And it worked too. Chief Judge John Parker of the Fourth Circuit, speaking of diversity jurisdiction, concluded that “[n]o power exercised under the Constitution has, in my judgment, had greater influence in *welding these United States into a single nation*; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union.”³⁴

Those who tried to abolish diversity in the mid-to-late twentieth century failed to appreciate its integral role in the economy and in building a sense that while people may be North Carolinians and Pennsylvanians, they are also citizens of the United States. They thus failed to consider whether abolition (or significant reduction) of diversity jurisdiction would affect the constitutional free trade zone or the integrating force molded by the commerce, full faith and credit, and privileges and immunity clauses. By asserting that there is no appreciable bias against out-of-staters in contemporary America, they addressed a symptom and not the disease. Bias against nonlocals is the symptom. Discrimination against citizens of other states, including protectionist restrictions on trade (whether manifested by state legislatures or locally elected judges), is the disease.

Those who wish to abolish or curtail diversity jurisdiction substantially should be required to show that it no longer promotes the free trade and flow of capital praised by Taft³⁵ and the nation-building effect praised by Parker.

32. William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 604 (1922) (emphasis added).

33. The Court’s dormant commerce clause jurisprudence is consistent with this goal: the commerce clause, of its own power, without legislation, prohibits state protectionism against the citizens of other states. *See infra* note 37.

34. John J. Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932) (emphasis added).

35. I am aware of no economic analysis of whether Chief Justice Taft’s conclusion was based in

But, again, few critics addressed it.³⁶ Without data, let us appeal to common sense. The Court has, even in recent times, been required to strike down protectionist state statutes as violating the commerce clause.³⁷ If state legislatures overreach to protect instate citizens, why would we be confident that state courts provide adequate protection to citizens of other states and to the interstate economy? For half a century, we have seen a drain of economic investment from the “rustbelt” to the “sunbelt.” Especially in difficult economic times (including economic travail brought on by a pandemic), is it not plausible to think that commercial litigants might fear litigation in state courts?³⁸

I am not suggesting that the nation would collapse if diversity jurisdiction were abolished or significantly curtailed. I have no idea what would happen on this score. But diversity jurisdiction is a constitutional doctrine designed to mesh with and reinforce others. We should be wary of making appreciable changes to a part of that system without assessing the potential impact on the whole. Moreover, as we next address, I believe that critics of diversity jurisdiction understated the breadth of the bias rationale.

II. LEGISLATION OF 1875 AND A BROADER VISION OF THE BIAS RATIONALE

The traditional view of the bias rationale, repeatedly invoked by the Supreme Court, is that diversity is necessary to avoid a fear of *state-based* bias.³⁹ Before making the argument that the proper focus may be *region-based* bias, we must note an extraordinary lack of consensus on exactly what litigants were supposed to be afraid of. Some assert that the fear was of state

fact.

36. The REPORT, FCSC is an exception, in that it concedes that diversity jurisdiction “foster[ed] conditions that a young commercial republic needed for its growth.” REPORT, FCSC, *supra* note 1, at 39. It did not engage the question, however, of whether economic conditions continue to support a role for diversity jurisdiction.

37. *See, e.g.*, *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459–76 (2019) (holding that the residency requirement to operate retail liquor store license violates commerce clause; “the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law”); *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (invalidating Oklahoma law that required coal-fired electric utility plants in the state, producing power for use in the state, to burn a mixture containing at least ten percent Oklahoma coal; “[s]uch a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory . . .”).

38. Along these lines, Judge Posner, while advocating generally for the repeal of diversity jurisdiction, urged that it could be justified when one litigant could fear a lack of impartiality in state court because of local *economic* incentives. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 215–16 (1996) (referring to “rational prejudice,” which are occasions in which in-state residents, including elected judges, would have an economic incentive to discriminate against out-of-staters).

39. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553–54 (2005) (noting the purpose of diversity jurisdiction “is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants”).

courts *qua* courts—that is, that the state court factfinding or jury selection or procedures would harm the nonlocal litigant.⁴⁰ But there is also a strong argument that the fear was not of state courts as such, but of protectionist state legislation.⁴¹ Moreover, there is support for the notion that the fear was of state juries.⁴² Some assert that the fear was not about bias against out-of-state litigants, but against out-of-state creditors.⁴³ Which is the proper undergirding for diversity jurisdiction? No one knows. It seems likely that proponents had some combination of such things in mind.

It is also unclear whether, at the time of the founding, there was evidence of actual bias in the administration of local justice.⁴⁴ And, if there was not, was there nonetheless a reasonable *anticipation* of such bias as interstate dealings became more frequent?⁴⁵ After all, with the adoption of the Constitution, there was every reason to believe that there would be an increase in interstate business and, therefore, interstate litigation in which state courts might discriminate against nonlocals.⁴⁶ Again, there is no conclusive evidence, and it seems likely that some proponents thought there was actual bias while some feared prospective bias.

Now to my central point: that whatever bias was feared, it was rooted

40. See, e.g., *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) (“However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies . . . between citizens of different states.”). The concern about unfair court procedure and administration is not irrelevant today. See *infra* Section V.C.2 (describing that the Class Action Fairness Act was motivated in part by perceived abuses in class action procedures in some state courts).

41. Dean Borchers argues compellingly that diversity jurisdiction was motivated by concern about aberrational state laws. Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 129–33 (1993); see also Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495 (1928) (“[T]he real fear was not of state courts so much as of state legislatures.”). After the decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the fear of aberrational substantive state law may have abated. See *infra* Section V.C.2 (noting *Erie* requires federal courts in diversity cases to apply state substantive law).

42. Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1025 (2007) (noting diversity jurisdiction was motivated by fear of state court juries, which at the time had authority to decide issues of law and fact and were composed largely of people from agrarian areas).

43. See, e.g., Friendly, *supra* note 41, at 496–97 (“[T]he desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction, and that as a reason it was by no means without validity.”).

44. See, e.g., Friendly, *supra* note 41, at 493 (noting evidence available at the time of the founding “entirely fails to show the existence of prejudice on the part of the state judges”). But see Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 876 (1931) (“[T]he theory of no local prejudice is presumptively improbable.”).

45. See, e.g., John P. Frank, *The Case for Diversity Jurisdiction*, 15 HARV. J. ON LEGIS. 403, 406 (1979) (noting that diversity jurisdiction was based upon “gloomy anticipation of things to come rather than an experienced evil”).

46. Yntema & Jaffin, *supra* note 44, at 879–80.

not in litigants' state of citizenship, but in the region from which they hailed. As noted, the Court has adopted the state-based notion.⁴⁷ At first blush, this focus makes sense. After all, the constitutional and statutory grants of diversity jurisdiction speak of state citizenship. The original Judiciary Act appears to have embraced this state-centric view by requiring that one of the litigants in a diversity case be a citizen of the forum state. Interestingly, however, after eighty-six years Congress jettisoned that requirement and has never brought it back.

As a result, since 1875, the diversity statute has permitted jurisdiction, for instance, in a federal court in Alabama for a case brought by a citizen of Mississippi against a citizen of New York (we will assume that the amount in controversy requirement is satisfied). The plaintiff may sue in federal court or the defendant may remove to federal court. But if state-based bias is the justification for jurisdiction, this case should not be in federal court: no party in the suit is a citizen of Alabama and therefore no one need fear bias in the courts of that state.⁴⁸

Is it not possible, however, that Congress's deletion of the requirement of an instate party reflects a concern with *region-based* bias? Would it not be rational for the New York defendant, sued by a citizen of Mississippi in a state court in Alabama, to want to remove the case to federal court? That defendant does not fear bias because she is litigating against an Alabaman. She fears bias because she, as a regional outsider, is litigating against a southerner in a southern state.⁴⁹ (The same would be true for the Alabama citizen sued in New Jersey by a New York citizen.)

This broader view of the bias rationale is supported by Taft's quotation above.⁵⁰ He praised diversity jurisdiction on regional basis: it permitted creditors (who at the time were predominantly easterners) to extend credit "for the development of the southern and western United States." He spoke of regions, not states. Is it not possible that Congress, after the courts had eighty-six years of federal courts' experience with diversity cases, consciously deleted the requirement of an instate litigant for the purpose of protecting litigants against fear of regional bias?

47. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553–54 (2005) (the purpose of diversity jurisdiction "is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants").

48. See Klerman & Nash, *supra* note 8, at 3.

49. See FALLON ET AL., *supra* note 31, at 1420 (asking whether diversity jurisdiction is justified by "the fact that one noncitizen often may have much closer ties to the forum state than another"); Frank, *supra* note 45, at 28 (noting that diversity jurisdiction based upon "[t]he desire to avoid *regional* prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation") (emphasis added).

50. See *supra* text accompanying note 32.

After all, in 1789, the United States was an agrarian country of thirteen states huddled along the Atlantic seaboard, with citizens traveling by horse and horse-drawn conveyances. In 1875, the country had been transformed, with thirty-eight states spanning the continent, with citizens traveling by railroad. It would not be surprising that most diversity cases in the late eighteenth century were between citizens of neighboring states, while by 1875 there were many more cases between citizens of more distant states—of different regions.⁵¹ By 1875, there were more regions to the country and there was far more interaction between them than in 1789.

Congress deleted the requirement of an in-forum litigant for diversity cases in the Jurisdiction and Removal Act of 1875.⁵² The theme of the legislation and the political tenor of the times support the conclusion that Congress was concerned with *regional* antipathies. The undeniable purpose of the 1875 Act was to expand the federal docket at the expense of state courts.⁵³ To that end, the Act permitted *plaintiffs* as well as defendants to remove cases from state court to federal court.⁵⁴ For the first time, this Act granted general federal question jurisdiction to the federal courts.⁵⁵

By deleting the instate litigant requirement, the 1875 Act resulted in statutory language that (unlike the 1789 Act) tracked the Article III diversity clause precisely.⁵⁶ The Act, in the words of Professor Purcell, “pushed the

51. I am aware of no data on the point, but the conclusion seems logical. The development of corporate law supports this conclusion as well. In the early days of the nation, a corporation could be formed only by legislative act granting a charter. Starting in the 1830s, states started passing “general” incorporation statutes, by which people could form a corporation by filing appropriate papers with a state official. By 1859, more than half the states had such laws. By 1890, every state had such a law, making corporations far easier to form. Indeed, by the late nineteenth century, states had started competing with each other to attract incorporation, which led to far more interstate corporate transaction of business. See RICHARD D. FREER & DOUGLAS K. MOLL, *PRINCIPLES OF BUSINESS ORGANIZATIONS* 168–69 (2d ed. 2018).

52. Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.

