

Duke Law Journal

VOLUME 69

NOVEMBER 2019

NUMBER 2

BEYOND BIAS IN DIVERSITY JURISDICTION

SCOTT DODSON†

ABSTRACT

The long-running debate over the propriety and proper scope of diversity jurisdiction has always centered on the traditional justification for diversity jurisdiction: the need to avoid actual or perceived state court bias against out-of-state parties. Supporters of diversity jurisdiction assert that such bias continues to justify diversity jurisdiction, while opponents argue that it does not. This Article argues that both sides have it wrong. Supporters are wrong that out-of-state bias and its perception are sufficient to justify diversity jurisdiction today. Yet opponents are wrong that the lack of bias supports the abolition or extreme restriction of diversity jurisdiction. The problem is the centrality of the bias rationale, which has obscured more pertinent considerations in diversity debates. This Article aims to shift the debate about diversity jurisdiction away from the bias rationale and toward matters relevant to modern litigation, including facilitating multistate aggregation. This Article shows that moving beyond bias allows for more honest and legitimate debate of the propriety and scope of diversity jurisdiction, and it identifies promising areas for diversity reform in light of that new focus while remaining faithful to the Constitution.

TABLE OF CONTENTS

Introduction	268
I. The Origin and Entrenchment of the Bias Rationale	271
A. The Diversity Clause.....	271

Copyright © 2019 Scott Dodson.

† Geoffrey C. Hazard Jr. Distinguished Professor of Law and Associate Dean for Research, UC Hastings Law. I am grateful to those who commented on early drafts. I am also grateful for feedback received at the UC Hastings Law 10-10 Workshop.

B.	The Judiciary Act of 1789.....	279
C.	Entrenchment by the Supreme Court.....	281
II.	The Centrality of the Bias Rationale	283
A.	Legal Developments	284
B.	Academic Commentary.....	288
III.	Marginalizing the Bias Rationale	293
A.	Out-of-State Bias is Neither Widespread nor Strong	293
B.	Fear of Out-of-State Bias Does not Strongly Motivate Selection of Federal Court	296
C.	Federal Court Neutrality is Questionable	296
D.	Diversity’s Scope Exceeds the Bias Rationale.....	297
E.	Diversity’s Costs Exceed its Remedial Value	298
IV.	Refocusing the Debate.....	301
A.	Facilitating Aggregation.....	301
1.	<i>Benefits of Aggregation</i>	301
2.	<i>Diversity Jurisdiction and Aggregation</i>	303
B.	Other Benefits of Diversity Jurisdiction.....	308
C.	An Illustration: CAFA	310
V.	Reforming Diversity Jurisdiction	314
A.	Potential Reforms	314
1.	<i>The Forum-Defendant Bar</i>	315
2.	<i>The Complete Diversity Rule</i>	316
3.	<i>Citizenship Tests</i>	318
B.	Constitutional Constraints	321
	Conclusion.....	322

INTRODUCTION

Diversity jurisdiction—the grant of authority to federal courts to hear state law cases involving parties from different states—is enshrined in the Constitution and has been granted by statute since the Judiciary Act of 1789.¹ Most jurists accept that the primary and

1. See Scott Dodson & Philip A. Pucillo, *Joint and Several Jurisdiction*, 65 DUKE L.J. 1323, 1325 (2016) (stating that diversity jurisdiction “has been a mainstay of federal dockets for more than two hundred years”). This Article addresses only domestic diversity jurisdiction, not alienage jurisdiction, which presents unique foreign affairs issues and represents only a tiny fraction of cases. See Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT’L L. 1, 4–5 & n.19 (1996) (noting that alienage diversity implicates foreign affairs and is an issue in only a tiny fraction of cases); Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 121–22 (same).

traditional justification for diversity jurisdiction is to provide a neutral federal forum in cases presenting a risk that the state forum would be biased—or be perceived to be biased—against an out-of-state litigant.² This bias rationale has been tethered to diversity jurisdiction since the Founding Era, when Federalists defended the Diversity Clause on that ground,³ and it has been repeatedly accepted by the Court to the present day.⁴ The bias rationale has been used to explain the Supreme Court’s interpretation of the general diversity jurisdiction statute to require complete diversity, Congress’s decision to deem corporations to be citizens of the state of their principal place of business, and the removal statute’s bar on removal of diversity cases by in-state defendants.⁵

Throughout its long history, diversity jurisdiction has always been controversial.⁶ Unsurprisingly in light of its origins, perennial debates about diversity jurisdiction’s proper scope have centered around the bias rationale.⁷ Abolitionists seek to eliminate or minimize diversity jurisdiction on the ground that the bias rationale offers no justification for diversity jurisdiction today, while diversity jurisdiction supporters contend that the bias rationale remains a forceful justification.⁸

This Article argues that both sides are wrong. Supporters are wrong that the bias rationale continues to justify diversity jurisdiction today. This is because any evidence of bias is thin and regional; the fear of out-of-state bias plays only a minimal role in forum selection; the remedy of federal neutrality is suspect; the scope of diversity

2. See, e.g., Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 119–20 (2003) [hereinafter Bassett, *The Hidden Bias*] (calling state bias the “traditional, most common explanation of diversity jurisdiction’s purpose”); Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 IND. L.J. 181, 190 (1998) (referring to state bias as the “principal argument for diversity jurisdiction”).

3. See *infra* notes 11–71 and accompanying text.

4. See *infra* notes 72–84 and accompanying text.

5. See *infra* notes 85–107 and accompanying text.

6. See, e.g., James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 1 (1964) (“While there are other segments of federal jurisdiction as old as diversity, probably none is as controversial.”); James Bradley Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311, 316 (1891) (“Why is it that a United States court is given this duty of administering the law of another jurisdiction?”).

7. See Bassett, *The Hidden Bias*, *supra* note 2, at 119 (“Commentators have repeatedly debated the continued viability of diversity jurisdiction. These debates have tended to focus on . . . the existence of local bias . . .”).

8. See *infra* notes 108–34 and accompanying text.

jurisdiction exceeds any rational cure; and the costs of diversity jurisdiction are overwhelming.⁹

But opponents are also wrong to suppose that nothing else can justify diversity jurisdiction. To the contrary, the bias rationale is not the only justification—or even the most compelling justification—for diversity jurisdiction today. Promoting aggregation across state lines, in particular, is an important benefit of federal jurisdiction that diversity jurisdiction can facilitate. And other benefits of diversity jurisdiction—such as avoiding other kinds of state biases—also could justify federal jurisdiction.¹⁰

This Article therefore aims to shift the diversity jurisdiction debate away from its myopic focus on out-of-state bias and toward considerations that are more meaningful for modern civil litigation. Scholars, judges, and legislators should recognize that diversity jurisdiction can serve important purposes other than protecting against state bias toward out-of-state citizens. Of course, there are downsides to diversity jurisdiction, and, at the end of the day, it may be that the costs of diversity jurisdiction still outweigh its benefits in certain instances. But at least the debate would be more honest. And if freed from the bias rationale, the debate might reveal creative ways to put diversity jurisdiction to better use.

Part I of this Article lays out the origins and entrenchment of the bias rationale, revealing the foundation that has grounded diversity jurisdiction for more than two centuries. Part II shows how the bias rationale has shaped both legal developments and debates about the scope of diversity jurisdiction. Part III then confronts the merits of the bias rationale and argues, contrary to supporters of diversity jurisdiction, that the bias rationale is far too weak to justify modern diversity jurisdiction. Part IV takes aim at opponents of diversity jurisdiction, contending that other considerations—including the advantages of interstate aggregation—can bolster the case for diversity jurisdiction. With the debate refocused on the concerns of modern civil litigation, Part V stakes out areas for more productive diversity jurisdiction reform and shows that reform measures justified on grounds other than the bias rationale would be constitutional.

9. *See infra* notes 135–81 and accompanying text.

10. *See infra* notes 181–260 and accompanying text.

I. THE ORIGIN AND ENTRENCHMENT OF THE BIAS RATIONALE

This Part locates the origin of the bias rationale in the drafting and ratification of the Constitution and traces its entrenchment through the passage of the Judiciary Act of 1789 and subsequent Supreme Court opinions.

A. *The Diversity Clause*

Article III of the Constitution extends the judicial power of the United States to controversies “between Citizens of different States.”¹¹ The historical record reveals relatively little about the purpose of or motivations behind the Diversity Clause; the Framers appeared hardly to have debated it at all.¹² What historical record exists, however, does suggest that the Framers were motivated by a fear of state bias against out-of-state litigants and resulting interstate discord.

The Clause had its origins in Edmund Randolph’s Virginia Plan. All of the plans submitted to the Constitutional Convention provided for a federal judiciary, but only the Virginia Plan—which became the preferred template for discussion—included domestic diversity jurisdiction.¹³ Randolph introduced resolutions on May 29, 1787, to give lower federal courts jurisdiction in “cases in which foreigners or citizens of other States applying to such jurisdictions may be

11. U.S. CONST. art. III, § 2, cl. 1.

12. See 13E CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3601 (3d ed. 2019) (“Neither the debates of the Constitutional Convention nor the records of the First Congress shed any substantial light on why diversity jurisdiction was granted to the federal courts by the Constitution or why the First Congress exercised its option to vest that jurisdiction in the federal courts.”); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 *LAW & CONTEMP. PROBS.* 3, 3 (1948) [hereinafter Frank, *Historical Bases*] (“[T]he judiciary clauses were almost immune from strenuous criticism or discussion.”); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 *HARV. L. REV.* 483, 484 (1928) [hereinafter Friendly, *The Historic Basis*] (“A search of the letters and papers of the [Framers] does not reveal that they had given any large amount of thought to the construction of a federal judiciary. Certain it is that diversity of citizenship, as a subject of federal jurisdiction, had not bulked large in their eyes.”).

13. See Moore & Weckstein, *supra* note 6, at 2–3 (“[O]nly the plan presented by Governor Randolph of Virginia specifically included cases in which ‘citizens of other States’ may be interested.” (citation omitted)); see also Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 *L. & HIST. REV.* 451, 474–78 (2010) (discussing the Virginia Plan’s adoption of Madison’s “federal negative” as a way to prevent states from “thwarting and molesting each other” and the Plan’s embrace of “structural mechanisms dictating the relationship among different legislative powers”).

interested.”¹⁴ That proposal was tentatively adopted without discussion on June 4.¹⁵

The following day, however, John Rutledge of South Carolina and Roger Sherman of Connecticut moved to amend the provisions to eliminate all lower federal court jurisdiction on the ground that the state courts were sufficient as the sole courts of first instance,¹⁶ with the Supreme Court providing appellate review.¹⁷ James Madison opposed the motion and, with respect to the elimination of diversity jurisdiction, argued that appellate review would not remedy biased decisions in state courts. Nevertheless, the motion carried, 5–4.¹⁸ Madison and James Wilson, not to be cowed, offered an alternative that would restore constitutional authorization of lower federal court jurisdiction, including diversity jurisdiction, but would also give Congress the option not to create lower federal courts at all.¹⁹ This compromise satisfied the delegates and was approved 8–2.²⁰

On June 13, the Convention amended the resolutions to extend federal jurisdiction to “questions which involve the national peace and harmony”²¹ and reported them to the Committee of Detail.²² Some have opined that this amendment was not a repudiation of diversity jurisdiction but rather a punt to the Committee of Detail to work out specifics in light of the general principle of interstate “harmony,” of

14. James Madison, Resolutions Proposed by Mr. Randolph in Convention (May 29, 1787), in 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20, 22 (Max Farrand ed., 1911).

15. Frank, *Historical Bases*, *supra* note 12, at 10.

16. James Madison, In Committee of the Whole (June 5, 1787), in 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 119, 124–25.

17. See James Madison, Friday June 15th. <1787>, in 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 244 (providing that the “supreme Tribunal” of the federal judiciary “shall have authority . . . by way of appeal in the dernier resort in all cases [inter alia] . . . in which foreigners may be interested”).

18. James Madison, In Committee of the Whole, *supra* note 16, at 124–25; Frank, *Historical Bases*, *supra* note 12, at 10.

19. Debates in the Federal Convention of 1787 As Reported by James Madison, in H.R. Doc. No. 69-398 (1926), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 109, 158–59 (Charles C. Tansill ed., 1927).

20. *Id.* at 159.

21. James Madison, In Committee of the Whole, *supra* note 16, at 223–24. For commentary on the meaning of the idea of “national harmony,” see generally Jesse M. Cross, *National “Harmony”: An Inter-Branch Constitutional Principle and its Application to Diversity Jurisdiction*, 93 NEB. L. REV. 139 (2014).

22. For more detail about the various discussions and amendments proposed, see DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, *supra* note 19, at 198–203.

which diversity jurisdiction was seen as a part.²³ Indeed, drafts produced in the Committee of Detail contained specific diversity language.²⁴ Subsequently, the Committee produced, and the Convention accepted without contest, the Diversity Clause.²⁵

Ratification proved far more contentious than the drafting. The Diversity Clause was vehemently attacked during the state ratifying conventions.²⁶ Some attacks were part of a more general challenge to lower federal court jurisdiction as a whole.²⁷ In Virginia, Patrick Henry and George Mason predicted that expansive federal court jurisdiction would destroy state courts. Henry said:

I see arising out of that paper, a tribunal, that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen; and from the extensive jurisdiction of these paramount courts, the state courts must soon be annihilated.²⁸

Mason echoed that federal jurisdiction would “absorb and destroy the judiciaries of the several States”²⁹ and that the federal courts’ “effect and operation will be utterly to destroy the state governments.”³⁰ The basic fear of state court displacement was largely

23. See, e.g., Bassett, *The Hidden Bias*, *supra* note 2, at 125–26 (expressing this opinion); 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, 93 (1993) (same); Friendly, *The Historic Basis*, *supra* note 12, at 485–86 (same); Moore & Weckstein, *supra* note 6, at 3 (same).

24. Committee of Detail, in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 129, 146–47, 173.

25. *Id.* at 146–47, 172–73; James Madison, In Convention (Aug. 6, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 177, 186–87; Journal (Aug 27, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 422, 424–25.

26. Friendly, *The Historic Basis*, *supra* note 12, at 487.

27. See, e.g., James Madison, In Committee of the Whole, *supra* note 16, at 119, 125 (Pierce Butler) (proclaiming that the establishment of lower federal courts would incite a “revolt”); *id.* at 124 (John Rutledge) (calling lower federal courts an “unnecessary encroachment on the jurisdiction” of the state courts); *id.* at 125 (Roger Sherman) (same); James Madison, In Convention (July 18, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 40, 45–46 (Luther Martin) (same).

28. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 542 (Jonathan Elliot ed., 2d. ed. 1836) [hereinafter ELLIOT’S DEBATES].

29. George Mason (Sept. 15, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 636, 638.

30. 3 ELLIOT’S DEBATES, *supra* note 28, at 521 (George Mason). These were alarmist overstatements; even after the passage of the Judiciary Act extending diversity jurisdiction to the lower federal courts, state courts maintained active dockets. See Friendly, *The Historic Basis*, *supra* note 12, at 489–90 (recounting similar sentiments).

caused by diversity jurisdiction, a grant seen as being expansive and potentially preemptive of state court jurisdiction.³¹ That fear was enough for Mason to declare diversity jurisdiction “improper and inadmissible.”³²

The Antifederalists also targeted diversity jurisdiction on its own grounds. Some worried that diversity jurisdiction carried with it an implied power by federal courts to make federal law that would displace state law in such cases.³³ Mason pointed to the offensive nature of diversity jurisdiction as an affront to the judgment and dignity of state courts:

[Federal] *jurisdiction* further extends to controversies between citizens of different states. Can we not trust our state courts with the decision of these? If I have a controversy with a man in Maryland, . . . are not the state courts competent to try it? Is it suspected that they would enforce the payment if unjust, or refuse to enforce it if just? The very idea is ridiculous.³⁴

Mason and others raised the logistical difficulties associated with travel to potentially distant federal courthouses.³⁵ Mason waxed, “What! [C]arry me a thousand miles from home—from my family and business—to where, perhaps, it will be impossible to prove that I paid it?”³⁶ And in North Carolina, Samuel Spencer stated:

Nothing can be more oppressive than the cognizance with respect to controversies between citizens of different states. In all cases of appeal, those persons who are able to pay had better pay down in the

31. See *The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention, Held at Philadelphia, in 1787*, by Luther Martin, Esquire, Attorney General of Maryland, and one of the Delegates in the Said Convention, in 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 172, 220–21 (“Should a citizen of Virginia, Pennsylvania, or any other of the United States, be indebted to, or have debts due from a citizen of this State [of Massachusetts] . . . it is only in the courts of Congress that either can apply for redress.”).

32. 3 ELLIOT’S DEBATES, *supra* note 28, at 523 (George Mason).

33. See Friendly, *The Historic Basis*, *supra* note 12, at 490 (noting the Antifederalists’ argument “that since the Constitution and laws made in pursuance thereof were declared to be the supreme law of the land, the states must bow to this congressional legislation, even in suits between citizens of the same state in the state courts”).

