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Beyond Bias in Diversity Jurisdiction

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ABSTRACT

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

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TABLE OF CONTENTS

INTRODUCTION 3

I. THE ORIGIN AND ENTRENCHMENT OF THE BIAS RATIONALE.....5
A. Drafting 5
B. Ratification 7
C. The Judiciary Act of 1789 15
D. Entrenchment by the Supreme Court 16

II. THE CENTRALITY OF THE BIAS RATIONALE 19
A. Legal Developments 20
B. Academic Commentary 24

III. MARGINALIZING THE BIAS RATIONALE 21
A. Lack of Bias 22
B. Irrelevance of Bias 32
C. Bias Unremedied 33
D. Diversity's Scope 34
E. Diversity's Costs 35

IV. REFOCUSING THE DEBATE 38
A. Facilitating Aggregation 38
1. Benefits of Aggregation 38
2. Diversity Jurisdiction and Aggregation 39
B. Other Benefits of Diversity Jurisdiction.....45
C. An Illustration: CAFA.....46

V. REFORMING DIVERSITY JURISDICTION 51
A. Potential Reforms.....51
1. The Forum-Defendant Bar 52
2. The Complete-Diversity Rule 53
3. Citizenship Tests 55
B. Constitutional Constraints 59

CONCLUSION.....61

INTRODUCTION

Diversity jurisdiction—the grant of authority to federal courts to hear state-law cases involving parties from different states—was enshrined in the Constitution and has been granted by statute since the Judiciary Act of 1789.[1] Most jurists accept that the primary and traditional justification for diversity jurisdiction is to provide a neutral federal forum in cases presenting a risk that the state forum would be biased—or be perceived to be biased—against an out-of-state litigant.[2] This bias rationale has been tethered to diversity jurisdiction since the Founding Era, when Federalists defended the Diversity Clause on that ground,[3] and it has been repeatedly accepted by the Court to present day.[4] The bias rationale has been used to explain the Supreme Court's interpretation of the general diversity-jurisdiction statute to require complete diversity, Congress's decision to deem corporations to be citizens of the state of their principal place of business, and the removal statute's bar on removal of diversity cases by in-state defendants.[5]

Throughout its long history, diversity jurisdiction has always been controversial.[6] Unsurprisingly in light of its origins, perennial

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

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

[3] *See infra* text accompanying notes 11-67.

[4] *See infra* text accompanying notes 68-74.

[5] *See infra* text accompanying notes 75-95.

[6] *See* James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 1 (1964) ("While there are other

debates about diversity jurisdiction's proper scope have centered around the bias rationale.[7] Abolitionists seek to eliminate or minimize diversity jurisdiction on the ground that the bias rationale offers no justification today, while diversity-jurisdiction supporters contend that the bias rationale remains a forceful justification.[8]

In my view, both sides are wrong. Supporters are wrong that the bias rationale continues to justify diversity jurisdiction today. Any evidence of bias is thin and regional, the fear of out-of-state bias plays only a minimal role in forum selection, the remedy of federal neutrality is suspect, the scope of diversity jurisdiction exceeds any rational cure, and the costs of diversity jurisdiction are overwhelming.[9]

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

I therefore aim to shift the diversity-jurisdiction debate away from its myopic focus on out-of-state bias and toward considerations that are more meaningful for modern civil litigation. Scholars, judges, and legislators should recognize that diversity jurisdiction can serve important purposes other than protecting against state bias against out-of-state citizens. Of course, there are downsides to diversity jurisdiction, and, at the end of the day, it may be that the costs of diversity jurisdiction still outweigh its

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segments of federal jurisdiction as old as diversity, probably none is as controversial."); *e.g.*, James Bradley Thayer, *The Case of* Gelpcke v. Dubuque, 4 HARV. L. REV. 311, 316 (1891) ("Why is it that a United States court is given this duty of administering the law of another jurisdiction?").

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

[8] *See infra* text accompanying notes 97-124.

[9] *See infra* text accompanying notes 125-168.

[10] *See infra* text accompanying notes 169-238.

benefits in certain instances. But at least the debate would be more honest. And if freed from the bias rationale, the debate might reveal creative ways to put diversity jurisdiction to better use.

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

I. THE ORIGIN AND ENTRENCHMENT OF THE BIAS RATIONALE

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

A. Drafting

The Constitution extends the judicial power of the United States to controversies "between Citizens of different States."[11] The historical record reveals relatively little about the purpose of or motivations behind the Diversity Clause; the Framers appeared hardy to have debated it at all.[12] What historical record exists,

[11] U.S. CONST. art. III § 2.

[12] *See* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 L. & CONTEMP. PROBS. 3, 3 (1948) (stating that "the judiciary clauses were almost immune from strenuous criticism or discussion"); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 (1928) ("A

however, does suggest that the Framers were motivated by a fear of state bias against out-of-state litigants and resulting interstate discord.

The Clause had its origins in Edmund Randolph's Virginia plan. All of the plans submitted to the constitutional convention provided for a federal judiciary, but only the Virginia plan—which became the preferred template for discussion—included domestic diversity jurisdiction.[13] Randolph introduced resolutions on May 29, 1787, to give lower federal courts jurisdiction in "cases in which foreigners or citizens of other States applying to such jurisdictions may be interested."[14] That proposal was tentatively adopted without discussion on June 4 but, the following day, was reconsidered upon motion by John Rutledge of South Carolina and Roger Sherman of Connecticut to amend the provisions to eliminate lower-federal-court jurisdiction on the ground that the state courts were sufficient.[15] James Madison opposed the motion partially on the ground that biased decisions in state courts would not be remedied by appellate review, but the motion carried, 5-4.[16] Madison and James Wilson, not to be cowed, offered an alternative that would restore constitutional authorization of lower federal-court jurisdiction but give Congress the option not to create lower

search of the letters and papers of the men who were to frame the Constitution does not reveal that they had given any large amount of thought to the construction of a federal judiciary. Certain it is that diversity of citizenship, as a subject of federal jurisdiction had not bulked large in their eyes."); 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE JURIS. § 3601 (3d ed. 2017) ("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.").

[13] *See* Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 L. & HIST. REV. 451, 475-77 (2010); Moore & Weckstein, *supra* note 6, at 2-3.

[14] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed. 1911).

[15] 1 *id.* at 124-25, 244.

[16] 1 *id.* at 124-25; Frank, *supra* note 12, at 10.

federal courts at all. This compromise satisfied the delegates and was approved 8-2.[17]

On June 13, the resolutions were amended to extend federal jurisdiction "to questions which involved the national peace and harmony"[18] and reported to the Committee of Detail.[19] Some have opined that this amendment was not a repudiation of diversity jurisdiction but rather a punt to the Committee of Detail to work out specifics in light of the general principle of interstate "harmony," of which diversity jurisdiction was seen as a part.[20] Indeed, drafts produced in the Committee of Detail contained specific diversity language,[21] and the Committee produced, and the Convention accepted without contest, the Diversity Clause.[22]

B. Ratification

Ratification proved far more contentious than the drafting. The Diversity Clause was vehemently attacked during the state ratifying conventions.[23] Some attacks were part of a challenge to lower-court federal jurisdiction generally.[24] In Virginia, Patrick

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[17] Charles C. Tansill, *Documents Illustrative of the Formation of the Union of the American States*, H.R. Doc. No. 398, 69th Cong., 1st Sess. 158-59 (1928).

[18] 1 Farrand, *supra* note 14, at 223-24. For commentary on the meaning of the idea of "national harmony," see Jesse M. Cross, *National "Harmony": An Inter-Branch Constitutional Principle and its Application to Diversity Jurisdiction*, 93 NEB. L. REV. 139 (2014).

[19] For more detail about the various discussions and amendments proposed, see Tansill, supra note 17, at 198-203.

[20] Friendly, *supra* note 12, at 485-86; *see also* Bassett, *supra* note 2, at 125-26 (expressing this opinion); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 93 (1993) (same); Moore & Weckstein, *supra* note 6, at 3 (same).

[21] 2 Farrand, *supra* note 14, at 129, 146-47, 173.

[22] 2 *id.* at 137, 146, 172, 177, 186-87, 422, 424-25.

[23] Friendly, *supra* note 12, at 487.

[24] *See, e.g.*, 1 Farrand, *supra* note 14, at 125 (Piece Butler) (proclaiming that the establishment of lower federal courts would incite a "revolt"); 1 *id.* at 124 (John Rutledge) (calling lower federal courts an "unnecessary encroachment on the jurisdiction" of the state courts); 1 *id.* at 125 (Roger Sherman) (same); 2 *id.* at 45-46 (Luther Martin) (same); 10 THE DOCUMENTARY HISTORY OF THE

Henry and George Mason predicted that expansive federal-court jurisdiction would destroy state courts. Henry said:

> I see arising out of that paper, a tribunal, that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen; and from the extensive jurisdiction of these paramount courts, the state courts must soon be annihilated.[25]

Mason echoed that federal jurisdiction would "absorb and destroy the judiciaries of the several States"[26] and that the federal courts' "effect and operation will be utterly to destroy the state governments."[27] The basic fear of state-court displacement was enough for Mason to declare diversity jurisdiction "improper and inadmissible."[28]

The antifederalists also targeted diversity jurisdiction on specific grounds. Some worried that diversity jurisdiction carried with it an implied power by federal courts to make federal law that would displace state law in such cases.[29] Mason pointed to the offensive nature of diversity jurisdiction as an affront to the judgment and dignity of state courts:

> [Federal] jurisdiction extends to controversies between citizens of different states. Can we not trust our state courts with the decision of these? If I have a controversy with a man in

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RATIFICATION OF THE CONSTITUTION 1422 (John P. Kaminski & Gaspare J. Saladino eds. 1993) (Patrick Henry) ("I see arising out of [the Constitution] . . . when the destruction of the State Judiciaries shall happen; and from the extensive jurisdiction of these paramount [federal] Courts, the State Courts must soon be annihilated.").

[25] 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 397 (Jonathan Elliot ed. 1836); 10 Kaminski & Saladino, *supra* note 24, at 1422.

[26] 2 Farrand, *supra* note 14, at 638.

[27] 3 Elliot, *supra* note 25, at 521 (George Mason). These were alarmist overstatements; even after the passage of the Judiciary Act extending diversity jurisdiction to the lower federal courts, state courts maintained active dockets. *See* Friendly, *supra* note 12, at 489-90.

[28] 3 Elliot, *supra* note 25, at 521 (George Mason).

[29] *See* Friendly, *supra* note 12, at 490.

> Maryland, . . . are not the state courts competent to try it? Is it suspected that they would enforce the payment if unjust, or refuse to enforce it if just? The very idea is ridiculous.[30]

Others raised the logistical difficulties associated with travel to potentially distant federal courthouses.[31] Mason waxed, "What! Carry me a thousand miles from home—from my family and business—to where, perhaps, it will be impossible to prove that I paid it?"[32] And in North Carolina, Samuel Spencer stated:

> Nothing can be more oppressive than the cognizance with respect to controversies between citizens of different states. In all cases of appeal, those persons who are able to pay, had better pay down in the first instance, though it be unjust, than be at such a dreadful expense, by going such a distance to the supreme federal court.[33]

So vocal were these objections that Virginia proposed eliminating diversity jurisdiction from the Constitution,[34] and Massachusetts and New Hampshire proposed adding an amount in controversy.[35]

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

> I sincerely believe this provision will be rather salutary, than otherwise. It may happen that a strong prejudice may arise in some states, against the citizens of others, who may have claims

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[30] JACKSON TURNER MAIN, THE ANTIFEDERALISTS 223-24 (1961) (George Mason).

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

[32] MAIN, *supra* note 30, at 223-24 (George Mason).

[33] 3 Elliot, *supra* note 25, at 127; 4 *id.* at 138 (same); *see also* 4 *id.* at 143 (M'Dowall of North Carolina) ("Can it be supposed that any man, of common circumstances, can stand the expense and trouble of going from Georgia to Philadelphia, there to have a suit tried?").

[34] 3 *id.* at 660.

[35] *E.g.*, 2 *id.* at 177 (Massachusetts); 1 *id.* at 322, 323, 326.