53. The Act was part of a series of efforts by which “the federal system was given authority to assume a more dominant position over the state courts.” STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 143 (1968).

54. Jurisdiction and Removal Act of 1875 § 2. Indeed, *any* plaintiff or defendant could remove a case invoking diversity jurisdiction. *Id.*

55. *Id.* § 1. Many are surprised to learn that Congress did not vest “general” federal question jurisdiction on the federal trial courts until 1875. Before that, there were specific grants of federal subject matter jurisdiction over claims arising under particular federal statutes. There was a brief period in the waning days of the John Adams administration in which Congress granted “general” federal question jurisdiction, but it was repealed after only one year. See 13D CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 162–63 (rev. 4th ed. 2018).

56. Article III speaks of “Controversies . . . between Citizens of different States.” U.S. CONST. art. III, § 2. The 1875 Act provided for jurisdiction over a “a controversy between citizens of different States.” Jurisdiction and Removal Act of 1875 § 2. Recall that the Judiciary Act of 1789, in contrast, provided jurisdiction when “the suit is between a citizen of the State where the suit is brought, and a citizen of another State.” Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 11.

reach of the federal courts toward their outer constitutional limits.”⁵⁷ Regarding diversity, the choice of the Article III language, “together with the statute’s clear purpose to expand federal jurisdiction, gave rise to the argument that Congress had intended to stretch federal diversity jurisdiction to its broadest constitutional reach and that the Constitution required only ‘minimum’ diversity.”⁵⁸ Jettisoning the in-forum litigant requirement would certainly be consistent with extending diversity jurisdiction to its constitutional limit.⁵⁹

The politics of the era was characterized by regional rivalries and suspicions. The 1875 Act was part of the nationalizing process of Reconstruction, in which a strong federal bench assured federal dominance over the states.⁶⁰ The Republicans, who had championed the cause of freed slaves, now shifted their concern to providing courts that were pro-business.⁶¹ The concern was largely regional, as “Congress abandoned its suspicions of southern courts and concentrated its attention on the middlewestern courts and legislatures infected with Granger resentment toward eastern capitalists.”⁶²

If the region-based theory of diversity jurisdiction is correct, various subject matter jurisdiction doctrines are problematic. Return to the hypothetical above—in which a citizen of Mississippi sued a citizen of New York in a state court in Alabama. Now suppose the plaintiff joins a second defendant, a citizen of Alabama. Though this case satisfies the requirements of the general diversity statute (again, we will assume the amount in controversy is satisfied), the New York defendant cannot remove the case. First, the general removal statutes require that all defendants agree to remove the case to federal court;⁶³ thus, the Alabama defendant can block removal.

57. PURCELL, *supra* note 26, at 15.

58. *Id.* at 105. Professor Purcell refers to the 1875 Act as having “enlarged” diversity jurisdiction. *Id.*; see also Woolley, *supra* note 8, at 45 (noting that a change in statutory language “immediately posed the question of whether Congress had legislatively overruled *Strawbridge*”).

59. The Court later held that the complete diversity rule survived the legislative change. *Peninsular Iron Co. v. Stone*, 121 U.S. 631, 632–33 (1887). It hinted at that result in *The Removal Cases*, 100 U.S. 457, 468–69 (1879). As noted, however, Congress has never restored the requirement that one of the litigants in a diversity case be a citizen of the forum state—nor has the Court ever attempted to restore that requirement as a “gloss” on the diversity statute.

60. William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 358 (1969).

61. *Id.* at 341 (“The flourishing economic development of the postwar years led most Republicans to substitute sympathies for entrepreneurial interests in place of their earlier care for the freedmen.”).

62. *Id.* The Granger Movement protested against perceived abuses of farmers that increased costs and drove down agricultural prices. It controlled several midwestern state legislatures and passed laws that set maximum rates to be charged by various eastern industries such as railroads. See generally SOLON JUSTUS BUCK, *THE GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC, AND SOCIAL MANIFESTATIONS 1870-1880* (1963).

63. WRIGHT ET AL., *supra* note 28, § 3730 (“[A]ll of the defendants in the state-court action must

Second, the in-state defendant rule, applicable under the general removal statute, blocks removal: a diversity case cannot be removed if one of the defendants is a citizen of the forum.⁶⁴ Here, the Alabama defendant is an in-state defendant, so the New York defendant has no access to federal court, despite what might be a legitimate concern about regional bias.

Indeed, if regional bias is the driver of diversity jurisdiction, the complete diversity rule is suspect. Suppose a New York plaintiff sues a Mississippi defendant in state court in New York. The New York plaintiff joins a New York defendant to the case, which defeats complete diversity. Here, the Mississippi defendant is in the same position as the New York defendant in the preceding paragraph. Both are required to litigate in a state court in a region they might consider unfriendly, but which their opponents consider home.

The Supreme Court justifies this result by asserting that the joinder of the New York defendant ensures that the Mississippi defendant need not fear local bias. In the Court's words, "[t]he presence of parties from the same State on both sides of a case dispels this concern."⁶⁵ As Professors Klerman and Nash demonstrate, however, this conclusion makes sense only if the co-defendants' interests are closely aligned. If they are not, the Mississippi defendant may be in especial need of a neutral forum, based upon fear that the local court will be inclined to impose liability against the nonlocal defendant.⁶⁶

The situation would be exacerbated if the New York defendant files a crossclaim against the Mississippi defendant. At that point, the southerner has been sued by two northerners in a New York state court. Yet the Mississippian has no access to federal court for four reasons: (1) the complete diversity rule, (2) the requirement that all defendants join in removal, (3) the in-state removal provision, and (4) the requirement that removal be based upon the plaintiff's complaint and not later-asserted claims.⁶⁷

consent to the removal."). The unanimity principle does not apply in various specialized statutes, such as CAFA. Under CAFA, any one defendant may remove a case from state to federal court. 28 U.S.C. § 1453(b).

64. 28 U.S.C. § 1441(b)(2). The in-state defendant rule does not apply in various specialized statutes, such as CAFA. Under CAFA, an in-state defendant may remove a case from state to federal court. 28 U.S.C. § 1453(b).

65. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 553–54 (2005) ("The presence of parties from the same State on both sides of a case dispels this concern [of local bias].").

66. Klerman & Nash, *supra* note 8, at 2–3; *see also* Woolley, *supra* note 8, at 19–20 ("[T]he joinder of a local defendant and a nonlocal defendant could leave the nonlocal defendant alone susceptible to local bias, notwithstanding a joint obligation.").

67. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104–07 (1941).

I am not urging that these four doctrines be repealed. My point is simply that diversity jurisdiction may be based upon a fear of region-based, rather than state-based, bias. And if this assertion is correct, it will affect any effort to rationalize the various doctrines underlying invocation of diversity jurisdiction.⁶⁸ Next, we will see that the bias rationale (whatever its scope) does not exhaust Congress's justifications for granting diversity jurisdiction.

III. THE EMERGENCE OF THE EFFICIENCY RATIONALE

Congress has invoked the Article III diversity jurisdiction for at least one reason other than the bias rationale: what can be called an "efficiency rationale," which recognizes that federal courts can facilitate aggregation of claims and parties when state courts cannot.⁶⁹ The original Congress could not have based jurisdiction on this justification because it became apparent (and possible) only after significant developments in the law of personal jurisdiction.

The Supreme Court has long tied personal jurisdiction of state courts to the due process clause of the Fourteenth Amendment.⁷⁰ That provision sets the outer boundary on a state court's authority to exercise personal jurisdiction over a defendant. The iconic case of the so-called modern era setting forth that authority is *International Shoe Co. v. Washington*,⁷¹ which

68. Occasionally Congress takes an act that is clearly consistent with the state-based bias rationale. In 2012, Congress amended 28 U.S.C. § 1446(c)(1). For years, the statute prohibited removal of a diversity case more than one year after the action was filed in state court. This provision was subject to abuse. For example, assume that P, a citizen of New York, sues D-1, a citizen of Alabama, and D-2, a citizen of New York, in state court in New York (and assume that the amount in controversy exceeds \$75,000). The case cannot be removed on the basis of diversity jurisdiction; it violates the complete diversity rule and there is an in-state defendant. Now suppose that one year and one day after filing this suit in state court, P voluntarily dismisses the claim against D-2. The case now satisfies the requirements for diversity jurisdiction and there is no in-state defendant. Under the limitation of § 1446(c), however, the Alabama defendant cannot remove the case because more than one year has elapsed since it was filed in state court. Thwarting removal in this case is inconsistent with the in-state bias rationale. D-1, the only remaining defendant, is forced to litigate in a state court against a citizen of that state. In 2012, Congress amended § 1446(c)(1); it continues to state the one-year limit but provides that it will not apply if "the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." *Id.* There are problems with the provision (including which party has the burden of proof and by what standard), but the change is consistent with the in-state bias rationale. It is not consistent, however, with the regional bias rationale.

69. See Dodson, *supra* note 8, at 301–08.

70. It first did so in *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878). The statement was dictum, however, because the judgment as issue was entered before ratification of the Fourteenth Amendment. Over time, the Court has come to see the Fourteenth Amendment as a source of substantive limitations on a state's authority to exercise personal jurisdiction. See Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 733–34 (2012) (discussing "the transformation of due process from a mechanism to allow a direct challenge of jurisdiction to the source of substantive standards by which to assess such a challenge").

71. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

has been interpreted many times.⁷² In simplified terms, *International Shoe* requires that a defendant establish volitional ties, or “minimum contacts,” with the forum state itself.⁷³

In contrast, the personal jurisdiction of federal courts is limited only by the due process clause of the Fifth Amendment. The Court has not provided meaningful guidance on the Fifth Amendment limits on federal-court personal jurisdiction. Nonetheless, there is broad support for the conclusion that Congress may vest federal courts with greater personal jurisdiction authority than state courts enjoy.⁷⁴ Acting on this understanding, Congress has occasionally enacted statutes allowing “nationwide service of process” for certain types of federal cases.⁷⁵ These statutes permit a federal court to exercise personal jurisdiction over a defendant based upon the defendant’s contacts with the United States as a whole, rather than its contacts with the forum state.⁷⁶ State courts cannot be given such broad authority under the Fourteenth Amendment; again, state court personal jurisdiction must be based upon the defendant’s contacts with the forum state itself.