34. 3 ELLIOT’S DEBATES, *supra* note 28, at 526.

35. See Friendly, *The Historic Basis*, *supra* note 12, at 490 (“The main theme . . . was rather that litigation in the new courts would be so expensive and subject to such numerous and costly appeals that the poor suitor could not obtain justice.”).

36. 3 ELLIOT’S DEBATES, *supra* note 28, at 526.

first instance, though it be unjust, than be at such a dreadful expense by going such a distance to the Supreme Federal Court.³⁷

So vocal were these objections that Virginia proposed eliminating diversity jurisdiction from the Constitution,³⁸ and Massachusetts and New Hampshire proposed adding an amount-in-controversy requirement.³⁹

Federalists defended diversity jurisdiction by raising the potential for state bias against out-of-state litigants and for the interstate discord that might occur as a result. In Virginia, Madison argued:

I sincerely believe this provision will be rather salutary than otherwise. It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. . . . A citizen of another state might not chance to get justice in a state court.⁴⁰

And Alexander Hamilton, in *The Federalist*, wrote:

It seems scarcely to admit of controversy, that the judiciary authority of the union ought to extend to these several descriptions of cases. . . . [including] all those in which the state tribunals cannot be supposed to be impartial and unbiased. . . . [Federal courts, by contrast,] having no local attachments, will be likely to be impartial between the different States and their citizens The reasonableness of the agency of the national courts, in cases in which the state tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts, as the proper

37. 4 ELLIOT'S DEBATES, *supra* note 28, at 138; *see also id.* at 143 (M'Dowall of North Carolina) ("Can it be supposed that any man, of common circumstances, can stand the expense and trouble of going from Georgia to Philadelphia, there to have a suit tried?").

38. *See* The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 27, 1788), *in* 3 *id.* at 660 (proposing a constitutional amendment that did not list diversity jurisdiction under the United States' judicial power).

39. *E.g.*, Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Feb. 6, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 28, at 177 (proposing amount-in-controversy requirements for the Supreme Court and the federal courts); 1 ELLIOT'S DEBATES, *supra* note 28, at 322, 323, 326 (documenting Massachusetts's and New Hampshire's ratifications of amount-in-controversy requirements).

40. 3 ELLIOT'S DEBATES, *supra* note 28, at 533 (James Madison).

tribunals for the determination of controversies between different states and their citizens.⁴¹

Federalists tied this risk of state bias against out-of-state litigants to more substantial risks to the political and economic future of the new nation. Hamilton continued:

The power of determining causes . . . between the citizens of different states, is . . . essential to the peace of the Union. . . . [I]n order to the inviolable maintenance of that equality of privileges and immunities, to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases, in which one state or its citizens are opposed to another state or its citizens.⁴²

In North Carolina, William Davie echoed these concerns: “The security of impartiality is the principal reason for giving up the ultimate decision of controversies between citizens of different states.”⁴³ John Marshall of Virginia was more circumspect, arguing that a federal forum removed animosity between states that might result from a state court judgment.⁴⁴

The Pennsylvania Federalists made a more economic connection to diversity jurisdiction. James Wilson argued that local concerns regarding commercial disputes would stymie national economic expansion, invoking the merchant whose “property lie[s] at the mercy of the laws of Rhode Island” and the creditor “who has his debts at the mercy of tender laws in other states.”⁴⁵ “[I]s it not necessary,” he queried, “if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort?”⁴⁶

Despite these rejoinders, the Federalists’ defense of diversity jurisdiction was less than wholehearted. In Virginia, Madison admitted: “As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to the state courts.”⁴⁷ Edmund Pendleton was even

41. THE FEDERALIST NO. 80, at 411, 413–14 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

42. *Id.* at 413.

43. 4 ELLIOT’S DEBATES, *supra* note 28, at 159 (William Richardson Davie).

44. 3 *id.* at 557 (Marshall) (arguing that diversity jurisdiction would “preserve the peace of the Union” by avoiding “disputes between the states”).

45. 2 *id.* at 491–92 (Wilson).

46. *Id.* at 491.

47. 3 *id.* at 533 (James Madison).

more deferential: “I think, in general [diversity disputes] might be left to the state tribunals; especially as citizens of one state are declared to be citizens of all. I think it will, in general, be so left by the regulations of Congress.”⁴⁸ And John Marshall distanced himself from the Diversity Clause: “Were I to contend that this was necessary in all cases, and that the government without it would be defective, I should not use my own judgment.”⁴⁹

The debate about the problem of state court bias against out-of-state litigants was related to an undercurrent of concern involving state bias against creditors—specifically, out-of-state creditors. In a famous article published in 1928, Henry Friendly argued that the lack of any evidence of state court bias against out-of-state litigants at the time,⁵⁰ coupled with Federalists’ tepid defense of diversity jurisdiction during ratification, suggested that the Diversity Clause was devised primarily to combat state lawmaking bias against creditors.⁵¹ Notwithstanding some wrangling over the accuracy of Friendly’s premise that no evidence of state court bias existed,⁵² Friendly has a point.⁵³ Creditor–

48. *Id.* at 549 (Edmund Pendleton).

49. *Id.* at 556.

50. Friendly, *The Historic Basis*, *supra* note 12, at 493 (noting that “[t]he very form in which [Madison’s] argument is stated throws doubts on the sincerity of those propounding it” because even “such information as we are able to gather from the reporters entirely fails to show the existence of prejudice on the part of the state judges”). This is in some contrast to bias against aliens. *See* Frank, *Historical Bases*, *supra* note 12, at 24 (“There can be no doubt, for example, of direct bias in the administration of justice against British creditors in Virginia.”). *But see* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996) (“Available data, however, do not support the conclusion that xenophobia is rampant in American courts.”).

51. Friendly, *The Historic Basis*, *supra* note 12, at 496–97 (“[W]e may say that the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction”); *see also* Frank, *Historical Bases*, *supra* note 12, at 22, 24–28 (identifying commercial interests as a basis for diversity jurisdiction).

52. In 1931, Hessel E. Yntema and George H. Jaffin pointed out that the dearth of evidence of state bias was explainable by, among other things, the rarity of interstate litigation in the 1700s. *See* Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 875–76 (1931). Some years later, John Frank offered a reconciliation between Yntema and Jaffin and Friendly, suggesting that although the Founding Era proponents of diversity jurisdiction did not have evidence of state bias at the time, they could reasonably predict that state bias against out-of-state litigants would likely arise as the Union matured. *See* Frank, *Historical Bases*, *supra* note 12, at 23–27 (“The diversity clauses were based on . . . anticipation more largely than on experience.”).

53. *See, e.g.*, FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 9 (1927) (highlighting that even a creditor’s subjective evaluation of a court’s impartiality could “undermine[] the sense of security necessary for commercial intercourse”); Felix Frankfurter, *Distribution of Judicial Power*

debtor relations were a brooding economic, social, and political issue in the years following the Revolutionary War.⁵⁴ The Framers did worry about anticreditor state laws,⁵⁵ and, at the time, there was significant uncertainty about whether federal courts, if granted diversity jurisdiction, would have to follow and enforce state commercial laws.⁵⁶ But regardless of the true motivations,⁵⁷ proponents tended to couch diversity justifications in terms of out-of-state bias, even if that out-of-state bias was thought to be directed at creditors.⁵⁸

Between United States and State Courts, 13 CORNELL L.Q. 499, 520 (1928) (agreeing that commercial concerns likely played a role in driving diversity jurisdiction).

54. PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* 115 (1974); MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781–1789*, at 303–06 (1950).

55. 4 ELLIOT'S DEBATES, *supra* note 28, at 157 (William Richardson Davie) (accusing states of passing laws discriminating against out-of-state creditors and supposing that federal courts might be less inclined to enforce those laws); *id.* at 159 (William Richardson Davie) ("It is necessary, therefore, in order to obtain justice, that we recur to the judiciary of the United States, where justice must be equally administered, and where a debt may be recovered from the citizen of one state as soon as from the citizen of another."); The Virginia Convention (June 20, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1427–28 (statement of Edmund Pendleton) (defending diversity jurisdiction as a way to combat state anticreditor laws); 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 220–21 (Luther Martin) ("Should a citizen of [any state], be indebted to, or have debts due from a citizen of this State . . . in consequence of commercial or other transactions, it is only in the courts of Congress that either can apply for redress."). Admittedly, the anticreditor bias rationale crossed over between legislatures and courts. *See* 2 ELLIOT'S DEBATES, *supra* note 28, at 491 (James Wilson) ("[I]f it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort?").

56. *Compare, e.g.*, Letter from Agrippa, Mass. Gazette, Dec. 14, 1787, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 79, 79–80 (Herbert J. Storing ed., 1981) (arguing that federal law would control contract claims in diversity cases), *with* 3 ELLIOT'S DEBATES, *supra* note 28, at 525–26 (Mason) (asserting that state law will control contract claims in diversity cases). Although the Judiciary Act of 1789 mandated that the new federal courts at least must apply state *statutory* law in diversity cases, Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2018)), the Supreme Court in 1842 held that federal courts sitting in diversity need not follow state *common* law. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842). *Swift* was famously overruled in 1938 by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938).

57. Robert Jones has offered yet another explanation: that diversity jurisdiction was designed to advance national interests by taking important cases away from state-level *juries*, who were often handpicked by local sheriffs, and placing them in federal courts, where federal marshals could select nationalist jurors. *See generally* Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997 (2007).

58. *See* Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1385 (1992) (characterizing debtor favoritism as a kind of state bias against out-of-staters because the creditors were likely to be out-of-staters).

In the end, although the state conventions did expose divisions about the Diversity Clause that stood in contrast to the general agreement about other grants of lower federal court jurisdiction such as admiralty,⁵⁹ those debates were minor when compared to the level of controversy over other parts of the proposed Constitution.⁶⁰ Perhaps the drafting compromise of leaving the scope of lower court diversity jurisdiction to Congress mollified some,⁶¹ but it is also likely that more pressing matters sidelined the Diversity Clause. Nevertheless, the ratification debates offer the best available evidence of the origins of the bias rationale.

B. *The Judiciary Act of 1789*

Notwithstanding assurances that Congress would be circumspect about granting lower federal court jurisdiction, the First Congress quickly passed the Judiciary Act, whose “transcendent achievement”⁶² was the establishment of the lower federal courts and the extension of diversity jurisdiction to them.⁶³ After all, because the Act did not grant general federal question jurisdiction to the new lower federal courts, those courts “would have had very little to do” without diversity jurisdiction.⁶⁴

One of the Judiciary Act’s primary drafters, Oliver Ellsworth, planned to extend diversity jurisdiction to all cases involving citizens of different states, but the final product was not quite so broad. The initial

59. Frank, *Historical Bases*, *supra* note 12, at 9 (“The experience of the Confederation convinced virtually every conscientious patriot of the 1780’s that the admiralty jurisdiction ought to be totally, effectively, and completely in the hands of the national government; and an extended search has not revealed a criticism from any contemporary source of the [grant of] admiralty jurisdiction.”).

60. *See id.* at 3 n.1 (admonishing that the debate about diversity jurisdiction “must be seen in proportion”). *But see* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81 (1923) (“There was no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists . . . as that which gave them power over ‘controversies between citizens of different States.’”).

61. *See* Warren, *supra* note 60, at 67–68 (explaining that this compromise was struck); 13E WRIGHT ET AL., *supra* note 12, § 3601 (explaining that Article III, Section 2, Clause I of the Constitution grants Congress the power to vest diversity jurisdiction in the federal courts, which it did by passing the Judiciary Act of 1789).

62. FRANKFURTER & LANDIS, *supra* note 53, at 4.

63. Judiciary Act of 1789, ch. 20, §§ 9–13, 1 Stat. 73, 73–78.

64. HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 141 (1973) [hereinafter FRIENDLY, *FEDERAL JURISDICTION*]; *see also* Kramer, *supra* note 1, at 97 (“When the federal courts were created, deciding diversity cases was one of their most important functions.”).

draft provided for diversity jurisdiction where a “citizen of another State than that in which the suit is brought is a party,”⁶⁵ but the final version became “[where] the suit is between a citizen of the State where the suit is brought, and a citizen of another State.”⁶⁶ The debate records reflect a suggestion to limit diversity jurisdiction to admiralty cases, but that suggestion evidently failed to carry the day.⁶⁷ In addition, defendants were given the right to remove a case when the defendant was an out-of-state citizen sued by an in-state plaintiff.⁶⁸

Although the debate records pertaining to the Judiciary Act’s grant of diversity jurisdiction are sparse, its language and quick passage support the inference that the drafters had the bias rationale in mind.⁶⁹ Charles Warren, one of the principal historians of the Judiciary Act, wrote:

The chief and only real reason for this diverse citizenship jurisdiction was to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in a State Court against foreigners or non-citizens. The Federal Court was to secure to a non-citizen the application of the same law which a State Court would give to its own citizens, and to see that within a State there should be no discrimination against non-citizens in the application of justice. There is not a trace of any other purpose than the above to be found in any of the arguments made in 1787–1789 as to this jurisdiction.⁷⁰

65. Warren, *supra* note 60, at 77–78.

66. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. at 78; *see also* Warren, *supra* note 60, at 79 (explaining that the original language, in which “neither the plaintiff nor the defendant need be a citizen of the State where the suit was brought” was “felt to be far too liberal a scope for Federal jurisdiction”).

67. Borchers, *supra* note 23, at 100–02.

68. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, at 79; *see also* Warren, *supra* note 60, at 90–91 (explaining the evolution of § 12 of the Draft Bill).

69. *See* Friendly, *The Historic Basis*, *supra* note 12, at 501 (asserting that the denial of federal jurisdiction “where neither party resided in the state where suit was brought” shows that the purpose of diversity jurisdiction was to prevent “local prejudice”); *Judiciary Act of 1789*, NAT’L ARCHIVES FOUND., <https://www.archivesfoundation.org/documents/judiciary-act-1789> [<https://perma.cc/EG9T-AVD2>]. Other motivations likely existed, including the promotion of national power by giving the new federal courts respectable dockets. *See* AM. LAW. INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 49 (1969) [hereinafter *ALI STUDY*] (asserting that one of the most important concerns in establishing the federal courts was to “enhance[] awareness in the people of the existence of the new and originally weak central government”).

70. Warren, *supra* note 60, at 83.

Though Warren's conclusion suffers from some hyperbole, it does reflect the likelihood that the bias rationale was a prime instigator of statutory diversity jurisdiction.⁷¹

C. *Entrenchment by the Supreme Court*

Whatever the actual motivations of the Framers, the ratifiers, and the First Congress, the Supreme Court and prominent commentators have entrenched the bias rationale in diversity jurisdiction lore.⁷² In the 1809 case of *United States v. Deveaux*,⁷³ Chief Justice John Marshall identified both bias and the risk of bias as targets of diversity jurisdiction:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.⁷⁴

Seven years later, Justice Story wrote in *Martin v. Hunter's Lessee*:⁷⁵

The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between . . . citizens of different states . . . it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at

71. Those who hoped the federal courts would become a refuge from state anticreditor legislation would have been disappointed by the Judiciary Act's inclusion of the Rules of Decision Act, which mandated that the new federal courts must apply state law in diversity cases. See Judiciary Act of 1789, § 34, 1 Stat. 73, at 92 (codified as amended at 28 U.S.C. § 1652 (2018)).

72. See Bassett, *The Hidden Bias*, *supra* note 2, at 130–31 (“[T]he ‘local bias’ notion subsequently has become bound up in, and indeed integral to, the very idea of diversity jurisdiction.”); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1460 (2008) (“Early on, however, the Supreme Court embraced [the bias rationale], and the Court has never abandoned it.”).

73. *United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).

74. *Id.* at 87.

75. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

least, of those cases should not have been left to the cognizance of the state courts.⁷⁶

The Supreme Court has adhered to these sentiments repeatedly since then.⁷⁷

And many commentators throughout the ages have also identified diversity jurisdiction's purpose as preventing state bias against out-of-state litigants. For example, Justice Joseph Story emphasized, in his famous *Commentaries on the Constitution* in 1833, that diversity jurisdiction was designed, and was necessary, to forestall the expectation that state courts would be biased in favor of in-state citizens.⁷⁸ The great Professors James William Moore and Donald Weckstein asserted in 1964 that “[t]he traditional view is that diversity jurisdiction was established to provide a forum for the determination of controversies between citizens of different states which would be free from local prejudice or influence,”⁷⁹ and they argued that diversity jurisdiction was essential to securing national harmony.⁸⁰ More recently, in 2006, Professor Douglas Floyd wrote:

The protection of out-of-state litigants against local bias was the only justification alluded to by the Framers for Article III's controversial intrusion on the historic jurisdiction of state courts by permitting

76. *Id.* at 347.