> against them. . . . A citizen of another state might not chance to get justice in a state court.[36]

Alexander Hamilton, in *The Federalist*, wrote:

> The reasonableness of the agency of the national courts in cases in which the state tribunals cannot suppose 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 general courts as proper tribunals for the determination of controversies between different States and their citizens. . . . It seems scarcely to admit of controversy that the judicial 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. . . . [Federal courts, by contrast,] having no local attachments, will be likely to be impartial between the different states and their citizens.[37]

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

> The power of determining causes . . . between the citizens of different States is . . . essential to the peace of the Union. . . . [I]n order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.[38]

In North Carolina, William Davie echoed these concerns: "The security of impartiality is the principal reason for giving up on the ultimate decision of controversies between citizens of different

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[36] 2 *id.* at 391; 3 *id.* at 486 (James Madison).
[37] THE FEDERALIST No. 80 (Alexander Hamilton) (George W. Cary & James McClellan eds. 2001).
[38] *Id.*

states."[39] John Marshall of Virginia was more circumspect, arguing that a federal forum removed animosity between states that might result from a state-court judgment:

> To preserve the peace of the Union only, its jurisdiction in this case ought to be recurred to. Let us consider that, when citizens of one state carry on trade in another state, much must be due to the one from the other . . . . Would not the refusal of justice to our citizens . . . produce disputes between the states? Would the federal judiciary swerve from their duty in order to give partial and unjust decisions?[40]

The Pennsylvania Federalists made a more economic connection to diversity jurisdiction.[41] James Wilson argued that local concerns regarding commercial disputes would stymie national economic expansion:

> [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? . . . [I]s it not an important object to extend our manufactures and our commerce?[42]

Despite these rejoinders, the Federalists' defense was less than wholehearted. In Virginia, Madison admitted: "As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left

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[39] 4 Elliot, *supra* note 25, at 159 (Davie).

[40] 3 *id.* at 557 (Marshall).

[41] *See, e.g.*, 3 *id.* at 281 (James Wilson); 3 *id.* at 320 (M'Kean). Opposing views of diversity jurisdiction existed there, too. *See* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 454, 469 (John Back McMaster & Frederick D. Stone eds. 1888) ("The judicial powers vested in Congress are also so various and extensive, that by legal ingenuity they may be extended to every case, and thus absorb the State judiciaries.").

[42] 2 Elliot, *supra* note 25, at 491-92 (Wilson).

to the state courts."[43] Edmund Pendleton was even more deferential: "I think, in general [diversity disputes] might be left to the state tribunals; especially as citizens of one state are declared to be citizens of all. I think it will, in general, be so left by the regulations of Congress."[44] And John Marshall distanced himself from the clause: "Were I to contend, that this was necessary in all cases, and that the government without it would be defective, I should not use my own judgment."[45]

In a famous article published in 1928, Henry Friendly argued that the lack of any evidence of state-court bias at the time,[46] coupled with Federalists' tepid defense of diversity jurisdiction during ratification, suggested that the Diversity Clause was motivated primarily by state lawmaking bias against creditors.[47] Notwithstanding some wrangling over the import of Friendly's premise that no evidence of state-court bias existed,[48] Friendly has

[43] 2 *id.* at 391; 3 *id.* at 486 (James Madison).
[44] 3 *id.* at 549 (Edmund Pendleton).
[45] 2 *id.* at 406. *See also* 10 Kaminski & Saladino, *supra* note 24, at 1414 (same).
[46] Friendly, *supra* note 12, at 493 ("The very form in which the argument is stated throws doubts on the sincerity of those propounding it" because the evidence "entirely fails to show the existence of prejudice on the part of state judges."). This is in some contrast to bias against aliens. *See* Frank, *supra* note 12, at 24 ("There can be no doubt, for example, of direct bias in the administration of justice against British creditors in Virginia."). *But see* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996) ("Available data, however, do not support the conclusion that xenophobia is rampant in American courts.").
[47] Friendly, *supra* note 12, at 496-97 ("[W]e may say that the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction."). *See also* Frank, *supra* note 12, at 22 (identifying commercial interests as a basis for diversity jurisdiction).
[48] In 1931, Hessel E. Yntema and George H. Jaffin pointed out that the dearth of evidence of state bias was explainable by, among other things, the rarity of interstate litigation in the 1700s. *See* Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 875-76 (1931). Some years later, John Frank offered a reconciliation between Yntema and Jaffin and Friendly, suggesting that although the Founding Era proponents of diversity jurisdiction did not have evidence of state bias at the time, they could reasonably predict that state bias against out-of-state litigants would likely arise as the Union matured. *See* Frank, *supra* note 12, at 24-27 ("The diversity clauses were based on . . . anticipation more largely than on experience.").

a point.[49] Creditor-debtor relations were a brooding economic, social, and political issue in the years following the Revolutionary War.[50] The Framers did worry about anti-creditor state laws,[51] and, at the time, there was significant uncertainty about whether federal courts, if granted diversity jurisdiction, would have to follow and enforce state commercial laws.[52] But regardless of the true

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[49] *See, e.g.*, Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520 (1928) (agreeing that commercial concerns likely played a role in driving diversity jurisdiction); FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 9 (1928) (same).

[50] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 248 (1998); PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA 115 (1974); MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789, at 303-06 (195).

[51] 4 Elliot, *supra* note 25, at 157 (William Richardson Davie) (accusing states of passing laws discriminating against out-of-state creditors and supposing that federal courts might be less inclined to enforce those laws); 4 *id.* at 159 (William Richardson Davie) (stating that an out-of-state creditor "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."); 10 Kaminski & Saladino, *supra* note 24, at 1427-28 (Edmund Pendleton) (defending diversity jurisdiction as a way to combat state anti-creditor laws); 3 Farrand, *supra* note 14, at 220-21 ("Should a citizen of Virginia, Pennsylvania, or any other of the United States, be indebted to, or have debts due from a citizen of this State, 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."). Admittedly, the anticreditor-bias rationale crossed over between legislatures and courts. *See* 2 *id.* at 519 (James Wilson) ("[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?").

[52] *Compare, e.g.*, 4 THE COMPLETE ANTI-FEDERALIST: WHAT THE ANTI-FEDERALISTS WERE FOR 78-79 (Herbert J. Storing ed. 1981) (Agrippa) ("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 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."), *with* 3 Elliot, *supra* note 25, at 526 (Marshall) (asserting that state law will control contract claims in diversity cases). Although the Judiciary Act of 1789 mandated that the new federal courts at least must apply state *statutory* law in diversity cases, Judiciary

motivations,[53] proponents tended to couch diversity justifications in terms of out-of-state bias, even if that out-of-state bias was thought to be directed at creditors.[54]

In the end, although the state conventions did expose divisions about the Diversity Clause that stood in contrast to the general agreement about other grants of lower federal-court jurisdiction such as admiralty,[55] those debates were minor when compared to the level of controversy over other parts of the proposed Constitution.[56] Perhaps the drafting compromise of leaving the scope of lower-court diversity jurisdiction to Congress mollified some,[57] but also likely is that more pressing matters kept the Diversity Clause free from more significant debate. Nevertheless, the ratification debates offer the best available evidence of the origins of the bias rationale.

Act of 1789, Sec. 34, the Supreme Court, in 1842, famously held that federal courts sitting in diversity need not follow state common law, *see* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). *Swift* was famously overruled in 1938 by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

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

[54] *See* Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1384 (1992) (characterizing debtor favoritism as a kind of state bias against out-of-staters because the creditors were likely to be out-of-staters).

[55] Frank, *supra* note 12, at 9 ("The experience of the Confederation convinced virtually every conscientious patriot of the 1780's that the admiralty jurisdiction ought to be totally, effectively, and completely in the hands of the national government, and an extended search has not revealed a criticism from any contemporary source of the clause of the constitution granting federal admiralty jurisdiction.").

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

[57] *See* Warren, *supra* note 56, at 81; 13E WRIGHT ET AL., *supra* note 12, § 3601.

C. The Judiciary Act of 1789

Notwithstanding assurances that Congress would be circumspect about granting lower federal-court jurisdiction, the First Congress quickly passed the Judiciary Act, which did just that. The Judiciary Act's "transcendent achievement"[58] was the establishment of the lower federal courts, and the Act extended diversity jurisdiction to them.[59] After all, because the Act did not grant general federal-question jurisdiction to the new lower federal courts, those courts, without diversity jurisdiction, "would have had very little to do."[60]

One of the Judiciary Act's primary drafters, Oliver Ellsworth, planned to extend diversity jurisdiction to all cases involving citizens of different states, but the final product was not quite so broad. The initial draft provided for diversity jurisdiction where a "citizen of another State than that in which the suit is brought is a party,"[61] but the final version became "[where] the suit is between a citizen of the State where the suit is brought, and a citizen of another State."[62] The debate records reflect a suggestion to limit diversity jurisdiction to admiralty cases, but that suggestion evidently failed to carry the day.[63] In addition, defendants were given the right to remove a case when the defendant was an out-of-state citizen sued by an in-state plaintiff.[64]

Although the debate records pertaining to the Judiciary Act's grant of diversity jurisdiction are sparse, its language and quick passage do support the inference that the drafters had the bias

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[58] FRANKFURTER & LANDIS, *supra* note 49, at 4.

[59] Judiciary Act of 1789, ch. 20, Sec. 9-13, 1 Stat. 73, 73-78.

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

[61] Warren, *supra* note 56, at 67-78; FRANCIS WHARTON, STATE TRIALS 38 (1849).

[62] Judiciary Act of 1789, ch. 20, Sec. 11-12, 1 Stat. 73, 78-79; Warren, *supra* note 56, at 78.

[63] Borchers, *supra* note 20, at 100-02.

[64] Judiciary Act of 1789, ch. 20, Sec. 12, 1 Stat. 73, 79; Warren, *supra* note 56, at 90-91.

rationale in mind.[65] Charles Warren, one of the principal historians of the Judiciary Act, wrote:

> The chief and only real reason for this diverse citizenship jurisdiction was to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in a State Court against foreigners or non-citizens. The Federal Court was to secure to a non-citizen the application of the same law which a State Court would give to its own citizens, and to see that within a State there should be no discrimination against non-citizens in the application of justice. There is not a trace of any other purpose than the above to be found in any of the arguments made in 1787-1789 as to this jurisdiction.[66]

Though Warren's conclusion suffers from some hyperbole, it does reflect the likelihood that the bias rationale was a prime instigator of statutory diversity jurisdiction.[67]

D. Entrenchment by the Supreme Court

Whatever the actual motivations of the Framers, the ratifiers, and the First Congress, the Supreme Court and prominent commentators have entrenched the bias rationale in diversity-

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[65] *See* Friendly, *supra* note 12, at 501. Other motivations likely existed, including the promotion of national power by giving the new federal courts respectable dockets. *See* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 101 (1969) (asserting that one of the most important concerns in establishing the federal courts was to "enhance[] awareness in the people of the existence of the new and originally weak government").

[66] Warren, *supra* note 56, at 83. For similar conclusion, see JULIUS GOEBEL JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (Paul A. Freund ed. 1971).

[67] Those who hoped the federal courts would become a refuge from state anticreditor legislation would have been disappointed by the Judiciary Act's inclusion of the Rules of Decision Act, which mandated that the new federal courts must apply state law in diversity cases. *See* Judiciary Act of 1789, Sec. 34, *codified as amended at* 28 U.S.C. § 1652.

jurisdiction lore.[68] In the 1809 case of *United States v. Deveaux*, Chief Justice John Marshall identified both bias and the risk of bias as targets of diversity jurisdiction:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.[69]

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

> constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between . . . citizens of different states . . . it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts.[70]

The Supreme Court has adhered to these sentiments repeatedly even into the modern era.[71] And commentators throughout the ages

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

[69] United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

[70] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816).

[71] *See, e.g.*, Pease v. Peck, 59 U.S. (18 How.) 595, 599 (1855) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different states, has its foundation in the

have also identified diversity jurisdiction's purpose as attending to the risk of state bias against out-of-state litigants.[72] Today, the bias rationale is the "stock rationale"[73] and "continues to serve as a modern-day justification for diversity jurisdiction."[74]

supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners."); Burgess v. Seligman, 107 U.S. 20, 34 (1883) (explaining that diversity jurisdiction was designed "to institute independent tribunals, which . . . would be unaffected by local prejudices"); Barrow S.S. Co. v. Kane, 170 U.S. 100, 111 (1898) ("The object of the provisions of the Constitution and statutes of the United States, in conferring upon the Circuit Courts of the United States jurisdiction of controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides."); Erie R. Co. v. Tompkins, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."); Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias."); Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) ("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."); Hertz Corp. v. Friend, 130 S. Ct. 1181, 1188 (2010) (identifying "diversity jurisdiction's basic rationale" as "opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties").

[72] *See, e.g.*, C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487, 500 (2006) (calling local bias against out-of-state litigants "was the only justification alluded to by the Framers" for the Diversity Clause); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 629-31 (1833) (crediting the bias rationale).

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

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

II. THE CENTRALITY OF THE BIAS RATIONALE

In light of this history, it is unsurprising that questions and debates about diversity jurisdiction and its proper scope have focused on the policy goal of mitigating state bias (or its perception) against out-of-state litigants.[75] That is not to say that other justifications have not been proffered.[76] But the bias rationale

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[75] *See* Bassett, *supra* note 2, at 119 ("Commentators have repeatedly debated the continued viability of diversity jurisdiction. These debates have tended to focus on . . . the existence of local bias . . . ."); Borchers, *supra* note 20, at 79 ("The consensus is that diversity has existed and exists to provide a neutral forum for out-of-staters against perceived local bias by state courts."). *See also* 13B WRIGHT ET AL., *supra* note 12, § 3601, at 338 (noting "the traditional, and most often cited, explanation of the purpose of diversity jurisdiction—the fear that state courts would be prejudiced against out-of-state litigants"). This policy goal is almost always contrasted with two countervailing features of diversity jurisdiction: the burden on federal caseloads and the difficulties inherent in federal courts deciding state claims. *See* Bassett, *supra* note 2, at 119.