Congress first invoked nationwide service of process in civil cases in the Federal Interpleader Act (FIA), passed in 1917.⁷⁷ Interpleader is specialized litigation in which the stakeholder, who is in possession of money or other property, joins in a single proceeding all potential claimants to that property. Interpleader is the model of efficiency: all claimants’ assertions are determined in one case, and the judgment binds all parties. If the stakeholder were not able to interplead, the stakeholder could be sued in separate cases by each claimant. These multiple suits would burden the stakeholder (and the judicial systems) with the expense of litigating the question of ownership repeatedly. It would also open the door to inconsistent results: one court might conclude that A owns the property and another court conclude that B owns the same property. Interpleader thus achieves the benefits of packaging related claims and parties in one suit.

Congress passed the FIA to take advantage of the fact that federal courts

72. See generally RICHARD D. FREER, CIVIL PROCEDURE 82–119 (4th ed. 2017) (“Progeny of *International Shoe*”).

73. *Int’l Shoe Co.*, 326 U.S. at 316.

74. See generally Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509 (2019); Wendy Perdue, *Aliens, the Internet, and “Purposeful Availment”: A Reassessment of Fifth Amendment Limitations on Personal Jurisdiction*, 98 NW. U. L. REV. 455 (2004).

75. Without such a provision, the personal jurisdiction authority of a federal court in a diversity case generally is co-extensive with that of a state court in the state in which it sits. FED. R. CIV. P. 4(e)(2).

76. See FREER, *supra* note 72, at 145 (“The Court has never explained how the personal jurisdiction analysis might differ under the Fifth and Fourteenth Amendments. One widely accepted contention is that the Fifth Amendment inquiry focuses on contacts between the defendant and the United States as a whole.”).

77. Federal Interpleader Act of 1917, ch. 113, 39 Stat. 929.

may be given broader personal jurisdiction power than state courts.⁷⁸ To this end, it provides for nationwide service of process.⁷⁹ The problem then became the constitutional limits on subject matter jurisdiction. The FIA does not create a federal right or claim; thus, cases arising under it will rarely invoke federal question jurisdiction.⁸⁰ The viable basis of subject matter jurisdiction was diversity of citizenship, but the complete diversity rule would thwart many interpleader cases from invoking federal jurisdiction. Congress therefore allowed jurisdiction based upon “minimal diversity” among the parties: there is subject matter jurisdiction if *any* claimant is of diverse citizenship from *any other claimant*.⁸¹

For our purposes, the FIA is important because Congress justified its use of diversity jurisdiction on grounds completely unrelated to the bias rationale. Nowhere in the legislative history of the Act is there any reference to a need for access to federal courts to avoid perceived bias in state courts. The sole purpose was to open federal courts for the sake of efficiency. In the decision upholding the constitutionality of jurisdiction based upon minimal diversity, the Court spoke of Congress’s “purpose broadly to remedy the problem posed by multiple claimants to a single fund.”⁸² Not once did the Court refer to the avoidance of bias as a motivation for expanding federal diversity jurisdiction to its constitutional limit; the legislative purpose, upheld by the Court, was the promotion of efficient joinder.

Eighty-five years later, Congress returned to the same theme in the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (“MMTJA”).⁸³ That legislation promotes efficient packaging of claims arising from a “single accident” in which at least seventy-five persons are killed. As with interpleader, MMTJA extends personal jurisdiction by permitting nationwide service of process.⁸⁴ It expands subject matter jurisdiction based upon minimal diversity of citizenship⁸⁵ and expands removal jurisdiction by permitting any single defendant, even a citizen of the forum state, to remove a case from state to federal court.⁸⁶ Here, as with interpleader, we find no

78. The impetus for the legislation was the Court’s holding in *New York Life Insurance Co. v. Dunlevy*, 241 U.S. 518, 522–23 (1916) that a federal interpleader court lacked personal jurisdiction over one of the claimants to the case.

79. This provision is today codified at 28 U.S.C. § 2361. Again, state courts cannot be given this personal jurisdiction power.

80. See, e.g., *Metro. Life Ins. Co. v. Price*, 501 F.3d 271, 275 (3d Cir. 2007) (noting interpleader invoked federal question jurisdiction when claims were to life insurance benefits under an ERISA plan).

81. This provision is today codified at 28 U.S.C. § 1335.

82. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967).

83. The provisions of this Act include 28 U.S.C. §§ 1369, 1697, 1785, 1391(g), and 1441(e).

84. 28 U.S.C. § 1697.

85. 28 U.S.C. § 1369(a).

86. 28 U.S.C. § 1441(e)(1).

legislative history expressing concern with avoidance of state-court bias. The purpose is to expand federal jurisdiction for purposes of litigation efficiency.⁸⁷

Congress further expanded access to federal courts in aggregate litigation with the Class Action Fairness Act of 2005 (“CAFA”).⁸⁸ Interestingly, Congress based CAFA on both the bias rationale and the efficiency rationale. CAFA grants federal jurisdiction for class and mass actions⁸⁹ based upon minimal diversity (of any class member from any defendant), permits removal by a single defendant (even an in-state defendant), and liberalizes the amount in controversy requirement by permitting aggregation of claims.⁹⁰ CAFA was the congressional response to vigorous lobbying by business interests, which argued that some state courts were especially hostile to them, as manifested by their liberal certification of class actions.⁹¹ The legislative history is replete with congressional findings of state-court bias in class action practice.⁹²

In fact, Congress went beyond these rationales and based CAFA in part on the commerce clause. In doing so, it expressly recognized the possibility that state court litigation may harm the free flow of commerce.⁹³ Thus, Congress’s most recent legislation under the diversity clause supports the argument, made in Part I above, that diversity jurisdiction is an integral part of the facilitation of commerce.

87. See Underwood, *supra* note 1, at 217 (noting MMTJA’s goal is “wholly unrelated to avoiding local bias”).

88. 28 U.S.C. §§ 1332(d), 1453. Section 1332 provides the jurisdictional grant and carve-outs, and § 1453 provides the removal provision.

89. In some states, procedural rules allow hundreds or even thousands of claimants to join as co-plaintiffs without denominating the case as a class action. The statutory reference to “mass actions” was intended to ensure that CAFA applied to such cases. See GEORGENE M. VAIRO, *MOORE’S FEDERAL PRACTICE: THE COMPLETE CAFA: ANALYSIS AND DEVELOPMENTS UNDER THE CLASS ACTION FAIRNESS ACT OF 2005*, at 8 (2011).

90. CAFA requires an aggregate amount in controversy of more than \$5,000,000, permits subject matter jurisdiction if any class member is of diverse citizenship from any defendant, and permits removal of class and mass actions from state court by a single defendant, even one who is an in-state defendant. 28 U.S.C. § 1332(d).

91. David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1293 (2007) (noting that some CAFA backers “claimed that trials courts in certain states—the so-called ‘magnet’ jurisdictions in particular counties in Illinois, Texas, Alabama, and Mississippi—were beholden to local lawyers, had spun out of control, and would certify meritless classes to coerce extortionate settlements”).

92. CAFA was intended to “prevent judge shopping to States and even counties where courts and judges have a prejudicial predisposition on cases.” 151 CONG. REC. S999 (daily ed. Feb. 7, 2005) (statement of Sen. Specter); see VAIRO, *supra* note 89, at 1–6 (detailing the purposes of CAFA).

93. 28 U.S.C. § 1711 (noting “abuses of the class action device” have “adversely affected interstate commerce”; “[a]buses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution”; CAFA will “benefit society by encouraging innovation and lowering consumer prices”).

Some have questioned Congress's use of diversity jurisdiction to accomplish anything other than avoidance of the fear of local bias.⁹⁴ Surely, however, the fact that the Founders, including the original Congress, were motivated by one desire does not limit the use of diversity for the rest of the life of the Republic. Experience with more than a century of federal litigation and the emergence of Fourteenth Amendment limits on state-court personal jurisdiction made clear that the federal courts are uniquely able to foster inclusive processing and adjudication of aggregate litigation.⁹⁵ Is Congress unable to achieve that goal because the Founders did not envision it? Based upon the ease with which the Court upheld the constitutionality of the FIA, the answer must be no.⁹⁶

Next, we address ramifications of the fact that both Congress and the federal courts have played roles in defining the scope of diversity jurisdiction.

IV. INSTITUTIONAL LIMITS AND THE INTERACTION OF CONGRESS AND THE COURTS

Congress drafts jurisdictional statutes, but the federal courts interpret them. Each group must keep in mind the institutional limits of a very small bench. There are only 663 Article III district judgeships. For decades, Congress has refused to increase substantially the number of Article III judges.⁹⁷ Congress must be careful not to overwhelm the federal bench by overzealous grants of subject matter jurisdiction, and the courts have an incentive to avoid overzealous interpretations of statutory grants.⁹⁸

Much of diversity doctrine is the result of back-and-forth between Congress and the courts. Congress imposed an amount in controversy requirement but left it to the courts to determine how that amount is assessed,

94. See, e.g., C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 615–16 (2004) (arguing that legislation based upon diversity jurisdiction must be necessary and proper to achieve the purpose of avoiding bias).

95. Though it is not based upon the diversity power, Congress enacted the multidistrict litigation statute, 28 U.S.C. § 1407, in furtherance of the same policy. There, it vastly expanded the power of federal courts to transfer related civil cases by removing the usual venue and personal jurisdiction restrictions on transfer.

96. Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169, 184 (1990) (concluding that fifteen years before passage of CAFA, any objection to the use of minimal diversity to facilitate mass tort jurisdiction reform “is easily answered by reference to the Supreme Court’s affirmation of the minimal diversity-based federal interpleader statute”).

97. As of July 2020, however, the Senate Judiciary Committee was considering a bill to increase the number of Article III judges. See generally *Judicial Conference’s Recommendation for More Judgeships Before the U.S. S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Christian K. Adams, National President, Federal Bar Association) (supporting the bill).

98. The incentive might be heightened by the increased district court docket causes by CAFA. See VAIRO, *supra* note 89, at 187–89.

for example, in multiparty and multiclaim cases. Congress granted diversity of citizenship jurisdiction but left it to the courts to define the citizenships of natural persons and unincorporated associations. Congress in 1958 defined the citizenship of corporations,⁹⁹ but the judiciary wrestled for fifty-two years before the Court provided a definitive interpretation of a corporation's "principal place of business" for that purpose.¹⁰⁰

Even as to matters expressly addressed by statute, the congressional purpose often is not clear. The general diversity statute has always included an amount in controversy requirement. Congress has increased it from time to time.¹⁰¹ In 1789, a diversity case had to exceed \$500. Since 1996, the statute has required an assertion in excess of \$75,000.¹⁰² Why has Congress always imposed such a requirement in diversity cases?

