

# Washington University Law Review

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Volume 81 | Issue 1

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2003

## The Hidden Bias in Diversity Jurisdiction

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### Recommended Citation

Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L. Q. 119 (2003).  
Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol81/iss1/3](https://openscholarship.wustl.edu/law_lawreview/vol81/iss1/3)

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# THE HIDDEN BIAS IN DIVERSITY JURISDICTION

DEBRA LYN BASSETT\*

## INTRODUCTION

Commentators have repeatedly debated the continued viability of diversity jurisdiction. These debates have tended to focus on two points: the existence of local bias (which contributes to arguments favoring the retention of diversity jurisdiction) and the workload of the federal courts (which contributes to arguments favoring the abolition of diversity jurisdiction). What has been missed in this debate is that, far from being an antidote to local bias, diversity jurisdiction today embodies, and indeed promotes, a form of bias by its very existence—a bias against rural areas so pervasive as to require the abolition of diversity jurisdiction.

Diversity jurisdiction—the subject-matter jurisdiction of the federal courts to decide disputes between citizens of different states<sup>1</sup>—is a provision of long-standing<sup>2</sup> and disputed historical purpose.<sup>3</sup> The traditional, most

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1. Diversity jurisdiction is authorized by the Constitution. U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to Controversies . . . between Citizens of different States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”). However, the actual grant of diversity jurisdiction is statutory. 28 U.S.C. § 1332(a) (2000):

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between— (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

*Id.*

2. Diversity jurisdiction was a part of the United States Constitution from the outset. See Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 242-46 (1985) (noting that Committee of Detail drafts included references to diversity jurisdiction); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484-87 (1928) [hereinafter Friendly, *Historic Basis*] (tracking the “textual history of the

common explanation of diversity jurisdiction's purpose is the protection of out-of-state litigants from local bias by state courts.<sup>4</sup> The continued necessity of diversity jurisdiction has been hotly debated on many occasions,<sup>5</sup> generating extensive commentary in the legal literature.<sup>6</sup>

These debates are nothing new; diversity jurisdiction has generated controversy since its inception.<sup>7</sup> More recently, the increased caseload in the federal courts has motivated calls for diversity's abolition.<sup>8</sup> Supporters of

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diversity clause"). The statutory provision was codified in the Judiciary Act of 1789. *See* Amar, *supra*, at 259-67 (describing provisions of the first Judiciary Act); Friendly, *supra*, at 500-04 (discussing the passage of the first Judiciary Act).

3. *Compare* Erie R.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."), with Friendly, *Historic Basis*, *supra* note 2, at 496-97 ("The desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction."). *See also infra* notes 24-25 and accompanying text (discussing disagreement among commentators regarding the historical purpose of diversity jurisdiction).

4. Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 IND. L.J. 181, 190 (1998) ("The principal argument for diversity jurisdiction is the protection of out-of-state litigants from local prejudice.").

5. *See* Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 98 (noting that "[e]very administration since President Carter's, the Judicial Conference, the American Law Institute, state courts, numerous public interest and legal aid organizations, and most legal scholars support the abolition or curtailment of diversity").

6. *See, e.g.,* Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179, 193 (1929) (supporting diversity jurisdiction); David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968) (supporting limits on diversity jurisdiction); John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963) [hereinafter Frank, *Maintaining Diversity*] (supporting diversity jurisdiction); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 521 (1928) (arguing that there are no longer valid reasons for diversity jurisdiction); Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 314 (1979) (stating that diversity jurisdiction is "an idea whose time has passed"); Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 201-05 (1982) (supporting the continuing operation of diversity jurisdiction); James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: The Silver Lining*, 66 A.B.A. J. 177, 180 (1980) (supporting abolition of diversity jurisdiction); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and A Proposal*, 91 HARV. L. REV. 317, 317 (1977) (proposing that "the decision to retain, curtail, or abolish diversity jurisdiction should be made by each judicial district individually"); Charles A. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 194 (1969) (arguing that diversity jurisdiction should be severely limited).

7. *See infra* notes 26-82 and accompanying text (discussing historical debates concerning diversity jurisdiction).

8. *See* FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 14 (Apr. 2, 1990) [hereinafter FEDERAL COURTS STUDY COMMITTEE] ("Diversity cases are a large part of the trial load of the district courts, and their elimination would therefore markedly lighten the burden on those courts.").

The problem is not merely that diversity cases misuse federal judicial resources. It is that they misuse a lot of federal judicial resources. . . . Diversity cases account for about half of the civil trials in federal court, and they frequently generate complex procedural and jurisdictional

diversity jurisdiction have countered with arguments that local bias against nonresidents persists<sup>9</sup> and that, in light of diversity's 200-plus years in existence, there are insufficiently compelling reasons to abandon a provision of such historical long standing.<sup>10</sup> This Article, however, looks at diversity jurisdiction from a very different perspective: regardless of its origins, or even its overall utility, diversity jurisdiction's continued existence in its current form perpetuates a continuing form of discrimination partly of its own creation—the idea that rural courts and rural juries are inferior to those found in more urbanized areas.<sup>11</sup>

Part I of this Article briefly examines diversity jurisdiction generally and historically.<sup>12</sup> Part II analyzes the interplay between diversity jurisdiction and antirural bias.<sup>13</sup> Finally, Part III proposes limitations upon diversity

problems. . . .

The cost of this jurisdiction is high. A study by the Federal Judicial Center estimated that adjudicating diversity cases in 1988 (when the jurisdictional minimum was \$10,000) consumed the equivalent of the workload of 193 district judges and 22 court of appeals judges. Total costs to the federal court system, including juror fees and subsidiary costs, were estimated to be \$131 million annually, more than one-tenth of the federal judicial budget.

*Id.* at 40-41.

9. See *infra* notes 85-104 and accompanying text (discussing local bias justification for diversity jurisdiction).

10. See *Federal Courts Improvement Act of 1994 (In-State Plaintiffs Diversity Jurisdiction): Hearings on H.R. 4357 and H.R. 4446 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 103d Cong., 36 (1994) (statement of John Frank, Senior Partner, Lewis & Roca Law Firm, Phoenix, Ariz., on Behalf of the Arizona State Bar Association) ("I am not here preaching the cult of the superman, arguing that all Federal judges are better than all State judges, or even that most of them are. [¶] I say only that many thousands of Americans have believed that they would be better off in the Federal court than in the State court. . . . [¶] The point is that for more than two centuries these people and their ancestors before them have been entitled to make that choice. They should not be deprived of that option now."). See also John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403 (1979) [hereinafter Frank, *Case for Diversity*] (arguing that, due to diversity's longevity, it should not be altered without a compelling reason); Frank, *Maintaining Diversity*, *supra* note 6, at 10-11 ("The first great value of diversity is its disposition of something on the order of fifteen thousand disputes a year to the general satisfaction of those who need their disposition. . . . [¶] [W]ith a high degree of uniformity, the *system* has been generally satisfactory to those living under it. . . . There is a general feeling that justice in federal courts is being well administered. There is no widespread, obvious abuse to be corrected."); Statement of Robert D. Raven, President, American Bar Ass'n, before the Federal Courts Study Committee, at 4 (Mar. 20, 1989) (on file with author) (For nearly 200 years, diversity jurisdiction has served the ends of justice well, and that jurisdiction should not be altered in the absence of a compelling showing of need for change.").

11. Elsewhere, I have referred to this phenomenon of viewing the world from the perspective of the urban—at the expense of the rural perspective—as "ruralism." See generally Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 279 (2003) [hereinafter Bassett, *Ruralism*] (defining ruralism).

12. See *infra* notes 15-83 and accompanying text (discussing historical background of diversity jurisdiction).

13. See *infra* notes 84-121 and accompanying text (discussing impact of antirural bias upon diversity jurisdiction).

jurisdiction in recognition of the impact of this bias in the exercise of diversity jurisdiction.<sup>14</sup>

## I. THE HISTORICAL BACKGROUND OF DIVERSITY JURISDICTION

Diversity jurisdiction is one form of federal subject-matter jurisdiction<sup>15</sup> and is invoked in slightly less than one-third of the civil cases filed in federal court.<sup>16</sup> Through diversity jurisdiction, federal courts may hear lawsuits based on state law so long as the parties satisfy certain prerequisites.<sup>17</sup> To invoke diversity jurisdiction under the traditional diversity statute,<sup>18</sup> the lawsuit must involve “a controversy between citizens of different states or between a citizen of a state and an alien,”<sup>19</sup> and the amount in controversy

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14. See *infra* notes 122-46 and accompanying text (proposing limitations upon diversity jurisdiction).

15. Subject-matter jurisdiction goes to a court’s power to hear a particular type of case. ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS ¶ 1.01, at 1-2 (3d ed. 1998) (“A court is said to have jurisdiction of the subject matter of an action if the case is one of the type of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority.”). The parameters of a court’s subject-matter jurisdiction are defined by constitutional or statutory provisions. *Id.* ¶ 1.01, at 1-3 (“Statutes or constitutional provisions define the kinds of cases [courts may] adjudicate.”).

16. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 135 (1996) (stating that in 1996, 30.2% of the civil cases commenced in federal court, excluding prisoner petitions, were founded on diversity).

17. Federal courts are courts of limited jurisdiction. CASAD, *supra* note 15, ¶ 1.01, at 1-3 (“All federal courts are courts of limited jurisdiction, their subject matter jurisdiction being restricted to the kinds of cases and controversies listed in article III of the United States Constitution.”).

18. The traditional diversity statute is 28 U.S.C. § 1332 (2000). 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3602, at 363-64 (2d ed. 1984) (“[Diversity jurisdiction] is conferred on the federal courts, subject to some important legislative modifications, by Section 1332 of the Judicial Code.”). Section 1332 requires “complete diversity”; that is, there cannot exist a common citizenship between opposing sides of the litigation. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). However, statutory exceptions to the complete diversity requirement exist, perhaps most notably under the Federal Interpleader Act. 28 U.S.C. § 1335(a)(1) (2000) (requiring only “[t]wo or more adverse claimants of diverse citizenship”); 13B WRIGHT ET AL., *supra*, § 3605, at 406 (noting that diversity jurisdiction under § 1335 requires only “minimal diversity,” which exists if there is “one claimant from a different state from all the other claimants”).