[76] As for other justifications, some have pointed to biases regarding characteristics other than state citizenship. *See infra* text accompanying notes 207-**Error! Bookmark not defined.**. Others have lauded the uniformity and familiarity of federal procedures. *See* John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. LEGIS. 403, 408-09 (1979) [hereinafter, "Frank, *Case*"]; EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 54 (1992). *But cf.* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016) (arguing that state procedure tends to mimic federal procedure). Still others have suggested that federal-court engagement with state law benefits federal courts by keeping them close to their states' common law and benefits state law by allowing the pronouncements of the federal courts. *See* John Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 11-12 (1963) [hereinafter, "Frank, *Maintaining*"]; Carl E. Stewart, *Diversity Jurisdiction: A Storied Part, a Flexible Future*, 63 LOY. L. REV. 207, 226 (2017) ("[D]iversity cases keep federal judges tied to their state law roots."); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 322-26 (1977). However, the breadth of federal law and the availability of supplemental jurisdiction appears to offer similar benefits without the need for diversity jurisdiction and the resulting federalism friction. *See* Kramer, *supra* note 1, at 105, 108. Still others suggest that some vertical forum shopping might be good to create a competitive market and spur the improvement of both state and federal courts, *see* H.L.A. Hart, *The Relations Between State and Federal Law*, 54 COLO. L. REV. 489, 513, 540 (1954); Frank, *Maintaining*, *supra*, at 11-12, though it's not clear that courts care about docket share in an economic

is a central feature of both defenses of and attacks on diversity jurisdiction, shaping both the development of the law and academic debates about its reform. This Part illustrates some of those key debates.

A. Legal Developments

A number of key legal developments showcase the bias rationale's relevance to diversity jurisdiction: complete diversity, corporate citizenship, and the forum-defendant bar to removal.[77]

The first example involves the complete-diversity rule. In, the 1806 case *Strawbridge v. Curtiss*,[78] the Supreme Court held (or, at least, has long been interpreted to have held) that the diversity-jurisdiction statute required complete diversity—that all plaintiffs must have citizenships different from all defendant.[79] Although

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sense. Finally, some have suggested that federal courts offer better adjudicative quality, *see* Shapiro, *supra*, at 328-29; Moore & Weckstein, *supra* note 6, at 21-22, but the record of federal-court interpretations of state law is decidedly mixed, *see* Frank Chang, Note, *You Have Not Because You Ask Not: Why Federal Courts do Not Certify Questions of State Law to State Courts*, 85 GEO. WASH. L. REV. 251, 266 (2017) (offering examples of incorrect *Erie* guesses).

[77] Other examples exist, including failed (and unworkable) attempts to tie diversity jurisdiction to an actual showing of bias. *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & CONTEMP. PROBS. 216, 239-40 (1948); 13E WRIGHT ET AL., *supra* note 12, § 3601; FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (Apr. 2, 1990) (recounting the 1948 elimination of the removal requirement of a showing of bias). An argument can be made that amount-in-controversy requirement is a proxy for the identification of controversies whose high value is likely to entice the most bias. *See generally* Stewart, *supra* note 76, at 213. Congress has periodically raised the threshold. *See* Act of March 3, 1887, ch. 1-2, 24 Stat. 552-53; Act of Aug. 13, 1888, ch. 866, sec. 1-2, 25 Stat. 433-34; Judiciary Act of March 3, 1911, ch. 231, sec. 24, 36 Stat. 1087, 1091; Act of July 25, 1958, sec. 2, 72 Stat. 415 ($10,000); Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4642 ($50,000); Act of Oct. 19, 1996, Pub. L. 104-317, sec. 205, 110 Stat. 3847, 3850 ($75,000).

[78] 7 U.S. (3 Cranch) 267 (1806).

[79] *Id.* at 267 ("[E]ach distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the federal courts."). *See also* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S FEDERAL COURTS 1424 (7th ed. 2015) (questioning the interpretation of *Strawbridge* but acknowledging

Strawbridge does not tie its complete-diversity rule to state bias, later Court opinions and commentators have reasoned that *Strawbridge* reflects the premise that the presence of same-state opponents should neutralize any out-of-state bias and thus obviate the need for federal diversity jurisdiction.[80]

The second example involves corporate citizenship. In 1844, the Court concluded that corporations were deemed citizens, for diversity-jurisdiction purposes, solely of their state of incorporation.[81] Corporations could incorporate in a state without doing business in that state, however, and as commerce expanded after the Civil War, corporations increasingly did business in many states in which they were not incorporated, and thus of which they were not considered citizens. In 1928, the Court decided *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab &*

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that "the decision has consistently been interpreted more broadly . . . as requiring 'complete' diversity").

[80] *See* Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553-54 (2005) ("The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action."); Burbank, *supra* note 68, at 1460 & n.79 ("In cases kept from federal court by [the complete-diversity rule], a state court intent on disfavoring an out-of-state citizen would also have to disfavor one of its own."); David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 18 (1968) ("The assumption apparently underlying *Strawbridge* is that the presence of Massachusetts people on both sides of a case will neutralize any possibility of bias affecting litigants from other states."); 13E WRIGHT ET AL., *supra* note 12, § 3605 ("The presumed theory behind the original grant of diversity jurisdiction . . . was to provide a neutral, national forum for cases in which there would be a danger of bias in a state court . . . . This justification . . . does not apply to cases in which there are citizens from the same state on opposing sides . . . .").

[81] Louisville, C. & C. R.R. v. Letson, 43 U.S. (2 How.) 497, 554 (1844) ("A suit then brought by a citizen of one state against a corporation by its corporate name in the state of its locality, by which it was created and where its business is done by any of the corporators who are chosen to manage its affairs, is a suit, so far as jurisdiction is concerned, between citizens of the state where the suit is brought and a citizen of another state."). *See also* Steamship Co. v. Tugman, 106 U.S. 118, 120-21 (1882).

Transfer Co. and held that a corporation was a citizen only of its state of incorporation even when the corporation did no business there and did nearly all of its business in the same state as the citizenship of its litigation opponent.[82]

Black & White Taxicab raised concern in Congress, which thought it "at odds with diversity jurisdiction's basic rationale, namely, opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties,"[83] because a local corporation could incorporate away from its principal place of business to take advantage of diversity jurisdiction in the state where it was doing the most business.[84] A local corporation suffered no out-of-state bias, the rationale goes, in its home state of business. Congress overturned *Black & White Taxicab*'s "fictional premise that a diversity of citizenship exists"[85] in 1958 by amending the diversity statute to expressly provide that a corporation was a citizen of both its state of incorporation and the state of its principal place of business.[86]

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[82] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 522-25 (1928).

[83] Hertz Corp. v. Friend, 559 U.S. 77, 85 (2010).

[84] *See* S. Rep. No. 530, 72d Cong., 1st Sess. 2, 4 (1932). Academic commentary was similarly negative. *See* Warren, *supra* note 56, at 90 (calling the case a "malignant decision").

[85] H.R. Rep. No. 85-1706, at 3; S. Rep. No. 1830, at 3, 85th Cong., 2d Sess. 3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101. *See also* H.R. Rep. No. 85-1706H, at 4; S. Rep. No. 85-1830, at 4 ("Whatever the effectiveness of this rule, it was never intended to extent to local corporations which, because of a legal fiction, are considered citizens of another State.").

[86] Act of July 25, 1958, sec. 2, 72 Stat. 415, codified at 28 USC 1332(c). Although Congress used the bias rationale to justify the amendment, Congress may have been motivated more strongly by curbing the rankest form of corporate forum shopping while still allowing broad diversity jurisdiction over cases affecting national economic policy. *See* PURCELL, *supra* note 76, at 241 ("That [economic] policy judgment was profoundly if subtly different from the traditional premise that justified diversity jurisdiction. In 1958 Congress was not concerned with protecting corporations against the dangers of local prejudice but with keeping in the hands of the national courts what it regarded as in every realistic sense the basic affairs of the nation."); Burbank, *supra* note 68, at 1481 n.174 (agreeing with Purcell and marshalling additional evidence).

The third example involves removal. Congress provided for removal of cases from state to federal court in the original Judiciary Act of 1789,[87] and it persists to this day.[88] Congress presumably provided for removal of diversity cases to safeguard the policies of diversity, namely, "to protect nonresidents from the local prejudices of state courts."[89] Consistent with that purpose, the Judiciary Act granted a right of removal in nonland domestic cases only to out-of-state defendants; in-state defendants could not remove even if complete diversity existed.[90] Prohibiting in-state defendants from removing diversity cases was consistent with the bias rationale, which presumed that the federal forum existed to protect out-of-staters.[91] Aside from a brief experiment from 1875-1887, when the right of removal was greatly expanded,[92] removal of diversity cases under the general removal statute has always been limited to out-of-state defendants.[93] This feature of removal is additional evidence of the impact of the bias rationale on federal jurisdiction based on diversity.[94]

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[87] Judiciary Act of 1789, 1 Stat. 73, Ch. 20, § 12.

[88] 28 U.S.C. § 1441 *et seq.*

[89] 14C WRIGHT ET AL., *supra* note 12, § 3721.

[90] Judiciary Act of 1789, 1 Stat. 73, Ch. 20, § 12.

[91] *See* Howard M. Wasserman, *A Jurisdictional Perspective on* New York Times v. Sullivan, 107 NW. U. L. REV. 901, 907 (2013); Morris v. Nuzzo, 718 F.3d 660, 665 (7th Cir. 2013) ("[T]he forum defendant rule disallows federal removal premised on diversity in cases where the primary rationale for diversity jurisdiction—to protect defendants against presumed bias of local courts—is not a concern because at least one defendant is a citizen of the forum state.").

[92] *Compare* Act of March 3, 1875, ch. 137, sec. 2, 18 Stat. 470 (authorizing any party to remove without regard to residency), *with* Act of March 3, 1887, ch. 1-2, 24 Stat. 552-53; Act of Aug. 13, 1888, ch. 866, sec. 1-2, 25 Stat. 433-34 (limiting removal to out-of-state defendants).

[93] 14C WRIGHT ET AL., *supra* note 12, § 3721. For discussions of the forum-defendant rule, see Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55 (2008); Scott Dodson, *The Forum-Defendant Rule in Arkansas*, 2007 ARK. L. NOTES 73 (2007).

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

These examples of the influence of the bias rationale on statutory developments do not mean that the bias rationale has motivated all diversity-jurisdiction developments. But even when the bias rationale seems irrelevant to particular statutory acts or reforms,[95] reformers often strive to deploy the bias rationale in their reform efforts.[96] I will have more to say about the distorting effect of the bias rationale in certain diversity reforms, but, for now, my point is that the bias rationale is and continues to be a central feature in them.

B. Academic Commentary

The perennial "Great Debate"[97] among academics about the propriety and scope of diversity jurisdiction also tends to focus on out-of-state bias.[98] In general, opponents of diversity jurisdiction tend to argue that out-of-state bias does not exist or is too muted to support diversity jurisdiction, while supporters tend to argue that out-of-state bias exists (or the perception of bias exists) and thus demands diversity jurisdiction.[99] Other arguments, such as

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decision is arguably consistent with it, as Frankfurter pointed out in 1928. *See* Frankfurter, *supra* note 49, at 525-26.

[95] I deal with the prominent example of CAFA below. *See infra* text accompanying notes 215-238. For other examples, see Joanna Shepherd, *Estimating the Impact of a Minimal Diversity Standard on Federal Court Caseloads*, National Association of Manufacturers 4 (June 2015).

[96] Purcell, *supra* note 73, at 1834 (noting that it is the bias rationale's "amorphous nature" that has "offered jurisdictional reformers a perennial opportunity").

[97] Currie, *supra* note 80, at 4.

[98] 13E WRIGHT ET AL., *supra* note 12, § 3601 ("Not surprisingly, the question of what purpose is served by diversity jurisdiction has retained its controversial character over the years."). Opponents have been prominent and vocal. *See* Stewart, *supra* note 76, at 211.

[99] *See* Kramer, *supra* note , at 119 ("[A]dvocates of diversity jurisdiction argue that bias is a problem and that it necessitates diversity jurisdiction, and many of their opponents regard this as the strongest argument for diversity jurisdiction."); Purcell, *supra* note 73, at 1847 ("Advocates of preserving or expanding federal jurisdiction stressed the grave dangers of 'bias' and 'local prejudice,' while those who sought to limit or abolish the jurisdiction minimized or denied these dangers."); 13E WRIGHT ET AL., *supra* note 12, § 3601 ("Those

federalism, docket load, doctrinal complexity, and nonstate biases, do play a role. But the out-of-state bias rationale is the perennial focus. Some examples follow.