One argument is consistent with the bias rationale: that in-state (or regional) bias will be more profound in a significant dispute; the nonlocal litigant has more to fear if there is a good deal at stake in the case.¹⁰³ If that is so, however, how do we explain the court-made aggregation doctrine, under which claims asserted by multiple plaintiffs against a single defendant cannot be added for determining whether the amount in controversy is satisfied?¹⁰⁴ Suppose five New York plaintiffs sue a single Mississippi defendant in state court in New York. Each plaintiff asserts a state law claim of \$70,000. The Mississippi defendant faces potential liability of \$350,000—far in excess of \$75,000—but cannot remove the case to federal court. Under *Clark v. Paul Gray, Inc.*,¹⁰⁵ diversity requires that the claim of each plaintiff must satisfy the statutory amount requirement.

Clark suggests that there is another reason for the amount in

99. Before 1958, Congress did not define the citizenship of corporations for purposes of diversity jurisdiction. The Court long treated corporations as citizens of the state(s) in which they were incorporated but did so through a circuitous fiction: a case by or against a corporation was deemed to be by or against its shareholders, who, the Court declared, are presumed to be citizens of the state(s) of incorporation. *Covington Drawbridge Co. v. Shepherd*, 61 U.S. (20 How.) 227, 233 (1858).

100. *Hertz Corp. v. Friend*, 559 U.S. 77, 80–81 (2010) (adopting the "nerve center" approach to principal place of business).

101. See Gensler & Michalski, *supra* note 8, at 9–12 (noting history of amount in controversy requirement in diversity cases).

102. For over a century, Congress imposed a monetary limit on federal question jurisdiction as well but dropped it in 1980.

103. The historic amount in controversy requirement in federal question cases would make less sense on this basis. Presumably, violation of a federal right should be redressable in a federal court regardless of the size of the claim. Indeed, this is the reason Congress gave for jettisoning the amount in controversy requirement in federal question cases; federal rights are of equal dignity regardless of the monetary value of the harm inflicted on the plaintiff.

104. See generally FREER, *supra* note 72, at 225–27.

105. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939).

controversy requirement: docket control.¹⁰⁶ The fact that Congress has not raised the amount in controversy in a quarter century, combined with the fact that it has rejected efforts to tie the requirement to the consumer price index, suggests that Congress is comfortable with the percentage of diversity cases on the federal civil docket—that the current docket is not out of hand.

Viewed as docket control, the aggregation rule of *Clark* makes sense: the federal courts, left to define the amount in controversy themselves, do so in a way to reduce the number of diversity cases. In *Zahn v. International Paper Co.*,¹⁰⁷ the Court extended the *Clark* rule to claims asserted in a diversity class action. Thus, the claim of each member of the class had to meet the amount in controversy requirement. *Zahn* was decided in 1973, when the federal courts were especially active in federal civil rights and institutional litigation. More than one commentator concluded that *Zahn* was an anti-diversity case, aimed at keeping state-law based class actions out of federal courts that were busy deciding federal question cases.¹⁰⁸

The problem of ascribing congressional purpose is even more difficult when the source of the “statutory” rule is not Congress at all. Much of diversity doctrine (including the aggregation doctrine noted above) originated in judicial decisions. Under the canon of implicit adoption, when Congress re-enacts the general diversity statute without changing the judge-made doctrine, that doctrine becomes a “statutory” requirement. But they are “statutory” in name only. There is no statutory language. There is no debate. There is no legislative history. How are we to ascribe purpose, then, to such “statutory” rules?

Consider the complete diversity rule. The Court invented it out of whole cloth in 1806 in *Strawbridge v. Curtiss*.¹⁰⁹ Congress has never rescinded it in the general diversity statute.¹¹⁰ Why did the Court create, and Congress by inaction embrace, the complete diversity rule? We have no idea. Chief

106. See Gensler & Michalski, *supra* note 8, at 4 (“Congress has used a jurisdictional amount requirement to regulate access to federal courts and throttle the number of diversity cases.”); *id.* at 12–24 (describing policy and goals of amount in controversy requirement in diversity cases). Of course, nothing prohibits Congress from basing a provision on more than one rationale. The amount in controversy requirement may be based both upon the bias rationale and upon a concern for docket control.

107. *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 296–98 (1973).

108. 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE at 106-61 to 106-64.1; 7A WRIGHT ET AL., *supra* note 28, at 74–76; Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. REV. 186, 193–94 (1996).

109. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806); see Martin H. Redish, *Re-Assessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1803 (1992) (noting that the complete diversity rule of *Strawbridge* was imposed “[w]ithout any grounding in either constitutional or statutory text and with reasoning that charitably could be described as cryptic”).

110. As noted, Congress has rejected the complete diversity rule in the FIA, MMTJA, and CAFA.

Justice Marshall did not tell us in the remarkably cryptic *Strawbridge* opinion.¹¹¹ We are told that Marshall later lamented the decision, but we do not know why.¹¹²

Let us hold the complete diversity rule up to the four rationales we have discussed as relevant to diversity doctrine: (1) fear of instate bias, (2) fear of regional bias, (3) efficient joinder in the federal courts, and (4) docket control. In the absence of a stated reason for the complete diversity rule, perhaps we must judge the complete diversity rule by its *effect*. As discussed in Part II above, at least sometimes, the complete diversity rule is not consistent with the traditional *instate* bias rationale¹¹³ or with the broader *regional* bias rationale.¹¹⁴ The rule may not foster efficient joinder in federal court¹¹⁵ because it permits a plaintiff to pursue separate cases in federal and state court against different defendants. But it certainly serves the docket-control function.

Based upon its *effect*, then, perhaps the *principal* function of the complete diversity rule today is docket control—to avoid expanding the diversity docket. Chief Justice Marshall certainly did not have docket control in mind when he wrote his opinion for the Court in *Strawbridge*. Until 1875, when Congress granted general federal question jurisdiction, the principal item in the federal civil menu was diversity cases, and there was no hint that dockets were swamped in the early nineteenth century.

Things changed, however, with the 1875 legislation.¹¹⁶ It so increased the federal caseload as to bring docket control to the forefront, where it has

111. Professor Woolley argues that the *Strawbridge* holding is rooted in the requirements of common law joinder. Woolley, *supra* note 8, at 16–32.

112. In *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844), the Court dealt with the citizenship of a corporation for diversity jurisdiction. Justice Wayne's opinion referred to Chief Justice Marshall: "We remark too, that the cases of *Strawbridge* and *Curtiss* and the *Bank and Deveaux* have never been satisfactory to the bar, and that they were not especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late chief justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different." As Professors Klerman and Nash note, it is not clear whether Chief Justice Marshall's lament was about the complete diversity rule itself or about its application in those two cases. Klerman & Nash, *supra* note 8, at 9 n.13.

113. See *supra* Part II.

114. See *supra* Part II.

115. Efficient joinder generally is available in state court, which has general subject matter jurisdiction and need not be concerned with citizenship of the parties.

116. There were occasional docket-control crises in the interim, to be sure. An 1841 bankruptcy law providing for voluntary bankruptcy petitions swamped the federal trial courts. The law was repealed in short order. See EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 115 (2001) (discussing docket pressure caused by the 1841 law).

remained.¹¹⁷ It has been a motivator in applying the complete diversity rule just as it was (in *Clark and Zahn*) in applying the amount in controversy requirement. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*,¹¹⁸ Justice Kennedy’s majority opinion deserved a prize for contortion in concluding that the complete diversity rule must be assessed on an “action-specific” basis while (the equally statutory) requirement of amount in controversy is assessed on a “claim-specific” basis.¹¹⁹ In fairness, the contortion was necessary to avoid eviscerating the complete diversity rule.¹²⁰ And one can imagine that the *Allapattah* Court viewed the then-recent passage of MMTJA and the lurking passage of CAFA, with jurisdictional expansions, with concern. Under the circumstances, the Court was not going to trust Congress to fix a docket control problem created by the statutory evisceration of the complete diversity rule.

Against this background of differing policy bases and different decisionmakers, we should not be surprised that aspects of diversity doctrine are inconsistent.

V. INCONSISTENT DOCTRINE, CONSTITUENCIES, AND REALPOLITIK

A. THE IMPOSSIBILITY OF CONSISTENCY

There are many rules underlying a plaintiff’s invocation of diversity jurisdiction under § 1332(a)(1): the complete diversity rule, definitions of citizenship, amount in controversy, and aggregation come to mind. These and others underlie a defendant’s ability to remove a diversity case from state to federal court, including the instate defendant limitation, the one-year limitation, and the requirement that all defendants join in removal to federal court.

We have just seen that the various rules governing diversity jurisdiction have been imposed by different players: Congresses sitting in different eras and judges sitting in different eras. We have also seen that there are various

117. The expansion led to legislative and judicial efforts to pare the federal docket. On the judicial side, for example, as discussed in text accompanying *supra* note 59, the Court invigorated the complete diversity rule in *The Removal Cases*. See generally PURCELL, *supra* note 26, at 15 (“Expanded jurisdiction under the 1875 act brought increasingly heavier caseloads to the federal courts, and pressure grew to relieve the growing burden.”).

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

119. *Id.* at 552–53; see Woolley, *supra* note 8, at 58–59 (noting *Allapattah* Court’s “assumption that *Strawbridge* . . . requires that complete diversity be measured against the *entire* civil action authorized by the Federal Rules is simply wrong”).

120. It certainly was arguable that the supplemental jurisdiction statute could be used to avoid the complete diversity rule. See WRIGHT ET AL., *supra* note 28, at 328–31. The Court’s holding avoided the need to trust Congress to fix the problem created by evisceration of the complete diversity rule.

possible underlying justifications for diversity jurisdiction. Congress has never adopted a consistent rationale to support diversity doctrine, which means that there is no single metric by which the various rules are to be assessed. Are we trying to avoid state-based bias? Are we trying to avoid region-based bias? Are we trying to facilitate efficient joinder of cases? Are we trying to avoid inundating the Article III courts? Are we trying to do something else? Are we trying to balance all of the above?

Against this background, it is no surprise that the various rules are consistent. They are a hodge-podge. They pull in different directions. How could it be otherwise? But there is one thing for which Congress can be relied upon: Job One, which is to pursue reelection. There are various constituencies interested in diversity jurisdiction. The one that matters the most is the practicing bar.