19. 13B WRIGHT ET AL., *supra* note 18, § 3601, at 334. See also CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 23, at 127 n.1 (4th ed. 1983) (noting that both of these provisions usually are referred to as “diversity jurisdiction,” although the latter also commonly is referred to as “alienage jurisdiction”); 13B WRIGHT ET AL., *supra* note 18, § 3601, at 335 (noting that diversity jurisdiction “embraces both diversity and alienage cases”); 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 (1996) [hereinafter Johnson, *Alienage Jurisdiction*] (arguing for a statute for alienage jurisdiction, separate and distinct from diversity jurisdiction). Although the term “diversity jurisdiction” typically is intended to encompass both controversies between citizens of different states as well as alienage jurisdiction, this Article’s use of the term “diversity jurisdiction” is intended to include only the former. My proposal expressly excludes alienage jurisdiction. See *infra*

must exceed \$75,000.<sup>20</sup>

The historical purpose behind diversity jurisdiction is unclear,<sup>21</sup> and its utility has long been controversial.<sup>22</sup> Two major theories occupy the consensus positions as to the historical purpose of diversity jurisdiction, both originating with the same general concept—that of local bias or prejudice.<sup>23</sup> The theory most often articulated is that the intent of diversity jurisdiction was to protect out-of-state litigants from bias by state courts.<sup>24</sup> The second

note 133 and accompanying text (calling for the abolition of traditional diversity jurisdiction, but not alienage jurisdiction).

20. 28 U.S.C. § 1332(a). *See also* 13B WRIGHT ET AL., *supra* note 18, § 3601 (noting amount in controversy requirement of “more than \$75,000”). Again, an exception to this amount in controversy exists under the Federal Interpleader Act, which requires only \$500 in controversy. 28 U.S.C. § 1335(a).

21. *See* H.R. REP. NO. 95-893, 2 (1978) [hereinafter ABOLITION OF DIVERSITY] (“The debates of the Constitutional Convention are unclear as to why the Constitution made provision for [diversity] jurisdiction; nor is pertinent legislative history much aid as to why the First Congress exercised its prerogative to vest diversity jurisdiction in the Federal courts.”). *See also* 13B WRIGHT ET AL., *supra* note 18, § 3601, at 337 (“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.”); Friendly, *Historic Basis*, *supra* note 2, at 484-87 (noting the records of the Constitutional Convention provide little help in determining the reasons behind the diversity clause).

22. *See* 13B WRIGHT ET AL., *supra* note 18, § 3601, at 344 (“[T]he question of what purpose is served by diversity jurisdiction has retained its controversial character over the years. Time only has exacerbated the controversy stirred at the time of the ratification debates.”); Friendly, *supra* note 2, at 487 (“On no section of the new Constitution was the assault more bitter than on the provisions for the federal judiciary . . . . [D]iversity of citizenship jurisdiction came in for its share of criticism.”); Moore & Weckstein, *supra* note 6, at 1 (“While there are other segments of federal jurisdiction as old as diversity, probably none is as controversial. From the beginning, proposals have been made to abolish or substantially curtail diversity jurisdiction and many words have been written in support of, or in opposition to, such proposals.”); *id.* at 3-4 (“The lack of recorded opposition in the Constitutional Convention should not be taken as an indication of complete acceptance of diversity jurisdiction. Sharp attacks were soon launched in the state ratifying conventions, the first Congress, and the press.”). *See also supra* note 6 and accompanying text (citing legal commentary supporting, and opposing, the abolition of diversity jurisdiction).

23. Other proffered justifications have included the equally crowded nature of the state courts and keeping federal judges in touch with mainstream tort and contract litigation. *See* Frank, *Case for Diversity*, *supra* note 10, at 412 (analogizing the abolition of diversity jurisdiction to a “jurisdictional variation of the old three-shell game” in which diversity cases disappear from under the shell representing the federal courts, only to reappear under the shell representing the state courts); Shapiro, *supra* note 6, at 322 (“[Diversity jurisdiction] keep[s] federal judges from becoming narrow technicians, specializing in esoteric federal statutes and occasional constitutional questions, and in helping them maintain closer touch with the mainstream of common law tort and contract litigation.”).

24. *See* JOHN J. COUND ET AL., CIVIL PROCEDURE CASES AND MATERIALS 260 (8th ed. 2001) (setting out presumption “that diversity jurisdiction was created to protect out-of-state litigants against local prejudice”); *id.* at 261 (“The most common explanation for the creation of diversity jurisdiction was a fear that state courts would be prejudiced against out-of-state parties.”); DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 164 (4th ed. 2001) (“Many legal scholars . . . have concluded that [diversity jurisdiction] was based on a fear that State courts would be biased or prejudiced against those from out of State.”) (quoting ABOLITION OF DIVERSITY, *supra* note 21, at 2); 13B WRIGHT ET AL., *supra* note 18, § 3601, at 338 (noting “the traditional, and most often cited,

theory, merely a variant of the first, is that state legislatures, rather than state courts, were biased against commercial interests.<sup>25</sup> A closer look at each theory shows that neither theory finds strong support in the historical documentation.

#### *A. Protecting Out-of-State Litigants from State Court Bias*

The traditional theory offered in support of diversity jurisdiction is that the Framers of the United States Constitution feared state court prejudice against out-of-state litigants.<sup>26</sup> Little historical documentation, however, exists to support this theory.<sup>27</sup>

On May 29, 1787, Edmund Randolph introduced a resolution,<sup>28</sup> later denoted the Virginia Plan,<sup>29</sup> which explicitly provided for diversity jurisdiction:

[T]hat a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. [T]hat the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.<sup>30</sup>

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explanation of the purpose of diversity jurisdiction—the fear that state courts would be prejudiced against out-of-state litigants.”).

25. See 13B WRIGHT ET AL., *supra* note 18, § 3601, at 339 (“Several historians have suggested . . . that the real fear was not of the state courts, but of the state legislatures . . . . The fear of state legislatures may have arisen less from interstate hostility than from a desire to protect commercial interests from class bias.”).

26. See *supra* note 24 and accompanying text (discussing this traditional view).

27. See Friendly, *Historic Basis*, *supra* note 2, at 484-85 (noting that diversity jurisdiction “had not bulked large” in the eyes of Constitution’s framers; . . . “[n]or are the records of the Convention fruitful to a student of the diversity clause”).

28. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 16 (Max Farrand ed., 1911) [hereinafter FARRAND, RECORDS OF THE FEDERAL CONVENTION].

29. 1 *id.* at 20 n.10.

30. 1 *id.* at 21-22.

On June 13, 1787, however, Randolph moved to amend this provision to provide: “That the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony,”<sup>31</sup> thus eliminating the original specific reference to diversity jurisdiction.

On July 18, 1787, the provision regarding the jurisdiction of the federal judiciary again was amended to substitute a more general “arising under” provision for the specific references to impeachment and collection of the national revenue: “That the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony.”<sup>32</sup>

Despite the omission of diversity jurisdiction expressly, later developments suggest that the vague reference to “the national peace and harmony” may have been intended to encompass this concept. On July 24, 1787, the entire Virginia Plan was submitted to the Committee of Detail<sup>33</sup> to address ambiguities and clarify the language.<sup>34</sup> An early Committee of Detail draft reflects the expansion of “national peace and harmony” to include cases involving “the collection of the revenue,” “disputes between citizens of different states,” “disputes between different states,” and “disputes, in which subjects or citizens of other countries are concerned.”<sup>35</sup> A later draft

31. 1 *id.* at 223-24.

32. 2 *id.* at 39.

33. 2 *id.* at 97 (noting that the five members of the Committee of Detail were “the honorable Mr. Rutledge, Mr. Randolph, Mr. Gorham, Mr. Elsworth, and Mr. Wilson”).

34. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 772 (1984) (“The Committee [of Detail] was not charged with presenting new structural solutions to problems, but rather, as its name suggests, was merely directed to convert the Convention’s general statements of structural principles into a draft document.”).

35. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION, *supra* note 28, at 129, 146-47. This portion of the Committee of Detail documents “is in the handwriting of Edmund Randolph with emendations by John Rutledge.” 2 *id.* at 137 n.6. Of particular interest is the manner in which this provision is structured. The provision appears as follows:

7. The jurisdiction of the supreme tribunal shall extend

1. to all cases, arising under laws passed by the general <Legislature>
2. to impeachments of officers, and
3. to *such* other cases, as the national legislature may assign, as involving the national peace and harmony,

in the collection of the revenue  
in disputes between citizens of different states  
[in disputes between a State & a Citizen or Citizens of another State]  
in disputes between different states; and  
in disputes, in which subjects or citizens of other countries are concerned  
[& in Cases of Admiralty Jurisdn]



expanded the jurisdictional provision to include, among other things,<sup>36</sup> jurisdiction over “Controversies between (States,—except those wh. regard Jurisdn or Territory,—betwn) a State and a Citizen or Citizens of another State, between Citizens of different States and between (a State or the) Citizens (of any of the States) (thereof) and foreign States, Citizens, or Subjects.”<sup>37</sup> Thus, in light of the repeated detailed expansion of the phrase “national peace and harmony” to encompass diversity jurisdiction expressly, it appears that the Framers always intended to include diversity jurisdiction.<sup>38</sup>

With respect to diversity jurisdiction, the Committee of Detail draft presented to the full Convention on August 6, 1787, had changed little from its earlier draft.<sup>39</sup> The debates concerning the provision for a federal judiciary began August 27, 1787,<sup>40</sup> but diversity jurisdiction was the subject of neither debate nor amendment.<sup>41</sup>

Debates during the subsequent state ratifications were more critical of diversity jurisdiction.<sup>42</sup> The preeminent concerns involved the vast power of

2 *id.* at 146-47 (italics and brackets in original). The bracketed material indicates additions in Rutledge’s handwriting. 2 *id.* at 137 n.6. Randolph authored both the original draft submitted to the Committee of Detail, *see supra* notes 28-34 and accompanying text, and the Committee of Detail draft set forth above. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION, *supra* note 28, at 137 n.6. The continuity in authorship, together with the ordering and indentations of this provision—with the diversity clause listed as an apparent subset of cases “involving the national peace and harmony”—suggest that diversity jurisdiction was an intended part of the Constitution from the outset.

36. 2 *id.* at 172-73 (extending jurisdiction to cases arising under laws passed by the federal Legislature; cases involving ambassadors, public ministers, or consuls; admiralty and maritime cases; and impeachment of national officers).

37. 2 *id.* at 173.

38. *See* 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) (“Given the ordering of the items on this more extensive list, this early committee draft of Article III indicates that the Committee [of Detail] viewed diversity jurisdiction as implicit in the ‘national peace and harmony’ resolution adopted on the floor of the Convention.”).

39. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION, *supra* note 28, at 177, 186-87:

The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects.

*Id.*

40. 2 *id.* at 422-25.

41. *See* 2 *id.* at 422, 424-25. *See also* Borchers, *supra* note 38, at 93 (“At no point . . . from the time the resolutions were referred to the Committee of Detail to the end of the Convention, was there any recorded debate, or any significant tinkering, with regard to the diversity grant of jurisdiction.”).