In the *Erie* era, diversity skeptics, prominently including Felix Frankfurter, argued that the bias rationale was essentially defunct:

> Whatever may have been true in the early days of the Union, when men felt the strong local patriotism of the politically *nouveaux riches*, has not the time come now to reconsider how justifiable the apprehensions [of bias], how valid the fears? The Civil War, the Spanish War, and the World War have profoundly altered national feeling, and the mobility of modern life has greatly weakened state attachments. Local prejudice has ever so much less to thrive on than when diversity jurisdiction was written into the Constitution.[100]

Diversity supporters, sensing vulnerability, and indeed facing Senate bills that would abolish diversity jurisdiction,[101] argued that the bias rationale continued to justify diversity jurisdiction. Judge John Parker asserted that the threat of local bias "is as valid today as it was in 1787" because "the state trial judge is generally a local man with a local outlook."[102] Other supporters conceded that bias was less of a problem than in the 1700s but nevertheless contended that bias was still real enough to warrant diversity protection. Robert Brown wrote:

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who favor the retention of diversity jurisdiction contend that this prejudice still exists, although perhaps in a diminished form.").

[100] Frankfurter, *supra* note 49, at 521. This argument was not new in the *Erie* era. *See* Alfred Russell, *Avoidable Causes of Delay and Uncertainty in Our Courts*, 25 AM. L. REV. 776, 795 (1891) ("The original reason assigned for the federal jurisdiction in [diversity] was, that a citizen of one State might not be able to get justice in the State courts of another State. However this may have been before the whole country was unified by steam and electricity, and by the result of the Civil War, it is certainly not so now. . . . I am inclined to the opinion that Congress should abolish this jurisdiction completely.").

[101] *See* S. 3151, 70th Cong.; Victor Eugene Flango, *How Would the Abolition of Federal Diversity Jurisdiction Affect State Courts?*, 74 JUDICATURE 35, 35 (1990).

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

> There seems to be no disagreement as to the primary purpose of this provision for federal jurisdiction based upon diversity of citizenship. It was to provide, so far as possible, against injury to nonresident suitors because of local and sectional prejudice, which would be extremely likely to have an important effect in the state courts. . . . Undoubtedly, such prejudice is weakening, particularly in the younger generation, but it is still strong enough to influence the whole social fabric, including the local and state courts."[103]

Diversity jurisdiction prevailed in the *Erie* era,[104] but calls for abolition based on the lack of bias continued throughout the 1940s and 1950s.[105]

In the 1960s, perhaps again sensing vulnerability based on the commission of a study of diversity jurisdiction by the American Law Institute,[106] prominent commentators vocalized support for diversity jurisdiction. One of diversity jurisdiction's strongest proponents, James William Moore, argued, along with Donald Weckstein, that the fear of state bias against out-of-state litigants continued to justify diversity jurisdiction and, in fact, demanded an extension of diversity jurisdiction.[107] Some echoed his

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[103] Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179, 181-82 (1929). *See also, e.g.*, Gurney E. Newlin, *Proposed Limitations upon Our Federal Courts*, 15 A.B.A. J. 401, 403 (1929) ("While perhaps the danger of local prejudices or bias has somewhat abated during the past century, yet it has by no means disappeared to such an extent that it is a negligible factor, in present day affairs."). The historical record suggests that these were rote justifications rather than based on evidence, *see* PURCELL, *supra* note 76, at 129, and some contemporaries suggested that diversity supporters were more motivated by the pro-corporate biases of federal court, *see* George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 Ill. L. Rev. 356, 361 (1933).

[104] Flango, *supra* note 101, at 35.

[105] *See, e.g.*, ROBERT JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 37 (1955) (calling for abolition); Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (same).

[106] *See* 36 ALI Proceedings 34 (1959).

[107] Moore & Weckstein, *supra* note 6, at 16 ("While local prejudices and state jealousies may be diminishing, it is a fair inference that some litigants still resort to federal courts because of apprehensions as to the kind of justice that they will

sentiments,[108] while others struck a more moderated tone on bias.[109]

In 1969, the ALI issued a report on its study, which hewed closely to the bias rationale of diversity jurisdiction and proposed corresponding reforms. Its overarching policy was founded on the idea that "the function of jurisdiction is to assure a high level of justice to the traveler or visitor from another state" and "to eliminate any real risk of prejudice against him as a stranger."[110] The report thus recommended, among other things, excluding in-state plaintiffs from invoking diversity jurisdiction but allowing federal jurisdiction based on incomplete diversity when the risk of prejudice was real.[111]

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

> [t]he original reasons for diversity jurisdiction have long since disappeared. At present, there is little evidence that the State courts are less qualified or, due to latent prejudice against out-of-staters, unable to render fair and impartial justice in these cases.[112]

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receive in the courts of the state of which their adversary is a citizen."); *id.* at 1 ("We contend that experience and sound future planning justify an extension rather than curtailments of many phases of diversity jurisdiction.").

[108] Frank, *Maintaining*, *supra* note 76.

[109] Currie, *supra* note 80, at 5 ("My hunch is that it is too early to say that xenophobia has disappeared from the American scene, but I can appreciate the argument that the danger of bias is not great enough to justify the burden on federal courts and the interference with state prerogative that diversity jurisdiction entails."). Currie ultimately favored abolishing diversity jurisdiction on workability grounds. *Id.* at 6. For a contrary view, see Charles A. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 186-98 (1969) (supporting the ALI proposal).

[110] ALI STUDY, *supra* note 65, at 2. For a discussion of the ALI study as it relates to the bias rationale, see EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 2789-79 (2000).

[111] ALI STUDY, *supra* note 65, at 3.

[112] Abolition of Diversity of Citizenship Jurisdiction, H.R. Rep. No. 95-893, at 230 (1978).

The bill, however, was defeated in the Senate,[113] as were a number of other failed bills in the 1970s and 1980s purporting to abolish diversity jurisdiction.[114] Despite widespread calls for abolition or curtailment during this time,[115] defenders of diversity jurisdiction continued to muster support based on the bias rationale.[116]

The 1990s brought another round of debate. In 1988, Congress authorized the creation of the Federal Courts Study Committee,[117] which issued a report in 1990 recommending the near-abolition of diversity jurisdiction, primarily on the ground that local bias was no longer a compelling reason justifying diversity jurisdiction.[118] The report conceded that the threat of bias may exist regionally but that such isolated pockets could not justify the cost of diversity jurisdiction.[119] That same year, Larry Kramer, while acknowledging that, "[o]f the various arguments offered in support of diversity jurisdiction, the only credible one is that diversity is needed to protect out-of-state litigants from bias,"[120] nevertheless published a powerful critique of diversity jurisdiction.[121] And in 1996, the American Law Institute published another study report that concluded that "there is no longer the kind of prejudice against

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[113] S. 2389, 95th Cong. (2d Sess. 1978); H.R. 9622, 95th Cong. (2d Sess. 1978).

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

[115] *See* Kramer, *supra* note 1, at 98 (surveying those calls). *E.g.*, Thomas Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979).

[116] *E.g.*, Charles W. Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 JUDICATURE 291, 291-92 (1987) (arguing, based on the bias rationale, that corporations should be deemed citizens of each state in which they are registered to do business); Frank, *Case*, *supra* note 76, at 410 ("[I]nterstate prejudice is not dead now.").

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

[118] FEDERAL COURTS STUDY COMMITTEE, *supra* note 77, at 38-43.

[119] *Id.* at 38, 41 (estimating a cost of $131M annually, or more than 10% of the federal judicial budget).

[120] Kramer, *supra* note 1, at 125.

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

citizens of other states that motivated the creation of diversity jurisdiction."[122] Through this time, and to present, the scope of nonclass diversity jurisdiction has remained relatively unchanged, despite assaults on the bias rationale that continue to this day.[123]

As with the legal developments in diversity jurisdiction, the academic debates about diversity jurisdiction focus on the bias rationale. The bias rationale is not, of course, the *only* point of contention in these debates, but its shadow is long and omnipresent, both for proponents and opponents.[124]

III. MARGINALIZING THE BIAS RATIONALE

These legal changes and debates are deficient because they overstate the centrality and importance of the bias rationale. Using the bias rationale to justify diversity jurisdiction takes several analytic steps: (A) out-of-state bias or the perception of out-of-state bias exists; (B) bias or its perception is a motivating factor in invoking diversity jurisdiction; (C) diversity jurisdiction offers remedial neutrality; (D) the scope of diversity jurisdiction is designed to address out-of-state bias; and (E) diversity jurisdiction's remedial value justifies its costs. Each of these steps lacks foundation.

A. Lack of Bias

In theory, state judges would seem more likely to be swayed by local prejudices than federal judges because most state judges are elected or term appointed and are thus accountable to in-state

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[122] ALI STUDY, *supra* note 65, at 106.

[123] Stewart, *supra* note 76, at 218 ("[S]tate court bias is no longer a viable reason to justify the need for diversity jurisdiction, if it ever was.").

[124] There are a few notable exceptions. *See, e.g.*, Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986) (advocating for use of diversity jurisdiction to solve aggregation problems, without mention of the bias rationale). Rowe and Sibley engage precisely the kind of debate I hope to encourage.

powers.[125] And empirical evidence shows some connection between retention pressures and judicial decisionmaking.[126] But the direction of the retention pressures isn't clear. While retention pressures might induce favoritism toward in-state voters and political heavyweights,[127] they might also cut the other way, if the money driving judicial-election campaigns comes primarily from out-of-state business interests.[128]

Anecdotal reports of actual out-of-state bias are rare and isolated.[129] Available empirical evidence, though sparse and hard to come by,[130] suggest that the bias rationale has some marginal substance in that survey data show sporadic perceptions of local bias,[131] but the evidence is mixed.[132]

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[125] *See* Scott Dodson, *Accountability and Transparency in U.S. Courts* (unpublished manuscript 2019) (assessing the effects of state and federal judicial selection and retention on accountability and independence).

[126] *See id.* (citing studies).

[127] Shepherd, *supra* note 95, at 12.

[128] *See, e.g.*, Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 670-72 (2009); Michael Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239 (2013).

[129] In one notable example, Justice Richard Neely of the West Virginia Supreme Court once wrote: "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will reelect me." RICHARD NEELY, THE PRODUCTS LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 4 (1988). *See also* Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way with Its Feet*, N.Y. ST. B.J., July 1989, at 21 ("[A]nyone who believes that there is no local chauvinism in the state courts is hiding his head somewhere.").

[130] Marcus, *supra* note 74, at 1292.

[131] *See, e.g.*, Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 L. & SOC'Y REV. 749, 760 (1980) (53.3% of surveyed South Carolina lawyers, but only 18.2% of surveyed California lawyers, ranked fear of out-of-state bias as "important" or "very important"); Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 98 (1980) (finding 40% of respondents indicated that fear of local bias "had some bearing" on their forum selection); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U.

One major difficulty with evidence supporting the bias rationale is that out-of-state bias is difficult to isolate from other kinds of bias fears that do not necessarily fall across state lines. For example, one study that found that while 26% of plaintiff's lawyers and 51% of defendant's lawyers perceived local bias against out-of-staters in state courts, similar percentages perceived anticorporate biases and antirural biases.[133] The study also found that local bias was highly individualized to particular judges and parties, such as in specific judges' relationships with counsel via prior representation, partnership at a firm, or political support.[134] Other studies have found perceptions of local bias to be driven by antirural or anticorporate biases rather than out-of-state bias.[135] Another study concluded that even out-of-state biases may be more cultural than geographic—a Californian might perceive bias in a Mississippi court but an Alabaman might not, suggesting that the Californian's fear of bias is not because the Californian is non-Mississippian but because the Californian is Californian.[136] Consistent with these findings, the 1990 Federal Courts Study Committee concluded that state bias "does not fall along state boundary lines" and that "a greater tension than 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."[137]

L. REV. 369, 410 (1992) (finding 56.3% of defense lawyers surveyed listed out-of-state bias as a reason for removal).

[132] *See* Jolanta Juszkiewics Perlstein, *Lawyers' Strategies and Diversity Jurisdiction*, 3 L. & POL'Y Q. 321, 321 (1981) (finding no significant difference in forum selection when controlling for local bias). Of course, disclosed perception of bias does not prove bias (nor even, necessarily, actual perception of bias). *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 269 (1988).

[133] *See* Miller, *supra* note 131, at 408-31.

[134] *See id.* at 412.

[135] Bumiller, *supra* note 131 (antirural); Goldman & Marks, *supra* note 131, at 102-03 (anticorporate).

[136] ALI STUDY, *supra* note 65, at 106-07.

[137] FEDERAL COURTS STUDY COMMITTEE, *supra* note 77, at 15.