77. For examples, in chronological order, see *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855) (“The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different states, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners.”); *Burgess v. Seligman*, 107 U.S. 20, 34 (1883) (explaining that diversity jurisdiction was designed “to institute independent tribunals, which . . . would be unaffected by local prejudices”); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (“The object of . . . conferring upon the circuit courts . . . jurisdiction of controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides.”); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) (“Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state.”); *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945) (“Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias.”); and *Hertz Corp. v. Friend*, 559 U.S. 77, 85 (2010) (identifying “diversity jurisdiction’s basic rationale” as “opening the federal courts’ doors to those who might otherwise suffer from local prejudice against out-of-state parties”).

78. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 493, 629–31 (1833).

79. Moore & Weckstein, *supra* note 6, at 15.

80. *Id.* at 18 (“There seems little doubt that the independent national judiciary exercising jurisdiction over controversies between citizens of different states has been a cohesive force, during both quiet and tumultuous times, holding this Nation together under the abiding principle of justice under law.”).

federal courts to resolve cases turning solely on issues of state law where litigants were of diverse citizenship. The diversity jurisdiction was said to be necessary to ensure the availability of [impartial] national tribunals⁸¹

To be clear, academic acceptance of both the origins of the bias rationale and its continuing viability is nuanced and adulterated. Nevertheless, the bias rationale remains the “stock rationale” for diversity jurisdiction⁸²: it is taught in prominent law school casebooks⁸³ and “continues to serve as a modern-day justification for diversity jurisdiction.”⁸⁴

II. THE CENTRALITY OF THE BIAS RATIONALE

In light of this history, it is unsurprising that questions and debates about diversity jurisdiction and its proper scope have focused on the policy goal of mitigating state bias—or the perception of bias—against out-of-state litigants.⁸⁵ That is not to say that other justifications for

81. C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487, 500 (2006).

82. Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdiction Reform*, 156 U. PA. L. REV. 1823, 1847 (2008) [hereinafter Purcell, *The Class Action Fairness Act*].

83. See, e.g., RICHARD D. FREER ET AL., CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 181 (5th ed. 2008) (“The orthodox view is that diversity jurisdiction provides a neutral forum It provides a federal forum for an out-of-state litigant who feared that she might be the victim of local bias, or be ‘hometowned,’ if forced to litigate before the locally selected state court judge.”); JOEL WM. FRIEDMAN & MICHAEL G. COLLINS, THE LAW OF CIVIL PROCEDURE: CASES AND MATERIALS 186 (3d ed. 2010) (stating that diversity jurisdiction has historically been based on the idea “that since out-of-staters . . . could be victimized by the ‘home field advantage’ enjoyed by forum citizens, they deserve the opportunity to bring their claims . . . before a federal judge [who will be] less amenable to local prejudices, pressures, and concerns”); RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN & JAMES E. PFANDER, CIVIL PROCEDURE: A MODERN APPROACH 869 (7th ed. 2018) (“Although the historical record is rather thin on the question, Article III apparently provides for diversity and foreign national jurisdiction to afford a safety valve against state court prejudice against outsiders.”).

84. David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1263 (2007).

85. See Bassett, *The Hidden Bias*, *supra* note 2, at 119 (“Commentators have repeatedly debated the continued viability of diversity jurisdiction. These debates have tended to focus on . . . the existence of local bias”); Borchers, *supra* note 23, at 79 (“The consensus is that diversity has existed and exists to provide a neutral forum for out-of-staters against perceived local bias by state courts.”); see also 13E WRIGHT ET AL., *supra* note 12, § 3601 (noting “the traditional explanation, and the one most often cited by federal judges and legal scholars, of the purpose of the constitutional provision for diversity of citizenship jurisdiction and its immediate congressional implementation—the fear that state courts would be prejudiced against out-of-state litigants”). This policy goal is almost always contrasted with the countervailing burden on federal

diversity jurisdiction have not been proffered.⁸⁶ But the bias rationale is a central feature of defenses of and attacks on diversity jurisdiction, shaping both the development of the law and academic debates about its reform. This Part illustrates some of those key debates.

A. *Legal Developments*

A number of key legal developments showcase the bias rationale's relevance to diversity jurisdiction: the complete diversity requirement, corporate citizenship, and the forum-defendant bar to removal.⁸⁷

caseloads with the inclusion of purely state law cases. See Bassett, *The Hidden Bias*, *supra* note 2, at 119.

86. As for other justifications, some have pointed to biases regarding characteristics other than state citizenship. See *infra* notes 224–37 and accompanying text. Others have lauded the uniformity and familiarity of federal procedures. See Anthony Michael Sabino, Michael A. Sabino & James N. Sabino, *Americold, Diversity Jurisdiction, and Modern Business Entities*, 16 J. IN'TL BUS. & L. 165, 208 (2017). *But cf.* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 707–19 (2016) [hereinafter Dodson, *Gravitational Force*] (arguing that state procedure tends to mimic federal procedure). Still others have suggested that federal court engagement with state law benefits federal courts by keeping them close to their states' common law and benefits state law by allowing the pronouncements of the federal courts to provide guidance. See John Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 11–12 (1963) [hereinafter Frank, *Maintaining Diversity Jurisdiction*]; David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 322–26 (1977); Carl E. Stewart, *Diversity Jurisdiction: A Storied Past, a Flexible Future*, 63 LOY. L. REV. 207, 226 (2017) (“[D]iversity cases keep federal judges tied to their state law roots.”). However, the breadth of federal law and the availability of supplemental jurisdiction appears to offer similar benefits without the need for diversity jurisdiction and the resulting federalism friction. See Kramer, *supra* note 1, at 105, 108 (making this point). Still others suggest that some vertical forum shopping might be good to create a competitive market and spur the improvement of both state and federal courts, see Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513, 540 (1954), though it is not clear that courts care about docket share in an economic sense. Finally, some have suggested that federal courts offer better adjudicative quality, see Moore & Weckstein, *supra* note 6, at 21–22; Shapiro, *supra*, at 328–29, but the record of federal court interpretations of state law is decidedly mixed, see Frank Chang, Note, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 GEO. WASH. L. REV. 251, 266 (2017) (offering examples of incorrect *Erie* guesses).

87. Other examples exist, including failed and unworkable attempts to tie diversity jurisdiction to an actual showing of bias. See FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (1990) (recounting the 1948 elimination of the removal requirement of a showing of bias); see also 13E WRIGHT ET AL., *supra* note 12, § 3601 (detailing the role of bias in diversity jurisdiction's history); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & CONTEMP. PROBS. 216, 239–40 (1948). An argument can be made that the amount-in-controversy requirement is a proxy for the identification of controversies whose high value is likely to entice the most bias. Congress has periodically raised the threshold. See Act of Oct. 19, 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (\$75,000); Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4642 (\$50,000); Act of July 25, 1958, § 2, 72 Stat. 415 (\$10,000); Judiciary Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (\$3,000); Act of March 3, 1887, chs. 1–2, 24 Stat. 552–53 (\$2,000).

The first example involves the complete diversity rule. In the 1806 case *Strawbridge v. Curtiss*,⁸⁸ the Supreme Court held—or, at least, has long been interpreted to have held—that the diversity jurisdiction statute required complete diversity: that all plaintiffs must have citizenships different from all defendants.⁸⁹ Although *Strawbridge* does not tie its complete diversity rule to state bias, later Court opinions and academic commentators have reasoned that *Strawbridge* reflects the premise that the presence of same-state opponents should neutralize any out-of-state bias, obviating the need for federal diversity jurisdiction.⁹⁰

The second example involves corporate citizenship, which for many years was defined neither in the Constitution nor in the diversity statute. In 1844, the Court concluded that corporations were deemed citizens, for diversity jurisdiction purposes, solely of their state of incorporation.⁹¹ Corporations could incorporate in a state without doing business in that state, however. And as commerce expanded

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

89. *See id.* at 267 (“[E]ach distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts.”); *see also* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S FEDERAL COURTS* 1424 (7th ed. 2015) (questioning the interpretation of *Strawbridge* but acknowledging that “the decision has consistently been interpreted more broadly . . . as requiring ‘complete’ diversity”).

90. For example, in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Court noted:

The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action.

Id. at 553–54. *See also* 13E WRIGHT ET AL., *supra* note 12, § 3605 (explaining that “[t]he presumed theory behind the original grant of diversity jurisdiction . . . was to provide a neutral, national forum for cases in which there would be a danger of bias in a state court” and that “[t]his justification . . . does not apply to cases in which there are citizens from the same state on opposing sides”); Burbank, *supra* note 72, at 1460 & n.79 (“In cases kept from federal court by [the complete diversity rule], a state court intent on disfavoring an out-of-state citizen would also have to disfavor one of its own.”); David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 18 (1968) (“The assumption apparently underlying *Strawbridge* is that the presence of Massachusetts people on both sides of a case will neutralize any possibility of bias affecting litigants from other states.”).

91. *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 554 (1844); *see also* *Steamship Co. v. Tugman*, 106 U.S. 118, 120–21 (1882) (citing *Louisville, Cincinnati & Charleston R.R.*, 43 U.S. (2 How.) 497, for the same legal presumption that a suit by or against a corporation is considered a suit by or against citizens of the state whose laws created the company).

after the Civil War, corporations increasingly did business in many states in which they were not incorporated, and thus of which they were not considered citizens. In 1928, the Court decided *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,⁹² and held that a corporation was a citizen only of its state of incorporation even when the corporation did no business there and did nearly all of its business in the state where its litigation opponent held citizenship.⁹³

Black & White Taxicab raised concern in Congress, which thought the Court's decision was "at odds with diversity jurisdiction's basic rationale, namely, opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties,"⁹⁴ because a local corporation could incorporate away from its principal place of business to take advantage of diversity jurisdiction in the state where it was doing most of its business.⁹⁵ A local corporation suffered no out-of-state bias, the rationale goes, in its home state of business. Congress overrode *Black & White Taxicab*'s "fictional premise that a diversity of citizenship exists"⁹⁶ in 1958 by amending the diversity statute to expressly provide that a corporation was a citizen of both its state of incorporation and the state of its principal place of business.⁹⁷

92. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

93. *Id.* at 522–25.

94. *Hertz Corp. v. Friend*, 559 U.S. 77, 85 (2010).

95. See S. REP. NO. 72-530, at 4 (1932) (characterizing corporations' practice of incorporating and doing business in different states as one which "often occurs simply for the purpose of being able to have the advantage of choosing between two tribunals in case of litigation"). Academic commentary was similarly negative. See Warren, *supra* note 60, at 90 (calling the case a "malignant decision").

96. H.R. REP. NO. 85-1706, at 3 (1958); S. REP. NO. 85-1830, at 3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101; see also H.R. REP. NO. 85-1706, at 4; S. REP. NO. 85-1830, at 4 ("Whatever the effectiveness of this rule, it was never intended to extend to local corporations which, because of a legal fiction, are considered citizens of another State.").

97. Act of July 25, 1958, § 2, 72 Stat. 415, 415 (codified at 28 U.S.C. § 1332(c) (2018)). Although Congress used the bias rationale to justify the amendment, Congress may have been motivated more strongly by curbing the rankest form of corporate forum shopping while still allowing broad diversity jurisdiction over cases affecting national economic policy. See EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 241 (1992) [hereinafter PURCELL, *LITIGATION AND INEQUALITY*] ("In 1958 Congress was not concerned with protecting corporations against the dangers of local prejudice but with keeping in the hands of the national courts what it regarded as in every realistic sense the basic affairs of the nation."); Burbank, *supra* note 72, at 1481 n.174 (agreeing with Purcell and marshalling additional evidence).

The third example involves the removal process from state to federal court. Congress provided for removal of cases in the original Judiciary Act of 1789,⁹⁸ and it persists to this day.⁹⁹ Congress presumably provided for removal of diversity cases to safeguard the policies of diversity, namely, “to protect nonresidents from the local prejudices of state courts.”¹⁰⁰ Consistent with that purpose, the Judiciary Act granted a right of removal in nonland domestic cases only to out-of-state defendants; in-state defendants could not remove even if complete diversity existed.¹⁰¹ Prohibiting in-state defendants from removing diversity cases from state to federal court was consistent with the bias rationale, which presumed that the federal forum existed to protect out-of-staters from state bias.¹⁰² Aside from a brief experiment from 1875–1887, when the right of removal was greatly expanded,¹⁰³ removal of diversity cases under the general removal statute has always been limited to out-of-state defendants.¹⁰⁴ This feature of removal is additional evidence of the impact of the bias rationale on federal diversity jurisdiction.¹⁰⁵

98. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80.

99. 28 U.S.C. §§ 1441–55 (2018).

100. 14C WRIGHT ET AL., *supra* note 12, § 3721.

101. Judiciary Act of 1789, § 12, 1 Stat. 73, at 79–80.

102. See *Morris v. Nuzzo*, 718 F.3d 660, 665 (7th Cir. 2013) (“[T]he forum defendant rule disallows federal removal premised on diversity in cases where the primary rationale for diversity jurisdiction—to protect defendants against presumed bias of local courts—is not a concern because at least one defendant is a citizen of the forum state.”); Howard M. Wasserman, *A Jurisdictional Perspective on New York Times v. Sullivan*, 107 NW. U. L. REV. 901, 906 (2013) (“Diversity jurisdiction exists to counter bias against outsider litigants facing favored local parties in state court, where judges are often elected or subject to reelection, judges and juries are drawn locally, and everyone is potentially subject to local popular pressures and passions.”).

103. Compare Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470, 470–71 (authorizing any party to remove without regard to residency), with Act of March 3, 1887, ch. 373, §§ 1–2, 24 Stat. 552, 552–53, and Act of Aug. 13, 1888, ch. 866, §§ 1–2, 25 Stat. 433, 433–34 (limiting removal to out-of-state defendants).

104. See 14C WRIGHT ET AL., *supra* note 12, § 3721 (providing that the current version of the section on removal based on diversity of citizenship states: “A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”). For discussions of the forum-defendant rule, see Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 79–88 (2008) (assessing its jurisdictionality); Scott Dodson, *The Forum Defendant Rule in Arkansas*, 2007 ARK. L. NOTES 73, 73–81 (offering advice on litigating defects in the forum-defendant rule).

105. The Court also waded into removal in *Ex parte Wisner*, 203 U.S. 449 (1906), *overruled by Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653 (1923). This case held that removal based on diversity jurisdiction was barred when all parties were nonresidents, though the case was later overruled. *Id.* at 460–61. Although the Court did not ground its decision in the diversity rationale,

These examples of the bias rationale's influence on statutory developments do not mean that the bias rationale has motivated all diversity jurisdiction developments. But even when the bias rationale seems irrelevant to particular statutory acts or reforms,¹⁰⁶ reformers often strive to deploy the bias rationale in their efforts.¹⁰⁷ This Article will have more to say about the distorting effect of the bias rationale in certain diversity reforms, but, for now, the point is that the bias rationale has been and continues to be a central feature in these reforms.

B. Academic Commentary

The perennial "Great Debate"¹⁰⁸ among academics about the propriety and scope of diversity jurisdiction also tends to focus on out-of-state bias.¹⁰⁹ In general, opponents of diversity jurisdiction tend to argue that out-of-state bias does not exist or is too muted to support diversity jurisdiction, while supporters tend to argue that out-of-state bias exists—or the perception of bias exists—and thus demands diversity jurisdiction.¹¹⁰ Other arguments, such as federalism, docket load, doctrinal complexity, and nonstate biases, do play a role. But the out-of-state bias rationale is the perennial focus. Some examples of the bias rationale's widespread influence follow.

the decision is arguably consistent with it, as Frankfurter pointed out in 1928. *See* Frankfurter, *supra* note 53, at 525–26.

106. The prominent example of the Class Action Fairness Act of 2005 ("CAFA") is discussed below. *See infra* notes 237–61 and accompanying text. For other examples, see JOANNA SHEPHERD, NATIONAL ASSOCIATION OF MANUFACTURERS, ESTIMATING THE IMPACT OF A MINIMAL DIVERSITY STANDARD ON FEDERAL COURT CASELOADS 4 (June 2015).

107. Purcell, *The Class Action Fairness Act*, *supra* note 82, at 1834 (noting that it is the bias rationale's "amorphous nature" that has "offered jurisdictional reformers a perennial opportunity").

108. Currie, *supra* note 90, at 4.

109. 13E WRIGHT ET AL., *supra* note 12, § 3601 ("Not surprisingly, the question of what purpose is served by diversity jurisdiction has retained its controversial character over the years."). Opponents have been prominent and vocal. *See* Stewart, *supra* note 86, at 211 (noting that proponents of eliminating diversity jurisdiction have included Chief Justices Warren Burger and William Rehnquist, as well as several associate justices).

110. *See* 13E WRIGHT ET AL., *supra* note 12, § 3601 ("Those who favor the retention of diversity jurisdiction contend that this prejudice still exists, although perhaps in a diminished form."); Kramer, *supra* note 1, at 119 ("[A]dvocates of diversity jurisdiction argue that bias is a problem and that it necessitates diversity jurisdiction, and many of their opponents regard this as the strongest argument for diversity jurisdiction."); Purcell, *The Class Action Fairness Act*, *supra* note 82, at 1847 ("Advocates of preserving or expanding federal jurisdiction stressed the grave dangers of 'bias' and 'local prejudice,' while those who sought to limit or abolish the jurisdiction minimized or denied these dangers.").