42. *See* Friendly, *Historic Basis*, *supra* note 2, at 487:

Whatever the unanimity had been on the floor of the Convention it certainly was not reflected in the debates in the state conventions, nor in the press. On no section of the new Constitution was the assault more bitter than on the provisions for the federal judiciary. And while the main attack

the federal courts and the seeming exclusivity of federal subject-matter jurisdiction:

The Judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate and expensive, and justice as unattainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor.<sup>43</sup>

To a lesser degree, the states expressed concern that diversity jurisdiction would create inconveniences and expense by requiring travel to a distant federal court.<sup>44</sup> In responding to these concerns, the Federalists downplayed the importance of diversity jurisdiction but did not abandon the concept.<sup>45</sup>

was directed to the failure to make provision for trial by jury, diversity of citizenship jurisdiction came in for its share of criticism.

*Id.*

43. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION, *supra* note 28, at 638. *See also* 3 JONATHAN ELLIOT, THE DEBATES OF THE STATE CONVENTIONS ON THE FEDERAL CONSTITUTION 521 (1888) [hereinafter ELLIOT, DEBATES OF THE STATE CONVENTIONS] (quoting George Mason of Virginia):

What is there left to the state courts? Will any gentleman be pleased, candidly, fairly, and without sophistry, to show us what remains? There is no limitation. It goes to everything. . . . When we consider the nature of these courts, we must conclude that their effect and operation will be utterly to destroy the state governments. . . . I cannot see the propriety of [federal judicial power] in disputes between a state and the citizens of another state. As to controversies between citizens of different states, their power is improper and inadmissible.

3 *id.* at 523. *See also* 4 ELLIOT, DEBATES OF THE STATE CONVENTIONS, *supra*, at 138-39 (quoting Mr. Spencer of North Carolina) (“Nothing can be more oppressive than the cognizance with respect to controversies between citizens of different states. . . . Some of the most respectable states have proposed, by way of amendments, to strike out a great part of these . . . clauses. If they be admitted as they are, it will render the country entirely unhappy.”).

44. *See, e.g.*, 3 ELLIOT, DEBATES OF THE STATE CONVENTIONS, *supra* note 43, at 526 (quoting Mr. Mason of Virginia):

Their [federal court] jurisdiction further extends to controversies between citizens of different states. . . . What! carry me a thousand miles from home—from my family and business—to where, perhaps, it will be impossible for me to prove that I paid it? Perhaps I have a respectable witness who saw me pay the money; but I must carry him one thousand miles to prove it, or be compelled to pay it again.

*Id.*

45. 3 *id.* at 531, 533 (quoting James Madison of Virginia) (“As to [the] cognizance of [federal court jurisdiction in] disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to state courts.”); 3 *id.* at 549 (quoting Edmund Pendleton of Virginia):

[T]he principal objection of that honorable gentleman was, that jurisdiction was given it in disputes between citizens of different states. I think, in general, those decisions 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.

*Id.*

Some states, although not opposing diversity jurisdiction in its entirety,<sup>46</sup> proposed greater restrictions on the exercise of diversity jurisdiction, such as adding an amount-in-controversy requirement.<sup>47</sup> Although an amount-in-controversy component was not then integrated into the constitutional provision, it did become a component of the subsequent statutory grant of diversity jurisdiction to the federal courts.<sup>48</sup>

Interestingly, despite disputes during the state ratifying conventions over authorizing diversity jurisdiction, discussion during these state conventions regarding diversity jurisdiction's underlying purpose was minimal.<sup>49</sup> The few available references are general and merely suggest the need for an impartial forum.<sup>50</sup>

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46. The State of Virginia proposed abolishing diversity jurisdiction altogether. *See 3 id.* at 660 (Virginia) (proposing jurisdiction over controversies "between parties claiming lands under the grants of different states," but not over controversies between citizens of different states generally).

47. *See, e.g., 2 id.* (amendment submitted by Massachusetts):

The Supreme Judicial Federal Court shall have no jurisdiction of causes between citizens of different states, unless the matter in dispute, whether it concern the realty or personalty, be of the value of three thousand dollars at the least; nor shall the federal judicial powers extend to any action between citizens of different states, where the matter in dispute, whether it concerns the realty or personalty, is not of the value of fifteen hundred dollars at the least.

*2 id.* at 177. *See also 2 id.* at 409 (New York) (proposing that "the judicial power of the United States, as to controversies between citizens of different states, is not to be construed to extend to any controversy relating to any real estate not claimed under grants of different states").

48. The grant of diversity jurisdiction appeared in the Judiciary Act of 1789, and Congress codified diversity jurisdiction in title 28 of the United States Code in 1940. Apr. 20, 1940, ch. 177, 54 Stat. 143 (codified at 28 U.S.C. § 41(1)(b) (1946)). In 1948, Congress amended title 28 to fashion its current structure. Act of June 25, 1948, Pub. L. No. 80-773, § 1332, 62 Stat. 869, 930 (1948). The Judiciary Act of 1789 required, in addition to diversity of citizenship, the existence of more than \$500 in controversy to invoke diversity jurisdiction. The Judiciary Act of 1789, Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78 (1789). Congress has repeatedly raised the amount necessary to satisfy the amount in controversy hurdle from \$2,000 in 1887, Act of Mar. 3, 1887, ch. 373, 24 Stat. 552 (1887); to \$3,000 in 1911, Act of Mar. 3, 1911, § 24, 36 Stat. 1091 (1911); to \$10,000 in 1958, Act of July 25, 1958, Pub. L. No. 85-554, § 1332, 72 Stat. 415 (1958); to \$50,000 in 1988, The Judicial Improvements and Access to Justice Act, Act of Nov. 19, 1988, § 201, Pub. L. No. 100-702, § 201, 102 Stat. 4646 (1988) (amending 28 U.S.C. § 1332(a)); to \$75,000, its current level, in 1996. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847 (1996) (amending 28 U.S.C. § 1332(a)) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States . . ."). The reason articulated for these increases to the amount in controversy has consistently been to reduce the number of diversity cases that may be heard in federal court. *See S. Rep. No. 85-1830*, at 3 (1958) (stating that the Committee on the Judiciary believed the increased amount in controversy would reduce the federal court workload). *See also H.R. Rep. No. 100-889*, at 44-45 (1988) (stating that the increased amount in controversy would reduce the number of diversity cases in the federal courts and would adjust for inflation).

49. *See 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION, supra* note 28, at 45-47, 423-25 (reflecting amendments to the power of the federal judiciary without debate). *See also Borchers, supra* note 38, at 93 ("The record at the Convention . . . is more one of silent acquiescence than robust debate concerning diversity.")

50. *See, e.g., THE FEDERALIST No. 80*, at 534 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)

Similarly, the history behind the Judiciary Act of 1789 provides virtually no illumination of diversity jurisdiction's purpose.<sup>51</sup> The Judiciary Bill of June 12, 1789, contained a provision granting diversity jurisdiction to the federal courts, concurrent with the state courts, subject to a \$500 amount-in-controversy requirement.<sup>52</sup> The bill also contained a provision authorizing the removal of diversity cases from state court to federal court by nonresident defendants.<sup>53</sup> Although the debates on these provisions were not well preserved, it appears that the only significant suggestion—raised and rejected in both the Senate and the House—was to limit the diversity jurisdiction of the lower federal courts to admiralty cases.<sup>54</sup>

The sparse authority regarding diversity jurisdiction's purpose has been supplemented by discussions within court decisions, most notably decisions of the United States Supreme Court. In one early decision, Chief Justice Marshall observed:

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("It seems scarcely to admit of controversy that the judiciary authority of the union ought to extend to these several descriptions of causes, . . . [including] all those in which the state tribunals cannot be supposed to be impartial and unbiased."); *id.* at 537 (suggesting federal courts, "having no local attachments, will be likely to be impartial between the different states and their citizens"); *id.* at 538:

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

*Id.* See also 4 ELLIOT, DEBATES OF THE STATE CONVENTIONS, *supra* note 43, at 159 (quoting Mr. Davie of North Carolina) ("The security of impartiality is the principal reason for giving up the ultimate decision of controversies between citizens of different states."); 2 *id.* (quoting Mr. Wilson of Pennsylvania):

[I]s 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? I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island. I ask, further, How will a creditor feel who has his debts at the mercy of tender laws in other states? . . . [¶] Is it not an important object to extend our manufactures and our commerce? This cannot be done, unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained, unless we give the power of deciding upon those contracts to the general government.

2 *id.* at 491-92.

51. See generally JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (Paul A. Freund ed., 1971) (providing comprehensive history of Judiciary Act of 1789); WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PROMISES & USING NEW EVIDENCE (Wythe Holt & Lewis H. LaRue eds., 1990) (same).

52. Judiciary Bill of June 12, 1789, reprinted in LEGISLATIVE HISTORIES: FUNDING ACT [HR-63] THROUGH MILITIA BILL [HR-112] 1172, 1179 (Charlene B. Bickford & Helen E. Veit eds., 1986).

53. *Id.* at 1179.

54. See Borchers, *supra* note 38, at 100-02 (discussing proceedings during the creation of the Judiciary Act of 1789).

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. 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.<sup>55</sup>

On another occasion, Justice Frankfurter noted, “It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim.”<sup>56</sup>

Thus, today’s major argument for retaining diversity jurisdiction—the protection of out-of-state litigants from local bias<sup>57</sup>—is not supported by the original constitutional documents. There is no reason to believe that local bias was *a* reason, much less *the* reason, behind the creation of diversity jurisdiction.

Although it is entirely possible that local bias was never seen as an issue at the time of diversity’s creation, the “local bias” notion subsequently has become bound up in, and indeed integral to, the very idea of diversity jurisdiction. Protection against local bias is widely viewed as diversity’s most

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55. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). *See also* *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.”); *Burgess v. Seligman*, 107 U.S. 20, 34 (1883) (stating that diversity jurisdiction was established “to institute independent tribunals which it might be supposed would be unaffected by local prejudices”); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1856) (“It [diversity jurisdiction] is to make the people think and feel, though residing in different States of the Union, that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversy between the parties to a suit.”).

56. *Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting). *See also* *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring):

The power of Congress to confer such [diversity] jurisdiction was based on the desire of the Framers to assure out-of-state litigants courts free from susceptibility to potential local bias. That the supposed justification for this fear was not rooted in weighty experience is attested by the fact that so ardent a nationalist as Marshall gave that proposal of the Philadelphia Convention only tepid support in the Virginia Convention. But in any event, whatever “fears and apprehensions” were entertained by the Framers and ratifiers, there was fear that parochial prejudice by the citizens of one State toward those of another, as well as toward aliens, would lead to unjust treatment of citizens of other States and foreign countries.