Any perceptions of out-of-state bias also vary greatly by district.[138] One study found fear of local bias was a motivating factor in forum selection only in specific forums.[139] In particular, bias fears were low in the northeast, midwest, and far west, while stronger bias fears were reported in the south.[140]

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

B. Irrelevance of Bias

Fear of out-of-state bias, to the extent it exists, is only a weak motivation for invoking diversity jurisdiction. It turns out that a host of other factors influence forum selection, including the perceived quality of the court, favorable procedures, and the like.[141] In a 1992 survey, only 15% of plaintiff and 10% of defense attorneys identified out-of-state bias as a "very strong" factor in forum selection.[142] Indeed, the evidence suggests that nearly half of the diversity cases are brought by in-state plaintiffs who ought to be the beneficiaries of local bias in state court.[143] The most important factors appear to be convenience (including court

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[138] *See* Shapiro, *supra* note 76, at 332-39.
[139] *See* Miller, *supra* note 131, at 383.
[140] *See id.* at 410-11.
[141] *See id.* at 415.
[142] *See id.* at 411-12.
[143] ALI STUDY, *supra* note 65, at 1-2, 4-5, 168-72 (nearly half); Victor E. Flango, *How Would Proposed Changes in Federal Diversity Jurisdiction Affect State Courts?*, NAT'L CTR. FOR ST. CTS. 76-78 (Apr. 30, 1989) (49%); ANTHONY PARTRIDGE, THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION 34 (FJC 1988) (44%). *See also* Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. On the Judiciary, 92d Cong. 128 (1971) (testimony of Richard H. Field, Harvard Law School) ("Now, so far as the in-state plaintiff is concerned, this represents about half of the diversity cases.").

familiarity), cost, and bias against business/corporations.[144] Perceived competency issues were far more important than bias fears.[145]

C. Bias Unremedied

For those few cases presenting a real perception of out-of-state bias that is strong enough to motivate an invocation of diversity jurisdiction, it is not at all clear that federal jurisdiction offers much protection. Federal judges often come from the same circles as state judges and have the same local concerns; to the extent bias against out-of-staters exists, that bias might be equally held by local federal judges.[146] To the extent the fear of bias is directed at state *laws* that are biased against out-of-state parties, the Dormant Commerce Clause invalidates such biases that cross constitutional thresholds, and any remaining disadvantages to out-of-state litigants persist in federal court because *Erie* and the Rules of Decision Act demand that those state laws apply with the same force in diversity cases.[147] Nor are federal juries predictably less biased against out-of-state litigants than federal juries,[148] and, in

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[144] *See* Miller, *supra* note 131, at 424-25.

[145] *See id.* at 431-34. *See also* Stewart, *supra* note 76, at 218 ("What we can say for certain, however, is that today, 'state court bias' is hardly ever a factor in deciding to remove to or file a case in federal district court.").

[146] *See* Bassett, *supra* note 2, at 138-39 ("To characterize federal judges as carpetbaggers, unaware of, and insensitive to, local concerns is thus inaccurate."); FEDERAL COURTS STUDY COMMITTEE, *supra* note 77, at 15 (noting that federal courts "may not be wholly without a bias in favor of local residents").

[147] 28 U.S.C. § 1652; Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Federal procedure applies in diversity cases, but state procedure tends to mimic federal procedure, *see* Dodson, *supra* note 76, and as for any residual state-law differences, I know of no charge that they are inherently biased against out-of-state litigants.

[148] *See* Abolition of Diversity of Citizenship Jurisdiction, H.R. Rep. No. 95-893, at 230 (1978) (noting that "Federal juries are now drawn from the same registration or voter lists as State jurors"). To the extent federal juries remain more diverse, one commentator has argued, in some cases, that very diversity could include more bias than more homogenous state pools. *See* Johnson, *supra* note 1, at 54-55 (making this point with respect to alienage bias).

any event, jury trials are astonishingly rare.[149] In short, there is little reason to presume that federal diversity jurisdiction really offers any meaningful bulwark against out-of-state bias.

D. Diversity's Scope

Even were marginal perceptions of out-of-state bias sufficiently concerning to require remediation by federal jurisdiction, and even were diversity jurisdiction a reliable solution for those ills, the current expansiveness of diversity jurisdiction goes far beyond what is required for that remediation.[150] The grant of original diversity jurisdiction, for example, allows an in-state plaintiff to *invoke* federal diversity jurisdiction against an out-of-state defendant.[151] The statute also allows an out-of-state party to invoke diversity jurisdiction even if no in-state party is involved, as long as the lineup is completely diverse.

To illustrate the overbreadth of diversity jurisdiction, consider *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*,[152] filed in the Southern District of New York. The plaintiff, a longtime New York law firm that had routinely represented New York clients in New York state courts, invoked diversity jurisdiction. The

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[149] *See* John H. Langbein, *The Disappearance of the Civil Trial in the United States*, 122 YALE L.J. 522, 524-25 (2012); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (reporting a 1.2% jury-trial rate in federal court in 2002); Brian J. Ostrum *et al.*, *Examining Trial Trends in State Courts 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004) (reporting a 0.6% trial rate in state courts in 2002).

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

[151] *See* Burbank, *supra* note 68, at 1460 n.79 (stating that the ability of an in-state plaintiff suing an out-of-state defendant to invoke diversity jurisdiction "is inconsistent with the traditional account [of the bias rationale]"); Kramer, *supra* note 1, at 125 (arguing that the bias rationale "provides no support for allowing in-state plaintiffs to invoke diversity jurisdiction"); Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (same).

[152] 490 F.2d 509 (2d Cir. 1973).

defendant, though formally a resident of Connecticut and later Florida, kept a Manhattan apartment and had systemic business interests in New York. The case focused on conduct occurring in New York (legal representation in New York state courts, no less), and involved New York matrimonial law.[153] In short, neither party (especially not the plaintiff) was likely to suffer any bias for being an out-of-stater, and the whole case was profoundly state-law focused. Yet the federal court was forced to hear the case under diversity jurisdiction. Such an instance of diversity jurisdiction has no role in preventing state bias against out-of-state litigants.

E. Diversity's Costs

Even were diversity jurisdiction to reduce bias or the appearance of bias in some cases, the costs of diversity jurisdiction as a whole overwhelm those limited benefits. One result of expansive diversity jurisdiction is that the federal docket load of diversity cases is massive and always has been. Docket records suggest that diversity disputes in the early years of the federal judiciary made up a sizable portion of the federal dockets.[154] Today, diversity cases make up more than 30% of the federal docket.[155] Those same cases represent only about 1% of state

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[153] *Id.* at 515.

[154] Frank, *supra* note 12, at 17-18.

[155] *Compare* U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (reporting, in 2017, approximately 32% of the federal civil docket as diversity cases), *with* Kramer, *supra* note 1, at 99-100 (reporting around 25-30% in the 1970s and 1980s), *and with* FRIENDLY, *supra* note 60, at 140 (reporting similar figures prior to 1920). Approximately 30% of diversity cases originate in state courts and are removed to federal court. *See* Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 564 (2005); Shepherd, *supra* note 95, at 21 & n.59.

dockets,[156] a minimal load that some state judges have welcomed.[157]

The diversity-jurisdiction burden on federal courts, however, has meaningful adverse effects on the efficient and effective resolution of disputes. Diversity cases demand interpretation and application of state substantive law by federal judges less familiar with state law than their state-court counterparts.[158] Federal judges presented with an unsettled question of state law must choose between making an often difficult *Erie* guess[159] and delaying the case by seeking certification from the state courts.[160] When federal courts do decide questions of state law, those decisions are not precedential and thus deprive the state courts of the opportunity to build state-law precedent.[161]

Even the law of diversity jurisdiction can present intractable challenges. As Professor Tom Rowe has argued, diversity jurisdiction raises litigable and often contentious disputes about citizenship, the amount in controversy, alignment of parties, joinder, removal, and supplemental jurisdiction.[162] Diversity cases

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[156] *See* Kramer, *supra* note 1, at 110-17 (calculating that complete abolition of diversity jurisdiction would increase state caseloads by around 1% and workloads by about 5%); Victor E. Flango, *The Relative Impact of Diversity Cases on State Trial Courts*, STATE CT. J., Summer 1978, at 20, 22-23 (same).

[157] *See* Paul Butler, *Diversity in the Court System: Let's Abolish It*, 3 ADELPHIA L.J. 51, 64-65 (1984).

[158] Kramer, *supra* note 1, at 104 ("[S]tate courts have greater expertise and authority" over state-law claims, and thus "diversity jurisdiction forces federal courts to decide issues on which they have no special expertise at the expense of tasks they can perform significantly better than state courts."); *see also* FRIENDLY, *supra* note 60, at 141 (making this argument).

[159] *See* Stewart, *supra* note 76, at 219-22. For a recent state case rejecting a federal court's *Erie* guess, see, *e.g.*, Wood v. HSBC Bank USA, N.A., 505 S.W.3d 542, 544-45 (Tex. 2016).

[160] In recent years, the average turn-around time for certification from the Fifth Circuit to the Texas, Louisiana, and Mississippi supreme courts has been 482, 215, and 331 days respectively. *See* Stewart, *supra* note 76, at, 221.

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

[162] *See generally* Rowe, *supra* note 115, at 969-79. *See also* Kerry Abrams & Kathryn Barber, *Domicile Dismantled*, 92 IND. L.J. 387, 389-90 (2017) (challenging the utility of the citizenship test for individuals). For some key cases on these issues, see Americold Realty Trust v. ConAgra Foods, Inc., 577

also require consideration of ancillary doctrines like abstention and choice of law.[163] It is true that supplemental jurisdiction still forces these state-law problems on federal courts in some federal-question cases, but the federal diversity load dominates the supplemental-jurisdiction load.[164]

And all of these features means that diversity jurisdiction is a major distraction of federal-court attention away from civil (and criminal) cases arising under federal law.[165] Evidence suggests that these complexities make diversity cases more demanding and time-consuming—by as much as 22%—than federal-question cases.[166]

Further, as Professor Debra Bassett has pointed out, the bias rationale may itself promote a bias in the other direction. To the extent diversity jurisdiction licenses removal of cases from presumptively biased state courts, the law stigmatizes those state courts in ways that are both offensive and counterproductive.[167] Worse, the stigmatization is wholesale: "[W]hen local bias is used in the diversity jurisdiction context, it reaches beyond the potential prejudice of one particular judge and instead paints an entire court system with the broad brush of bias."[168]

U.S. _ (2016) (unincorporated-entity citizenship); Hertz Corp. v. Friend, 559 U.S. 77, 89 (2010) (corporate citizenship); Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996) (curing defects in removal based on diversity jurisdiction); Exxon Mobile Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005) (addressing the complexities of supplemental jurisdiction over claims tied to diversity claims).

[163] *See* Kramer, *supra* note 1, at 105-06; Rowe, *supra* note 115, at 969. For notable cases, see, *e.g.*, Colo. R. v. United States, 424 U.S. 800 (1976) (abstention); La. Power & Light Co., v. City of Thibodaux, 360 U.S. 25 (1959) (abstention); Ferens v. John Deere Co., 494 U.S. 516 (1990) (choice of law).

[164] Rowe, *supra* note 115, at 969.

[165] FRIENDLY, *supra* note 60, at 141 (declaring diversity jurisdiction's "greatest single objection" to be "the diversion of judge-power urgently needed for tasks which only federal courts can handle or which, because of their expertise, they can handle significantly better than the courts of a state").

[166] *See* STEVEN FLANDERS, THE 1979 FEDERAL DISTRICT COURT TIME STUDY 15 (1980). There is some evidence that the burden disparity lessens significantly at the appellate level, perhaps because appealed issues of federal law are more complicated than the appellate issues in diversity cases. *See* RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 139 (1985).

[167] Bassett, *supra* note 2, at 140.

[168] *Id.* at 138.

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

IV. REFOCUSING THE DEBATE

That the bias rationale cannot support diversity jurisdiction does not mean that abolitionists win the debate. Diversity jurisdiction has much to commend it for reasons other than the mitigation of out-of-state bias—reasons that are often given short shrift when the focus is on out-of-state bias.[169] The upshot is that debates about diversity jurisdiction should move beyond the bias rationale to consider the full gamut of virtues and vices of diversity jurisdiction. These virtues and vices are often overshadowed by the bias rationale or overlooked entirely, but, I argue, they are where the debate ought to occur.

A. Facilitating Aggregation

Facilitating aggregation is an important justification for diversity jurisdiction that has received very little attention in the diversity debates[170] but that has new agency in light of recent legal developments.

1. Benefits of Aggregation

The law used to prefer individualized litigation for its simplicity because trial was a difficult and burdensome ordeal.[171] As the ratification debates showed, there were real concerns about

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

[170] A notable exception, though one that antedates dramatic changes in recent jurisdictional law, is Rowe & Sibley, *supra* note 124 (proposing expanded diversity jurisdiction to provide for federal-court aggregation of certain mass torts).

[171] *See* Stephen N. Subrin, *How Equity Conquered the Common Law*, 135 U. PA. L. REV. 909, 915-16 (1987).

the burdens of travel for litigation,[172] such that a lawsuit involving parties from three different states with myriad claims among them would have presented significant manageability issues. Fortunately, in the antebellum era, most disputes were of the simple "A v. B for a cow" variety.[173]

Things are quite different today. Commerce is international and multifaceted, travel is easy, and litigation is pervasive. The law's perspective on aggregation has evolved as well: the law now favors aggregation of claims, parties, and cases because of its efficiency and fairness benefits to the parties and the system.[174] In general, it is far more efficient and fair to litigate a thousand similar claims together, before a single decisionmaker, than independently and perhaps scattered across the country.[175]

2. Diversity Jurisdiction and Aggregation

State borders impede aggregation by curtailing the reach of state courts and state laws. State joinder rules can be grudging, and personal jurisdiction limits the power of a state court to hear disputes involving out-of-state parties.[176] But diversity jurisdiction

[172] *See supra* text accompanying notes 32-34.