In the *Erie* era, when the rise of federal question litigation began putting pressure on federal dockets, diversity skeptics—prominently including Justice Felix Frankfurter—argued that the bias rationale was essentially defunct:

Whatever may have been true in the early days of the Union, when men felt the strong local patriotism of the politically *nouveaux riches*, has not the time come now to reconsider how justifiable the apprehensions [of bias], how valid the fears? The Civil War, the Spanish War, and the World War have profoundly altered national feeling, and 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.¹¹¹

Diversity supporters, sensing vulnerability, and indeed facing Senate bills that would abolish diversity jurisdiction,¹¹² argued that the bias rationale continued to justify diversity jurisdiction. Judge John Parker asserted that the threat of local bias “is as valid today as it was in 1787” because “the state trial judge is generally a local man with a local outlook.”¹¹³ Other supporters conceded that bias was less of a problem than in the 1700s but nevertheless contended that bias was still real enough to warrant diversity protection. Robert Brown wrote:

There seems to be no disagreement as to the primary purpose of this provision for federal jurisdiction based upon diversity of citizenship. It was to provide, so far as possible, against injury to nonresident suitors because of local and sectional prejudice, which would be extremely likely to have an important effect in state courts. . . . Undoubtedly, such prejudice is weakening, particularly in the younger generation, but it is still strong enough to influence the whole social fabric, including the local and state courts.¹¹⁴

111. Frankfurter, *supra* note 53, at 521. This argument was not new in the *Erie* era. See Alfred Russell, *Avoidable Causes of Delay and Uncertainty in Our Courts*, 25 AM. L. REV. 776, 795–96 (1891) (opining that “[h]owever [out-of-state bias] may have been before the whole country was unified by steam and electricity, and by the result of the Civil War, it is certainly not so now. . . . I am inclined to the opinion that Congress should abolish this jurisdiction completely”).

112. See, e.g., S. 4357, 71st Cong., 2d Sess. (1930); Victor Eugene Flango, *How Would the Abolition of Federal Diversity Jurisdiction Affect State Courts?*, 74 JUDICATURE 35, 35 (1990) [hereinafter Flango, *How Would Abolition of Diversity Affect State Courts?*] (“In 1932, Senator George Norris of Nebraska introduced a bill to abolish diversity jurisdiction completely.”).

113. John J. Parker, *The Federal Jurisdiction and Recent Attacks upon It*, 18 A.B.A. J. 433, 437 (1932).

114. Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179, 181–82 (1929); see also, e.g., Gurney E. Newlin, *Proposed Limitations upon Our Federal Courts*, 15 A.B.A. J. 401, 403 (1929) (“While perhaps the danger

Calls for diversity jurisdiction's abolition based on the lack of bias continued throughout the 1940s and 1950s.¹¹⁵

In 1959, based on a suggestion from Chief Justice Earl Warren, the American Law Institute ("ALI") commissioned a multiyear, comprehensive study of diversity jurisdiction and its future.¹¹⁶ Perhaps sensing vulnerability based on the ALI's study, prominent commentators vocalized support for diversity jurisdiction. Two of diversity jurisdiction's strongest proponents, James William Moore and Donald Weckstein, argued that the fear of state bias against out-of-state litigants continued to justify diversity jurisdiction and, in fact, demanded an extension of diversity jurisdiction.¹¹⁷ Some echoed Moore and Weckstein's sentiments,¹¹⁸ while others struck a more moderated tone on bias.¹¹⁹

of local prejudices or bias has somewhat abated during the past century, yet it has by no means disappeared to such an extent that it is a negligible factor, in present day affairs."). The historical record suggests that these were rote justifications rather than based on evidence, *see* PURCELL, LITIGATION AND INEQUALITY, *supra* note 97, at 129 ("To remove under the [local prejudice] act, parties had only to submit affidavits stating that they had reason to believe that from prejudice or local influence they would be unable to obtain justice in the state courts." (quotations omitted)), and some contemporaries suggested that diversity supporters were more motivated by the procorporate biases of federal court, *see* George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 361 n.30 (1933) (citing the opinion that the "feared prejudice [of local courts] is not so much against non-residents as it is against corporations").

115. *See, e.g.*, *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 59–60 (1954) (Frankfurter, J., concurring) (calling for abolition); ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 37 (Harv. Univ. Press 1955) (same).

116. *See Wednesday Morning Session May 20, 1959*, 36 A.L.I. PROC. 27, 34 (1959) ("I would hope, Mr. President . . . that the American Law Institute would undertake a special study and publish a report defining, in the light of modern conditions, the appropriate bases for assigning the jurisdiction of Federal and State courts.").

117. *See* Moore & Weckstein, *supra* note 6, at 16 ("While local prejudices and state jealousies may be diminishing, it is a fair inference that some litigants still resort to federal courts because of apprehensions as to the kind of justice that they will receive in the courts of the state of which their adversary is a citizen."); *id.* at 1 ("We contend that experience and sound future planning justify an extension rather than a curtailment of many phases of diversity jurisdiction.").

118. *See* Frank, *Maintaining Diversity Jurisdiction*, *supra* note 86, at 13 (defending diversity jurisdiction by suggesting that any hypothetically unmanageable caseload could be addressed by expanding the number of federal judges).

119. *See* Currie, *supra* note 90, at 5 (explaining his "hunch" that "it is too early to say that xenophobia has disappeared from the American scene," but that he could "appreciate the argument that the danger of bias is not great enough to justify the burden on federal courts and the interference with state prerogative that diversity jurisdiction entails"). Currie ultimately favored abolishing diversity jurisdiction on workability grounds. *Id.* at 6. For a contrary view, see Charles Alan Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 194–98 (1969) (supporting the ALI proposal, which recommended reducing diversity jurisdiction in some ways and expanding it in others).

In 1969, the ALI issued a report on its study, which hewed closely to the bias rationale of diversity jurisdiction and proposed corresponding reforms. Its overarching policy was founded on the idea that “the function of the jurisdiction is to assure a high level of justice to the traveler or visitor from another state” and “to eliminate any real risk of prejudice against him as a stranger.”¹²⁰ The report thus recommended, among other things, excluding in-state plaintiffs from invoking diversity jurisdiction but allowing federal jurisdiction based on incomplete diversity when the risk of prejudice was real.¹²¹

The ALI report did not result in legislative reform. Instead, in the 1970s, the House passed a bill purporting to eliminate diversity jurisdiction entirely on the ground that

the original reasons for diversity jurisdiction have long since disappeared. At present, there is little evidence that the State courts are less qualified or, due to latent prejudice against out-of-staters, unable to render fair and impartial justice in these cases.¹²²

The bill, however, was defeated in the Senate,¹²³ as were a number of other failed bills in the 1970s and 1980s purporting to abolish diversity jurisdiction.¹²⁴ Despite widespread calls for its abolition or curtailment during this time,¹²⁵ diversity jurisdiction’s defenders continued to muster support based on the bias rationale.¹²⁶

120. ALI STUDY, *supra* note 69, at 2. For a discussion of the ALI study as it relates to the bias rationale, see EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 278–79 (2000) [hereinafter PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION*].

121. ALI STUDY, *supra* note 69, at 3.

122. ROBERT KASTENMEIER, *ABOLITION OF DIVERSITY OF CITIZENSHIP JURISDICTION*, H.R. REP. NO. 95-893, at 3–4 (1978).

123. S. 2389, 95th Cong. (2d Sess. 1978) (providing a bill to, among other things, “abolish diversity of citizenship as a basis of jurisdiction of Federal district courts”); H.R. 9622, 95th Cong. (2d Sess. 1978) (same).

124. *See, e.g.*, H.R. 2404, 97th Cong. (1981); S. 2389 & H.R. 9622, 95th Cong., 2d Sess. (1978); S. 2094, 95th Cong., 2d Sess. (1978), H.R. 7243, 95th Cong., 1st Sess. (1977).

125. *See, e.g.*, Kramer, *supra* note 1, at 98 (surveying those calls); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979) (offering a thorough critique of diversity jurisdiction and praising the virtues of abolition).

126. *See, e.g.*, John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. LEGIS. 403, 410 (1979) [hereinafter, Frank, *Case for Diversity Jurisdiction*] (“[I]nterstate prejudice is not dead now.”); Charles W. Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 JUDICATURE 291, 295 (1987) (arguing, based on the bias rationale, that corporations should be deemed citizens of each state in which they are

The 1990s brought another round of debate. The so-called “litigation explosion” of the 1970s caused considerable concern about federal docket overload.¹²⁷ In 1988, Congress authorized the creation of the Federal Courts Study Committee,¹²⁸ which issued a report in 1990 recommending the near abolition of diversity jurisdiction, primarily on the ground that local bias was no longer a compelling justification for diversity jurisdiction.¹²⁹ The report conceded that the threat of bias may exist regionally but that such isolated pockets could not justify the cost of diversity jurisdiction.¹³⁰ That same year, Larry Kramer, despite acknowledging that, “[o]f the various arguments offered in support of diversity jurisdiction, the only credible one is that diversity is needed to protect out-of-state litigants from bias,”¹³¹ nevertheless published a powerful critique of diversity jurisdiction.¹³² Since this period, the scope of nonclass diversity jurisdiction has remained relatively unchanged, despite assaults on the bias rationale that continue to this day.¹³³

As with the legal developments in diversity jurisdiction, the academic debates about diversity jurisdiction focus on the bias rationale. The bias rationale is not, of course, the *only* point of contention in these debates. But its shadow is long and omnipresent, both for proponents and opponents of diversity jurisdiction. A notable exception is a 1986 article by Professor Tom Rowe and Attorney Ken Sibley, which argued for reformed use of diversity jurisdiction in mass-accident cases but did not reconcile that reformation with the bias rationale.¹³⁴ This Article aims to expand upon that narrow proposal,

registered to do business because such corporations have “local business establishments” that protect them from any local prejudice).

127. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 985–89 (2003) (detailing the “litigation explosion” trope and its effects).

128. Federal Courts Study Act, Pub. L. No. 100-702, tit. I, 102 Stat. 4644 (1988).

129. FED. COURTS STUDY COMM., *supra* note 87, at 38–43.

130. *Id.* at 40–41 (estimating a cost of \$131 million annually, or more than 10 percent of the federal judicial budget).

131. Kramer, *supra* note 1, at 125.

132. *Id.* at 99 (“[F]ew other classes of disputes have a weaker claim on federal judicial resources. . . . Accordingly, Congress should abolish diversity jurisdiction (subject to three exceptions . . .).”).

133. See Stewart, *supra* note 86, at 218 (“[S]tate court bias is no longer a viable reason to justify the need for diversity jurisdiction, if it ever was . . .”).

134. See Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 28–29 (1986) (considering caseloads, administrability, and federalism concerns).

but the underbrush of the bias rationale must be cleared first. It is to that task that this Article turns next.

III. MARGINALIZING THE BIAS RATIONALE

These legal changes and debates discussed previously are deficient because they overstate the centrality and importance of the bias rationale. The centrality of the bias rationale to justify diversity jurisdiction depends upon real or feared out-of-state bias that motivates parties to select federal court, which in turn supplies the desired neutrality, whose benefits outweigh the costs of diversity jurisdiction. In reality, the centrality of the bias rationale falters on each of these analytic steps: (A) studies show that out-of-state bias or the perception of out-of-state bias is neither widespread nor particularly strong; (B) the perception of bias does not often motivate parties to invoke diversity jurisdiction; (C) federal court neutrality is questionable; (D) diversity jurisdiction's scope vastly exceeds what is necessary to address out-of-state bias; and (E) diversity jurisdiction's costs exceed any remedial value.

A. *Out-of-State Bias is Neither Widespread nor Strong*

In theory, state judges would seem more likely to be swayed by local prejudices than federal judges because most state judges are elected or term appointed and are thus accountable to in-state powers.¹³⁵ And empirical evidence shows some connection between retention pressures and judicial decision-making.¹³⁶ But the direction of the retention pressures is not clear. Although retention pressures might induce favoritism toward in-state voters,¹³⁷ they might also cut the other way, particularly if the money driving judicial election campaigns comes primarily from out-of-state business interests.¹³⁸

135. See generally Scott Dodson, *Accountability and Transparency in U.S. Courts*, in GENERAL REPORT ON ACCOUNTABILITY AND TRANSPARENCY (forthcoming 2020) (on file with the *Duke Law Journal*) (assessing the effects of state and federal judicial selection and retention on accountability and independence).

136. See *id.* (manuscript at n.59) (citing several empirical studies on the relationship between retention pressures and judicial decision-making).

137. SHEPHERD, *supra* note 106, at 12.

138. Cf. James G. Gimpel, Frances E. Lee & Shanna Pearson-Merkowitz, *The Check Is in the Mail: Interdistrict Funding Flows in Congressional Elections*, 52 AM. J. POL. SCI. 373, 374, 377–78 (2008) (discussing the prevalence of extradistrict campaign funding in congressional elections); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 670–72 (2009) (describing the empirical effect of campaign contributions from special interest groups on judicial elections).

Anecdotal reports of actual out-of-state bias are rare and isolated.¹³⁹ Available empirical evidence, though sparse and hard to come by,¹⁴⁰ suggests that the bias rationale has some marginal substance in that survey data show sporadic perceptions of local bias,¹⁴¹ but the evidence is mixed.¹⁴²

One major difficulty with evidence supporting the bias rationale is that out-of-state bias is difficult to isolate from other kinds of bias fears that do not necessarily fall across state lines. For example, one study that found that although 26 percent of plaintiffs' lawyers and 51 percent of defendants' lawyers perceived local bias against out-of-staters in state courts, similar percentages perceived anticorporate biases and antirural biases.¹⁴³ This suggests that other factors that happen to be correlated with out-of-state status—like corporate or rural status—might be driving some of the perceived state court bias against those

139. In one notable example, Justice Richard Neely of the West Virginia Supreme Court once wrote:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 4 (1988); *see also* Charles L. Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way but Vote the Other Way with Its Feet*, N.Y. ST. B.J., July 1989, at 20, 21 (“[A]nyone who believes that there is no local chauvinism in the state courts is hiding his head somewhere.”).

140. *See* Marcus, *supra* note 84, at 1292 (noting that empirical evidence on local bias is scant, and that studies of attorneys' perception of bias are the best available data).

141. *See, e.g.*, Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 L. & SOC'Y REV. 749, 760 (1980) (noting how 53.3 percent of surveyed District of South Carolina lawyers, but only 14.6 percent of surveyed Central District of California lawyers, ranked fear of out-of-state bias as “important” or “very important”); Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 98 (1980) (finding 40 percent of respondents indicated that fear of local bias “had some bearing” on their forum selection); 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) (noting that 50.7 percent of defense counsel and 26.3 percent of plaintiffs' attorneys cited a perception of local bias).

142. *See* Jolanta Juskiewicz Perlstein, *Lawyers' Strategies and Diversity Jurisdiction*, 3 L. & POL'Y Q. 321, 327 (1981) (finding no statistically significant difference in forum selection when varying information about local bias). Of course, disclosed perception of bias in surveys proves neither bias nor even, necessarily, actual perception of bias. *Cf.* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 269 (1988) (noting that opinion polls cannot prove anything about actual differences between courts, in commenting on the issue of courts' friendliness to constitutional claims).

143. Miller, *supra* note 141, at 428.

parties.¹⁴⁴ One study also suggested that local bias could be highly individualized to particular judges and parties, such as in specific judges' relationships with counsel via prior representation, partnership at a firm, or political support.¹⁴⁵ Another study concluded that even out-of-state biases may be more cultural than geographic—a Californian might perceive bias in a Mississippi court but an Alabaman might not, suggesting that the Californian's fear of bias is not because the Californian is non-Mississippian but because the Californian is Californian.¹⁴⁶ Consistent with these findings, the 1990 Federal Courts Study Committee concluded that state bias "does not fall along state boundary lines" and that "a greater tension than the tension between residents and nonresidents is that 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."¹⁴⁷

Any perceptions of out-of-state bias also vary greatly by district.¹⁴⁸ One study found fear of local bias was a motivating factor in forum selection only in specific forums.¹⁴⁹ In particular, bias fears were relatively low in the Northeast, Midwest, and Far West, while stronger bias fears were reported in the South.¹⁵⁰

The available data thus suggest that actual state bias against out-of-state parties is extremely rare, that the perception of state bias is geographically sporadic and individualized, and that any perception of bias against out-of-state parties is intertwined with perceptions of bias against parties for reasons other than their nonresident status.

144. See Bumiller, *supra* note 141, at 762 (finding perceptions of local bias to be driven by antirural bias rather than out-of-state bias); Goldman & Marks, *supra* note 141, at 102–03 (finding perceptions of local bias to be driven by anticorporate bias rather than out-of-state bias); *cf.* Miller, *supra* note 141, at 428–29 (refuting the contention that bias against out-of-state litigants is identical to bias against businesses but finding overlap between out-of-state and locality-based bias).