*Id.* (internal citations omitted).

57. *Lilly*, *supra* note 4, at 190 (“[I]t suffices to say that the principal argument for diversity jurisdiction is the protection of out-of-state litigants from local prejudice.”).

compelling, if not its sole, justification.<sup>58</sup> Yet the concept of local bias makes no sense under several of the scenarios in which diversity jurisdiction can be invoked. Protection from local bias retains some plausibility in those circumstances where a defendant invokes diversity jurisdiction to remove a case from state to federal court. However, protection against local bias provides no justification for many other instances where diversity jurisdiction can be invoked under the statute. In particular, protection against local bias cannot be used to support jurisdiction when a diversity case is brought by a resident plaintiff against a nonresident defendant in the plaintiff's home state.<sup>59</sup>

Since diversity jurisdiction was not, and still is not, restricted to removal cases, the “local bias” argument appears incomplete at best. Some commentators, however, have advanced an alternative theory, premised upon protecting commercial interests from bias stemming from state legislatures, rather than state judges. A related component of this alternative theory is merely another version of local bias—perceived state court prejudice against creditors. This version rests on the notion that federal courts provided a more hospitable forum for plaintiff creditors.

### *B. Protecting against Bias Resulting from State Laws*

The alternative theory as to the origins of diversity jurisdiction, although of relatively recent origin, is again premised on local bias. Accepting the theory that diversity jurisdiction was aimed at ensuring an impartial forum,<sup>60</sup> the risk of bias conceivably could stem, not from a fear that state judges were less competent,<sup>61</sup> but from the concern that the applicable state law might be

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58. See *supra* note 24 and accompanying text (citing authorities).

59. See FEDERAL COURTS STUDY COMMITTEE, *supra* note 8, at 14 (“[A] plaintiff may invoke the federal diversity jurisdiction even though he or she is a citizen of the state in which the federal court sits and the defendant is a nonresident, so that the plaintiff could not possibly fear harmful bias if the suit were brought in state court instead.”).

60. See *supra* note 50 and accompanying text (discussing desire for impartiality as motivation for diversity jurisdiction).

61. At least some of those involved in the constitutional process expressly disavowed any concern regarding the competence of state judges, but instead articulated their concern in terms of state judges' allegiance to state governments:

[Mr. Locke] supposes that the idea of cognizance of the laws of the Union to federal courts, must have arisen from suspicions of partiality and want of common integrity in our state judges. The worthy gentleman is mistaken in his construction of what I said. I did not personally reflect on the members of our state judiciary; nor did I impute the impropriety of vesting the state judiciaries with exclusive jurisdiction over the laws of the Union, and cases arising under the Constitution, to any want of probity in the judges. But if they be the judges of the local or state laws, and receive emoluments for acting in that capacity, they will be improper persons to judge of the laws of the Union. A federal judge ought to be solely governed by the laws of the United States, and receive

unfavorable.<sup>62</sup> Thus, this alternative theory focuses upon the underlying motivation for diversity jurisdiction as protecting commercial interests from unfavorable state laws.<sup>63</sup> Perhaps the most vocal advocate of this view was jurist Henry Friendly, who stated: “[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, and that as a reason it was by no means without validity.”<sup>64</sup>

The theory of diversity jurisdiction as a mechanism to protect commercial interests finds some support both from a general historical perspective and specifically from documents relating to the Constitutional Convention. At the time of the Constitutional Convention, many states<sup>65</sup>—and many

his salary from the treasury of the United States. It is impossible for any judges, receiving pay from a single state, to be impartial in cases where the local laws or interests of that state clash with the laws of the Union, or the general interests of America.

4 ELLIOT, DEBATES OF THE STATE CONVENTIONS, *supra* note 43, at 172 (quoting Mr. Maclaine of North Carolina).

62. *See* 4 *id.* (quoting Mr. Davie of North Carolina):

Is it probable, if a citizen of South Carolina owed a sum of money to a citizen of this state, that the latter would be certain of recovering the full value in their courts? That state might in future, as they have already done, make pine-barren acts to discharge their debts. They might say that our citizens should be paid in sterile, inarable [*sic*] lands, at an extravagant price. They might pass the most iniquitous instalment [*sic*] laws, procrastinating the payment of debts due from their citizens, for years—nay, for ages. Is it probable that we should get justice from their own judiciary, who might consider themselves obliged to obey the laws of their own state? Where, then, are we to look for justice? To the judiciary of the United States.

4 *id.* at 157. The requirement that federal courts sitting in diversity are required to apply state substantive law was not clearly established at the time of the creation of diversity jurisdiction. *See infra* notes 81-82 and accompanying text (discussing the impact of *Erie* upon this theory).

63. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 141-42 (1985) (arguing that the protection of commercial interests was an important consideration in the creation of diversity jurisdiction); Kramer, *supra* note 5, at 119 (noting that “bias may have been less important in the creation of diversity jurisdiction than the desire to protect commercial interests from pro-debtor state courts”).

64. Friendly, *Historic Basis*, *supra* note 2, at 496-97. *See also* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 28 (1948):

[T]he diversity jurisdiction in the federal Constitution may fairly be said to be the product of three factors . . . .

1. The desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation.

2. The desire to permit commercial, manufacturing, and speculative interests to litigate their controversies, and particularly their controversies with other classes, before judges who would be firmly tied to their own interests.

3. The desire to achieve more efficient administration of justice for the classes thus benefited.

*Id.*

65. *See* JACKSON T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 31 (1961); Wythe Holt, *To Establish Justice: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1435, 1445 (noting that several states had pre-

individuals<sup>66</sup>—owed large debts as a result of the Revolutionary War.<sup>67</sup> Widespread debt, the failure of the Articles of Confederation to enforce debt collection, and the customary methods of debt collection, including imprisonment,<sup>68</sup> led debtors<sup>69</sup> to obtain relief through state legislatures.<sup>70</sup> Such debtor relief, though largely successful, violated the treaty between the United States and Great Britain<sup>71</sup> and angered both foreign and domestic creditors.<sup>72</sup> Thus, from a general historical perspective, attention to creditor interests at the national level would be a logical reaction to the debtor relief provisions at the state level.

Some support for the “protection of creditors” view is also found in historical documents. Documents from the Constitutional Convention and the subsequent ratifying debates contain references to commercial interests

Revolutionary War debts owed to the British, and noting the significant role of debt in the depressionary 1780s).

66. MAIN, *supra* note 65, at 6.

67. See THE FEDERALIST No. 15, *supra* note 50, at 91 (Alexander Hamilton) (“Do we owe debts to foreigners and to our own citizens contracted in a time of imminent peril, for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge.”). See also *id.* No. 34, at 213 (Alexander Hamilton) (“[L]et us advert to the large debt which we have ourselves contracted in a single war. . . . It is true that several of the States separately are incumbered with considerable debts, which are an excrescence of the late war.”).

68. John P. Kaminski & Gaspare J. Saladino, *Agrarian Unrest and the Constitution*, in 1 COMMENTARIES ON THE CONSTITUTION: PUBLIC AND PRIVATE 91, 91 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

69. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 28 (2d ed. 1943).

70. See MAIN, *supra* note 65, at 26, 32-37 (noting debt relief provisions).

71. Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., art. IV, 8 Stat. 80, 82 (1783) (“[C]reditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”).

72. See MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789, at 278-79 (1950); Holt, *supra* note 65, at 1453. See also Stone Grissom, *Diversity Jurisdiction: An Open Dialogue in Dual Sovereignty*, 24 HAMLINE L. REV. 372, 377-78 (2001):

The economic plight of the United States after the Revolutionary war also attributed to the need for the creation of a procedural device to deal with diversity jurisdiction cases. The end of the war brought with it enormous debts for many Americans. The emergence of a free nation meant that much of the economic support previously provided by the British Empire was now absent. As local debts grew, repayment became an enormous obstacle and led to several disturbances of the peace. Local farmers and planters, particularly in the South, were unable to repay many of their loans, which led to the increasing anticreditor sentiments against British and American creditors who were attempting to force repayment in the state courts. Many states, in reaction, passed legislation to hinder creditors from collecting in an attempt to revitalize their economy and provide relief to their citizenry. In addition, many states were disregarding the treaties entered into by the newly formed national government under the Articles of Confederation.

*Id.*



generally,<sup>73</sup> and to debtors and creditors in particular,<sup>74</sup> reflecting underlying concern for those interests:

By the third article, the judicial power of the United States is vested in *one supreme court*, and in such *inferior courts*, as the Congress may from time to time ordain and establish. These courts, and *these only*, will have a right to decide [the matters enumerated in Article III].

. . . .

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, or any other claim be subsisting on one side or the other, *in consequence of commercial or other transactions*, it is only in the courts of Congress that either can apply for redress.<sup>75</sup>

Of course, the theory that diversity jurisdiction served to protect creditors against state statutes has validity only if invoking diversity jurisdiction would thereby permit the federal court to circumvent state law.<sup>76</sup> This theory is still

73. The original Pinckney Plan authorized appellate review “in all Cases in which Foreigners may be interested in the Construction of any Treaty, or which may arise on any Act for regulating Trade or collecting Revenue *or on the Law of Nations, or general commercial or marine Laws.*” 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION, *supra* note 28, at 157 & n.15.

74. *See, e.g.*, 3 ELLIOT, DEBATES OF THE STATE CONVENTIONS, *supra* note 43 (quoting Mr. Mason of Virginia):

Their jurisdiction further extends to controversies between citizens of different states. . . . What effect will this power have between British creditors and the citizens of this state? This is a ground on which I shall speak with confidence. Every one, who heard me speak on the subject, knows that I always spoke for the payment of the British debts. I wish every honest debt to be paid. Though I would wish to pay the British creditor, yet I would not put it in his power to gratify private malice to our injury. Let me be put right if I be mistaken; but there is not, in my opinion, a single British creditor but can bring his debtors to the federal court.

3 *id.* at 526. *See also* 4 *id.* (quoting Mr. Davie of North Carolina):

The tedious delays of judicial proceedings, at present, in some states, are ruinous to creditors. In Virginia, many suits are twenty or thirty years spun out by legal ingenuity, and the defective construction of their judiciary. A citizen of Massachusetts or this country might be ruined before he could recover a debt in that state. 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.

4 *id.* at 159. *See also* 4 *id.* at 143 (quoting Mr. 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?”).

75. 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION, *supra* note 28, at 220-21 (italics added in final paragraph).