[173] Frank, *supra* note 12, at 26.

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

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

[176] *See* Dodson, *supra* note 174, at 35-45.

can enable salutary aggregation in federal court that would be forbidden in state court in a number of ways.[177]

The Federal Interpleader Act is a prime example.[178] Interpleader is a joinder device that allows a custodian facing multiple competing claims to the same asset to join the claimants together in a single proceeding to determine entitlement to the asset.[179] Without interpleader, the custodian could be subject to independent actions for the same asset, potentially being exposed to duplicative or even multiplicative liability.[180]

Interpleader depends upon the ability to serve each claimant with process that will bring them before a court with personal jurisdiction over them.[181] But that kind of joinder is nearly impossible in state court if the claimants are citizens of many different states. Recent Supreme Court decisions severely restrict a state court's personal jurisdiction over out-of-state litigants.[182]

Diversity jurisdiction saves the day. The Federal Impleader Act grants federal courts diversity jurisdiction to hear impleader actions based on state law.[183] To ensure maximum opportunity for joinder of claimants, the act requires only minimal diversity and a de minimis amount in controversy.[184] Further, Congress gave the

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[177] *See generally* Rowe & Sibley, *supra* note 124 (making this argument to propose a precursor to the MMJTA).

[178] Act of Feb. 22, 1917, ch. 113, 39 Stat. 929, *codified at* 28 U.S.C. § 1335 (1958). For a history, see 7 WRIGHT ET AL., *supra* note 12, § 1701.

[179] *See* Zechariah Chafee Jr., *Interpleader in the United States Courts*, 41 YALE L.J. 1134, 1134-35 (1932).

[180] *See id.* For an example of such a situation, see N.Y. Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916).

[181] *See* Chafee, *supra* note 179, at 1136 ("[A]n interpleader suit will not give complete relief to the stakeholder unless the entire controversy can be settled in the interpleader proceeding.").

[182] For a detailed explanation, see Dodson, *supra* note 174, at 19-45. For a prediction that personal-jurisdiction limits are likely to continue for the foreseeable future, see Scott Dodson, *Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73, 74-78, 83-84 (2018).

[183] 28 U.S.C. § 1335.

[184] *Id.* § 1335(a)(1) (requiring only "[t]wo or more adverse claimants of diverse citizenship" and an amount in controversy exceeding $500). *See also* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 533 (1967) (confirming minimal diversity). Professor Jim Pfander raises the possibility that *Tashire* might be read

federal courts a nationwide range for service of process in interpleader actions,[185] thus ensuring that all claimants anywhere in the United States could be brought before the single interpleader proceeding. Through the Federal Interpleader Act, diversity jurisdiction provides for a salutary aggregation that could not be accomplished in state court.[186] Notably, the bias rationale offers no compelling rationale for diversity jurisdiction in interpleader; rather, the overriding benefit is simply aggregation.

Interpleader is not a unique aberration. The Multiparty, Multiforum Trial Jurisdiction Act of 2002,[187] the Y2K Act of 1999,[188] and even the supplemental-jurisdiction statute[189] all use diversity jurisdiction to promote aggregation even when the bias rationale is not seriously implicated. The MMTJA and Y2K Act both grant minimal diversity jurisdiction and nationwide personal jurisdiction for purposes of facilitating aggregation.[190] And the supplemental-jurisdiction statute allows joinder of certain

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as upholding the Interpleader Act on ancillary-jurisdiction grounds rather than minimal-diversity grounds. *See* James F. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CALIF. L. REV. 1423, 1453-54 (2007).

[185] *See* 28 U.S.C. § 2361 ("In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be . . . addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.").

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

[187] 28 U.S.C. § 1369.

[188] Pub. L. No. 106-37, § 15(c)(2), 113 Stat. 185, 201 (1999).

[189] 28 U.S.C. § 1367.

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

nondiverse state claims that might not be able to be joined in state court.[191]

Diversity jurisdiction also promotes aggregation through class actions. State class-action laws can differ from Rule 23, the class-action rule that applies in federal court.[192] Many state laws, for example, bar class actions entirely or for certain claims or for certain kinds of relief.[193] Rule 23, however, has no claim restrictions; it applies with full force in federal court even when based upon state claims that would be precluded from representative litigation under a state class-action rule.[194]

Diversity jurisdiction enables those representative actions, which might be barred in state court, to be pursued under the federal class-action rule in federal court. The Class Action Fairness Act of 2005 grants federal diversity jurisdiction to certain class actions based on minimal diversity.[195] And even ordinary class actions can meet the complete-diversity requirement if the class proffers representatives who are completely diverse.[196] Because of the Supreme Court's restrictive application of personal-jurisdiction

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[191] *See* 28 U.S.C. § 1367 (extending diversity jurisdiction to a related state impleader claim brought by an out-of-state defendant against a same-state third party). *Cf.* FED. R. CIV. P. 4(k)(1)(B) (authorizing service of process on an impleaded party outside of the forum state if served within 100 miles of the courthouse).

[192] *See* THE LAW OF CLASS ACTION: FIFTY-STATE SURVEY 2011-2012 (ABA 2012).

[193] *See, e.g.*, GA. CODE § 10-1-399(a) ("Any person who suffers injury or damages as a result of a violation of Chapter 5B of this title, as a result of consumer acts or practices in violation of this part, as a result of office supply transactions in violation of this part or whose business or property has been injured or damaged as a result of such violations may bring an action individually, but not in a representative capacity."); Falls v. Jefferson Davis Cnty. Pub. Sch. Bd., 95 So. 3d 1223, 1227 (Miss. 2012) ("[In] Mississippi, there are no class actions.").

[194] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

[195] 28 U.S.C. § 1332(d).

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

doctrine, most class actions will be pursued in the defendant's home state.[197] But under these circumstances—in which the class would be severely hampered by state class-action law if confined to state court—the invocation of the federal forum is almost certainly motivated by aggregation, not the alleviation of out-of-state bias.[198]

Perhaps the broadest diversity-based aggregation device is multidistrict litigation. The Multidistrict Litigation Act[199] was intended as the primary mechanism for aggregating state-law mass-tort cases.[200] With class actions in decline, MDLs are on the rise and offer tremendous efficiencies and savings for both parties and courts in consolidating pretrial cases.[201] Although personal-jurisdiction limits in MDL cases remain uncertain,[202] there is no question that MDL in federal court offers multistate aggregation on

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[197] Dodson, *supra* note 174, at 37-38.

[198] The bias rationale may still play a role in certain cases, of course. *See* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1267 (2018) ("The types of corporations that find themselves as mass-tort defendants—Big Tobacco, Big Pharma, Big Anything—are often major political and social players in their home states. Even if they did not choose their headquarters to minimize litigation risk, they may have powerful lobbies in the state legislature and, over time, may seek protective substantive or procedural legislation and work to help shape the (often elected) state judiciary. Similarly, local jurors may not be eager to put a major local employer and economic engine out of business."). And, intriguingly, some of the Court's personal-jurisdiction decisions have a ring of diversity jurisdiction about them. *See id.* at 1302 ("Bristol-Myers sounded more like it was arguing in favor of federal diversity jurisdiction than for limitations on personal jurisdiction. The assumption underlying Bristol-Myers's position is that California judges cannot be presumed to treat an out-of-state defendant like Bristol-Myers fairly. . . . Such an argument hews more closely to the traditional justification for including diversity jurisdiction in Article III, namely, that state courts cannot be trusted to treat out-of-staters evenhandedly.").

[199] 28 U.S.C. § 1407.

[200] Bradt & Rave, *supra* note 198.

[201] *Id.* at 1267; Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 414 (2014) ("Centralization likewise advantages defendants by making meaningful closure possible through a global settlement.").

[202] Dodson, *supra* note 174, at 43-45, Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, MICH. L. REV. (forthcoming 2019).

a scale that would be impossible in state court.[203] Diversity jurisdiction makes that aggregation possible by enabling state-law cases to be filed in federal court and then consolidated across state lines in a single MDL court. To be sure, MDL aggregation has its problems,[204] but the aggregation power of federal MDL is undeniable. Further, it seems obvious that diversity-based MDLs have little to do with the bias rationale because no matter where individual cases are filed, the cases are all transferred to a single federal court in a state that may be the home state of the party who invoked federal jurisdiction in the first place.[205]

These diversity-based aggregation benefits are appreciable, but diversity jurisdiction has even greater potential. Current personal-jurisdiction law stymies broader aggregation in federal court. As I have argued elsewhere, however, Congress or the Supreme Court could lift personal jurisdiction's obstacles to aggregation in federal court by expanding the scope of the federal service-of-process rule in certain multiparty cases.[206] But the efficacy of this solution to the limits of personal jurisdiction depends upon the expansion of diversity jurisdiction over such cases. Diversity jurisdiction thus holds enormous additional potential as a catalyst for facilitating aggregation in federal court on a much grander scale.

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[203] For a discussion of the possibility of informal multistate coordination, see Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1886-91 (2000).

[204] Centralization does increase the power of a single judge and sometimes repeat attorneys. *See* Bradt & Rave, *supra* note 198, at 1314-15; Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 70-72 (2017).

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

[206] Dodson, *supra* note 174; Dodson, *supra* note 202.

B. Other Benefits of Diversity Jurisdiction

Freeing the debate from the tethers of the bias rationale also sets other considerations in a new light. For example, diversity jurisdiction can help avoid other state-court biases that are not inherently tied to out-of-state citizenship. As shown above, even some of the Constitution's framers seemed more focused on anticreditor or economic biases than nonresident status generally.[207] Corporations have long valued diversity jurisdiction because of a belief that federal courts are more business-friendly than state courts.[208] Some litigants perceive certain state courts are more plaintiff-friendly, or class-action-friendly, than their corresponding federal courts.[209] Others see antirural or antiurban

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[207] *See supra* text accompanying notes 47-52. *See also* Samuel Issacharoff & Catherine Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1398-404 (2006) (arguing that federal judges have seen themselves as better guarantors of a national free market).

[208] *See* Charles E. Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A. J. 499, 502 (1933); Frank, *supra* note 12, at 28; Marcus, *supra* note 74, at 1252; Miller, *supra* note 131, at 409 (finding, in removed cases, reports of perceived state-court bias against corporations among 18% of P attorneys and 45% of D attorneys); PURCELL, *supra* note 110, at 64 ("Diversity jurisdiction symbolized for both Progressives and their adversaries the de facto alliance between corporations and the national judiciary."); PURCELL, *supra* note 76, at 141-64; William Howard Taft, *Criticisms of the Federal Judiciary*, 29 AM. L. REV. 641, 650-51 (1895) (calling state courts "a corporation-hating community"). *But see* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS 1890-1937, at 6 (1994) (disputing federal courts' procorporate tendency).

[209] *See* Eric Helland & Alex Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341 (2002); Purcell, *supra* note 73, at 1849 ("For more than half a century, from Reconstruction to the New Deal, tort plaintiffs suing national corporations preferred state courts, in part because they believed that federal judges were biased against them."); Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 49 (2012) ("Congress [in passing CAFA] was plainly concerned that state courts were certifying too many class actions, and it plainly was hoping that fewer would be certified in federal court."); THOMAS E. WILLGING & SHANNON R. WHEATMAN, ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION 8 (Fed. Jud. Ctr. 2004) (reporting class-action plaintiffs' preference for state court), available at http://

biases in state courts.[210] Still others have suggested that diversity jurisdiction can help overcome racial bias in state courts.[211] Political or social preferences may differ in state and federal court,[212] such as when a litigation raises sensitive or highly charged issues like abortion or religion. Quite aside from biases, diversity jurisdiction offers certain efficiencies, including interstate procedural uniformity and familiarity and the ability to transfer to more convenient locations.[213]

I do not defend these benefits here or suggest that they should carry the day.[214] My point instead is that minimizing the out-of-state bias rationale allows these factors to be confronted and debated more clearly on their own terms rather than be overshadowed by the lens of out-of-state bias.

C. An Illustration: CAFA

Unmooring the diversity debate from the bias rationale, while adding important modern considerations like aggregation or mitigation of other biases to take center stage, allows jurists to have a more honest and useful conversation about diversity jurisdiction and its role. The Class Action Fairness Act of 2005[215]

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www.fjc.gov/public/pdf.nsf/lookup/ClAct05.pdf/$file/ClAct05.pdf. *Cf.* Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128, 131 (2000) (finding evidence of antiplaintiff bias in federal appellate courts).

[210] *See generally* Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273 (2003).