B. PERIPHERAL PLAYERS: ACADEMICS AND FEDERAL JUDGES

The anti-diversity movement was in full swing in the 1960s and 1970s. At the vanguard were academics who concluded that diversity jurisdiction had had its day.¹²¹ With few exceptions (notably J.W. Moore¹²² and John Reed¹²³), law professors were strongly anti-diversity. In addition, from the mid-twentieth century to the 1970s, high-profile federal judges—including Justices Frankfurter and Jackson, Chief Justices Warren and Burger, Judges Friendly, Frank, Haynsworth, and Posner—joined the call for abolishing diversity jurisdiction.¹²⁴ The political high point of the effort, as noted in the Introduction, came in 1978, when the House of Representatives passed a bill abolishing general diversity jurisdiction.¹²⁵

Despite the failure of that effort in the Senate, anti-diversity forces kept up the pressure. In 1988, as part of the Judicial Improvements and Access to Justice Act,¹²⁶ Congress created the Federal Courts Study Committee (“FCSC”). That Act was sponsored in the House by the same Representative, Robert Kastenmeier, who had sponsored the 1978 bill to abolish diversity. The FCSC was “to examine problems and issues facing the courts of the

121. See Thomas E. Baker, *A View to the Future of Judicial Federalism: “Neither Out Far Nor in Deep,”* 45 CASE W. RESV. L. REV. 705, 765 (1995) (“The parties to the debate generally have chosen sides so that state and federal judges and academics favor abolition [of diversity jurisdiction] while the practicing lawyers favor retention.”).

122. See generally James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964). Moore was the founder and original author of the multi-volume treatise MOORE’S FEDERAL PRACTICE.

123. See generally Reed, *supra* note 2.

124. Underwood, *supra* note 1, at 180–98.

125. See H.R. 9622, 95th Cong. (1978) (abolishing “diversity of citizenship as a basis of jurisdiction of Federal district courts”).

126. Judicial Improvements and Access to Justice Act, 1988, Pub. L. No. 100-702, 102 Stat. 4642.

United States.”¹²⁷ The fifteen-member committee was heralded as a “blue-ribbon panel” of judges, members of Congress and lawyers.¹²⁸ Representative Kastenmeier was a member of the committee.

The laboring oar for the FCSC was pulled not by the committee members (mostly attorneys and judges who had day jobs), but by the group of eight reporters and associate reporters, which consisted primarily of law professors (whose day job includes things like writing reports). Most of these professors took, and have taken, no public position on the debate over diversity jurisdiction. Two of them, however, wrote law review articles consistent with the abolition of diversity.¹²⁹

To the surprise of few, then, the Report of the FCSC, issued in 1990, concluded that general diversity jurisdiction should be abolished. Indeed, it opined, no type of dispute had a “weaker claim” of access to the federal docket.¹³⁰ The Report expressed concern about the percentage of the docket dedicated to diversity cases.¹³¹ It assumed that the purpose of diversity jurisdiction was to avoid bias against noncitizens of a forum and asserted—largely as a matter of faith, it seems—that contemporary American society had moved beyond such parochial favoritism.¹³²

The Report did not consider the role of diversity jurisdiction may play in the national economy.¹³³ It also failed to consider that diversity jurisdiction might be justified on grounds broader than bias against out-of-state citizens. On the whole, the Report reflected the then-current academic mantra that “everyone knows” that diversity jurisdiction is passé. Law review commentary of the day featured a great many statements by professors who had convinced themselves, for example, that “[f]ew would

127. *Id.* 102 Stat. at 4644.

128. *See, e.g.*, Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the “Crisis of Volume” in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97, 98 (1994) (“blue-ribbon panel”).

129. *See* Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 102 (1990); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 1011 (1979). Dean Kramer’s article advocated for the abolition of diversity jurisdiction, in terms often identical with the Report. Professor Rowe, on the other hand, did not advocate abolition; rather, Professor Rowe pointed out several interesting potential positive side effects of abolition.

130. REPORT, FCSC, *supra* note 1, at 39. Dean Kramer repeated the phrase in a law review article. Kramer, *supra* note 129, at 102.

131. REPORT, FCSC, *supra* note 1, at 40 (“The problem is not merely that diversity cases misuse federal judicial resources. It is that they misuse a lot of federal judicial resources.”).

132. *Id.* at 15 (“In any event we do not agree that retention of the diversity jurisdiction is justified by concerns with favoritism and prejudice.”); *id.* at 40 (“Proponents of diversity jurisdiction say that these litigants need access to federal courts because of local bias in state courts. We concede that this may be a problem in some jurisdictions, but we do not regard it as a compelling justification for retaining diversity jurisdiction.”).

133. *See supra* Part I.

deny that the diversity jurisdiction of the federal courts should be substantially contracted.”¹³⁴

Few among the academy, perhaps. But not few among litigators.¹³⁵ The disconnect between professors and practitioners was clear in the Report itself. Three members of the FCSC were practicing lawyers. Two of them dissented from the proposed abolition of diversity jurisdiction.¹³⁶ Another demonstration of disconnect was a law review article by the member of Congress who sponsored both the bill to abolish diversity in 1978 and the bill to form the FCSC in 1989. He listed prominent opponents of diversity jurisdiction and referred to them as a “lawyers’ Hall of Fame.”¹³⁷ But it was not a practicing lawyers’ Hall of Fame. It was a *judges and professors’ Hall of Fame*.¹³⁸ These critics of diversity missed the point that had been made in 1978 when the Senate rejected the effort to abolish diversity: members of the bar—the people who must use the jurisdiction of the courts, rather than opine about it—embrace diversity.

In retrospect, the Report was the last hurrah of those who would abolish diversity jurisdiction.¹³⁹ It was the last frontal assault, and it failed. Congress simply ignored it.¹⁴⁰

134. Maurice J. Holland, Book Review, 3 CONST. COMM. 220, 227 (1986) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)). Professor Holland referred to “the beleaguered diversity jurisdiction,” *id.* at 225, missing the fact that it was not beleaguered among the bar, *see* Coyle, *Time to Kill Diversity Jurisdiction*, NAT’L L.J., February 29, 1988, at 40 (quoting Professor Maurice Rosenberg: “hard-working judges and thoughtful academics believe those fears of hometown favoritism are not really a problem today”); *see also* Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 311 (1980) (“A two hundred year era appears to be coming to an end. The federal courts are apparently on the verge of losing their primordial authority to hear disputes between citizens of different states.”).

135. Testifying in 1978, litigator John P. Frank said: “The proposal to abolish the diversity jurisdiction is, from the standpoint of the bar, approximately as popular as tuberculosis in a hospital.” Bruce A. Wagman, Note, *Second Bites at the Jurisdictional Apple: A Proposal for Preventing False Assertions of Diversity of Citizenship*, 41 HASTINGS L.J. 1417, 1417 n.4 (1990) (citing *Hearings on Proposals Concerning Diversity of Citizenship Jurisdiction Before the S. Subcomm. on Improvement of Judiciary Machinery*, 95th Cong. 230 (1978) (testimony of John P. Frank)); *see also* Reed, *supra* note 2, at 302 (“[S]upport of diversity jurisdiction is almost unanimous among the trial bar, on both sides of the table.”).

136. REPORT, FCSC, *supra* note 1, at 42–43 (describing the “[d]issenting statement of Mr. Harrell and Mrs. Motz,” the latter now Judge Motz of the United States Court of Appeals for the Fourth Circuit). Among other points, the dissenting lawyers opined that the recommendation to abolish diversity jurisdiction was based upon “statistics which concededly may be unreliable” and “vastly overstate[d] the cost incurred by the federal courts in retaining diversity jurisdiction.” *Id.* at 43.

137. Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 303 (1979).

138. The list included Justices Brandeis, Frankfurter, and Jackson; Chief Justices Warren and Burger; Dean Roscoe Pound; and Professor Charles Alan Wright.

139. *See* Underwood, *supra* note 1, at 201 (noting the Report was “the most significant threat” to diversity jurisdiction).

140. Representative Kastenmeier lost his bid for a thirteenth term in the House in 1990.

Critics of diversity then may have changed tactics and adopted what Professor Redish called “guerrilla warfare” on diversity.¹⁴¹ Rather than seeking outright abolition, they sought to limit it in various ways.¹⁴² Some charged that the supplemental jurisdiction statute, 28 U.S.C. § 1367, passed in 1990, was such an effort—because despite its stated goal of codifying practice as it had existed before an unfortunate Court decision,¹⁴³ it appeared to impose new restrictions on supplemental jurisdiction.¹⁴⁴ Ironically, that statute, apparently inadvertently, resulted in an expansion of diversity jurisdiction—by obviating the holdings of *Clark*¹⁴⁵ and *Zahn*¹⁴⁶ regarding the amount in controversy for diversity cases.¹⁴⁷

Over time, however, even these efforts slowed, and the academy today—a generation later—seems surprisingly ambivalent, even accepting, of diversity jurisdiction. Recent scholarship has emphasized the efficiency

141. Redish, *supra* note 109, at 1803 (referring to the supplemental jurisdiction statute’s “guerrilla warfare on diversity jurisdiction”); see also Underwood, *supra* note 1, at 200 (noting critics “nipped at the feet of diversity jurisdiction”).

142. An instance is the one-year limit on removal of a diversity case from state court, imposed in 1990. 28 U.S.C. § 1446(c)(1). Academics urged various inroads on diversity jurisdiction, short of abolition. One was a suggestion that corporations be deemed citizens of all states in which they do business, which would decrease the number of cases involving corporations that could satisfy the complete diversity rule. Charles W. Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 JUDICATURE 291, 291 (1987). Congress never acted on the suggestion.

143. The case was *Finley v. United States*, 490 U.S. 545 (1989), which called into question the whole of existing supplemental jurisdiction doctrine by implying an affirmative congressional grant; the doctrine had emerged as judge-made law. The Report recognized the potential damage caused by *Finley* and recommended that Congress pass a statute to codify the doctrine previously known as pendent and ancillary jurisdiction. REPORT, FCSC, *supra* note 1, at 47–48. The pertinent legislative history stated that the statute would “essentially restore the pre-*Finley* understanding on the authorization for and limits on other forms of supplemental jurisdiction.” H.R. REP. NO. 101-734, at 28 (1990).

144. For example, pre-statutory case law generally permitted supplemental jurisdiction (then called ancillary jurisdiction) over claims by and against intervenors of right, but not over claims by or against necessary parties joined under Federal Rule 19. Some commentators noted the anomaly of this result (because intervenors of right and Rule 19 absentees are similarly situated) and urged that the anomaly be fixed by extending supplemental jurisdiction in the Rule 19 context. See, e.g., Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, the New Law, and Rule 19*, 38 U. KAN. L. REV. 863, 922–23 (1990). The statute resolved the anomaly the other way by removing supplemental jurisdiction in the intervention context. See generally WRIGHT ET AL., *supra* note 28, at 323 (“[Section] 1367 has been anything but non-controversial.”).

145. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939) (holding each plaintiff’s claim must meet the amount in controversy requirement).

146. *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 294–95 (1973) (holding each class member’s claim must meet the amount in controversy requirement).