145. See Miller, *supra* note 141, at 412 (noting that several respondents described perception of local bias based on previous interactions with certain judges).

146. See ALI STUDY, *supra* note 69, at 106–07 ("On the other hand, the bias that was formerly thought to operate against out-of-staters as such seems still to exist to some degree with respect to persons from a more distant part of the country.").

147. FED. COURTS STUDY COMM., *supra* note 87, at 15.

148. See Shapiro, *supra* note 86, at 332–39 (reporting on results from a survey sent to federal district and appellate judges regarding views and time spent on diversity litigation).

149. See Bumiller, *supra* note 141, at 760 (comparing survey results from the Eastern District of Wisconsin, the Eastern District of Pennsylvania, the District of South Carolina, and the Central District of California).

150. *Id.* at 759–60.

B. Fear of Out-of-State Bias Does not Strongly Motivate Selection of Federal Court

Fear of out-of-state bias, to the extent it exists, is only a weak motivation for invoking diversity jurisdiction. While empirical research on the question is limited and somewhat dated, it turns out that a host of other factors influence forum selection, including the perceived quality of the court, favorable procedures, and the like.¹⁵¹ In a 1992 survey, only 15 percent of plaintiff and 10 percent of defense attorneys identified out-of-state bias as a “very strong” factor in forum selection.¹⁵² Indeed, the evidence suggests that nearly half of the diversity cases in federal court are brought by in-state plaintiffs who ought to be the beneficiaries of local bias in state court.¹⁵³ The most important factors appear to be convenience considerations such as court familiarity, cost, and bias against corporations.¹⁵⁴ Perceived competency issues are far more important than bias fears.¹⁵⁵

In short, avoiding out-of-state bias does not seem to strongly motivate attorneys to invoke diversity jurisdiction, and even when fear is a motivator, other, stronger factors supply the driving force.¹⁵⁶

C. Federal Court Neutrality is Questionable

For those few cases presenting a real perception of out-of-state bias that is strong enough to motivate an invocation of diversity jurisdiction, it is not at all clear that federal jurisdiction offers much

151. See *id.* at 762–64, 768–71.

152. See Miller, *supra* note 141, at 408, 429 (noting that 10 percent of defense attorneys said bias was a strong reason for removal from state to federal court).

153. See ALI STUDY, *supra* note 69, at 1–2, 4–5, 168–72 (noting that nearly half of diversity cases are brought by in-state plaintiffs); VICTOR E. FLANGO, NAT’L CTR. FOR ST. CTS., HOW WOULD PROPOSED CHANGES IN FEDERAL DIVERSITY JURISDICTION AFFECT STATE COURTS? 76–78 (1989) (noting that 49 percent of diversity cases are brought by in-state plaintiffs); ANTHONY PARTRIDGE, THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION 34 (FJC 1988) (noting that 44 percent of diversity cases are brought by in-state plaintiffs).

154. See Miller, *supra* note 141, at 424–25 (detailing these factors in one study).

155. See *id.* at 431–34 (discussing the dichotomy between competency concerns and local litigant bias); Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 972–73 (1995) [hereinafter Flango, *Litigant Choice*] (reporting that more attorneys indicated that judicial competence and quality were important to forum selection than avoiding out-of-state bias); see also Stewart, *supra* note 86, at 218 (“What we can say for certain, however, is that today, ‘state court bias’ is hardly ever a factor in deciding to remove to or file a case in federal district court.”).

156. See Flango, *Litigant Choice*, *supra* note 155, at 966 (“[L]ocal bias was not a single consideration affecting forum choice but was one of a combination of attitudes . . .”).

protection. Federal judges often come from the same circles as state judges and have the same local concerns; if any bias against out-of-staters exists, that bias might be equally held by local federal judges.¹⁵⁷ To the extent the fear of bias is directed at state *laws* that are biased against out-of-state parties, the Dormant Commerce Clause invalidates such biases that cross constitutional thresholds. Any remaining disadvantages to out-of-state litigants persist in federal court because *Erie* and the Rules of Decision Act demand that those state laws apply with the same force in diversity cases.¹⁵⁸ Nor are federal juries predictably less biased against out-of-state litigants than state juries,¹⁵⁹ and, in any event, jury trials are astonishingly rare.¹⁶⁰ In short, there is little reason to presume that federal diversity jurisdiction really offers any meaningful bulwark against out-of-state bias.

D. Diversity's Scope Exceeds the Bias Rationale

Even if marginal perceptions of out-of-state bias were sufficiently concerning to require remediation by federal jurisdiction, and even if diversity jurisdiction were a reliable solution for those ills, the current expansiveness of diversity jurisdiction goes far beyond what is required for that remediation.¹⁶¹ The grant of original diversity jurisdiction, for example, allows an in-state plaintiff to *invoke* federal diversity

157. See FED. COURTS STUDY COMM., *supra* note 87, at 15 (noting that federal courts “may not be wholly without a bias in favor of local residents”); Bassett, *The Hidden Bias*, *supra* note 2, at 138–39 (“To characterize federal judges as carpetbaggers, unaware of, and insensitive to, local concerns is thus inaccurate.” (quoting Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120 (1977))).

158. 28 U.S.C. § 1652 (2018); *Erie R.R. v. Tompkins*, 304 U.S. 64, 79–80 (1938). Federal procedure applies in diversity cases, but state procedure tends to mimic federal procedure, *see* Dodson, *Gravitational Force*, *supra* note 86 at 707–19, and as for any residual state law differences, the author knows of no charge that they are inherently biased against out-of-state litigants.

159. See ABOLITION OF DIVERSITY OF CITIZENSHIP JURISDICTION, H.R. REP. NO. 95-893, at 4 (1978) (“Federal juries are now drawn from the same registration or voter lists as State jurors . . .”). To the extent federal juries remain more diverse, one commentator has argued, in some cases, that very diverse federal juries could include more bias than more homogenous state pools. *See* Johnson, *supra* note 1, at 54–55 (making this point with respect to alienage bias).

160. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 463 (2004) (reporting a 1.2 percent jury-trial rate in federal court in 2002); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524–25 (2012).

161. *Cf.* Bassett, *The Hidden Bias*, *supra* note 2, at 131 (arguing that the bias rationale “makes no sense under several of the scenarios in which diversity jurisdiction can be invoked”). For examples, *see* Rodney K. Miller, *Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity*, 64 OKLA. L. REV. 269, 272–73 (2012).

jurisdiction against an out-of-state defendant.¹⁶² The statute also allows an out-of-state party to invoke diversity jurisdiction even if no in-state party is involved, as long as the lineup is completely diverse.

To illustrate the overbreadth of diversity jurisdiction, consider *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*,¹⁶³ filed in the Southern District of New York. The plaintiff, a longtime New York law firm that had routinely represented New York clients in New York state courts, invoked diversity jurisdiction. The defendant, though formally a resident of Connecticut and later Florida, kept a Manhattan apartment and had regular business interests in New York. The case focused on conduct occurring in New York—legal representation in New York state courts, no less—and involved New York matrimonial law.¹⁶⁴ In short, neither party, especially not the plaintiff, was likely to suffer any bias for being an out-of-state litigant, and the whole case was profoundly state law focused. Yet the federal court was forced to hear the case under diversity jurisdiction. Such an instance of diversity jurisdiction has no role in preventing state bias against out-of-state litigants.

E. Diversity's Costs Exceed its Remedial Value

Even if diversity jurisdiction were to reduce bias or the appearance of bias in some cases, the costs of diversity jurisdiction as a whole overwhelm those limited benefits. One result of expansive diversity jurisdiction is that the federal docket load of diversity cases is massive and always has been. Records suggest that diversity disputes in the early years of the federal judiciary made up a sizable portion of the federal dockets.¹⁶⁵ Today, diversity cases make up more than 30 percent of the federal docket.¹⁶⁶ Those same cases represent only a tiny

162. See *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (critiquing diversity jurisdiction by suggesting that the fear of bias was not truly justified by experience); Burbank, *supra* note 72, at 1460 n.79 (stating that the ability of an in-state plaintiff suing an out-of-state defendant to invoke diversity jurisdiction “is inconsistent with the traditional account [of the bias rationale]”); Kramer, *supra* note 1, at 125 (arguing that the bias rationale “provides no support for allowing in-state plaintiffs to invoke diversity jurisdiction”).

163. *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509 (2d Cir. 1973).

164. *Id.* at 515.

165. Frank, *Historical Bases*, *supra* note 12, at 17–18.

166. Compare U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2017) (reporting, in 2017, approximately 32 percent of the federal civil docket as diversity cases), with Kramer, *supra* note 1, at 99–100 (reporting around 25–30 percent in the 1970s and 1980s). Approximately 30 percent of diversity cases originate in state courts and are removed to federal court.

percentage of state dockets,¹⁶⁷ a minimal increase in workload that some state judges have welcomed.¹⁶⁸

The diversity jurisdiction burden on federal courts, however, has meaningful adverse effects on the efficient and effective resolution of disputes. Diversity cases demand interpretation and application of state substantive law by federal judges less familiar with it than their state court counterparts.¹⁶⁹ Federal judges presented with an unsettled question of state law must choose between making an often difficult *Erie* guess¹⁷⁰ and delaying the case by seeking certification from the state courts.¹⁷¹ When federal courts do decide questions of state law, those decisions are not precedential and thus deprive the state courts of the opportunity to build state law precedent.¹⁷²

Even the law of diversity jurisdiction can present intractable challenges. As Professor Tom Rowe has argued, diversity jurisdiction raises litigable and often contentious disputes about citizenship, the amount in controversy, alignment of parties, joinder, removal, and supplemental jurisdiction.¹⁷³ Diversity cases also require consideration

SHEPHERD, *supra* note 106, at 21 & n.59; Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 564 (2005).

167. Data analysis from the 1970s and 1990s calculated an increase of only around 1 percent to state dockets from abolition of diversity jurisdiction. See Victor E. Flango & Nora F. Blair, *The Relative Impact of Diversity Cases on State Trial Courts*, 2 STATE CT. J., no. 2, Summer 1978, at 22–23 (“If diversity cases were distributed evenly among the states, each state would experience an average 1.03 percent increase in civil filings . . .”); Kramer, *supra* note 1, at 110–17 (calculating that complete abolition of diversity jurisdiction would increase state caseloads by around 1 percent and workloads by about 5 percent).

168. See M. Caldwell Butler, *Diversity in the Court System: Let’s Abolish It*, 3 ADELPHI L.J. 51, 64–65 (1984) (discussing a resolution by the Conference of Chief Justices reporting that state judges are able and willing to accept diversity cases).

169. FRIENDLY, FEDERAL JURISDICTION, *supra* note 64, at 141 (making this argument); Kramer, *supra* note 1, at 104 (arguing that “state courts have greater expertise and authority” over state law claims, and thus “diversity jurisdiction forces federal courts to decide issues on which they have no special expertise at the expense of tasks they can perform significantly better than state courts”).

170. See Stewart, *supra* note 86, at 219–22 (discussing the process by which federal courts are required to adjudicate state law cases in federal courts). For a recent state case rejecting a federal court’s *Erie* guess, see, for example, *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 544–45 (Tex. 2016).

171. In recent years, the average turnaround time for certification from the Fifth Circuit to the Texas, Louisiana, and Mississippi Supreme Courts has been 482, 215, and 331 days respectively. Stewart, *supra* note 86, at 221.

172. See Kramer, *supra* note 1, at 104 (“[T]he opinion of a federal court sitting in diversity does not constitute precedent within the state system.”).

173. See Rowe, *supra* note 125, at 969–79 (discussing the contentious nature of the highlighted issues in diversity cases); see also Kerry Abrams & Kathryn Barber, *Domicile Dismantled*, 92 IND.

of ancillary doctrines like abstention and choice of law.¹⁷⁴ It is true that supplemental jurisdiction still presents these state law problems in some federal question cases, but the discretionary nature of supplemental jurisdiction allows federal judges to avoid those problems in many cases.¹⁷⁵ By contrast, the federal diversity caseload, which comprises more than 30 percent of the district courts' private civil cases, forces these problems upon federal courts.¹⁷⁶

And all of these features mean that diversity jurisdiction is a major distraction of federal court attention away from civil and criminal cases arising under federal law.¹⁷⁷ Evidence suggests that these complexities make diversity cases more demanding and time-consuming—by as much as 22 percent—than federal question cases.¹⁷⁸

Further, as Professor Debra Bassett has pointed out, the bias rationale may itself promote a bias in the other direction. To the extent diversity jurisdiction licenses removal of cases from presumptively biased state courts, the law stigmatizes those state courts in ways that are both offensive and counterproductive.¹⁷⁹ Worse, the stigmatization is wholesale: “[W]hen local bias is used in the diversity jurisdiction context, it reaches beyond the potential prejudice of one particular

L.J. 387, 389–90 (2017) (challenging the utility of the citizenship test for individuals). For some key cases on these issues, see *Americold Realty Trust v. ConAgra Foods, Inc.*, 136 S. Ct. 1012 (2016) (unincorporated-entity citizenship); *Hertz Corp. v. Friend*, 559 U.S. 77, 89 (2010) (corporate citizenship); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005) (addressing the complexities of supplemental jurisdiction over claims tied to diversity claims); and *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996) (curing defects in removal based on diversity jurisdiction).

174. See Kramer, *supra* note 1, at 105–06; Rowe, *supra* note 125, at 969. For notable cases, see, for example, *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (choice of law), *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (abstention), and *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (abstention).

175. See 28 U.S.C. § 1367(c) (2018) (providing four circumstances under which district courts may decline to exercise supplemental jurisdiction).

176. See TABLE C-2—U.S. DISTRICT COURTS—CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, U.S. CTS. (December 31, 2018), <https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2018/12/31> [<https://perma.cc/LT7K-FNBJ>] (dividing the total number of diversity cases (84,496) by the total number of cases in 2018 (278,721) produces 30.32 percent).

177. FRIENDLY, FEDERAL JURISDICTION, *supra* note 64, at 141 (declaring diversity jurisdiction's “greatest single objection” to be “the diversion of judge-power urgently needed for tasks which only federal courts can handle or which, because of their expertise, they can handle significantly better than the courts of a state”).

178. See STEVEN FLANDERS, THE 1979 FEDERAL DISTRICT COURT TIME STUDY 15 (1980).

179. Bassett, *The Hidden Bias*, *supra* note 2, at 140.

judge and instead paints an entire court system with the broad brush of bias.”¹⁸⁰

These costs of diversity jurisdiction are significant; opponents are right that the bias rationale cannot justify those costs.

IV. REFOCUSING THE DEBATE

Abolitionists do not win the debate simply because the bias rationale alone cannot support diversity jurisdiction. Diversity jurisdiction has much to commend it for other reasons—reasons that are often given short shrift when the focus is on the bias rationale.¹⁸¹ The upshot is that debates about diversity jurisdiction should move beyond the bias rationale to consider the full gamut of diversity jurisdiction’s virtues and vices. These virtues and vices are often overshadowed by the bias rationale or overlooked entirely, but, as this Article argues, they are where the debate ought to occur. In that spirit, this Part explores some of the benefits of diversity jurisdiction outside of the bias rationale, namely facilitating aggregation and alleviating other nonstate biases.

A. *Facilitating Aggregation*

Facilitating aggregation is an important justification for diversity jurisdiction that has received very little attention in the diversity debates¹⁸² but that has new agency in light of recent legal developments.

1. *Benefits of Aggregation.* The law used to prefer individualized litigation for its simplicity because trial was a difficult and burdensome ordeal.¹⁸³ As the ratification debates showed, there were real concerns about the burdens of travel for litigation,¹⁸⁴ such

180. *Id.* at 138.

181. *Cf.* 13E WRIGHT ET AL., *supra* note 12, § 3601 (“[T]he decision to retain or abolish or further curtail the statutory basis for this category of federal subject matter jurisdiction must depend on its utility in contemporary society.”).

182. A notable exception, though one that antedates dramatic changes in recent jurisdictional law, is Rowe & Sibley, *supra* note 134 (proposing expanded diversity jurisdiction to provide for federal court aggregation of certain mass torts).

183. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 915–16 (1987) (describing the early evolution of writs and substantive law and “rules severely restricting the joinder of plaintiffs and defendants”).

184. See *supra* notes 35–37 and accompanying text.

that a lawsuit involving parties from three different states with myriad claims among them would have presented significant manageability issues. Fortunately, in the antebellum era, most disputes were of the simple “A v. B for a cow” variety.¹⁸⁵

Things are quite different today. Commerce is international and multifaceted, travel is easy, and litigation is pervasive. The law’s perspective on aggregation has evolved as well: the law now favors aggregation of claims, parties, and cases because of its efficiency and fairness benefits to the parties and the system.¹⁸⁶ In general, it is far more efficient and fair to litigate a thousand similar claims together, before a single decision-maker, than independently and perhaps scattered across the country.¹⁸⁷

Today’s litigation statistics bear out the benefits of the law’s preference for aggregation. As of May 15, 2019, the Joint Panel on Multidistrict Litigation has consolidated more than 144,000 individual pending cases into only about two hundred multidistrict litigation (“MDL”) proceedings for efficient, aggregated, pretrial proceedings.¹⁸⁸ Class actions, though not as prevalent as they once were, are still the vehicle of choice for large-scale securities-fraud claims and some consumer actions involving hundreds of thousands of individual claimants.¹⁸⁹ The alternative to aggregation is frightening, even for defendants. Uber, which forced its drivers to sign arbitration

185. Frank, *Historical Bases*, *supra* note 12, at 26.

186. See Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 7–16 (2018) [hereinafter Dodson, *Personal Jurisdiction and Aggregation*]. For a recent history of aggregation, see generally Judith Resnik, “Vital” State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts, 165 U. PA. L. REV. 1765 (2017).