[211] Benjamin V. Madison, III, *Color-Blind: Procedure's Quiet but Crucial Role in Achieving Racial Justice*, 78 UMKC L. REV. 617, 618-19 (2010) (focusing on the criminal trial of officers involved in the Rodney King beating).

[212] *See* Letter from GBA Strategies to Nat'l Ctr. for State Courts (Dec. 4, 2014), http://jpo.wrlc.org/bitstream/handle/11204/3967/Analysis%20of%C20National%C20Survey%C20of%C20Registered%20Voters.pdf?sequence=4 (finding evidence of public perceptions of political bias in state courts).

[213] *See, e.g.*, Frank, *Case*, *supra* note 76, at 408-09 (lauding the uniformity and familiarity of federal procedures); 28 U.S.C. § 1404(a) (allowing venue transfer for the convenience of the parties and witnesses).

[214] Using other biases to justify diversity jurisdiction implicates some of the same challenges as out-of-state bias. *See supra* Part III.

[215] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

offers an illustration of how improved rationale transparency could benefit reform efforts.

Before CAFA, only named representatives' citizenships were counted for complete-diversity purposes,[216] a doctrine that enabled class counsel to manipulate the complete-diversity rule by selecting representatives who destroyed complete diversity and thus defeated diversity jurisdiction.[217] In addition, class actions were subject to the forum-defendant bar to removal: even if the class representatives were completely diverse, the case could not be removed to federal court if any defendant were a citizen of the state where the case was filed.[218] Also, removal required consent of all defendants and removal within one year of filing.[219] Finally, unincorporated entities are deemed citizens of each state that its members were citizens,[220] meaning that some entities were citizens of many states and increasing the likelihood that those entities would destroy complete diversity. These features enabled class representatives and class counsel to select favorable state courts for litigation and engineer strategies to avoid federal court even though the class members might reside in many different states.[221]

In a nutshell, CAFA broadens diversity jurisdiction over certain multistate class actions with at least 100 class members.[222] For CAFA classes, the statute authorizes diversity jurisdiction based on minimal diversity of any class member and any defendant.[223] The statute lifts the forum-defendant and one-year

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[216] Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 365-67 (1921).

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

[218] *See* 28 U.S.C. § 1441(b).

[219] *See* 28 U.S.C. § 1446(b)(2)(A); *id.* § 1446(c)(1).

[220] *See* Americold Realty Trust v. ConAgra Foods, Inc., 577 U.S. _ (2016).

[221] Sen. Rep. No. 109-14, 109th Cong., 1st Sess., at 15-25 (2005). The general removal statute also bars appellate review of remand orders. *See* 28 U.S.C. § 1447(d). CAFA restores appellate review. *See* 28 U.S.C. § 1453(c).

[222] *See* 28 U.S.C. § 1332(d).

[223] *See id.* § 1332(d)(2) (extending diversity jurisdiction when "any member of a class of plaintiffs is a citizen of a State different from any defendant"). The

bars and eliminates the unanimity requirement.[224] Finally, the statute makes unincorporated entities citizens only of "a citizen of the State where it has its principal place of business and the State under whose laws it is organized."[225]

CAFA expands opportunities for defendants to secure a federal forum on CAFA classes. Congress's rationale seems to have been not to alleviate any bias against out-of-state defendants but to harness the advantages of federal court for defendants.[226] Congress and CAFA supporters saw federal courts as more favorable to defendants and to businesses and more hostile to class actions and were motivated to use diversity jurisdiction to combat perceived proclass, antidefendant, and antibusiness biases in certain state courts (and to neutralize the plaintiff-side forum selection of those state courts).[227] That motivation is an appropriate justification for diversity jurisdiction and is one that should be debated on its own terms.[228]

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constitutionality of using putative class members' citizenships to establish diversity jurisdiction has been questioned. *See* Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*, 51 WM. & MARY L. REV. 1113 (2009).

[224] *See* 28 U.S.C. § 1453(b) (authoring removal of CAFA classes without regard to forum-defendant citizenship).

[225] *Id.* § 1332(d)(10).

[226] *E.g.*, Burbank, *supra* note 68, at 1528; Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1725 (2008); Roosevelt, *supra* note 209, at 49 ("Congress was plainly concerned that state courts were certifying too many class actions, and it plainly was hoping that fewer would be certified in federal court.").

[227] *See* Marcus, *supra* note 74, at 1252; Sen. Rep. No. 109-14, 109th Cong., 1st Sess., at 23 (2005) (calling out "some state judges [who] are less careful than their federal court counterparts about applying the procedural requirements that govern class actions").

[228] To be fair, the congressional hearings did address many of the CAFA policies on their own terms. *See* Sen. Rep. No. 109-14, 109th Cong., 1st Sess., at 51-75 (2005). For examples of efforts to engage those justifications post-enactment, see Patricia Hatamyar Moore, *Confronting the Myth of "State Court Class Action Abuses" Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. REV. 133 (2013); WILLGING & WHEATMAN, *supra* note 209, at 34-36 (noting that "cases were almost equally likely to be certified"

However, because Congress relied primarily on Article III's grant of diversity jurisdiction to support CAFA, the centrality of the bias rationale to diversity jurisdiction induced Congress and CAFA supporters to justify the act on the basis of combating out-of-state bias.[229] The Act itself expressly finds that

> [a]buses in class actions undermine . . . the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are . . . sometimes acting in ways that demonstrate bias against out-of-State defendants.[230]

The accompanying Senate Report states that "[o]ne of the primary historical reasons for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court."[231] It continues:

> As set forth in Article III of the Constitution, the Framers established diversity jurisdiction to ensure fairness for all parties in litigation involving persons from multiple jurisdictions,

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in state and federal courts and reporting slightly lower certification rate in state courts).

[229] *See* Marcus, *supra* note 74, at 1293 ("Whether real or imagined, local bias fairly frequently spurred arguments in CAFA debates."). *E.g.*, Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the H. Comm. on the Judiciary, 108th Cong. 23 (2003) (statement of John H. Beisner, Partner, O'Melveny & Myers LLP), available at http://judiciary.house.gov/legacy/87093.PDF ("[T]here can no longer be any question that some local judges are exhibiting bias against out-of-state defendants. . . the very type of bias that led to the creation of diversity jurisdiction in the first place.").

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

[231] Sen. Rep. No. 109-14, 109th Cong., 1st Sess., at 5 (2005). *Cf. id.* at 8-9 ("According to the Framers, the primary purpose of diversity jurisdiction was to protect citizens in one state from the injustice that might result if they were forced to litigate in out-of-state courts.").

> particularly cases in which defendants from one state are sued in the local courts of another state. Interstate class actions which often involve millions of parties from numerous states present the precise concerns that diversity jurisdiction was designed to prevent: frequently in such cases, there appears to be state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation.[232]

These are tenuous justifications for CAFA.[233] Out-of-state bias tends to justify retaining—not eliminating, as CAFA does—the complete-diversity rule and the forum-defendant rule. Eliminating these features might be consistent with a more honest appraisal of CAFA's motivations, but, without more explanation and evidence, they are inconsistent with the bias rationale.[234] In addition, opponents have challenged the underlying premise that state courts were, in fact, exhibiting such bias.[235]

This focus on the bias rationale has diverted attention away from the real debate about CAFA. Indeed, courts have picked up on CAFA's reliance on the bias rationale and repeated it in their opinions and as grounding for their holdings. The Fifth and Tenth Circuits have both stated that "In enacting CAFA, Congress ought to correct state and local court abuses in class actions such as bias against out-of-State defendants by expanding federal diversity

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[232] *Id.* at 6. The Senate Report secondarily notes "that the Framers were concerned that state courts might discriminate against interstate businesses and commercial activities, and thus viewed diversity jurisdiction as a means of ensuring the protection of interstate commerce." *Id.* at 12.

[233] Cross, *supra* note 18, at 194 ("CAFA has raised concerns among lawyers and scholars in part because it unambiguously extends diversity jurisdiction beyond what many believe is the sole purpose of diversity jurisdiction: the prevention of state court bias against out-of-state parties.").

[234] *See* Burbank, *supra* note 68, at 1517-18. It is possible that the bias rationale could support minimal diversity and the removal of the forum-defendant rule, but only if evidence suggested that the presence of one out-of-state party on the side of the party invoking diversity jurisdiction was likely to generate state-court prejudice against out-of-state citizens despite the citizenships of the other parties.

[235] *See, e.g.*, Purcell, *supra* note 73, at 1885 (stating "there was no evidence that bias or unfairness existed in state courts generally").

jurisdiction over interstate class actions."[236] The Eleventh Circuit recently held that the dual in-state and out-of-state citizenship of defendants could not create minimal diversity jurisdiction sufficient to allow removal of a CAFA case to federal court because those defendants "face no risk of any conceivable local bias" in the state court.[237] Litigants, too, have tied CAFA to the bias rationale, with one brief asserting: "CAFA was adopted for the purpose of protecting the precise category of defendants at issue in this case: out-of-state defendants against whom large damage claims have been asserted and who fear that they may be discriminated against in state court."[238]

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

V. REFORMING DIVERSITY JURISDICTION

In this Part, I show how reorienting diversity jurisdiction from the bias rationale and toward other considerations like aggregation leads to several possible areas for reform, and I assess the constitutionality of using considerations other than the bias rationale to support such reform efforts.

A. Potential Reforms

Refocusing the diversity debate suggests reconsideration of the forum-defendant bar to removal, the complete-diversity rule, and

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[236] Speed v. JMA Ene. Co., 872 F.3d 1122, 1126 (10th Cir. 2017); Arbuckle Mountain Ranch of Tex., Inc. v. Chesapeake Ene. Corp., 810 F.3d 335, 337 (5th Cir. 2016).

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

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

the tests for citizenship. I am not arguing here that these reforms should be pursued; they present complicated policy issues involving federalism, federal docket control, and party convenience and fairness. I merely mean to point out that reengaging those complicated policy issues, unshackled by the bias rationale, may lead to profitable reform in these areas of the law.

1. The Forum-Defendant Bar

The most obvious reform possibility is the elimination of the forum-defendant bar to removal of diversity cases. The general removal statute bars a case founded entirely on diversity jurisdiction from being removed if any served defendant is a citizen of the forum state.[239] This bar is based entirely on the bias rationale: the presence of an in-state defendant should obviate the need for the defendants to invoke a federal forum's protection from local bias.[240]

Yet the forum-defendant bar presents other issues for consideration. On the one hand, the forum-defendant bar helps control federal dockets, preserve state prerogatives, and reduce defendant forum shopping.[241] On the other hand, the forum-defendant bar gives plaintiffs a distinct advantage against defendants because the bar prevents defendants from invoking a federal forum that plaintiffs could have invoked in the first instance. This forum-choice disparity gives rise to both plaintiff-side and defense-side gamesmanship. Plaintiffs try to ensure joinder of an in-state defendant to prevent removal even if their stronger claims are against out-of-state defendants, while out-of-state defendants might try to remove a case quickly, before any in-

[239] 28 U.S.C. § 1441(b).

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

[241] Congress has chosen to limit diversity-based removal for substantive reasons in other areas. *See* 28 U.S.C. § 1445(c) (prohibiting removal of worker's compensation claims).

state defendant has been served.[242] The bar also prevents salutary removal on grounds unrelated to out-of-state bias, such as state bias against the particular type of defendant or defense likely to be asserted. Finally, the bar also prevents removal when access to federal court might allow for advantageous federal consolidation in an MDL or other aggregated litigation.

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

2. The Complete-Diversity Rule

Another is reform of the complete-diversity rule, which, ever since *Strawbridge*, has been justified on state-bias grounds.[243] The shadow of the bias rationale has loomed over recent incursions on the complete-diversity rule. The supplemental-jurisdiction statute, for example, took pains to preserve the complete-diversity rule,[244] and the Court has continued to interpret the supplemental-jurisdiction statute in light of the bias rationale.[245] CAFA supporters unconvincingly pitched CAFA's adoption of minimal diversity as consistent with the bias rationale.[246] And other statutes grounded in minimal diversity have been exceedingly modest

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[242] *See, e.g.*, Arthur Hellman *et al.*, *Neutralizing the Stratqgem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103 (2016) (proposing legislation to address the gamesmanship of plaintiffs and defendants regarding the forum-defendant bar).

[243] *See supra* note 80.

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

[245] *See* Exxon Mobile Corp. v. Allapattah Services, Inc., 545 U.S. 546, 584 (2005).

[246] *See supra* text accompanying notes 229-232.

despite the appeal of broader federal jurisdiction.[247] The Multiparty, Multiforum Trial Jurisdiction Act of 2002,[248] for example, grants minimal-diversity jurisdiction over a very narrow class of cases like airplane crashes[249] that present a "single accident, where at least 75 natural persons have died in the accident at a discrete location."[250] MMTJA proponents initially urged broader jurisdictional grants to facilitate aggregation of complex litigation,[251] but the MMTJA as enacted was far narrower.[252]

Like the forum-defendant rule, however, the complete-diversity rule has its own rich web of policy implications, and when debated out of the bias rationale's shadow, those policy implications might lead to additional incursions complete diversity. The rule obstructs aggregation by preventing federal-court joinder of nondiverse parties who may be important—even necessary—to the litigation.[253] The rule thus causes unfairness, inefficiency, and duplicative litigation.[254] As a secondary matter, the complete-diversity rule, by demanding attention to every party's citizenship,

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

[248] Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826 (2002).