147. In *Allapattah*, the Court held that § 1367 permitted supplemental jurisdiction over claims by plaintiffs so long as one plaintiff’s claim satisfied the amount in controversy requirement as well as over claims by class members so long as the class representative’s claim exceeded \$75,000. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552–57 (2005). These holdings resulted from the fact that Congress, in drafting § 1367(b), which restricts supplemental jurisdiction in diversity cases, failed to account for claims by multiple plaintiffs or by class members. *Id.*

rationale of diversity jurisdiction,¹⁴⁸ and has even raised the possibility of doing away with the complete diversity rule, at least in some instances.¹⁴⁹ One study suggests that the sky would in fact not fall if federal jurisdiction were based upon minimal diversity: the increase in federal caseload would be surprisingly modest.¹⁵⁰ More study is needed, but the academic ambivalence toward, if not embrace of, diversity jurisdiction is startling to those of us who started teaching in the heyday of the anti-diversity movement.

The same seems to have happened with judges. As noted, in earlier times various high-profile federal judges, particularly appellate judges, publicly called for curtailing diversity jurisdiction.¹⁵¹ One gets the sense that federal judges today seem less inclined to take sides on the issue. The shift in attitude is reflected in the year-end message of the Chief Justice. These messages, started by Chief Justice Burger in 1970, generally have been pleas for relief from the relentless increase in caseload per Article III judge. As late as 1998, Chief Justice Rehnquist expressly asked Congress to consider cutting the federal docket—and to consider diversity jurisdiction on the chopping block.¹⁵² In contrast, Chief Justice Roberts has not called for trimming the federal caseload, but for increased funding.¹⁵³ The tone seems to be: diversity is here to stay; let us get the workforce necessary to handle the caseload.

Why have academics and federal judges retreated from the abolish-diversity mantra that was so prevalent forty years ago? There are likely many reasons, but I suggest, tentatively, one possible contributing factor. Much of the criticism of diversity in the 1960s into the 1980s was based upon the fact that diversity cases took federal judges' time and attention away from federal question cases.¹⁵⁴ Those years saw considerable federal legislative and

148. See Dodson, *supra* note 8, at 301–08.

149. See Klerman & Nash, *supra* note 8, at 2–5 (urging an exception to the complete diversity rule when parties who destroy complete diversity are not citizens of the forum state).

150. See Joanna M. Shepherd, *Courts Must Restore Minimal Diversity to Restore Balance of Justice*, NAT'L L. REV. (July 28, 2015), <https://www.natlawreview.com/article/courts-must-restore-minimal-diversity-to-restore-balance-justice> [<https://perma.cc/6XDE-7WVL>] (concluding based upon empirical analysis of 3600 complaints that switching to minimal diversity would increase district court caseloads by an average of forty-three cases per year per judgeship).

151. See REPORT, FCSC, *supra* note 1.

152. WILLIAM H. REHNQUIST, 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (1998) (“I therefore call on Congress to consider legislative proposals that would reduce the jurisdiction of federal courts. For many years, diversity of citizenship cases have been identified as one such area in which Congress could enact some very useful reforms.”).

153. See, e.g., JOHN G. ROBERTS, JR., 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2013) (lamenting that the Chief Justice “must once again dwell on the need to provide adequate funding for the Judiciary”).

154. See generally Kramer, *supra* note 5.

judicial ferment, particularly with the recognition of new federal rights. Congress was creating new rights and courts were finding others, sometimes from constitutional penumbra and sometimes by inferring private rights of action from legislation creating criminal penalties and administrative regulation.

In such an era, the call to abolish diversity was, to a degree, a call to facilitate the enforcement of these new rights. Testifying in 1978, Professor Wright argued for abolition of diversity jurisdiction expressly to allow plaintiffs “to take advantage of laws that Congress has passed in the last 15 years, giving rights that did not exist . . . I want them to be able to get to trial.”¹⁵⁵ To put the point bluntly, in such days, why should a federal judge be bothered trying to guess what the Kansas Supreme Court would say on an issue of contract law (that it has not addressed in eighty years) when there were federal rights to discover and enforce and institutional wrongs to be righted?

We appear to live in a different judicial world today. I tread lightly here because there certainly are charges of judicial activism today.¹⁵⁶ But, on the whole, I believe Congress and the federal courts are not creating as many federal *rights* today as they were four and five decades ago.¹⁵⁷ Today, perhaps, having state-law-governed cases account for nearly a third of the federal civil docket is not taking time away from enforcing a panoply of new federal civil rights or judicial creativity. At any rate, it is not clear that Congress worries a great deal about what law professors think. And federal judges are not a unified political power. But the organized bar is a different matter.

155. H.R. REP. NO. 95-893, at 57 (1978) (testimony of Charles Alan Wright).

156. Witness, for example, contemporary concern over “national” injunctions issued by district judges, which have the effect of shutting down national programs. See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418 (2017).

157. President Reagan understood the importance of lower federal court appointments for setting an ideological tone. He and President George H. W. Bush molded the bench to a remarkable degree. At the end of their three terms in the White House, these two presidents had appointed seventy-five percent of the Article III judiciary. Sheldon Goldman, *Bush’s Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 297 (1993). President Clinton, in contrast, was the first two-term president to leave office having appointed fewer than half of the sitting federal judges. FALLON ET AL., *supra* note 31, at 280 n.24. From 1981 through 2008, then, Republican presidents served twenty years and appointed 879 federal judges, while the one Democrat president served eight years and appointed 379 federal judges. *Id.* at 279–80. Since then, of course, President Obama served two terms and President Trump one, so the numbers will have changed. It is interesting, however, that President Trump is the only president in history to appoint two hundred Article III judges in one term. While it is dangerous to assume that the federal judges reflect unerringly the ideology of the president who appointed them, it seems safe to say that the Article III bench might be inclined toward less judicial activism than in the 1960s and 1970s. Put another way, it is difficult to see today’s federal bench as leading the kind of rights revolution we saw in those earlier decades. If this assertion is correct, it may explain the seeming lack of agitation to get rid of diversity cases: the added time is not needed on the federal question side of the docket.

C. THE PRIMARY CONSTITUENCY: THE ORGANIZED BAR

1. Political Power

What the bar thinks about subject matter jurisdiction can matter to Congress. One example is the bar's activism after the House passed two bills abolishing diversity jurisdiction in 1978.¹⁵⁸ Another is CAFA, which, as discussed in Part III, responded to defense concerns about class litigation in some state courts.¹⁵⁹ Perhaps a starker example is the fact that the Senate Judiciary Committee for years made the American Bar Association—a private interest group—an integral part of selecting Article III judges;¹⁶⁰ the legislature expressly delegated at least some aspects of its constitutional role to an interest group of lawyers.

I realize that to speak of the political power of the “organized bar” is nebulous. But whether it is the American Association for Justice (formerly the American Trial Lawyers Association) or the American Civil Liberties Union on the left or the Federalist Society of American Center for Law and Justice on the right, these are groups of lawyers. They represent different interests, but neither side hesitates to share its views on the jurisdiction of the federal courts. (I am not saying that the bar is the only interest group that lobbies on jurisdictional issues. CAFA demonstrates clearly that what might be called “the business community” cares deeply about court access; I simply consider such lobbying interests beyond my scope here.¹⁶¹)

Among the bar, which side—plaintiff or defense—benefits from the choice of courts provided by diversity jurisdiction? As in so many other areas, we have no definitive data. While there are cases in which both sides will prefer to litigate in state court or in federal court, the issue usually raises a zero-sum game.¹⁶² Assuming that the case satisfies the requirements for a diversity jurisdiction, the plaintiff's choice of federal court binds the defendant; there is nothing the defendant can do to get the case into state court. If the plaintiff prefers state court, the plaintiff will file suit there, but the choice may be trumped by the defendant through removal, subject to restrictions such as the instate defendant rule. Thus, the current system

158. See *supra* text accompanying note 6.

159. See Marcus, *supra* note 91, at 1293.

160. See generally Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 WM. & MARY BILL OF RTS. J. 37, 39–44 (2001) (describing the history of ABA's involvement in federal judicial selection).

161. Of course, Professor Purcell has demonstrated corporate interests' embrace of diversity jurisdiction through 1958. See generally PURCELL, *supra* note 26.

162. See Crump, *supra* note 5, at 9 (“[T]he choice-is-good theory tacitly assumes that both parties get to make the decision. But the assumption is incorrect. Sometimes the plaintiff can choose the forum, and sometimes the defendant can do so. When both disagree, obviously, only one can decide.”).

empowers both sides, and the current level of choice seems to enjoy widespread acceptance.

The general mantra, certainly proved in lobbying over CAFA, is that the defense bar favors federal court and the plaintiff's bar favors state court.¹⁶³ Over time and location, however, the preferences may change. At any rate, it is not clear that either side has actively pushed for abolition of diversity jurisdiction.¹⁶⁴

2. Why the Bar Embraces Diversity Jurisdiction

Even if Congress had adopted and articulated a consistent rationale for diversity jurisdiction, that rationale would not limit the bar's use of it. Stated another way, once Congress passes a jurisdictional statute, it cannot limit its use to cases that fall within the stated legislative rationale.

That said, we know remarkably little about *why* the bar embraces diversity. Perhaps the most frequently surveyed aspect of the question is the extent to which lawyers file cases in (or remove cases to) federal court out of fear of local bias. Most of the surveys are more than a generation old. A 1980 study in Cook County, Illinois, found that 40% of lawyers invoking diversity jurisdiction cited "bias against an out-of-state resident" as a factor in forum selection.¹⁶⁵ Another study the same year found that concern about bias differed from court to court: for instance, 14.6% of lawyers in the Central District of California considered the issue "important" or "very important," compared to 53.3% in the District of South Carolina.¹⁶⁶ In a 1992 paper, 50.7% of defense lawyers and 26.3% of plaintiffs' lawyers surveyed cited perception of local bias as influencing a choice of forum.¹⁶⁷

In addition to being dated, these studies are not very helpful because they were not consistent in asking how important a fear of bias was to a lawyer's forum decision. Most did not test separately for views of plaintiffs' and defendants' lawyers. Generally, they did not test for whether the concern about bias related to state citizenship, regional citizenship, or something else. And very few scholars have tested for actual bias, as opposed to feared bias.¹⁶⁸

163. VAIRO, *supra* note 89, at 2 (noting that critics of CAFA charge that the Act is aimed at "[p]roviding corporate defendants a safe haven in federal court").

164. See Reed, *supra* note 2, at 302.

165. Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 97-99 (1980).

166. Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 L. & SOC'Y REV. 749, 760 (1980).

167. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 428 (1992).