187. See Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 813 (1989) (discussing how “packaging” can eliminate duplicative litigation); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1349 (2000) (same). For an example of some aggregation successes and some failures, see Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 263–66 (2006) (detailing the successes of aggregation for resolving asbestos claims in the early 1990s).

188. See U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT - DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT, (May 15, 2019) https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-May-15-2019.pdf [<https://perma.cc/FR22-35XG>].

189. See *Federal Securities Class Action Litigation 1996 – YTD*, STAN. L. SCH. SEC. CLASS ACTION CLEARINGHOUSE, <http://securities.stanford.edu/charts.html> [<https://perma.cc/HF4P-ZCPK>] (reporting that 2017 and 2018 were two of the three highest-filing years for securities class actions ever).

agreements that prevented aggregation, currently faces more than sixty thousand independent arbitration demands by individual drivers, many of whom have similar claims that could otherwise be amenable to aggregate treatment.¹⁹⁰ Experts conclude that Uber's cost of resolving those disputes as individual arbitrations could exceed \$600 million, vastly more than Uber would need to settle the cases on an aggregated basis.¹⁹¹

2. *Diversity Jurisdiction and Aggregation.* State borders impede aggregation by curtailing the reach of state courts and laws. State joinder rules can be grudging, and personal jurisdiction limits the power of a state court to hear disputes involving out-of-state parties.¹⁹² But diversity jurisdiction can enable salutary aggregation in federal court that would be forbidden in state court in a number of ways.¹⁹³

The Federal Interpleader Act is a prime example.¹⁹⁴ Interpleader is a joinder device that allows a custodian facing multiple competing claims to the same asset to join the claimants together in a single proceeding to determine entitlement to that asset.¹⁹⁵ Without interpleader, the custodian could be subject to independent actions for the same asset, potentially being exposed to duplicative or even multiplicative liability.¹⁹⁶

Interpleader depends upon the ability to serve each claimant with process that will bring them before a court with personal jurisdiction over them.¹⁹⁷ But that kind of joinder is nearly impossible in state court if the claimants are citizens of many different states. This is because the Supreme Court's recent decisions restricting a state court's personal jurisdiction over out-of-state litigants will likely impede a state court's

190. Joel Rosenblatt, *Uber Gambled on Driver Arbitration and Might Have Come Up the Loser*, L.A. TIMES (May 8, 2019, 10:22 AM), <https://www.latimes.com/business/la-fi-uber-ipo-arbitration-miscalculation-20190508-story.html> [<https://perma.cc/W4VQ-JBKL>].

191. *Id.*

192. See Dodson, *Personal Jurisdiction and Aggregation*, *supra* note 186, at 35–45.

193. See generally Rowe & Sibley, *supra* note 134 (making this argument to propose a precursor to the Multiparty, Multiforum Trial Jurisdiction Act of 2002).

194. Act of Feb. 22, 1917, ch. 113, 39 Stat. 929 (codified as amended at 28 U.S.C. § 1335 (2018)). For a history, see 7 WRIGHT ET AL., *supra* note 12, § 1701.

195. See Zechariah Chafee, Jr., *Interpleader in the United States Courts*, 41 YALE L.J. 1134, 1134–35 (1932) (discussing the benefits of interpleader in U.S. courts).

196. See *id.* For an example of such a situation, see *New York Life Insurance Co. v. Dunlevy*, 241 U.S. 518 (1916).

197. See Chafee, *supra* note 195, at 1136 (“[A]n interpleader suit will not give complete relief to the stakeholder unless the entire controversy can be settled in the interpleader proceeding.”).

ability to hale many claimants—who will be considered defendants in an interpleader action—into the action.¹⁹⁸

Diversity jurisdiction saves the day. The Federal Interpleader Act grants federal courts diversity jurisdiction to hear interpleader actions based on state law.¹⁹⁹ To ensure maximum opportunity for joinder of claimants, the Act requires only minimal diversity and a de minimis amount in controversy.²⁰⁰ Further, Congress gave the federal courts a nationwide range for service of process in interpleader actions,²⁰¹ thus ensuring that all claimants anywhere in the United States could be brought before the single interpleader proceeding. Through the Federal Interpleader Act, diversity jurisdiction provides for a salutary aggregation that could not be accomplished in state court.²⁰² Notably, the bias rationale offers no compelling rationale for diversity jurisdiction in interpleader; rather, the overriding benefit is simply aggregation.

198. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (insisting on a connection between the claim and the state); *Walden v. Fiore*, 571 U.S. 277, 285–86 (2014) (insisting on a connection between the defendant and the state). For a detailed discussion of personal jurisdiction limits in the context of multistate joinder and interpleader, see Dodson, *Personal Jurisdiction and Aggregation*, *supra* note 186, at 19–45. For a prediction that personal jurisdiction limits are likely to continue for the foreseeable future, see Scott Dodson, *Jurisdiction in the Trump Era*, 87 *FORDHAM L. REV.* 73, 74–78, 83–84 (2018) [hereinafter Dodson, *Jurisdiction in the Trump Era*].

199. 28 U.S.C. § 1335 (2018).

200. *Id.* § 1335(a)(1) (requiring only “[t]wo or more adverse claimants, of diverse citizenship” and an amount in controversy exceeding \$500); see also *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 533 (1967) (confirming the requirement of only minimal diversity). Professor Jim Pfander raises the possibility that *Tashire* might be read as upholding the Interpleader Act on ancillary jurisdiction grounds rather than minimal diversity grounds. James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 *CALIF. L. REV.* 1423, 1453–54 (2007).

201. 28 U.S.C. § 2361 provides:

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be . . . addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

202. See 13E *WRIGHT ET AL.*, *supra* note 12, § 3601 (“[Interpleader] is a convenient means of providing a federal forum for cases over which no state court might be able to obtain jurisdiction.”); see also Kramer, *supra* note 1, at 123 (“[C]ommentators unanimously agree that the federal courts provide a service in [interpleader] cases that state courts may not be able adequately to provide.”).

Interpleader is not a unique aberration. The Multiparty, Multiforum Trial Jurisdiction Act of 2002 (“MMTJA”),²⁰³ the Y2K Act of 1999,²⁰⁴ and even the supplemental jurisdiction statute²⁰⁵ all use diversity jurisdiction to promote aggregation even when the bias rationale is not seriously implicated. The MMTJA and Y2K Act both grant minimal diversity jurisdiction and nationwide personal jurisdiction for purposes of facilitating aggregation.²⁰⁶ And the supplemental jurisdiction statute allows joinder of certain nondiverse state claims that might not be able to be joined in state court.²⁰⁷

Diversity jurisdiction also promotes aggregation through class actions. State class action laws can differ from Rule 23, the class action rule that applies in federal court.²⁰⁸ Many state laws, for example, bar class actions entirely or for certain claims and kinds of relief.²⁰⁹ Rule 23, however, has no claim restrictions; it applies with full force in federal court even when based upon state claims that would be precluded from representative litigation under a state class action rule.²¹⁰

Diversity jurisdiction enables those representative actions, which might be barred in state court, to be pursued under the federal class action rule in federal court. The Class Action Fairness Act of 2005 (“CAFA”) grants federal diversity jurisdiction to certain class actions

203. 28 U.S.C. § 1369.

204. Y2K Act, Pub. L. No. 106-37, § 15(c)(2), 113 Stat. 185, 201 (1999) (codified at 15 USC § 6614).

205. 28 U.S.C. § 1367.

206. *See, e.g.*, H.R. REP. NO. 107-685, at 200 (2002) (Conf. Rep.), *reprinted in* 2002 U.S.C.C.A.N. 1120, 1152 (citing a “waste of judicial resources—and the costs to both plaintiffs and defendants—of litigating the same liability question several times over in separate lawsuits”).

207. *See* 28 U.S.C. § 1367 (extending diversity jurisdiction to a related state impleader claim brought by an out-of-state defendant against a same-state third party); *cf.* FED. R. CIV. P. 4(k)(1)(B) (authorizing service of process on an impleaded party outside of the forum state if served within one hundred miles of the courthouse).

208. *See generally* THE LAW OF CLASS ACTION: FIFTY-STATE SURVEY 2019 (ABA 2019) (describing all fifty states’ laws on class actions).

209. For example, the Georgia Code provides that

Any person who suffers injury or damages as a result of a violation of Chapter 5B of this title, as a result of consumer acts or practices in violation of this part, as a result of office supply transactions in violation of this part or whose business or property has been injured or damaged as a result of such violations may bring an action individually, but not in a representative capacity

GA. CODE ANN. § 10-1-399(a) (2015). *See also* *Falis v. Jefferson Davis Cty. Pub. Sch. Bd.*, 95 So. 3d 1223, 1227 (Miss. 2012) (Dickinson, J., dissenting) (“[I]n Mississippi, there are no class actions.”).

210. *See* *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 399–400 (2010) (holding that Rule 23 controls over a New York state rule precluding certain class action claims).

based on minimal diversity.²¹¹ And even ordinary class actions can meet the complete diversity requirement if the class proffers representatives who are completely diverse.²¹² Because of the Supreme Court's restrictive application of personal jurisdiction doctrine, most class actions will be pursued in the defendant's home state.²¹³ But under these circumstances—in which the class would be severely hampered by state class action law if confined to state court—the invocation of the federal forum is almost certainly motivated by aggregation, not the alleviation of out-of-state bias.²¹⁴

Perhaps the broadest diversity-based aggregation device is MDL. The Multidistrict Litigation Act²¹⁵ was intended as the primary mechanism for aggregating state law mass tort cases.²¹⁶ With class actions in decline, MDLs are on the rise and offer tremendous efficiencies and savings for both parties and courts in consolidating

211. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

212. See *Snyder v. Harris*, 394 U.S. 332, 340 (1969) (looking to the named representatives' citizenships for determining the citizenship of a non-CAFA class for diversity jurisdiction purposes); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 365–67 (1921) (same).

213. See Dodson, *Personal Jurisdiction and Aggregation*, *supra* note 186, at 37–38 (discussing state-based limitations and prospective solutions).

214. The bias rationale may still play a role in certain cases, of course. Some commentators have noted:

The types of corporations that find themselves as mass-tort defendants—Big Tobacco, Big Pharma, Big Anything—are often major political and social players in their home states. Even if they did not choose their headquarters to minimize litigation risk, they may have powerful lobbies in the state legislature and, over time, may seek protective substantive or procedural legislation and work to help shape the (often elected) state judiciary. Similarly, local jurors may not be eager to put a major local employer and economic engine out of business.

Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1294 (2018). And, intriguingly, some of the Court's personal jurisdiction decisions have a ring of diversity jurisdiction about them:

Bristol-Myers sounded more like it was arguing in favor of federal diversity jurisdiction than for limitations on personal jurisdiction. The assumption underlying Bristol-Myers's position is that California judges cannot be presumed to treat an out-of-state defendant like Bristol-Myers fairly. . . . Such an argument hews more closely to the traditional justification for including diversity jurisdiction in Article III, namely, that state courts cannot be trusted to treat out-of-staters evenhandedly.

Id. at 1302.

215. 28 U.S.C. § 1407 (2018).

216. See Bradt & Rave, *supra* note 214, at 1262–63 (articulating the genesis of MDL and the aims of its statutory architects).

pretrial cases.²¹⁷ Although personal jurisdiction limits in MDL cases remain uncertain,²¹⁸ there is no question that MDL in federal court offers multistate aggregation on a scale that would be impossible in state court.²¹⁹ Diversity jurisdiction makes that aggregation possible by enabling state law cases to be filed in federal court and then consolidated across state lines in a single MDL court. To be sure, MDL aggregation has its problems,²²⁰ but the aggregation power of federal MDL is undeniable. Further, it seems obvious that diversity-based MDLs have little to do with the bias rationale because no matter where individual cases are filed, the cases are all transferred to a single federal court in a state that may be the home state of the party who invoked federal jurisdiction in the first place.²²¹

These diversity-based aggregation benefits are appreciable, but diversity jurisdiction has even greater potential. Current personal jurisdiction law stymies broader aggregation in federal court because Rule 4(k) of the Federal Rules of Civil Procedure generally incorporates the restrictive limits that personal jurisdiction imposes on state courts in multistate cases.²²² Of course, Congress or the Supreme Court could lift personal jurisdiction's obstacles to aggregation in federal court by expanding the scope of Rule 4(k) in certain multiparty

217. *Id.* at 1266–67; *see also* Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 414 (2014) (“Centralization likewise advantages defendants by making meaningful closure possible through a global settlement.”).

218. *See* Dodson, *Personal Jurisdiction and Aggregation*, *supra* note 186, at 43 (discussing some of the potential restrictions on personal jurisdiction in MDL cases); *see also* Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1469–71 (2019) [hereinafter Dodson, *Plaintiff Personal Jurisdiction*] (discussing the limits of personal jurisdiction over plaintiffs in MDL cases).

219. For a discussion of the possibility of informal multistate coordination, *see* Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1886–92 (2000).

220. For example, centralization increases the power of a single judge and, sometimes, repeat attorneys. *See* Bradt & Rave, *supra* note 214, at 1314–15 (discussing the risks of increasingly personal relationships among repeat actors in MDL cases); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 70–72 (2017) (same).

221. Notwithstanding the forum-defendant bar to removal, nothing prevents a defendant from removing a case based on diversity jurisdiction in one state and then moving to transfer the case to the federal court in its home state. Nor does the law prevent a plaintiff from filing in federal court based on diversity jurisdiction in the plaintiff's home state or by filing elsewhere and then seeking transfer to the plaintiff's home state. *See* *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990) (sanctioning both options).

222. *See, e.g.*, FED. R. CIV. P. 4(k)(1)(A) (“Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”).

cases.²²³ But the efficacy of this personal jurisdiction fix depends upon the expansion of diversity jurisdiction over such cases, for the fix is only available in federal court. Diversity jurisdiction thus holds enormous additional potential as a catalyst for facilitating aggregation in federal court on a much grander scale.

B. Other Benefits of Diversity Jurisdiction

Freeing the debate from the tethers of the bias rationale also sets other considerations in a new light. For example, diversity jurisdiction can help avoid other state court biases that are not inherently tied to out-of-state citizenship.

As shown above, even some of the Constitution's Framers seemed more focused on anticreditor or economic biases than nonresident status generally.²²⁴ Corporations have long valued diversity jurisdiction because of a belief that federal courts are more business friendly than state courts.²²⁵ That sentiment largely continues in modern times: a study published in 1992 found 45 percent of surveyed defense attorneys reported that they perceived state court bias against corporate defendants,²²⁶ and a study published in 1995 found that corporations tend to favor selecting federal court.²²⁷

Relatedly, some litigants perceive certain state courts as more plaintiff friendly, or class action friendly, than their corresponding

223. See, e.g., Dodson, *Personal Jurisdiction and Aggregation*, *supra* note 186, at 39–40 (suggesting rule expansion for pendent personal jurisdiction).

224. See *supra* notes 50–56 and accompanying text; see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1398–1404 (2006) (arguing that federal judges have seen themselves as better guarantors of a national free market).

225. See PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 120, at 64 (“Diversity jurisdiction symbolized for both Progressives and their adversaries the de facto alliance between corporations and the national judiciary.”); Charles E. Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A. J. 499, 502 (1933) (reviewing data in support of this point); Frank, *Historical Bases*, *supra* note 12, at 28 (noting the anticipatory nature of this concern); William H. Taft, *Criticisms of the Federal Judiciary*, 29 AM. L. REV. 641, 650–51 (1895) (calling state courts part of “a corporation-hating community”). *But see* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 6 (1994) (disputing federal courts’ procorporate tendency by arguing that the “federal judicial power and the judiciary’s solicitude for the rights of private property continued to grow throughout the antebellum period”).