76. *See* Borchers, *supra* note 38, at 87:

[I]f the grant of diversity jurisdiction was aimed at state legislative bias, . . . then merely granting diversity jurisdiction would have been insufficient. If federal courts had a duty to apply the same substantive law that state courts applied, diversity jurisdiction would afford no independent

plausible, however, with respect to the possible underlying motivation for diversity jurisdiction. At the time of the Convention, the law to be applied in diversity cases was not clear—the application of state law to substantive issues in diversity cases was not clarified until *Erie Railroad Co. v. Tompkins* in 1938.<sup>77</sup>

The historical documents reflect different opinions with respect to the law that would govern diversity cases. One anti-Federalist expressed the view that federal courts sitting in diversity would not defer to state law:

Causes of all kinds, between citizens of different states, are to be tried before a continental court. The court is not bound to try it according to the local laws where the controversies happen; for in that case it may as well be tried in a state court. The rule which is to govern the new courts, must, therefore, be made by the court itself, or by its employers, the Congress.<sup>78</sup>

John Marshall was more reassuring that state law would govern diversity cases,<sup>79</sup> but this reassurance was not uniform among the Federalists.<sup>80</sup>

In any event, even if the original purpose underlying the grant of diversity jurisdiction was to avoid unjust state laws, *Erie* destroyed this underpinning 160 years later.<sup>81</sup> Pursuant to the *Erie* doctrine, diversity jurisdiction does not avoid the application of state law.<sup>82</sup> Thus, the substantive law applied is the

protection against laws biased in favor of in-state groups; to combat legislative prejudice, a court would have to apply different substantive principles in diversity cases.

*Id.*

77. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Indeed, before *Erie*, federal law would likely apply to commercial disputes under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

78. 4 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST: WHAT THE ANTI-FEDERALISTS WERE FOR 77-78* (Herbert J. Storing ed., 1981) (writings of Agrippa).

79. 3 ELLIOT, *DEBATES OF THE STATE CONVENTIONS*, *supra* note 43, at 526 (quoting John Marshall of Virginia) (“By the laws of which state will it be determined? . . . By the laws of the state where the contract was made. According to those laws, and those only, can it be decided. . . . The laws which governed the contract at its formation govern it in its decision.”).

80. *See* Borchers, *supra* note 38, at 97:

It is doubtful . . . that Marshall believed that diversity courts were universally required to adhere to state laws. Other Federalist statements in support of diversity jurisdiction indicate a belief that disputes would be resolved by general principles, and lurking under Federalist support for the diversity grant was a perception that it was a necessary counterweight to the more parochial enactments of state legislatures.

*Id.*

81. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *See also* FEDERAL COURTS STUDY COMMITTEE, *supra* note 8, at 40 (“In most diversity cases . . . there is no substantial need for a federal forum. Federal courts offer no advantage over state courts in interpreting state law; quite the reverse. Federal rulings on state law issues have little precedential effect.”).

82. *See* HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 142 (1973) (“When the state law is plain, the federal judge is reduced to a ‘ventriloquist’s dummy to the courts of some

same regardless of whether the lawsuit was filed in state court or federal court.

Ultimately, it is not possible to determine the original underlying purpose for diversity jurisdiction with certainty. Perhaps more importantly, regardless of the original purpose assigned to diversity jurisdiction, that purpose is not determinative of diversity jurisdiction's continuing vitality today.<sup>83</sup> Thus, whatever the original purpose behind the creation of diversity jurisdiction, we must look at today's proffered justifications for its continued use. When diversity jurisdiction has been challenged in recent times, its supporters tend to suggest a justification couched in the notion of local bias. Today's notion of local bias, however, is both a product of, and a contributor to, a special, often hidden, and widely (if implicitly) accepted form of discrimination, which renders "local" bias, in fact, an "antirural" bias.

## II. DIVERSITY JURISDICTION AND ANTIRURAL BIAS

Despite their near-universal acceptance, neither of the proffered justifications for diversity jurisdiction—the notion of local bias and the notion of the inferiority of state court judges—is substantiated by empirical support.<sup>84</sup> When these justifications for diversity jurisdiction are removed, all that remains is a formal legal theory that rests on antirural bias.

### A. *The Notion of Local Bias*

As previously noted, the reason commonly proffered for the origins<sup>85</sup>—and the continued existence<sup>86</sup>—of diversity jurisdiction is local bias or prejudice, and this justification has been set forth on countless occasions.<sup>87</sup>

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particular state.”); Borchers, *supra* note 38, at 80 (noting that *Erie* “require[s] federal court adherence to substantive state law in diversity cases”).

83. 13B WRIGHT ET AL., *supra* note 18, § 3601, at 345 (“The conditions that existed, or were feared to exist, in 1789 largely are irrelevant in determining the continued necessity for diversity jurisdiction. Accordingly, the decision to retain or abolish this category of federal subject matter jurisdiction must depend on its utility in contemporary society.”).

84. *See infra* notes 91-92, 99-101 and accompanying text.

85. *See supra* notes 15-83 and accompanying text (discussing historical origins of diversity jurisdiction).

86. *See* Douglas D. McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?*, 7 LITIG. 38, 39 (1980) (listing the reasons proffered by proponents of diversity jurisdiction and stating that “[t]he only substantial argument favoring diversity jurisdiction is the original one: it allays fear of local prejudice”).

87. *See, e.g.*, FRIENDLY, *supra* note 82, at 146-48 (noting local prejudice as proffered justification for diversity jurisdiction); Borchers, *supra* note 38, at 79 (“[T]he consensus is that diversity has existed and exists to provide a neutral forum for out-of-staters against perceived local bias by state courts.”); Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L.

When we look closely at the concept of “local bias,” however, it turns out that local bias is, in actuality, antirural bias.

The term “local bias” is used in the legal literature regularly without definition, thereby assuming that readers understand its meaning.<sup>88</sup> In brief, the concept is intended to convey the notion that a court against which an allegation of local bias is leveled may be incapable of trying the case fairly—not due to lack of ability or resources, but due to a bias or prejudice in favor of a local party and/or against a nonlocal party.<sup>89</sup> The judiciary’s major purpose, of course, is the administration of justice.<sup>90</sup> Because the concept of local bias interjects the belief that some courts may be incapable of impartiality, an allegation of local bias undermines the very ideal of justice.

Hard evidence of the phenomenon of local bias does not exist because local bias does not lend itself to empirical measurement. Those who have researched local bias acknowledge that “[t]he actual existence of local prejudice is difficult to uncover, and thus survey research must be content with an examination of the *perception* of such prejudice by attorneys.”<sup>91</sup> Attorney perception of local bias is, appropriately, commonly described as the “fear” of local bias.<sup>92</sup> Accordingly, any finding of local bias is, in actuality, a finding of attorneys’ *fear* of local bias, not a finding of local bias itself.

In the abstract, the idea that courts—or, more specifically, individual judges—will occasionally be biased in favor of a particular party is an

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REV. 961, 964 (1995) (“Protection for out-of-state litigants has been cited as the basic reason for retaining diversity jurisdiction in federal courts.”); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 278 (1992) (noting that diversity jurisdiction was “created because of the fear that state courts might prefer local litigants”); Lilly, *supra* note 4, at 190 (same); McFarland, *supra* note 86, at 39 (same).

88. See, e.g., Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1274 & n.155 (1999) (using the term “local bias” without explanation); Borchers, *supra* note 38, at 79 (same); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1437 (1999) (same).

89. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U.L. REV. 369, 374 (1992) (noting that “the historical rationale for concurrent federal and state court jurisdiction may be perceived, in part, as a concern about the . . . fairness of the state courts”).

90. See, e.g., *Suggs v. Pan Am. Life Ins. Co.*, 847 F. Supp. 1324, 1357 (S.D. Miss. 1994) (“The overriding purpose of the judiciary is to provide justice.”).

91. Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 94 (1980) (italics added).

92. See, e.g., Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 LAW & SOC’Y REV. 749, 759 (1980) (“The issue . . . may be the perception of bias rather than actual bias against out-of-staters.”); Kramer, *supra* note 5, at 119 (noting that empirical studies “test only lawyers’ fears, not the reality of bias or even the fears of clients”); McFarland, *supra* note 86, at 55 (“Both the supporters and opponents of diversity jurisdiction too often speak of prejudice, rather than fear of prejudice.”).

unremarkable proposition.<sup>93</sup> After all, it is this notion of occasional bias that underlies the concepts of judicial recusal and disqualification.<sup>94</sup> However, when local bias is used in the diversity jurisdiction context, it reaches beyond the potential prejudice of one particular judge and instead paints an entire court system with the broad brush of bias.

It is this expansive reach—the assumption of bias, not by one judge but by an entire court system—that should give us pause. After all, if a claim sounding in state law is adjudicated in federal court by invoking diversity jurisdiction, the same state substantive law applies as would apply had the action been filed in state court.

Under what circumstances would a state court system, but not the corresponding federal court system, have an institutionalized local bias?<sup>95</sup> After all, federal judges, like state court judges, are drawn from the communities in which they live and work. Thus federal judges, like state court judges, are intimately familiar with the prominent personalities and business interests appearing in their courtrooms.

Federal judges are chosen from the geographical area they serve. Generally, they are appointed with the consent and often at the behest of a senator representing the state in which they will sit, frequently after local officials and citizen groups have had the opportunity to make their views on the nominee known. To characterize federal

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93. See Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3 (1994) (“[A]ll judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decision-making process.”); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000) (noting judges may be susceptible to bias).

94. See 28 U.S.C. § 455(b)(1) (2000) (requiring recusal when a judge “has a personal bias or prejudice concerning a party”). See, e.g., *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process . . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”). See generally Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002) [hereinafter Bassett, *Judicial Disqualification*] (noting the existence of unconscious bias and proposing a modified peremptory challenge procedure for disqualifying federal appellate judges).

95. See Kramer, *supra* note 5, at 120:

[T]he aid a federal court may render in the small class of cases in which bias is important is exceedingly limited. The same biased jurors serve in both state and federal courts, and the power of a federal judge to protect an out-of-stater by directing a verdict or by setting one aside is not great. The argument for diversity jurisdiction must therefore be that the federal judge will more freely exercise the powers that he has—assuming, as will not always be the case, that the federal judge is less biased than his state court counterpart.