168. But see Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort*

To argue that there is no bias based upon geography—that communication and travel have erased suspicions and fears based upon geography—is counterintuitive and contrary to experience. Geographic stereotypes have long been rampant and seem not to be abating.¹⁶⁹ When Atlanta was named the host city of the 1996 Olympics, a California newspaper huffed about the “Bubba Olympics,”¹⁷⁰ in which a demonstration sport would be bass fishing. Today, when things go poorly, they are said “to go South.” Something is said to happen “in a New York minute.”¹⁷¹ The Los Angeles Times advertises itself as providing national news with a “West Coast Perspective.”¹⁷² Studies confirm stereotyping based upon region.¹⁷³ After the 2016 presidential election, it is difficult to claim that people do not make judgments about others based upon region. We are constantly treated to national maps with individual counties shaded red or blue based upon how they voted. We hear routinely about the “coastal elites” and those in “flyover country.”¹⁷⁴ It is not clear that those terms even existed twenty years ago.

Geography on the substate level may also affect forum selection. Some may engage diversity jurisdiction out of concern about bias in the context of urban versus rural. Big-city lawyers, litigating “downstate,” may prefer to be in federal court—not to avoid state-based or regional bias, but bias within a state itself.¹⁷⁵ Professor Bassett has argued that diversity jurisdiction is used

Awards, 4 AM. L. & ECON. REV. 341, 368 (2002) (showing findings suggest actual bias against out-of-state tort defendants in states with elected judges).

169. See, e.g., *Stereotypes Americans Have About US Regions*, VOA NEWS (Feb. 9, 2015), <https://blogs.voanews.com/all-about-america/2015/02/09/stereotypes-americans-have-about-us-regions> [<https://perma.cc/4JPB-SHPV>] (presenting a map showing stereotypes based upon American regions based upon nationwide survey conducted by YouGov).

170. Eric Harrison, *Mountain of Racist History Casts Shadow on Olympics*, L.A. TIMES (July 19, 1995, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1995-07-19-mn-25619-story.html> [<https://perma.cc/PFP3-DXTG>].

171. See Daniel Hamermesh, *East Is East, West Is West, and New York Is Different*, PSYCH. TODAY (Mar. 2, 2019), <https://www.psychologytoday.com/us/blog/spending-time/201903/east-is-east-west-is-west-and-new-york-is-different> [<https://perma.cc/3NL2-9WUA>] (“Our stereotypes about location aren’t just about regions: They’re also about individual cities.”). Johnny Carson defined a New York minute as the time between a traffic light’s turning green and others honking at you to move. *Id.*

172. L.A. TIMES, www.latimes.com [<https://perma.cc/7NF5-4YWF>].

173. See, e.g., Katherine H. Rogers & Dustin Wood, *Accuracy of United States Regional Personality Stereotypes*, 44 J. RSCH. PERSONALITY 704, 704–05 (2010).

174. See, e.g., *Flyover Country*, WIKIPEDIA, https://en.wikipedia.org/wiki/Flyover_country#:~:text=%22Flyover%20country%22%20thus%20refers%20to,in%20person%20at%20ground%20level [<https://perma.cc/9RDM-54YV>] (defining flyover country as “the part of the country that some Americans—especially urban, wealthier, white-collar Americans—only view by air when traveling and never actually see in person at ground level”); *Coastal Elite*, URB. DICTIONARY, urbandictionary.com/define.php?term=Coastal%20Elite [<https://perma.cc/2n6Z-U6HX>] (“‘Coastal elite’ is a not-so-obscure reference to primarily intellectual, educated, economically advantaged, people in states like Washington, Oregon, California, Massachusetts, Connecticut, New York and Pennsylvania.”).

175. The Report opined that there is “greater tension . . . between urban residents and rural residents of the same state or between poor and rich, or between individuals and corporations or other institutions, in the same state” than between citizens of different states. REPORT, FCSC, *supra* note 1, at 15; see also

frequently to remove cases from rural state courts to urban federal courts based upon negative stereotypes of rural judges and potential jurors.¹⁷⁶ Some data suggest significant differences in racial stereotyping within geographic units such as counties and cities.¹⁷⁷ In sum, we really do not know about how—and how much—perceptions of bias drive forum selection.

We also do not know whether the invocation of diversity is affected by various state characteristics. For instance, is it possible that lawyers are more likely to file or remove a case in states with a great many counties, as opposed to states with few counties? Georgia has 159 counties. In state court, the jury will be drawn from one of those small geographic units, which is likely to be a rather insular pool. The Northern District of Georgia, however, is composed of forty-six counties, assigned to four divisions, which may result in a markedly broader, less parochial, jury pool.¹⁷⁸

On the other hand, the Southern District of California is comprised of only two counties: San Diego County (with 3,338,000 residents) and Imperial County (with 181,000 residents). A jury pool in the Southern District of California will likely be chosen from a venire that is only slightly less insular than one drawn from a portion of San Diego County for a state court case. Do these geographic differences affect the invocation of diversity jurisdiction?¹⁷⁹ We do not have definitive data.

There is plenty of anecdotal evidence, however, for the conclusion that the jury pool can drive the decision whether to litigate in federal court. In *World-Wide Volkswagen Corp. v. Woodson*,¹⁸⁰ the parties litigated to the Supreme Court on the question of personal jurisdiction over two New York defendants. The real issue in the case, however, was the jury pool. The plaintiffs wanted the New York defendants in the case to defeat diversity

Bumiller, *supra* note 166, at 762 (noting concern about “local” bias is actually concern about “rural” bias); Reed, *supra* note 2, at 298 (“Diversity jurisdiction has evolved to the point where it now offers its protection to those who might otherwise suffer from many kinds of prejudice.”).

176. Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 138–45 (2003). She argues that diversity jurisdiction should be abolished because it is based upon inappropriate stereotypes against people who live in rural areas. *See also* Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 279 (2003) (defining “ruralism” and stereotypes based upon rural residence).

177. Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CALIF. L. REV. 1123, 1126 (2014).

178. A plaintiffs’ lawyer in Philadelphia explained to me: “I want Philadelphia jurors. I do not want a jury pool selected from everybody in all of the other counties in the E.D. of PA.” Email from Dale Larrimore, Esq., to author (July 28, 2020, 16:29 EDT) (on file with author).

179. The question brings to mind a fascinating “local option plan” proposed by the late Professor Shapiro. It would allow each federal district choice in whether to retain or curtail diversity jurisdiction within the district. David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 319 (1977).

180. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980).

jurisdiction and, therefore, to ensure that trial would be held in state court in Creek County, Oklahoma—a venue famous for pro-plaintiff verdicts. The non-New York defendants wanted to remove the case to federal court so the jury would be selected from the eleven counties comprising the Northern District of Oklahoma.¹⁸¹ They could do so only if the New York defendants were not joined—hence the argument that those defendants were not subject to personal jurisdiction in Oklahoma.

Obviously, the practicing bar values diversity jurisdiction for a variety of reasons beyond the possibility that a federal court may provide an antidote to local bias. To the bar, diversity jurisdiction brings *choice*.¹⁸² The fact that a state-law-based claim may be litigated in state or in federal court allows lawyers to weigh an unending list of factors—rational, irrational, consistent, inconsistent, noble, ignoble—in selecting the optimal forum for their clients. Again, the *uses* of diversity jurisdiction are broader than the *justifications* for it. Thus, at some level, the congressional understanding of the reasons for granting diversity jurisdiction is quite beside the point. The important point is that the bar values and is politically potent.

The bar's political power is not the only point. The bar's preference should be studied to determine the manifold reasons for sometimes preferring federal over state court. Recall that one original possible basis for diversity jurisdiction was concern about—and the desire to avoid—not simply state courts, but aberrational state decisional laws.¹⁸³ With *Erie Railroad v. Tompkins*,¹⁸⁴ however, this problem should have abated. After all, under *Erie*, the “law” applicable to decide the case should be the same in state and in federal court.¹⁸⁵ Therefore, litigants who opt for federal court (at least when the applicable state law is clear) must be looking for something else.

But *Erie* does not abate concerns about aberrant or unfair state *procedural* law. Indeed, a primary motivation for CAFA was the argument that state class action rules—procedural laws—were so easily invoked as to put defendants at a disadvantage.¹⁸⁶ Thus, before *Erie*, access to federal

181. See Charles W. Adams, *World-Wide Volkswagen v. Woodson—The Rest of the Story*, 72 NEB. L. REV. 1122, 1128 (1993).

182. See Charles Alan Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 207 (1969) (“[T]he basis for [lawyers’] position [on diversity] is not that they love the state courts less but that they love a choice of forum more.”).

183. See *supra* text accompanying note 41. I say “decisional laws” because even under the prior regime of *Swift v. Tyson*, 41 U.S. 1, 18–19 (1842), federal courts sitting in diversity were required to apply state statutory law.

184. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 90 (1938).

185. See Borchers, *supra* note 41, at 110–23 (elaborating on the point).

186. See, e.g., VAIRO, *supra* note 89, at 5–6 (describing proponents’ charge of “drive by certification” of class actions in some state courts).

courts offered respite from aberrational state substantive common law. And after *Erie*, they offer respite from aberrational state procedural law. Of course, what is “aberrational” is in the eye of the beholder. Diversity jurisdiction, supplemented by removal, as noted, empowers both sides to act, to a degree, on their view of state law.

There are simply innumerable factors that may influence a lawyer to choose one court over the other. One factor, undoubtedly, is the lawyer’s perception of the quality of the judges in the respective systems. And not simply the abilities of the judge, but of the judge’s ability to control a possibly biased jury. This concern raises the well-known “parity” debate, to which there is, as is also well known, no clear answer.¹⁸⁷ The elapsed time of pretrial litigation—through pleadings, motions, and discovery—may be significantly different in state and federal court. The discovery and evidentiary provisions may differ in the two tribunals. The local state bench may be particularly good or particularly unimpressive at various times. The state court system, or the local state court, may not be as inclined toward the “settlement culture” as federal courts increasingly are. If it is not, a party desiring to go to trial may prefer state court, while one preferring settlement may prefer federal court. The two systems may differ in terms of administrative support for the trial judge, such as the availability of adjunct personnel and case support through electronic platforms.

Not only is the list endless, but the weight accorded to the different factors will vary from case to case. Is it possible that a lawyer might make a forum selection decision for tactical advantage or based upon offensive stereotypes? Of course. We have no idea, however, how cases are affected by improper motives. In fact, we have no consensus on what are proper versus improper. Until we do—until someone proves that diversity jurisdiction is used in some normatively improper way (which that someone would need to define)—it seems prudent to let the lawyers decide.¹⁸⁸

In this regard, we should remember that the lawyer who makes a forum choice does so for the benefit of a client,¹⁸⁹ and is charged by professional

187. Dean Chemerinsky concluded that the debate about “parity” between federal judges and state judges “is unresolvable because parity is an empirical question for which there is no empirical answer.” Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236 (1988).