[249] H.R. Rep. No. 106-276, at 21 (1999).

[250] 28 U.S.C. § 1369(a).

[251] *See* Rowe & Sibley, *supra* note 124, at 55 (proposing minimal diversity to join certain claims arising from the "same transaction, occurrence, or series of related transactions or occurrences"); AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 37 (1994) (recommending minimal diversity for federal cases involving one or more common questions of fact where consolidation would promote justice, efficiency, and fairness).

[252] *See* Floyd, *supra* note 72 (detailing the MMTJA's legislative history).

[253] *See* FED. R. CIV. P. 19(b) (acknowledging the problem of necessary parties who cannot be joined). Personal jurisdiction hinders multistate party joinder as well, but expanding personal jurisdiction to facilitate joinder in federal court is a simple matter of rule or statutory amendment. *See* Dodson, *supra* note 174.

[254] Other scholars have strongly supported efforts to eliminate duplicative litigation. *See generally, e.g.*, Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000).

greatly complicates supplemental jurisdiction, incentivizes party gamesmanship, and exacerbates nettlesome questions of citizenship. Of course, any erosion of the complete-diversity rule should consider the effect on federal dockets,[255] the infringement on state prerogatives and on the development of state-law precedent,[256] and the possibility that diversity expansion could benefit one class of litigants more than another.[257] But it may be, on balance, that the statutory experiments with minimal diversity to date are too modest in light of the benefits of federal aggregation and the benefits of streamlined jurisdictional determinations. Marginalization of the bias rationale would allow debates about the use of minimal diversity in these areas to focus on their own merits and demerits.

3. Citizenship Tests

A third area of reform is the test for determining citizenship. Historically, citizenship determinations have been complex and unpredictable. The test for an individual U.S. citizen's state citizenship for purposes of diversity jurisdiction depends upon the individual's subjective intent to permanently reside in a particular

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[255] By one estimate, more than 550,000 cases filed in state court in 2013 qualified for minimal diversity but not complete diversity. *See* Shepherd, *supra* note 95, at 23. It is unclear how many of those might end up in federal court under a minimal-diversity grant, but whatever cases do would bring to federal courts many of the complexities inherent in diversity jurisdiction, including difficult *Erie* issues, abstention considerations, and certification pressures.

[256] Expansive federal diversity jurisdiction may also exacerbate the gravitational pull of federal-court decisionmaking on state-court precedent. *See* Dodson, *supra* note 76.

[257] *See* Dodson, *supra* note 182, at 81 (cautioning that recent expansions of diversity jurisdiction have disproportionately advantaged defendants); PURCELL, *supra* note 76, at 45-46 (arguing that corporations have used diversity jurisdiction to subject parties of more modest means to a more expensive litigation forum for purposes of pressuring more favorable settlements). Some data even suggest that vertical forum shopping affects case outcomes. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 599-606 (1998).

state,[258] which can lead to self-serving testimony and disruptive preliminary hearings involving significant evidentiary proof.[259] Citizenship of artificial entities suffer from similar complexities and uncertainties.[260] Most artificial entities—partnerships, real-estate trusts, unions, associations, and the like—take on the citizenships of each member.[261] Such derivative citizenship causes its own headaches.[262]

Admittedly, citizenship tests have not always hewn closely to the bias rationale.[263] But a more express disavowal of the bias rationale might encourage alternative formulations that expand or restrict federal jurisdiction for other justifiable reasons or lead to the development of tests that focus on virtues of clarity and predictability.[264]

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[258] 13E WRIGHT ET AL., *supra* note 12, § 3612.

[259] *Id.*

[260] *See* Americold Realty Trust v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1014 (2016) (stating that citizenship "can become metaphysical when applied to legal entities"); Stewart, *supra* note 76, at 214 ("With the advent of a perplexing variety of corporate structural forms, determining domicile for an entity, as opposed to a natural person, has become a byzantine task.").

[261] *See Americold*, 136 S. Ct. at 1014 (2016) ("While humans and corporations can assert their own citizenship, other entities take the citizenship of their members."); Carden v. Arkoma Assocs., 494 U.S. 185, 195-96 (1990) (stating the "oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of all its members" (quotation cleaned up)). *See, e.g.*, *id.* at 1017 (real-estate trusts); Chapman v. Barney, 129 U.S. 677, 682 (1889) (partnerships); Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 456-57 (1900) (joint-stock companies); Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 146 (1965) (unions). For a thorough discussion, see 13F WRIGHT ET AL., *supra* note 12, § 3630.1.

[262] For example, one judge analyzed more than ten layers of embedded citizenships before determining the party was nondiverse. *See* Quantlab Fin., LLC v. Tower Research Capital, LLC, 715 F. Supp. 2d 542 (S.D.N.Y. 2010).

[263] *See* James E. Pfander, *The* Tidewater *Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1952-53 (2004) ("By making party identity the test of jurisdiction . . . diversity offers a cleaner jurisdictional test" than an alternative approach to addressing state court bias, which requires an "official inquiry into problems with the quality of justice in state court").

[264] *See* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011).

A recent exposition of the test for corporate citizenship, for example, may be worth emulating. Corporations are statutorily prescribed the citizenship of their state of incorporation and the state of their "principal place of business."[265] The latter proved "difficult to apply,"[266] and lower courts developed a number of tests, including the "nerve center," "muscle center," and "center of gravity" tests for determining a corporation's principal place of business.[267] As the Supreme Court noted in 2010 in *Hertz Corp. v. Friend*,

> This complexity may reflect an unmediated judicial effort to apply the statutory phrase 'principal place of business' in light of the general purpose of diversity jurisdiction, *i.e.*, an effort to find the State where a corporation is least likely to suffer out-of-state prejudice when it is sued in a local court. . . . But, if so, that task seems doomed to failure. After all, the relevant purposive concern—prejudice against an out-of-state party—will often depend upon factors that courts cannot easily measure, for example, a corporation's image, its history, and its advertising, while the factors that courts can more easily measure, for example, its office or plant location, its sales, its employment, or the nature of the goods or services it supplies, will sometimes bear no more than a distant relation to the likelihood of prejudice. At the same time, this approach is at war with administrative simplicity. And it has failed to achieve a nationally uniform interpretation of federal law, an unfortunate consequence in a federal legal system.[268]

Hertz cleaned up that mess by holding that a corporation's principal place of business is "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities," typically its headquarters.[269] In giving the statute this construction, the Court "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as

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[265] 28 U.S.C. § 1332(c).
[266] Hertz Corp. v. Friend, 559 U.S. 77, 89 (2010).
[267] *Id.* at 90-91.
[268] *Id.* at 92.
[269] *Id.* at 80-81.

simple as possible."[270] The Court acknowledged that its focus on administrability could be seen as at odds with the bias rationale:

> We also recognize that the use of a "nerve center" test may in some cases produce rules that seem to cut against the basic rationale for 28 U.S.C. § 1332. For example, if the bulk of a company's business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the "principal place of business" is New York. One could argue that members of the public in New Jersey would be *less* likely to be prejudiced against the corporation than persons in New York—yet the corporation will still be entitled to remove a New Jersey state case to federal court. And note too that the same corporation would be unable to remove a New York state case to federal court, despite the New York public's presumed prejudice against the corporation.[271]

Nevertheless, the Court opted for a rule that elevated clarity over effectuation of the bias rationale.[272]

Hertz's minimization of the role of the bias rationale as an interpretive heuristic should be applauded and, in conjunction with other factors implicated by diversity jurisdiction, emulated in other areas.[273] Perhaps the test for unincorporated entities could similarly be simplified to be determined solely by the state whose law creates the entity, or perhaps both that state and the state of the

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[270] *Id.* at 80; *id.* at 94 ("[A]dministrative simplicity is a major virtue in a jurisdictional statute. . . . Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. . . . Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. . . . Simple jurisdictional rules also promote greater predictability.").

[271] Hertz, 559 U.S. at 96 (emphasis in original).

[272] *Id.* at 96 ("We understand that such seeming anomalies will arise. However, in view of the necessity of having a clearer rule, we must accept them.").

[273] The rule of considering only class representatives' citizenships for purposes of diversity jurisdiction in a class action, *see supra* note 196, is a similar paean to administrative simplicity.

entity's principal place of business, like the test for corporations.[274] Or perhaps the test for a natural person's citizenship could be based on objective factors rather than subjective intent. These possibilities may or may not prove sensible, but their sensibility ought to depend primarily on factors other than the impact of out-of-state bias.

B. Constitutional Constraints

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

The Diversity Clause extends the judicial power to "controversies . . . between citizens of different states."[275] That is all that is required. The Constitution does not codify the bias rationale in any form. Consistent with this language, the Court's opinions construing the Diversity Clause focus entirely on its text, which the Court has consistently read to authorize diversity jurisdiction based on "minimal diversity"—any one plaintiff of a different citizenship from any one defendant—without any regard to possibilities of state bias.[276] Thus, statutory grants of federal

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

[275] U.S. CONST. Art. III § 2.

[276] *See, e.g.*, Exxon Mobile Corp. v. Allapattah Services, Inc., 545 U.S. 546, 584 (2005) ("The Constitution broadly provides for federal-court jurisdiction in controversies 'between Citizens of different States.' Art. III, § 2, cl. 1. This Court has read that provision to demand no more than 'minimal diversity,' *i.e.*, so long as one party on the plaintiffs' side and one party on the defendants' side are of diverse citizenship, Congress may authorize federal courts to exercise diversity jurisdiction."); Grupo Dadaflux v. Atlas Global Group, L.P., 541 U.S. 567, 577 n.6 (2004) ("We understand 'minimal diversity' to mean the existence of at least *one* party who is diverse in citizenship from one party on the other side of the case, even though the extraconstitutional 'complete diversity'

diversity jurisdiction have long authorized even in-state plaintiffs to invoke diversity jurisdiction, despite the lack of any presumed state bias against them,[277] and the Court has never held any congressional authorization of diversity jurisdiction to be unconstitutional on bias-rationale grounds.[278] Nor has the Court invalidated any statutory tests for citizenship determination because of inconsistency with the bias rationale.[279] The upshot is that Congress can extend diversity jurisdiction whether there is bias (or its perception) or not.[280] As long as the controversy is

required by our cases is lacking."); State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967) ("Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."); *cf.* Pfander, *supra* note 184, at 1470 ("For the past generation or two, lawyers, academics and Supreme Court justices have understood that the decision in *State Farm v. Tashire* provides authority for grants of jurisdiction on the basis of minimal diversity between adverse claimants."). Professor Jim Pfander has argued that the restriction of Article III's grant of diversity jurisdiction to "controversies . . . between" diverse parties limits "the boldest assertions of minimal diversity" that attempt to join nondiverse claims that are "separate and distinct" from diverse claims, but he recognizes that "[a]rguments about bias . . . do not help much in defining constitutional limits on the scope of the litigation unit for diversity purposes." *Id.* at 1449-51.

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

[278] To the contrary, the Court has sustained minimal-diversity grants under the Diversity Clause despite the lack of any congressional purpose to protect against state bias. *See, e.g.*, *Tashire*, 386 U.S. at 531 (upholding the Interpleader Act's grant of minimal diversity jurisdiction, based on "the legislative purpose broadly to remedy the problems posed by multiple claimants to a single fund," under the Diversity Clause).

[279] Indeed, recent citizenship tests have eschewed dependence upon the bias rationale. *See supra* text accompanying notes 265-272 (discussing *Hertz*).

[280] It is true that the bias rationale has influenced the way Congress has extended, and the way the Court has construed, statutory grants of diversity jurisdiction. *See supra* text accompanying notes 77-96 (discussing the complete-diversity rule, the statutory designation of corporate citizenship, and the forum-defendant rule). The bias rationale has not, however, influenced the Court's construction of the Diversity Clause. *Cf. Tashire*, 386 U.S. at 531 n.7 (tacitly approving pending proposals to use diversity jurisdiction to promote multiparty/multiforum aggregation).

between citizens of different states, the Diversity Clause covers it.[281]

To be clear, there may be good reasons to resist sweeping proposals to expand federal jurisdiction to the reaches of the Diversity Clause. Significant policy considerations warrant caution.[282] But those are questions of policy, not of constitutional limit. Nothing in Article III prevents Congress from using the Diversity Clause to consider and weigh values unconnected to the bias rationale.

CONCLUSION

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

[281] One scholar has argued that the Diversity Clause restricts the grant of diversity jurisdiction to instances compatible with the bias rationale. *See* Floyd, *supra* note 72, at 615 (contending that Article III requires that congressional authorization of diversity jurisdiction must "reasonably . . . serve the purposes underlying Article III's grant of federal jurisdiction"). But that has never been the way the Court (or Congress) sees it.

[282] *See supra* text accompanying notes 154-166.