*Id.*

judges as carpetbaggers, unaware of, and insensitive to, local concerns is thus inaccurate.<sup>96</sup>

As Professor Lilly has observed, “It is noteworthy that a state law case filed in (or removed to) a federal court is still heard within essentially the same general geographic and political boundaries as it would be if the adjudication took place in a state court.”<sup>97</sup>

Disturbingly, the fear of local bias has a direct correlation to the size of the community in which the court is located. Lawyers generally do not fear local bias in large, urban areas, but they do fear such bias in smaller, rural areas. Linguistics are telling in this area: certainly we have all heard lawyers express indignation that they have been—or fear being—“home-towned.” As an initial matter, the term “home-towned” conveys a rural sense, an image of being small, nonurban, and unsophisticated. Although the meaning of the term “home-towned” merely suggests a benefit to someone known and/or bias against someone unknown—which can happen as easily in a city as a small town—the term “home-towned” generally is not used in association with cities. Instead, we tend to hear the term “home-towned” used in association with rural courts.<sup>98</sup>

Indeed, one study of local bias expressly concluded that “[t]he more rural the geographical area of the court the more likely attorneys will prefer federal courts to protect their clients from perceived local bias and poorer quality of judges.”<sup>99</sup> Another study observed that “[r]eports of bias directed at out-of-state litigants are most prevalent in the more rural areas of the country, including the Southern and lower Midwest states.”<sup>100</sup> Thus, lawyers are more likely to fear local bias when the court is located in a rural, rather than urban,

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96. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120 (1977) [hereinafter Neuborne, *Myth of Parity*].

97. Lilly, *supra* note 4, at 190-91.

98. See James W. McElhaney, *The Case Won't Settle: Things Are Different When You Know You're Going to Trial*, 82 A.B.A. J. 82, 84 (Nov. 1996) (referring to “home-towned” with respect to small communities—specifically to “a law firm in South Bend, Ind., represents a defendant in Oxford, Miss., or a firm from Cleveland represents a plaintiff in Barre, Vt.”—although acknowledging that home-towning “can happen anywhere”).

99. Bumiller, *supra* note 92, at 752.

100. Miller, *supra* note 89, at 428; *id.* (noting that “out-of-state bias was geographically concentrated in primarily rural areas”); see also *id.* at 430 (noting that although the “fear of bias against out-of-state litigants is not a major national concern, it is important in the less industrialized, more rural regions of the country”).

Generally, defense attorneys in the Northeast, the industrialized Midwest, and the Far West reported low levels of bias against out-of-state litigants compared to attorneys elsewhere. By contrast, attorneys in most Southern states and the less industrialized Midwest reported such bias as affecting their forum filing decisions in high proportions.

*Id.* at 410.

area. The pairing of “local bias” with the word “fear” is telling, because it is fear that underlies discrimination.<sup>101</sup> The assumption of local bias in rural, but not urban, areas is a reflection of ruralism.<sup>102</sup>

Is it likely that local bias occurs only in rural areas? Of course not. In communities of all sizes, residents know other residents. Obviously, the more prominent the resident, the more likely others will know him or her. Then why is local bias associated with rural areas but not urban areas? The answer lies, in large part, in the rural stereotype,<sup>103</sup> which associates rural dwellers with lower intelligence<sup>104</sup>—a notion that intersects with the belief that state court judges are inferior to federal court judges.

### *B. The Notion of the Inferiority of State Court Judges*

The second, interrelated notion connecting antirural bias and diversity jurisdiction goes to the perceived quality of state court judges. Numerous influential articles have been written with respect to the existence—or nonexistence—of parity between the federal and state courts,<sup>105</sup> and the United States Supreme Court has weighed in with conflicting pronouncements of its own on this topic.<sup>106</sup> The few studies that have been

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101. See, e.g., Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (noting that fear underlies all forms of domination and discrimination); Lynn E. Sudbeck, *Students with AIDS: Protecting an Infected Child's Right to a Classroom Education and Developing a School's AIDS Policy*, 40 S.D. L. REV. 72, 73 (1995) (noting that fear underlies discrimination against those infected with AIDS).

102. See Bassett, *Ruralism*, *supra* note 11, at 323-24.

103. See RALPH A. WEISHEIT ET AL., *CRIME AND POLICING IN RURAL AND SMALL-TOWN AMERICA* 25 (2d ed. 1999) (noting that “[s]tereotypes portray white trash as slow witted and inbreeding, with high illegitimacy rates and frequent involvement in crime”). See generally Bassett, *Ruralism*, *supra* note 11, at 293-99 (describing rural stereotypes).

104. The association of rural dwellers with lower intelligence is of long standing. See, e.g., KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO IN ESSENTIAL WORKS OF MARXISM* 17 (Arthur P. Mendel ed., 1961) (noting that the bourgeoisie “has created enormous cities, greatly increased the urban population as compared with the rural, and thus rescued a considerable part of the population from the idiocy of rural life.”). See generally Bassett, *Ruralism*, *supra* note 11, at 314-16 (noting stereotype of rural dwellers as lacking intelligence).

105. See, e.g., Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991); Erwin Chemerinsky, *Parity Reconsidered: Defining A Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) [hereinafter Chemerinsky, *Parity Reconsidered*]; Neuborne, *Myth of Parity*, *supra* note 106; Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797 (1995); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609 (1991).

106. *Contrast Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (stating there is “no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to constitutional claims than his neighbor in the state courthouse”) (internal quotations omitted), *with England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 436 (1964) (Douglas, J., concurring) (describing importance of federal court decisions in terms of the

attempted in this area<sup>107</sup> have been roundly criticized.<sup>108</sup> As Professor Chemerinsky concluded, “the debate about parity is unresolvable because parity is an empirical question for which there is no empirical answer.”<sup>109</sup>

The matter may be “unresolvable,” but the lack of resolution has not eliminated lawyers’ widespread belief in the superiority of federal judges.<sup>110</sup> As previously noted, studies of lawyers’ perceptions of local bias reveal a pattern associating more rural areas with increased local bias.<sup>111</sup> The rural stereotype associates both rural areas and rural dwellers with provincialism.<sup>112</sup> In a related vein, the rural stereotype similarly assumes a

“independence of federal judges, and the value of an escape from local prejudices”). Commentators have discussed federal and state court parity primarily in the context of whether federal courts are more capable than state courts of protecting federal constitutional rights. *See, e.g.*, Chemerinsky, *Parity Reconsidered*, *supra* note 105, at 233 (“[D]iscussions about the scope of federal jurisdiction largely have focused on whether federal courts are more willing and able than state courts to protect constitutional rights. This issue has been labeled the question of ‘parity’ between federal and state courts.”). The Supreme Court’s pronouncements regarding parity have largely been disregarded due to their inconsistency. *See id.* at 244 (“What is most striking about the Supreme Court’s statements about parity is their inconsistency. There are as many declarations that state courts are equal to federal courts as there are statements that federal courts are superior to state courts in protecting federal rights.”); *id.* at 245 (“[T]he Court’s statements about parity have been totally inconsistent and irreconcilable.”).

107. *See, e.g.*, Thomas Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315 (1984); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

108. *See, e.g.*, Chemerinsky, *Parity Reconsidered*, *supra* note 105, at 261-69 (extensively criticizing the Solimine and Walker study as having “severe methodological problems”); *id.* at 269-73 (criticizing other attempted empirical studies of parity).

109. *Id.* at 236. *See also* MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 2-3 (2d ed. 1990) (noting the difficulty of measuring parity empirically and stating that “definite empirical proof is probably impossible to achieve”).

110. *See* Neuborne, *Parity Revisited*, *supra* note 105, at 799-800:

I do not suggest that a crisis of competence exists at the state trial level; nor do I suggest that Cardozo has been reincarnated at the federal level. I do assert, though, that the average quality of professional judging at the federal trial level was “better” than at the state trial level, measured any way you want to—speed, technical proficiency, treatment of precedent, persuasiveness, imagination, or intangible judgment . . . .

I believe that my colleagues in the litigating bar share this perception. If they could talk frankly, I suspect that they would report a perceived quality gap between the average performance of state and federal trial benches. That is one reason why lawyers expend so much time and ingenuity jousting over questions of federal jurisdiction. Unfortunately, however, judicial policymakers, for understandable reasons, cannot openly acknowledge the existence of a quality gap.

*Id.* *See also* POSNER, *supra* note 63, at 143-44 (stating that federal judges are more competent on the whole than their state counterparts).

111. *See supra* notes 99-100 and accompanying text (noting that lawyers fear local bias in rural, rather than urban, areas).

112. Bumiller, *supra* note 92, at 761 (“The incidence of fear of bias supports a theory that out-of-state residents seek protection from the ‘provincialism’ of rural areas.”).



lack of intelligence.<sup>113</sup> These stereotyped attributes are reflected in comments generated in the course of surveys on local bias.<sup>114</sup> One of the more obvious reflections of this stereotype goes to the qualifications of state judges.

With some regularity, lawyers make blanket assumptions that federal judges are better qualified, whereas state judges are of poorer caliber.<sup>115</sup> It cannot logically be assumed, however, that federal judges are necessarily and uniformly superior to state judges.<sup>116</sup> In the selection of both state and federal judges, judicial appointments are highly political in nature, rather than based on a meritocracy.<sup>117</sup> Accordingly, the quality of both state and federal judges will vary.<sup>118</sup>

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113. See Bassett, *Ruralism*, *supra* note 11, at 314-16 (noting that intelligence is not associated with rural dwellers).

114. See Bumiller, *supra* note 92, at 760-61 (noting that one survey respondent indicated “rural state judges were unpredictable and might be biased against his out-of-state client. [Another] removed to federal court because the case involved a large industry from a small town where the plaintiff was an important businessperson in the community. Several other attorneys feared the influence of the opposing party’s family in the county or the hometown influence of a corporation in a community”).

115. See, e.g., POSNER, *supra* note 63, at 144 (arguing that there is “interesting” evidence suggesting that the quality of justice is better in federal courts because they have more qualified judges, less congestion, and better procedural rules).

116. See Bator, *supra* note 105, at 629-30:

I wish, finally, to make a few comments about the content of the arguments in favor of the superior competence and sensitivity of the federal courts. As I said before, many of these arguments are not implausible just because they are virtually all intuitive. But they do tend to be rather indiscriminating. They work with two undifferentiated categories—all state judges compared to all federal judges. They are, therefore, unable to account for the fact that, as we all know, there are tremendous variations in the quality of the bench from state to state—and, let’s remember, in the quality of federal judges, too. They also conceal, as I have noted before, that quality is not static.

*Id.* See also Chemerinsky, *Parity Reconsidered*, *supra* note 105, at 259:

[E]ven if quality could be defined, and even if it could be measured, at best the result would be an aggregate comparison of *all* state courts with *all* federal courts. As the term “parity” is used, it refers to an overall comparison of the federal courts with the composite of all of the state judiciaries. The state courts differ greatly from one another, just as the federal courts are not homogeneous.