188. Some seem to assume that forum-selection choices are routinely abusive. *See, e.g.*, Crump, *supra* note 5, at 7 (“In most instances, only one party has a choice. And in many instances, one party or the other will benefit more from increased cost, delay, and bad judging.”).

189. Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 962, 965 n.26 (1995); *see also* Reed, *supra* note 2, at 302 (“Attributing self-interest to lawyers who favor diversity jurisdiction overlooks the point that it is the citizen-client whose interests are at stake and who wants to use the federal courts. The fact that the lawyer has the technical knowledge on which the client relies should not obscure the fact that the lawyer is merely acting for the client.”).

norms to represent that client zealously. It is the lawyer who uses the courts (not the academic who writes about the courts) who may have experienced the frustration of litigating in an unfriendly forum. Absent proof of abuse, common respect for a profession should counsel restraint in telling that lawyer about which forum choices are proper.

Those who attempted to abolish diversity jurisdiction ran into a raw political fact: if Congress goes too far in restricting choice of forum, the bar will fight back. And they should have understood that the bar should not be presumed to act in improper, self-serving ways. The bar's embrace of diversity can tell us a great deal about the relative merits of federal and state courts. Unfortunately, we have done little to plumb the reasons for that embrace.

Those who today urge rationalization of diversity doctrine should keep these things in mind. In addition, they must acknowledge that our 230 years of diversity jurisdiction have resulted in a national legal culture, one that features intersystemic interaction. This national legal culture is ingrained and pervasive. It is not immutable, perhaps, but should be altered only after due consideration.

D. THE LEGAL CULTURE OF DIVERSITY JURISDICTION

The late Professor David Shapiro wrote elegantly in 1977 about the symbiosis that has developed between federal and state courts because of the concurrent jurisdiction over diversity cases.¹⁹⁰ If anyone can improve upon what Professor Shapiro said, it is not I, so I will do little more than summarize.

Our country's long experience with concurrent jurisdiction has given rise to an inter-systemic relationship between the federal and state courts.¹⁹¹ The relationship changed in the wake of *Erie*, to be sure, but has thrived. Put simply, this "legal culture" or "legal process" justification for diversity jurisdiction posits that the two systems adjudicate and process state-law cases in different ways that ultimately complement and contribute to each other.

The fact that federal judges deciding diversity cases cannot decree the content of state law may be frustrating at times. Some federal appeals court judges favored the abolition of diversity because, after *Erie*, they merely played the role of "ventriloquist's dummies."¹⁹² The widespread adoption of

190. See generally Shapiro, *supra* note 179.

191. See generally ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009).

192. "[T]he worst part of diversity jurisdiction is that it debases the judicial process, reducing

certification schemes may exacerbate that characteristic by permitting the federal judge to ask the relevant state court for guidance.¹⁹³

In reality, however, the ventriloquist's dummy effect is likely overstated. There is support for the conclusion that federal judges sitting in diversity have had significant influence on the development of state law.¹⁹⁴ In many cutting-edge areas, the high court of a state may not have spoken in recent times, opening the door for the federal judge's "Erie guess" to be informed by recent developments elsewhere. At least on these occasions, the determination of the content of state common law may not be as quotidian as some thought.

But even when state law is clear, there is something to be said for the fact that diversity cases give federal judges a currency and experience with common law that is less rarely encountered in federal question cases.¹⁹⁵ Significant restriction of diversity jurisdiction would change the character of the federal courts' mix of cases, undoubtedly making it narrower and more technical, more removed from the law of contract and tort that governs so much of the daily life of the populace.¹⁹⁶

In addition to the synergy of having federal courts divine and apply state law,¹⁹⁷ there is the synergy of "competing" court systems. Lawyers who are in state court one week and federal court the next can compare the two and attempt to have one emulate the desirable practices of the other. This competitive model probably accounts for the widespread adoption of the Federal Rules of Civil Procedure in state courts.¹⁹⁸

federal judges to what Judge Frank has called 'ventriloquist's dummy to the court of some particular state' . . ." Herbert Wechsler, *Federal J. Jurisdiction and the Revision of the Judicial Code*, 13 L. & CONTEMP. PROBS. 216, 238–39 (1948). The reference to Judge Frank was to Jerome Frank, who served on the United States Court of Appeals for the Second Circuit from 1941 until 1957.

193. The certification procedure has proved more problematic in practice than many had hoped.

194. See, e.g., Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law* (N.Y. Univ. Sch. of L., Public Law & Legal Theory Research Working Paper No. 18-33, Oct. 2018); see also Robert A. Shapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1444 (1999) (discussing the benefits of "cross-pollination" between federal and state courts and the role of federal courts in the development of state law).

195. In his 1977 survey, Professor Shapiro found slightly higher support for diversity jurisdiction among district judges than among court of appeals judges. Shapiro, *supra* note 179, at 332–37. It may be that appellate judges are particularly frustrated by the need to follow state law, which trial judges may appreciate the opportunity to engage the common law.

196. See Shapiro, *supra* note 179, at 322 (summarizing the argument "that diversity jurisdiction is of considerable utility in keeping federal judges from becoming narrow technicians, specializing in esoteric federal statutes and occasional constitutional questions, and in helping them maintain closer touch with the mainstream of common law tort and contract litigation").

197. Of course, the converse is true as well. State courts routinely hear cases arising under federal law, because very few grants of federal question jurisdiction are exclusive.

198. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 707–19 (2016) (noting state court procedure largely mirrors federal practice).

It is a mistake, however, to believe that adoption of the Federal Rules in state courts makes federal and state practice identical. The Federal Rules have been amended many times in the past twenty-five years.¹⁹⁹ I am aware of no state that has adopted all of those amendments. Many states lack the administrative mechanisms to process so many amendments.²⁰⁰ Beyond that, states have rejected various provisions of the Federal Rules. For example, despite the passage of over a quarter century, almost no states have adopted the mandatory disclosure provisions of Federal Rule 26(a). Neither have states seen fit to adopt the interlocutory appeal provision for class certification decisions found in Federal Rule 23(f).

Even when federal and state provisions are drafted in identical terms, state courts are free to interpret them differently from federal courts. For example, in *Standard Fire Insurance Co. v. Knowles*,²⁰¹ the Court held that issue preclusion could not bind a state court regarding class certification because the state and federal courts differed on how to interpret the identical class action provision.²⁰² Another example is the ongoing debate in state courts about whether to embrace the Court's adoption of "plausibility" pleading for stating a claim under Federal Rule 8(a)(2).²⁰³ State courts have split on the issue²⁰⁴ but have done so only after robust debate—debate fostered by our dual systems of courts.

Efforts to rationalize diversity doctrine must consider any impact of change on the legal culture that has grown around diversity jurisdiction over 230 years.

199. In the first fifty-seven years of the Federal Rules, from 1938 through 1994, the Advisory Committee on the Civil Rules promulgated eighteen sets of amendments. From 1995 through 2020, the Advisory Committee promulgated twenty sets of amendments, effective, respectively, in 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2005, 2006, 2007, 2008, 2009, 2010, 2013, 2014, 2015, 2016, and 2020.

200. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1176 ("Acting individually, state judiciaries cannot match the rulemaking resources of the federal courts available through the U.S. Judicial Conference and the Federal Judicial Center.").

201. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013).

202. *Id.* at 592–94.

203. The plausibility pleading regime resulted from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

204. *Compare, e.g.,* *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 863 (Wash. 2010) ("The Supreme Court's plausibility standard is predicated on policy determinations specific to the federal trial courts."), *with* *Warne v. Hall*, 373 P.3d 588, 593–94 (Colo. 2016) (adopting plausibility pleading, *inter alia*, because doing so will be convenient for lawyers who litigate in both federal and state courts). Similarly, state courts in states adopting Federal Rule 23 regarding class actions are not required to adopt the interpretation of the commonality requirement of Rule 23(a)(2) from *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352–60 (2011).

CONCLUSION

Diversity jurisdiction survived concerted frontal assaults made from the mid- to late-twentieth century. It weathered criticism of academics and of some high-profile federal judges. Today, diversity jurisdiction represents a burgeoning percentage of the federal civil docket,²⁰⁵ and it is supported by an efficiency rationale that did not exist at the founding. Today, academics and judges seem relatively ambivalent toward, and some even accepting of, diversity jurisdiction. Today, we see efforts not to abolish diversity jurisdiction, but to rationalize the various threads of its doctrine.

These efforts should be informed by the lessons that should have been learned by those who sought to abolish diversity jurisdiction. First, diversity is not a free-standing phenomenon. It is part of a carefully constructed constitutional plan intended to promote the free flow of commerce and a national identity. Second, what is usually presented as the traditional justification for diversity is sclerotic and understates the value of this branch of federal jurisdiction. Third, as a matter of political power, the bar embraces diversity jurisdiction and will fight to keep it. At one level, we retain diversity for this reason. But the bar's embrace is more than a raw political fact. It likely manifests rational choices made in the interests of clients. At least, it should spur meaningful study of the interests served by diversity jurisdiction (study that remains to be done). And that study must appreciate that, over two centuries, an elaborate legal culture has emerged concerning the relations of state and federal courts.

Congress likely will never abolish diversity jurisdiction. From time to time, it will adjust the doctrine around the edges, such as raising the amount in controversy requirement. It will do so not to serve some grand underlying policy, but to placate the federal bench's concern for docket control while not angering the bar. This balance has been in place for over 230 years. No unsubstantiated claim that diversity has outlived its "purpose"—and no academic appeal to rationalize the rules governing diversity—will affect that political reality.

205. In 2001, 19.5% of new cases filed in federal district court invoked diversity of citizenship jurisdiction. By 2014, the percentage swelled to 34%, though in 2015 the percentage was down to 30.9%. FREER, *supra* note 72, at 198–99 n.14. The year 2020 saw a stunning increase in the number of civil cases filed in district court, which raised the percentage of diversity cases to 42.3%. *Table C—U.S. District Courts—Civil Statistical Tables for The Federal Judiciary*, U.S. CTS. (Dec. 31, 2020), <https://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2020/12/31> [https://perma.cc/66TH-QZSR]. The main reason was the pendency of tens of thousands of product liability cases involving allegedly defective ear plugs provided to military personnel. These cases were transferred pursuant to the multidistrict litigation statute, 28 U.S.C. § 1407, to the Northern District of Florida. *Id.*