226. Miller, *supra* note 141, at 409.

227. See Flango, *Litigant Choice*, *supra* note 155, at 968 (“Attorneys who do regard corporate status as an important consideration in forum selection tend to favor federal court if their client is a corporation and state court if their opponent is a corporation.”).

federal courts.²²⁸ CAFA, which is discussed in more detail below, was motivated in large part by these concerns.²²⁹ Although state procedural rules largely mimic federal procedural rules, state rules have some differences,²³⁰ differences that often are perceived as advantaging plaintiffs.²³¹

Others see antirural or antiurban biases in state courts.²³² And some have suggested that diversity jurisdiction can help overcome racial bias in state courts.²³³ Political or social preferences may differ in state and federal court,²³⁴ such as when a litigation raises sensitive or highly charged issues like abortion or religion. Quite aside from biases, diversity jurisdiction offers certain efficiencies, including interstate procedural uniformity and familiarity and the ability to transfer to more convenient locations.²³⁵

228. See THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUD. CTR., ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION 8 (2004) (reporting class action plaintiffs' preference for state court); Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 368 (2002) (exploring incentives for state judges to favor in-state plaintiffs); Purcell, *The Class Action Fairness Act*, *supra* note 82, at 1849 ("For more than half a century, from Reconstruction to the New Deal, tort plaintiffs suing national corporations preferred state courts, in part because they believed that federal judges were biased against them."); cf. Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128, 131 (2000) (finding evidence of antiplaintiff bias in federal appellate courts).

229. See Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 49 (2012) ("Congress [in passing CAFA] was plainly concerned that state courts were certifying too many class actions, and it plainly was hoping that fewer would be certified in federal court.").

230. See Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 423–45 (2018) (highlighting certain significant procedural differences).

231. See Miller, *supra* note 141, at 418–22 (reporting attorney perceptions of proplaintiff procedures in state courts); cf. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1551–80 (2014) (making the case that federal court procedures have become increasingly antiplaintiff and antilitigation).

232. See generally Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273 (2003) (recognizing an increasingly urban focus in institutions and policies at the expense of rural interests).

233. See Benjamin V. Madison, III, *Color-Blind: Procedure's Quiet but Crucial Role in Achieving Racial Justice*, 78 UMKC L. REV. 617, 618–19 (2010) (highlighting procedural elements of the criminal trial of officers involved in the Rodney King beating).

234. See generally Letter from GBA Strategies to Nat'l Ctr. for State Cts. (Dec. 4, 2014), <http://jpo.wrlc.org/bitstream/handle/11204/3967/Analysis%20of%20National%20Survey%20of%20Registered%20Voters.pdf?sequence=4> [https://perma.cc/C4UC-GAV2] (finding evidence of public perceptions of political bias in state courts).

235. See, e.g., 28 U.S.C. § 1404(a) (2018) (allowing venue transfer for the convenience of the parties and witnesses); Frank, *Case for Diversity Jurisdiction*, *supra* note 126, at 408–09 (lauding the uniformity and familiarity of federal procedures).

This Article does not defend these potential benefits of diversity jurisdiction here or suggest that they should carry the day.²³⁶ Instead, the point is that minimizing the out-of-state bias rationale allows these factors to be confronted and debated more clearly on their own terms rather than be overshadowed by the lens of out-of-state bias.

C. *An Illustration: CAFA*

Unmooring the diversity debate from the bias rationale, while permitting important modern considerations like aggregation or mitigation of other biases to take center stage, allows judges, legislators, rulemakers, and commentators to have a more honest and useful conversation about diversity jurisdiction and its role. CAFA²³⁷ offers an illustration of how improved rationale transparency could benefit reform efforts. The use of CAFA as an illustration is not to defend the statute. Rather, this Section hopes to show how the centrality of the bias rationale distracted the CAFA debate from the real policy choices at hand.

Before CAFA, only named representatives' citizenships were counted for complete diversity purposes,²³⁸ a doctrine that enabled class counsel to manipulate the complete diversity rule by selecting representatives who destroyed complete diversity and thus defeated diversity jurisdiction.²³⁹ In addition, class actions were subject to the forum-defendant bar to removal: even if the class representatives were completely diverse, the case could not be removed to federal court if any defendant were a citizen of the state where the case was filed.²⁴⁰ Also, removal required the consent of all defendants and removal

236. Using diversity jurisdiction to alleviate state biases other than out-of-state bias implicates some of the same challenges, and may have similar unintended consequences, as using diversity jurisdiction to alleviate out-of-state bias. *See supra* Part III (discussing the limitations to out-of-state bias justifications). Further, encouragement of separate systems with different preferences may make each system more extreme. *See* Diego A. Zambrano, *Federal Aggrandizement and the Decay of State Courts*, 86 U. CHI. L. REV. (forthcoming 2019), (manuscript at 53–54) (on file with the *Duke Law Journal*) (illustrating normative concerns with adversely positioned state and federal court regimes).

237. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

238. *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 365–67 (1921) (citing precedent diversity jurisdiction principles elaborated in *Stewart v. Dunham*, 115 U.S. 61, 64 (1885)).

239. *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1597–98 (2008) (“Before CAFA, if plaintiffs’ counsel preferred state court, it was easy to avoid federal court simply by choosing class representatives to destroy complete diversity, by naming a nondiverse or in-state defendant” (footnotes omitted)).

240. 28 U.S.C. § 1441(b) (2018).

within one year of filing.²⁴¹ Finally, unincorporated entities are deemed citizens of each state where its members were citizens,²⁴² meaning that some entities were citizens of many states and increasing the likelihood that those entities would destroy complete diversity. These features enabled class representatives and class counsel to select favorable state courts for litigation and engineer strategies to avoid federal court even though the class members might reside in many different states.²⁴³

In a nutshell, CAFA broadens diversity jurisdiction over certain multistate class actions with at least one hundred class members.²⁴⁴ For CAFA classes, the statute authorizes diversity jurisdiction based on minimal diversity of any class member and any defendant.²⁴⁵ The statute also lifts the forum-defendant and one-year bars and eliminates the unanimity requirement.²⁴⁶ Finally, the statute makes unincorporated entities citizens only of “the State where it has its principal place of business and the State under whose laws it is organized.”²⁴⁷

CAFA expands opportunities for defendants to secure a federal forum on CAFA classes. Congress’s rationale seems to have been not to alleviate any bias against out-of-state defendants but to harness the advantages of federal court for defendants.²⁴⁸ Congress and CAFA supporters saw federal courts as more favorable to defendants and to businesses. At the same time, federal courts were perceived as more

241. *Id.* § 1446(b)(2)(A), (c)(1).

242. *See, e.g., Americold Realty Tr. v. ConAgra Foods, Inc.*, 136 S. Ct. 1012, 1016 (2016) (illustrating this rule in the context of real estate investment trusts).

243. *See* S. REP. NO. 109-14, at 15–25 (2005) (listing different purported abuses of jurisdictional flexibility proffered to class actions). The general removal statute also bars appellate review of remand orders, 28 U.S.C. § 1447(d), while CAFA restores appellate review, *id.* § 1453(c).

244. 28 U.S.C. § 1332(d)(5)(B).

245. *Id.* § 1332(d)(2)(A) (extending diversity jurisdiction when “any member of a class of plaintiffs is a citizen of a State different from any defendant”). The constitutionality of using putative class members’ citizenships to establish diversity jurisdiction has been questioned. *See, e.g.,* Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*, 51 WM. & MARY L. REV. 1113, 1130 (2009) (considering the relation of diversity jurisdiction to cases’ underlying controversies).

246. *See* 28 U.S.C. § 1453(b) (authorizing removal of CAFA classes without regard to any defendant’s forum citizenship).

247. *Id.* § 1332(d)(10).

248. *E.g.,* Burbank, *supra* note 72, at 1528 (“[T]he reason for federal subject matter jurisdiction . . . might seem to be a desire to give the corporate defendant . . . a more favorable forum.”); Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1725 (2008) (reviewing the corporate political interests supporting CAFA).

hostile to class actions and were motivated to use diversity jurisdiction to combat perceived proclass, antidefendant, and antibusiness biases in certain state courts while neutralizing the plaintiff-side forum selection of those state courts.²⁴⁹ That motivation is an appropriate justification for diversity jurisdiction and is one that should be debated on its own terms.²⁵⁰

However, because Congress relied primarily on Article III's grant of diversity jurisdiction to support CAFA, the centrality of the bias rationale to diversity jurisdiction induced Congress and CAFA supporters to justify the act on the basis of combating out-of-state bias.²⁵¹ The Act itself expressly finds that

abuses in class actions undermine . . . the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are . . . sometimes acting in ways that demonstrate bias against out-of-State defendants. . . .²⁵²

The accompanying Senate Report states that “[o]ne of the primary historical reasons for diversity jurisdiction is the reassurance of fairness

249. See S. REP. NO. 109-14, at 14 (2005) (calling out “some state court judges [who] are less careful than their federal court counterparts about applying the procedural requirements that govern class actions”); Marcus, *supra* note 84, at 1252 (discussing CAFA support among antiregulatory lawyers and litigants).

250. To be fair, the congressional hearings did confront some of the CAFA policies on their own terms. See S. REP. NO. 109-14, at 51–75 (2005) (chronicling criticisms of CAFA and respective rebuttals). For examples of efforts to engage those justifications post-enactment, see WILLGING & WHEATMAN, *supra* note 228, at 34–36 (noting that “cases were almost equally likely to be certified” in state and federal courts and reporting slightly lower certification rate in state courts), and see generally Patricia Hatamyar Moore, *Confronting the Myth of “State Court Class Action Abuses” Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKCL. REV. 133 (2013).

251. See Marcus, *supra* note 84, at 1293 (“Whether real or imagined, local bias fairly frequently spurred arguments in CAFA debates.”); see also *Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the H. Comm. on the Judiciary*, 108th Cong. 23 (2003) (statement of John H. Beisner, Partner, O’Melveny & Myers LLP), http://commdocs.house.gov/committees/judiciary/hju87093.000/hju87093_0f.htm [<https://perma.cc/N5DF-R2XN>] (“[T]here can no longer be any question that some local judges are exhibiting bias against out-of-state defendants . . . the very type of bias that led to the creation of diversity jurisdiction in the first place.”).

252. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(B), 119 Stat. 4, 5. The Act also finds that state courts were “keeping cases of national importance out of Federal court” and were “making judgments that impose their view of the law on other States and bind the rights of the residents of those States.” *Id.* § 2(a)(4)(A), (C). Those findings have never been established as historical goals of diversity jurisdiction.

and competence that a federal court can supply to an out-of-state defendant facing suit in state court.”²⁵³ It continues:

As set forth in Article III of the Constitution, the Framers established diversity jurisdiction to ensure fairness for all parties in litigation involving persons from multiple jurisdictions, particularly cases in which defendants from one state are sued in the local courts of another state. Interstate class actions which often involve millions of parties from numerous states—present the precise concerns that diversity jurisdiction was designed to prevent: frequently in such cases, there appears to be state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation.²⁵⁴

These are tenuous justifications for CAFA.²⁵⁵ Out-of-state bias tends to justify retaining—not eliminating, as CAFA does—the complete diversity rule and the forum-defendant rule because a defendant corporation sued in its home state should face no bias by a state court. Eliminating these features might be consistent with a more honest appraisal of CAFA’s motivations, but, without more explanation and evidence, they are inconsistent with the bias rationale.²⁵⁶ In addition, opponents have challenged the underlying premise that state courts were, in fact, exhibiting such bias.²⁵⁷

This focus on the bias rationale has diverted attention away from the real debate about CAFA. Indeed, courts have picked up on CAFA’s reliance on the bias rationale and repeated it in their opinions and as grounding for their holdings. The Fifth and Tenth Circuits have

253. S. REP. NO. 109-14, at 5 (2005); *cf. id.* at 7–8 (“According to the Framers, the primary purpose of diversity jurisdiction was to protect citizens in one state from the injustice that might result if they were forced to litigate in out-of-state courts.” (citing *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855))).

254. *Id.* at 6 (footnote omitted). The Senate Report also notes “that the Framers were concerned that state courts might discriminate against interstate businesses and commercial activities, and thus viewed diversity jurisdiction as a means of ensuring the protection of interstate commerce.” *Id.* at 8.

255. Cross, *supra* note 21, at 194 (“CAFA has raised concerns among lawyers and scholars in part because it unambiguously extends diversity jurisdiction beyond what many believe is the sole purpose of diversity jurisdiction: the prevention of state court bias against out-of-state parties.”).

256. See Burbank, *supra* note 72, at 1517–18 (articulating some of the reasons behind CAFA support). It is possible that the bias rationale could support minimal diversity and the removal of the forum-defendant rule, but only if evidence suggested that the presence of one out-of-state party on the side of the party invoking diversity jurisdiction was likely to generate state court prejudice against out-of-state citizens despite the citizenships of the other parties.

257. See, e.g., Purcell, *The Class Action Fairness Act*, *supra* note 82, at 1885 (“[T]here was no evidence that bias or unfairness existed in state courts generally . . .”).

both stated that, “In enacting CAFA, Congress sought to correct state and local court abuses in class actions such as bias against out-of-state defendants by expanding federal diversity jurisdiction over interstate class actions.”²⁵⁸ The Eleventh Circuit recently held that the dual in-state and out-of-state citizenship of defendants could not create minimal diversity jurisdiction sufficient to allow removal of a CAFA case to federal court because those defendants “face no risk of any conceivable local bias” in the state court.²⁵⁹ Litigants, too, have tied CAFA to the bias rationale, with one brief asserting: “CAFA was adopted for the purpose of protecting the precise category of defendants at issue in this case: out-of-state defendants against whom large damage claims have been asserted and who fear that they may be discriminated against in state court.”²⁶⁰

These courts have been waylaid by the bias rationale. CAFA instead should be viewed in light of its real purposes: protecting interstate commerce from perceived proclass, antidefendant, and antibusiness leanings in certain state courts. Those purposes animate reasonable debates about the policy wisdom of CAFA and the legal questions of its interpretation. But those debates should not depend upon the bias rationale.

V. REFORMING DIVERSITY JURISDICTION

This Part will show how reorienting diversity jurisdiction from the bias rationale and toward other considerations like aggregation leads to several possible areas for reform. It also assesses the constitutionality of using considerations other than the bias rationale to support such reform efforts.

A. *Potential Reforms*

Refocusing the diversity debate suggests reconsideration of the forum-defendant bar to removal, the complete diversity rule, and the tests for citizenship. This Part does not argue that these reforms should be pursued; they present complicated policy issues involving federalism, federal docket control, and party convenience and fairness.

258. *Speed v. JMA Energy Co.*, 872 F.3d 1122, 1126 (10th Cir. 2017) (quoting *Arbuckle Mountain Ranch of Tex., Inc. v. Chesapeake Energy Corp.*, 810 F.3d 335, 337 (5th Cir. 2016)).

259. *Life of the S. Ins. v. Carzell*, 851 F.3d 1341, 1346 (11th Cir. 2017); *cf.* *Hunter v. Medstar Geo. Univ. Hosp.*, 144 F. Supp. 3d 28, 29–30 (D.D.C. 2015) (relying, in part, on the lack of out-of-state bias to deny CAFA jurisdiction).

260. *IADC Amicus Brief Program*, 81 DEF. COUNS. J. 404, 430 (2014).

Rather, reengaging those complicated policy issues, unshackled by the bias rationale, may lead to more sincere discussions where individuals can meaningfully consider reform in these areas of the law.

1. *The Forum-Defendant Bar.* The most obvious reform possibility is the elimination of the forum-defendant bar to removal of diversity cases. The general removal statute bars a case founded entirely on diversity jurisdiction from being removed if any served defendant is a citizen of the forum state.²⁶¹ This bar is based completely on the bias rationale: the presence of an in-state defendant should obviate the need for the defendants to invoke a federal forum's protection from local bias.²⁶²

Yet the forum-defendant bar presents other issues for consideration. On the one hand, the forum-defendant bar helps control federal dockets, preserve state prerogatives, and reduce defendant forum shopping.²⁶³ On the other hand, the forum-defendant bar gives plaintiffs a distinct advantage against defendants because the bar prevents defendants from invoking a federal forum that plaintiffs could have invoked in the first instance. This forum-choice disparity gives rise to both plaintiff-side and defense-side gamesmanship. Plaintiffs try to ensure joinder of an in-state defendant to prevent removal even if their stronger claims are against out-of-state defendants, while out-of-state defendants might try to remove a case quickly, before any in-state defendant has been served.²⁶⁴ The bar also prevents salutary removal on grounds unrelated to out-of-state bias, such as state bias against the particular type of defendant or defense likely to be asserted. Finally, the bar also prevents removal when access to federal court might allow for advantageous federal consolidation in an MDL or other aggregated litigation.

261. 28 U.S.C. § 1441(b)(2) (2018).

262. See *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313, 319 (D. Mass. 2013) (“[T]he protection-from-bias rationale behind the removal power evaporates when the defendant seeking removal is a citizen of the forum state.”).

263. Congress has chosen to limit diversity-based removal for substantive reasons in other areas. See 28 U.S.C. § 1445(c) (prohibiting removal of cases that arise out of the forum state's worker's compensation laws).

264. See, e.g., Arthur Hellman, Lonny Hoffman, Thomas D. Rowe, Jr., Joan Steinman & Georgene Vairo, *Neutralizing the Stratagem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103, 104–08 (2016) (describing these strategies and proposing legislation to address the gamesmanship of plaintiffs and defendants regarding the forum-defendant bar).