*Id.*

117. See Debra Lyn Bassett, “*I Lost at Trial—In the Court of Appeals!*”: *The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 Hous. L. Rev. 1129, 1182-83 (2001) [hereinafter Bassett, *Lost at Trial*] (noting “the highly political nature of judicial appointments”). See also David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1506-09, 1516-17 (1992) (noting ideological screening of potential judges as part of the judicial selection process).

118. Flango, *supra* note 87, at 972, 974 (noting that “it is naive to compare federal courts to state courts as if there were only two court systems instead of fifty-two,” and concluding that “[t]he quality of state courts and judges varies from state to state and within each state over time”). See also Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, 61 N.Y. ST. B.J. 14, 18 (July 1989) (“[I]t is not clear that on a nationwide basis, federal courts are consistently superior to, or more current than, state courts.”).

Related to the stereotypes of provincialism and inferior intellect, the rural stereotype also assumes an inability to undertake rational thought. Anecdotes have accorded this portion of the rural stereotype with having an irrational, and perhaps dangerous, mentality.<sup>119</sup> This mentality typically is associated with ignorant rural dwellers drawing emotional, unsubstantiated conclusions, and a concomitant unwillingness to reflect calmly and rationally upon the available evidence. Bound with this mentality is a stereotype suggesting both lack of intelligence and lack of character—an assumption that rural dwellers are incapable of rendering a verdict based on objectivity and evidence, but instead will be swayed by subjective, emotional factors.<sup>120</sup>

Associating local bias with rural, but not urban, areas is a strong—and discriminatory—statement. It assumes provincialism; it assumes lack of intelligence; it assumes lack of character.

[The conclusions underpinning diversity jurisdiction] are, first, that local prejudice against out-of-state litigants is a significant problem in state courts, and, second, that the risk of such bias is substantially diminished if state law cases involving non-residents are heard in federal courts. Neither of these considerations is obvious, nor is either convincingly documented. It is frequently noted that many state judges are elected (and thus, presumably, subject to local political pressure) while federal judges enjoy tenure during good behavior. However, the effect of this difference remains speculative. It is sometimes argued that federal court juries are less likely to be biased than are state court juries. This contention, too, is unsupported by firm evidence. It is noteworthy that a state law case filed in (or removed to) a federal court is still heard within essentially the same general geographic and political boundaries as it would be if the adjudication took place in a state court. True, federal courts are generally located in urban areas (as are *most* state courts), while some state courts are situated in small towns. Precise geographic location may affect the

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119. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 797 (1995) (discussing small rural community in which the local sheriff “publicly expressed his desire to ‘pre-cook [the defendants] several days, just keep them alive and let them punish,’ and of an editorial writer who compared the defendants to rattlesnakes and rabid dogs. A local citizen [stated] . . . that the sentiment of ‘everybody’ prior to trial was ‘fry ‘em, electrocute ‘em’”).

120. See Jacqueline S. Anderson, *Changing Venue to Obtain a Fair and Impartial Trial: Trial Court Discretion or Subjective Evaluation?*, 70 N.D. L. REV. 675, 686 (1994) (noting that a North Dakota Supreme Court decision “leaves the impression that in less populated counties, jurors may not be trusted to lay aside any biases, impressions, or opinions and render a verdict based on the evidence presented at trial”).

collective experience and outlook of the jury. But there is of yet no evidence that a “rural” jury, as opposed to an “urban” one, is a threat to fair and impartial adjudication.<sup>121</sup>

In light of the discriminatory application of the local bias justification for diversity jurisdiction, Part III proposes a corresponding modification to diversity jurisdiction.

### III. A PROPOSAL TO ELIMINATE ANTIRURAL BIAS FROM DIVERSITY JURISDICTION

The continued necessity for diversity jurisdiction has been a subject of debate on numerous occasions.<sup>122</sup> The notion of local bias played a prominent role in these previous debates, leading to various surveys attempting to ascertain whether such bias in fact exists.<sup>123</sup> The results of these empirical studies were mixed.<sup>124</sup> Moreover, as previously noted, the existence of local bias as a factual matter does not lend itself to study.<sup>125</sup> Instead, the surveys undertaken have relied on perceptions—or more specifically, fears—of local bias.<sup>126</sup> Such fears cannot justify the perpetuation of a practice that is discriminatory in its implementation.

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121. Lilly, *supra* note 4, at 190-91.

122. See *supra* note 6 and accompanying text (discussing extensive debate in the legal literature regarding diversity jurisdiction).

123. See, e.g., Bumiller, *supra* note 92, at 749; Goldman & Marks, *supra* note 91, at 93; Miller, *supra* note 89, at 369; Jolanta Juskiewicz Perlstein, *Lawyers' Strategies and Diversity Jurisdiction*, 3 LAW & POL'Y Q. 321 (1981); Marvin Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962).

124. Flango, *supra* note 87, at 965 (“Empirical evidence on the influence of fear of prejudice on lawyers’ choice of forum has been mixed.”). See, e.g., Miller, *supra* note 89, at 410 (56.3% of defense lawyers surveyed indicated that bias against out-of-state litigants was a consideration in seeking removal). See also Bumiller, *supra* note 92, at 760 (53.3% of surveyed lawyers in South Carolina ranked fear of bias against out-of-state litigants “important” or “very important”; percentages dropped to 29.5% of surveyed lawyers in Wisconsin, 18.2% in Pennsylvania, and 14.6% in California); Goldman & Marks, *supra* note 91, at 98 (finding 40% of the respondents “indicated that fear of local bias had some bearing on their decision, and almost 20 percent found local bias to be an important consideration”); Perlstein, *supra* note 123, at 321 (finding no significant difference in selection of federal versus state forum for hypothetical case where half of respondents were told to assume no local bias existed and other half were told nothing about potential local bias); Summers, *supra* note 123, at 937 (Wisconsin study finding no case in which local bias was the sole consideration for litigating in federal court).

125. See *supra* notes 91-92 and accompanying text (noting that the existence of local bias is difficult to uncover, and therefore perceptions of such bias must be measured instead).

126. See Miller, *supra* note 89, at 380 (“Direct study of the issue of local bias . . . is not easily accomplished because this type of direct examination would be overly expensive, even on a scale as small as a single district court. . . . Research must look, therefore, to attorney surveys for proxies of direct measurement.”). See also Flango, *supra* note 87, at 965 (noting “the influence of fear of prejudice”).

In 1990, the Federal Courts Study Committee concluded that local bias was no longer of sufficient concern to merit the continuation of diversity jurisdiction.<sup>127</sup> The Study Committee offered a particularly enlightening comment:

[W]e do not agree that retention of the diversity jurisdiction is justified by concerns with favoritism and prejudice. Although there may be bias and prejudice in state courts, as there unfortunately is in many American institutions, it does not fall along state boundary lines. As an example, most of the shareholders of a corporation that is a citizen of one state may live in other states, in which event the citizenship of the corporation may not shield it from prejudice against nonresidents of that state. Then too, federal district courts are local institutions and may not be wholly without a bias in favor of local residents. Finally, and related to these points, *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.*<sup>128</sup>

Until now, the continued existence of diversity jurisdiction, as justified by its longstanding availability and the possibility of local bias at least in some circumstances, was not particularly problematic. After all, retaining diversity jurisdiction simply provided an additional option in selecting a forum, and its primary burden lay in its additional workload for the federal courts—a burden not always treated sympathetically.<sup>129</sup> The injection of antirural bias into this debate, however, adds an impermissible layer of discrimination that the courts cannot countenance.<sup>130</sup>

Diversity jurisdiction provides attorneys with an additional choice so that a lawsuit may be filed in either federal court or state court. Although fears of potential local bias may occasionally factor into this choice, the forum selection process is largely one of forum shopping.<sup>131</sup> Characterizing this

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127. See FEDERAL COURTS STUDY COMMITTEE, *supra* note 8, at 40.

128. *Id.* at 15 (italics added).

129. See, e.g., Frank, *Maintaining Diversity*, *supra* note 6, at 13 (“[One] criticism [of diversity jurisdiction] is that inclusion of the diversity cases clogs federal courts and requires more judges. If so, why not have more judges? What, precisely, is the evil? So far as cost is concerned, these cases must go somewhere.”).

130. Similarly, when the use of peremptory challenges to exclude all African-Americans as venirepersons finally was recognized and acknowledged as racially discriminatory, procedures were modified to prevent such discriminatory practices. See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986).

131. See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) (“The name of the game is forum-shopping.”); Kastenmeier &

forum selection process as avoiding local bias—rather than acknowledging the reality that the motivation behind exercising this choice is simply forum shopping—clothes this basic forum choice with the power and credence to perpetuate discrimination against rural dwellers. Accordingly, unless we are willing to acknowledge that forum shopping is an appropriate reason for maintaining diversity jurisdiction,<sup>132</sup> the bias behind the use of diversity jurisdiction requires diversity's abolition.<sup>133</sup>

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Remington, *supra* note 6, at 313 (“Basically, the bar likes forum shopping.”); J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) (referring to forum shopping as a “national legal pastime”). Forum shopping “occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.” BLACK’S LAW DICTIONARY 655 (6th ed. 1990).

132. See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1684 (1990) [hereinafter Note, *Forum Shopping*]:

Three reasons are generally given for policies against forum shopping: first, that forum shopping undermines the authority of substantive state law; second, that forum shopping overburdens certain courts and creates unnecessary expenses as litigants pursue the most favorable, rather than the simplest or closest, forum; and, third, that forum shopping may create a negative popular perception about the equity of the legal system.

*Id.* Other proffered justifications for diversity jurisdiction have included the benefits of overlap to the federal and state judicial systems, the greater variety in the cases heard, lessened federal court specialization, and fewer opportunities for a specialized federal bar or pressures upon federal courts by special interest groups. See Grissom, *supra* note 72, at 386.

133. As noted *supra*, this Article’s call for the abolition of diversity jurisdiction applies only to controversies between citizens of different states; this Article does not call for the abolition of alienage jurisdiction. See *supra* note 19 (proposal excludes alienage jurisdiction). The retention of alienage jurisdiction is warranted for two specific reasons. First, the Framers’ concern with the potential for bias against foreigners is articulated clearly. See 4 ELLIOT, DEBATES OF THE STATE CONVENTIONS, *supra* note 42, at 158-59 (quoting Mr. Davie of North Carolina) (“If our courts of justice did not decide in favor of foreign citizens and subjects when they ought, it might involve the whole Union in a war . . . . [W]here peace of the Union is affected, the general judiciary ought to decide.”); THE FEDERALIST, *supra* note 49, No. 80, at 568 (“[I]t is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign . . . .”); Johnson, *Alienage Jurisdiction*, *supra* note 19, at 16 (“At least at the time of the framing there was an undisputed need for alienage jurisdiction, which was not the case for diversity.”). Second, alienage jurisdiction addresses well-documented bias against noncitizens existing throughout both urban and rural areas of the United States and is not a component of, nor does it contribute to, ruralism. See, e.g., Bill Ong Hing, *Answering Challenges of the New Immigrant-Driven Diversity: Considering Integration Strategies*, 40 BRANDEIS L.J. 861, 879 (2002) (“Hatred fomented by anti-immigrant sentiment is not hard to find.”); Johnson, *Alienage Jurisdiction*, *supra* note 19, at 31 (“History has demonstrated that the political processes in the country are susceptible to antiforeign sentiment, sometimes of a particularly virulent strain, which necessitates a forum more politically insulated than that offered by most states.”); *id.* at 35-43 (discussing recurring xenophobia in the United States); Kevin R. Johnson, *The End of “Civil Rights” As We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1485 (2002) (noting the “well-documented history of racism and nativism,” “anti-immigrant sentiment,” and “xenophobia” in the United States). *But see* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1132 (1996) (although research data did not reflect a bias against foreigners in federal court litigation, “[w]e are not saying that anti-foreign bias is necessarily nonexistent, and we are not arguing for the abolition of federal alienage jurisdiction”); *id.* at 1133-34

Despite the very real phenomenon of forum shopping in selecting a federal forum based on diversity, candid acknowledgement of this reality is unlikely for two interrelated reasons. First, the United States Supreme Court has expressly condemned forum shopping in the very context of diversity jurisdiction,<sup>134</sup> which makes it especially difficult to subsequently use forum shopping as a justification for invoking diversity jurisdiction. Second, forum shopping as a general matter runs contrary to our ideal of impartial justice because forum shopping, by definition, admits that the legal system is subject to manipulation.<sup>135</sup>

Forum shopping is a disfavored—in fact, a broadly condemned—tactic.<sup>136</sup> The Supreme Court has repeatedly deplored forum shopping in its decisions.<sup>137</sup> Indeed, two of the Court's most prominent decisions denouncing forum shopping involved diversity jurisdiction: *Erie*<sup>138</sup> and *Hanna v. Plumer*.<sup>139</sup>

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(suggesting that “[f]oreigners abandon or satisfy most claims and, presumably, persist in the cases that they are most likely to win”).

134. See *infra* notes 137-40 and accompanying text (citing cases).

135. See Note, *Forum Shopping*, *supra* note 132, at 1685 (“Forum shopping suggests either a distrust of the system’s capacity to redress wrongs or an effort to obtain more than one’s entitlement under the prevailing rules.”).

136. See, e.g., Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 80 (1999) (noting the traditional view that “forum shopping [is] a terrible thing, practiced by only the most manipulative and devious attorneys”); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553 (1989) (“As a rule, counsel, judges, and academicians employ the term ‘forum shopping’ to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit.”); Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 167 (2000) (“Forum shopping is generally deplored as a dubious tactical maneuver. Courts routinely denounce parties who they find engaged in forum shopping and try to ensure that those parties gain no procedural advantage.”); Note, *Forum Shopping*, *supra* note 132, at 1680 (“Despite the widespread availability of forum shopping, courts and legislatures routinely denounce it.”); *id.* at 1681 (“[M]any court decisions and commentators have referred to ‘the policy against forum shopping’ or ‘the evil of forum shopping.’”). See generally Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 641 (1974) (contending that *Erie* was a general condemnation of all forms of forum shopping).

137. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (“Forum-shopping is thus of particular concern.”); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987) (discussing applicable statute of limitations in RICO cases and stating that “[t]he multistate nature of RICO indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping”). See also *Van Dusen v. Barrack*, 376 U.S. 612, 630-31 (1964) (stating that transfer of venue should not affect the applicable law because the venue statute should not be interpreted so as to promote forum shopping).

138. 304 U.S. 64, 74-75 (1938) (noting the “mischievous results” created by *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which resulted in varying rights “according to whether enforcement was sought in the state or in the federal court”).

139. 380 U.S. 460, 468 (1965) (Harlan, J., concurring) (noting it was not condoning forum shopping and citing “the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws”).

The Supreme Court has relied on the “danger of forum shopping” in reaching many decisions. Members of the Court have stated that a “significant encouragement to forum shopping is alone sufficient to warrant application of state law” and have noted “the odor of impermissible forum shopping which pervades this case.” Lower federal courts have routinely denounced forum shopping, calling it everything from an “improper purpose” to “a ‘heads I win, tails you lose’ . . . strategy.”<sup>140</sup>

Although forum shopping is not uniformly criticized in the Court’s decisions,<sup>141</sup> and although some commentators have argued that the evils of forum shopping have been overstated,<sup>142</sup> the negative connotations associated with forum shopping remain.

Absent the justification of forum shopping, the local bias fig leaf can no longer shelter the availability of diversity jurisdiction. The lack of a legitimate, non-discriminatory justification mandates the abolition of diversity jurisdiction.

Concerns previously remedied through the diversity jurisdiction option

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140. Note, *Forum Shopping*, *supra* note 132, at 1681.

141. See, e.g., *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984) (approving a forum shopping strategy of filing suit in a state with an unusually long statute of limitations as “no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations”). See also *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (permitting plaintiffs to file a lawsuit in one jurisdiction but then transfer the lawsuit to a second jurisdiction while retaining the advantages of the first jurisdiction’s laws). See generally George D. Brown, *The Ideologies of Forum Shopping—Why Doesn’t a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 651 (1993) (noting that “the [Supreme] Court is opposed to forum-shopping in the federal-state public and private law contexts [but] seemingly supportive of the state-state private law variant”).

142. See, e.g., Note, *Forum Shopping*, *supra* note 132, at 1695:

Forum shopping represents a continuum of activities within the legal universe; it cannot be dismissed merely as an evil to be avoided. Numerous safeguards exist to curb abuses and inconveniences that may be associated with forum shopping in specific instances. Conversely, the distaste with which courts characterize certain actions as forum shopping makes little sense when set against the array of permissible tools for advantage-seeking that the adversary system permits. The legal system’s concern that forum shopping is a manipulation of the rules by which plaintiffs avoid the “correct” legal forum in order to obtain a more favorable outcome conflicts with its commitment to party-driven litigation and to the provision of a remedy for every injury. Explicit criticism of forum shopping and its results forces the legal system to confront the uncomfortable fact that the available forums have recognizable biases and inadequacies.

*Id.* See also Brown, *supra* note 141, at 720 (noting that “[f]orum-shopping to obtain substantive law advantages is a complex issue. The classical view that it is an outright evil is no longer universally accepted, if indeed it ever was”); Juenger, *supra* note 136, at 571:

“Forum-shopping” is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.

*Id.* (internal quotations and citations omitted).

can be resolved through other existing means. In those instances in which a genuine issue of local bias arises—instances that have no basis in ruralism—a number of effective remedies already exist. Potential judicial bias can be addressed through a disqualification motion.<sup>143</sup> Potential juror bias can be addressed through voir dire<sup>144</sup> and controls over pretrial publicity.<sup>145</sup> More widespread concerns can be the basis for a change of venue.<sup>146</sup>

Accordingly, this Article calls for the abolition of diversity jurisdiction in those instances historically justified on the basis of local bias. In those instances where bias may exist in fact, other remedies remain—most notably, judicial disqualification (when the concern involves only the judge) and change of venue (when the concern covers a broader scope).

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143. See generally RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES §§ 27.1-27.53, at 765-839 (1996 & 1998 Supp.) (discussing the judicial disqualification provisions of all fifty states, the District of Columbia, and the territories of Puerto Rico, Guam, and the Virgin Islands). See also Bassett, *Judicial Disqualification*, *supra* note 94 (discussing judicial disqualification provisions).

144. See generally Bassett, *Lost at Trial*, *supra* note 117, at 1184 (noting “the availability of voir dire to ascertain potential bias and peremptory challenges to strike jurors with suspected biases”). See also José Felipe Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 344 n.4 (1998) (“Voir dire is the process where information is obtained from jurors in order to determine whether they should be disqualified because of some bias that makes them unable to serve.”).

145. See Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the “Rodney King” Case: An Interest Analysis*, 41 CLEV. ST. L. REV. 215, 218 (1993) (“[C]ourts have various methods of dealing with pretrial publicity and community prejudice, including the voir dire, continuances, controlling the courtroom atmosphere, and controlling what the parties, counsel, and law enforcement personnel say to the press.”).

146. See, e.g., 28 U.S.C. § 1391(a) (2000) (“A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.”); 28 U.S.C. § 1404(a) (2000) (authorizing federal courts to transfer civil actions to a different district “[f]or the convenience of parties and witnesses, in the interest of justice”); CAL. PENAL CODE § 1033(a) (West 1985) (requiring change of venue “when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county”); 725 ILL. COMP. STAT. 5/114-6(a) (West 1992); MD. RULE 4-254 (1994); MO. REV. STAT. § 545.430 (1994); N.D. CENT. CODE 28-04-07 (1991) (authorizing change of venue “[w]hen there is reason to believe that an impartial trial cannot be had” in that county); N.J. REV. STAT. ANN. § 2A:2-13 (West 1987) (“A change of venue in any civil or criminal cause in the superior court may be ordered by the court for good cause shown.”). See also Ryan, *supra* note 136, at 170 (observing that “venue statutes typically let the plaintiff choose among a number of courts—albeit a limited number—in which venue is proper”). Indeed, some commentators have argued that venue provisions are too broad, thereby providing too many opportunities for forum shopping. See, e.g., Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267 (1996); Ryan, *supra* note 136, at 172 (“Statutory reforms intended to lead to more efficient venue rules have instead resulted in more choices for the plaintiff, and consequently greater arbitrariness in venue.”).



### CONCLUSION

The continuing viability of diversity jurisdiction has rested primarily on the notion of avoiding local bias. However, the use of local bias as a justification for diversity jurisdiction is, in practice, a manifestation of ruralism. Studies have repeatedly shown that local bias is associated with rural, but not urban, areas. The rural stereotype, which assumes provincialism and lack of intelligence, underlies the fear of local bias. Indeed, the widespread acknowledgement that local bias is based on fear, rather than objective empirical evidence, supports the conclusion that prejudice motivates the invocation of diversity jurisdiction on the basis of local bias. As a form of discrimination, local bias cannot serve as the basis for the continuing use of diversity jurisdiction. Accordingly, this Article calls for the abolition of diversity jurisdiction under those circumstances traditionally justified on the basis of protecting nonresidents from local bias.