Minimizing the role of the bias rationale allows for fuller consideration of these issues. Perhaps the bar is sound as is. Perhaps additional exceptions to the bar are warranted for aggregation purposes. Perhaps the bar should be eliminated entirely. Or perhaps judges should have discretion to suspend the bar under certain circumstances. Whatever the ultimate fate of the forum-defendant bar, it should depend upon far more than just the bias rationale.

2. *The Complete Diversity Rule.* Another possible reform could involve the complete diversity rule, which, ever since *Strawbridge*, has been justified on state-bias grounds.²⁶⁵ The shadow of the bias rationale has loomed over recent incursions on the complete diversity rule. The supplemental jurisdiction statute, for example, took pains to preserve the complete diversity rule,²⁶⁶ and the Court has continued to interpret the supplemental jurisdiction statute in light of the bias rationale.²⁶⁷ CAFA supporters unconvincingly pitched CAFA's adoption of minimal diversity as consistent with the bias rationale.²⁶⁸ And other statutes grounded in minimal diversity have been exceedingly modest despite the appeal of broader federal jurisdiction.²⁶⁹ The MMTJA,²⁷⁰ for example, grants minimal diversity jurisdiction over a very narrow class of cases, like airplane crashes,²⁷¹ that present a "single accident, where at least 75 natural persons have died in the accident at a discrete location."²⁷² MMTJA proponents initially urged broader jurisdictional

265. See *supra* note 90.

266. See 13D WRIGHT ET AL., *supra* note 12, § 3567 ("Congress's effort thus grants supplemental jurisdiction broadly and then endeavors to withdraw the grant in certain instances, in an effort to preserve the complete diversity rule for diversity of citizenship cases.").

267. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553–54 (2005) (stating that the bias rationale "explains" why supplemental jurisdiction preserves the complete diversity rule of the diversity statute).

268. See *supra* text accompanying notes 251–55.

269. See, e.g., 15 U.S.C. § 6614(c) (2018) (granting minimal diversity jurisdiction for certain Y2K class actions); 28 U.S.C. § 1335 (granting minimal diversity jurisdiction for interpleader actions).

270. Multiparty, Multiforum Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826.

271. H.R. REP. NO. 106-276, at 21 (1999).

272. 28 U.S.C. § 1369(a).

grants to facilitate aggregation of complex litigation,²⁷³ but the MMTJA as enacted was far narrower.²⁷⁴

Like the forum-defendant rule, however, the complete diversity rule has its own rich web of policy implications, and when debated out of the bias rationale's shadow, those policy implications might lead to additional incursions of complete diversity. The rule obstructs aggregation by preventing federal court joinder of nondiverse parties who may be important—even necessary—to the litigation.²⁷⁵ The rule thus causes unfairness, inefficiency, and duplicative litigation.²⁷⁶ As a secondary matter, the complete diversity rule, by demanding attention to every party's citizenship, greatly complicates supplemental jurisdiction, incentivizes party gamesmanship, and exacerbates nettlesome questions of citizenship. Of course, any erosion of the complete diversity rule should consider the effect on federal dockets,²⁷⁷ the infringement on state prerogatives and on the development of state law precedent,²⁷⁸ and the possibility that diversity expansion could benefit one class of litigants more than another.²⁷⁹ But it may be, on

273. See AM. L. INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* 37 (1994) (recommending minimal diversity for federal cases involving one or more common questions of fact where consolidation would promote justice, efficiency, and fairness); Rowe & Sibley, *supra* note 134, at 55 (proposing minimal diversity to join certain claims arising from “the same transaction, occurrence, or series of related transactions or occurrences”).

274. See C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 616–28 (2003) [hereinafter Floyd, *The Limits*] (detailing the MMTJA's legislative history).

275. See FED. R. CIV. P. 19(b) (acknowledging the problem of necessary parties who cannot be joined). Personal jurisdiction hinders multistate party joinder as well, but expanding personal jurisdiction to facilitate joinder in federal court is a simple matter of rule or statutory amendment. See Dodson, *Personal Jurisdiction and Aggregation*, *supra* note 186.

276. Other scholars have strongly supported efforts to eliminate duplicative litigation. See generally, e.g., Redish, *supra* note 187.

277. By one estimate, more than 550,000 cases filed in state court in 2013 qualified for minimal diversity but not complete diversity. SHEPHERD, *supra* note 106, at 23–24. It is unclear how many of those might end up in federal court under a minimal diversity grant, but whatever cases do would bring to federal courts many of the complexities inherent in diversity jurisdiction, including difficult *Erie* issues, abstention considerations, and certification pressures.

278. Expansive federal diversity jurisdiction may also exacerbate the gravitational pull of federal court decision-making on state court precedent. See Dodson, *Gravitational Force*, *supra* note 86, at 738.

279. See PURCELL, *LITIGATION AND INEQUALITY*, *supra* note 97, at 45 (arguing that corporations have used diversity jurisdiction to subject parties of more modest means to a more expensive litigation forum for purposes of pressuring more favorable settlements); Dodson, *Jurisdiction in the Trump Era*, *supra* note 198, at 81 (cautioning that recent expansions of diversity jurisdiction have disproportionately advantaged defendants). Some data even suggest that vertical forum shopping, and therefore the possibility of removal, affects case outcomes. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About*

balance, that the statutory experiments with minimal diversity to date are too modest in light of the benefits of federal aggregation and streamlined jurisdictional determinations. Marginalization of the bias rationale would allow debates about the use of minimal diversity in these areas to focus on their own merits and demerits.

3. *Citizenship Tests.* A third area of reform is the test for determining citizenship. Historically, citizenship determinations have been complex and unpredictable. The test for an individual U.S. citizen's state citizenship for purposes of diversity jurisdiction depends upon the individual's subjective intent to permanently reside in a particular state,²⁸⁰ which can lead to self-serving testimony and disruptive preliminary hearings involving significant evidentiary proof.²⁸¹ Citizenship of artificial entities suffers from similar complexities and uncertainties.²⁸² Most artificial entities—partnerships, real estate trusts, unions, associations, and the like—take on the citizenships of each member.²⁸³ Such derivative citizenship causes its own headaches.²⁸⁴

Admittedly, citizenship tests have not always hewn closely to the bias rationale.²⁸⁵ But a more express disavowal of the bias rationale might encourage alternative formulations that expand or restrict

the Legal System? Win Rates and Removal Jurisdiction, 83 CORNELL L. REV. 581, 598–606 (1998) (describing and explaining this phenomenon).

280. 13E WRIGHT ET AL., *supra* note 12, § 3612.

281. *Id.*

282. See *Americold Realty Tr. v. ConAgra Foods, Inc.*, 136 S. Ct. 1012, 1014 (2016) (stating that citizenship “can become metaphysical when applied to legal entities”); Stewart, *supra* note 86, at 214 (“With the advent of a perplexing variety of corporate structural forms, determining domicile for an entity, as opposed to a natural person, has become a byzantine task.”).

283. See *Americold*, 136 S. Ct. at 1014 (2016) (“While humans and corporations can assert their own citizenship, other entities take the citizenship of the members.”); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195–96 (1990) (stating the “oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of ‘all the members’” (quoting *Chapman v. Barney*, 129 U.S. 677, 682 (1889))); see, e.g., *Americold*, 136 S. Ct. at 1014 (real estate trusts); *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 146–47 (1965) (unions); *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456–57 (1900) (joint-stock companies); *Chapman v. Barney*, 129 U.S. 677, 682 (1889) (partnerships). For a thorough discussion, see 13F WRIGHT ET AL., *supra* note 12, § 3630.1.

284. For example, one judge analyzed at least nine layers of embedded citizenships before determining the party was nondiverse. *Quantlab Fin., LLC v. Tower Research Capital, LLC*, 715 F. Supp. 2d 542, 546–49 (S.D.N.Y. 2010).

285. See James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1952 (2004) (“By making party identity the test of jurisdiction . . . diversity offers a cleaner jurisdictional test” than an alternative approach to addressing state court bias, which requires an “official inquiry into problems with the quality of justice in state court.”).

federal jurisdiction for other justifiable reasons or lead to the development of tests that focus on the virtues of clarity and predictability.²⁸⁶

A recent exposition of the test for corporate citizenship, for example, may be worth emulating. Corporations are statutorily prescribed the citizenship of their state of incorporation and the state of their “principal place of business.”²⁸⁷ The latter proved “difficult to apply,”²⁸⁸ and lower courts developed a number of tests, including the “nerve center,” “business activities,” and “center of gravity” tests for determining a corporation’s principal place of business.²⁸⁹ As the Supreme Court noted in 2010 in *Hertz Corp. v. Friend*:²⁹⁰

This complexity may reflect an unmediated judicial effort to apply the statutory phrase “principal place of business” in light of the general purpose of diversity jurisdiction, *i.e.*, an effort to find the State where a corporation is least likely to suffer out-of-state prejudice when it is sued in a local court. But, if so, that task seems doomed to failure. After all, the relevant purposive concern—prejudice against an out-of-state party—will often depend upon factors that courts cannot easily measure, for example, a corporation’s image, its history, and its advertising, while the factors that courts can more easily measure, for example, its office or plant location, its sales, its employment, or the nature of the goods or services it supplies, will sometimes bear no more than a distant relation to the likelihood of prejudice. At the same time, this approach is at war with administrative simplicity. And it has failed to achieve a nationally uniform interpretation of federal law, an unfortunate consequence in a federal legal system.²⁹¹

Hertz cleaned up that mess by holding that a corporation’s principal place of business is “the place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities,” typically its headquarters.²⁹² In giving the statute this construction, the Court “place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as

286. See Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 9–11 (2011) (recounting the Court’s preoccupation with jurisdictional clarity).

287. 28 U.S.C. § 1332(c) (2018).

288. *Hertz Corp. v. Friend*, 559 U.S. 77, 89 (2010).

289. *Id.* at 90–91.

290. *Id.* at 89.

291. *Id.* at 92 (citation omitted).

292. *Id.* at 80–81.

possible.”²⁹³ The Court acknowledged that its focus on administrability could be seen as at odds with the bias rationale:

We also recognize that the use of a “nerve center” test may in some cases produce results that seem to cut against the basic rationale for 28 U.S.C. § 1332. For example, if the bulk of a company’s business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the “principal place of business” is New York. One could argue that members of the public in New Jersey would be *less* likely to be prejudiced against the corporation than persons in New York—yet the corporation will still be entitled to remove a New Jersey state case to federal court. And note too that the same corporation would be unable to remove a New York state case to federal court, despite the New York public’s presumed prejudice against the corporation.²⁹⁴

Nevertheless, the Court opted for a rule that elevated clarity over effectuation of the bias rationale.²⁹⁵

Hertz’s minimization of the role of the bias rationale as an interpretive heuristic should be applauded and, in conjunction with other factors implicated by diversity jurisdiction, emulated in other areas.²⁹⁶ Perhaps the test for unincorporated entities could similarly be simplified; their citizenship could be determined solely by the state whose law creates the entity, or perhaps both that state and the state of the entity’s principal place of business, like the test for corporations.²⁹⁷ Or perhaps the test for a natural person’s citizenship could be based on objective factors rather than subjective intent. These possibilities may or may not prove sensible, but their sensibility ought

293. *Id.* at 80. The Court stated:

[A]dministrative simplicity is a major virtue in a jurisdictional statute. Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim’s legal and factual merits. Judicial resources too are at stake. . . . Simple jurisdictional rules also promote greater predictability.

Id. at 94 (citations omitted).

294. *Id.* at 96 (emphasis in original) (citation omitted).

295. *Id.* (“We understand that such seeming anomalies will arise. However, in view of the necessity of having a clearer rule, we must accept them.”).

296. The rule of considering only class representatives’ citizenships for purposes of diversity jurisdiction in a class action, *see supra* note 212, is a similar paean to administrative simplicity.

297. *See generally* Christine M. Kailus, Note, *Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall*, 2007 U. ILL. L. REV. 1543 (2007) (proposing such a test). Notably, CAFA adopts this rule for unincorporated entities who are parties in a CAFA class action. 28 U.S.C. § 1332(d)(10) (2018).

to depend primarily on factors other than the impact of out-of-state bias.

B. Constitutional Constraints

The Constitution erects no significant obstacle to severing the bias rationale from debates about diversity jurisdiction. The bias rationale is a policy consideration, not a constitutional constraint. As long as jurisdictional doctrine satisfies Article III, incompatibility with the bias rationale is of no constitutional moment.

The Diversity Clause extends the judicial power to “controversies . . . between Citizens of different States.”²⁹⁸ That is all that is required. The Constitution does not codify the bias rationale in any form. Consistent with this language, the Court’s opinions construing the Diversity Clause focus entirely on its text, which the Court has consistently read to authorize diversity jurisdiction based on “minimal diversity”—any one plaintiff of a different citizenship from any one defendant—without any regard to possibilities of state bias.²⁹⁹ Thus, statutory grants of federal diversity jurisdiction have long authorized even in-state plaintiffs to invoke diversity jurisdiction, despite the lack of any presumed state bias against them,³⁰⁰ and the Court has never held any congressional authorization of diversity jurisdiction to be

298. U.S. CONST. art. III, § 2.

299. For example, in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Court stated:

The Constitution broadly provides for federal-court jurisdiction in controversies “between Citizens of different States.” Art. III, § 2, cl. 1. This Court has read that provision to demand no more than “minimal diversity,” *i.e.*, so long as one party on the plaintiffs’ side and one party on the defendants’ side are of diverse citizenship, Congress may authorize federal courts to exercise diversity jurisdiction.

Id. at 584. *See also, e.g.*, *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 577 n.6 (2004) (“We understand ‘minimal diversity’ to mean the existence of at least *one* party who is diverse in citizenship from one party on the other side of the case, even though the extraconstitutional ‘complete diversity’ required by our cases is lacking.”); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) (“Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.”); *cf.* Pfander, *supra* note 200, at 1470 (“For the past generation or two, lawyers, academics and Supreme Court justices have understood that the decision in *State Farm v. Tashire* provides authority for grants of jurisdiction on the basis of minimal diversity between adverse claimants.”). Professor Pfander has argued that the restriction of Article III’s grant of diversity jurisdiction to “controversies . . . between” diverse parties limits “the boldest assertions of minimal diversity” that attempt to join nondiverse claims that are “separate and distinct” from diverse claims, but he recognizes that “[a]rguments about bias . . . do not help much in defining constitutional limits on the scope of the litigation unit for diversity purposes.” *Id.* at 1449–51.

300. *See* 28 U.S.C. § 1332(a) (containing no exclusion for in-state plaintiffs).

unconstitutional on bias rationale grounds.³⁰¹ Nor has the Court invalidated any statutory tests for citizenship determination because of inconsistency with the bias rationale.³⁰² The upshot is that Congress can extend diversity jurisdiction regardless of whether bias—or its perception—exists.³⁰³ As long as the controversy is between citizens of different states, the Diversity Clause covers it.³⁰⁴

To be clear, there may be good reasons to resist sweeping proposals to expand federal jurisdiction to the reaches of the Diversity Clause. Significant policy considerations warrant caution.³⁰⁵ But those are questions of policy, not of constitutional limits. Nothing in Article III prevents Congress from using the Diversity Clause to consider and weigh values unconnected to the bias rationale.

CONCLUSION

This Article is not another piece arguing for or against diversity jurisdiction. Rather, its point is to try to modernize and update the conversation about diversity jurisdiction to account for a diminished role of the bias rationale and new considerations, including the importance of federal aggregation. This Article's aim is to free diversity jurisdiction from its state-bias moorings to enable more honest—and more productive—consideration of the salutary scope of federal diversity jurisdiction.

301. To the contrary, the Court has sustained minimal diversity grants under the Diversity Clause despite the lack of any congressional purpose to protect against state bias. *See, e.g., Tashire*, 386 U.S. at 530 (upholding the Interpleader Act's grant of minimal diversity jurisdiction, based on "the legislative purpose broadly to remedy the problems posed by multiple claimants to a single fund" under the Diversity Clause).

302. Indeed, recent citizenship tests have eschewed dependence upon the bias rationale. *See supra* notes 287–96 and accompanying text (discussing *Hertz*).

303. It is true that the bias rationale has influenced the way Congress has extended, and the way the Court has construed, statutory grants of diversity jurisdiction. *See supra* notes 87–107 and accompanying text (discussing the complete diversity rule, the statutory designation of corporate citizenship, and the forum-defendant rule). The bias rationale has not, however, influenced the Court's construction of the Diversity Clause. *Cf. Tashire*, 386 U.S. at 531 n.7 (tacitly approving pending proposals to use diversity jurisdiction to promote multiparty and multiforum aggregation).

304. One scholar has argued that the Diversity Clause restricts the grant of diversity jurisdiction to instances compatible with the bias rationale. *See Floyd, The Limits, supra* note 274, at 615 (contending that Article III requires that congressional authorization of diversity jurisdiction must "reasonably . . . serve the purposes underlying Article III's grant of federal jurisdiction"). But that has never been the way the Court or Congress sees it.

305. *See supra* notes 165–80 and accompanying text.