

# ON THE DEATH OF DIVERSITY JURISDICTION: AN EMPIRICAL STUDY ESTABLISHING THAT DIVERSITY JURISDICTION IS NO LONGER JUSTIFIED

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*If you have your why for life, you can get by with almost any how.*  
– Friedrich Nietzsche

## ABSTRACT

American federal diversity jurisdiction was created in response to the concern that out-of-state litigants would suffer bias in state court due to their out-of-state status (“geographic bias”). As attested in the record from the state ratification conventions, in the legislative history of diversity jurisdiction, and in seventeen U.S. Supreme Court opinions (the most recent in 2021), the creation of an impartial tribunal to mitigate geographic bias was and is the central rationale for federal diversity jurisdiction. Even though geographic bias is *the* rationale for diversity jurisdiction, no (prior) empirical studies have established whether geographic bias *remains* a problem in the American civil justice system. This Article provides the results of an empirical study of objective data, representing over one million cases across thirty years, demonstrating that geographic bias is no longer an issue in the civil justice system. Given that this result eliminates the very reason for the existence of federal diversity jurisdiction, the outcome provides a strong basis for Congress to either modify or abolish diversity jurisdiction.

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#### I. THE DEATH OF GEOGRAPHIC BIAS AND THE RATIONALE FOR DIVERSITY JURISDICTION

The Framers of the United States Constitution believed that protecting out-of-state litigants from bias in state courts due to their out-of-state status (“geographic bias”) was so important to the administration of an impartial judicial system that they extended the federal judicial power to cases and controversies “between Citizens of different States” through the Diversity Clause of the U.S. Constitution.<sup>1</sup> The view that protection from geographic bias was, and remains, the rationale for diversity jurisdiction is well attested in the record—from the state ratification conventions<sup>2</sup> through the legislative history of the Diversity Clause as enacted in the U.S. Code,<sup>3</sup> and in seventeen U.S. Supreme Court opinions<sup>4</sup> from *Bank of the U.S. v. Deveaux* in 1809<sup>5</sup> to *Texas v. California* in 2021.<sup>6</sup>

It is not possible to determine today whether, at the time of the Founding, it was true that out-of-state litigants were subject to sufficient geographic bias to justify creation of federal diversity jurisdiction.<sup>7</sup> But we can determine whether geographic bias is a problem today.<sup>8</sup> Answering that question is vitally important because mitigating the effects of geographic bias is the very rationale for the existence of diversity jurisdiction<sup>9</sup> and, if it is shown that geographic bias is no longer a problem for litigants, then Congress may be justified in modifying or abolishing diversity jurisdiction.<sup>10</sup>

This Article is the first to present the results of an empirical study demonstrating that geographic bias is not a contemporary problem.<sup>11</sup> This study

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1. See discussion *infra* Section II.B.

2. See discussion *infra* Section II.B.2.

3. See discussion *infra* Section II.B.3.

4. See discussion *infra* Section II.B.4.

5. 9 U.S. (5 Cranch) 61, 87-88 (1809) (holding the purpose of diversity jurisdiction is to address fear of bias in state court against out-of-state litigants).

6. 141 S. Ct. 1469, 1469 (2021) (mem.) (Alito, J., dissenting).

7. See discussion *infra* Section II.B.1.

8. We can determine whether geographic bias is a problem today through an empirical study, like the one described *infra*, which in fact shows that geographic bias is not a problem today. See discussion *infra* Section IV.B.

9. See discussion *infra* Section II.B.2-4.

10. See discussion *infra* Section V.

11. See discussion *infra* Section IV.B (demonstrating that geographic bias is not a current issue in forum choice). Previous empirical studies have all taken the form of surveys from attorneys. See discussion *infra* Part III. All but one of the surveys agreed that geographic bias was a factor in forum choice. Regardless of the merits of these surveys, they do not resolve the question of whether geographic bias is a current problem because they range from thirty to sixty years old. See *id.*

is based on three hypotheses relating to actions filed under diversity jurisdiction.<sup>12</sup> First, if geographic bias is currently present in state courts, then in-state plaintiffs suing out-of-state defendants will have an incentive to file in state court to gain the benefit of that bias. As a result, we should find a negative correlation<sup>13</sup> between the percentage of in-state plaintiffs and filing rates<sup>14</sup> because in-state plaintiffs will strategically file in state court. At the same time, we should see a positive correlation<sup>15</sup> between the percentage of in-state plaintiffs and removal rates because out-of-state defendants will have an incentive to remove to federal court to gain the impartiality of the federal courts while in-state defendants will have no such incentive. Finally, out-of-state plaintiffs suing in-state defendants will have an incentive to file in federal court to avoid state court bias against them. This will produce a positive correlation between the percentage of out-of-state plaintiffs and federal filing rates as out-of-state plaintiffs seek the impartiality of the federal courts while in-state defendants have no need to do so.

After examining over one million diversity actions across thirty years, we conclude that none of these hypotheses are supported in the empirical record. In essence, we find that a litigant's out-of-state status is not relevant to "forum choice" (the choice to file in federal or state court and the choice to remove from state court to federal court); consequently, geographic bias is not an issue in today's civil justice system.

This Article proceeds in four Parts. Part II provides an overview of the history of diversity jurisdiction in two sections. The first section reviews the use of special jurisdiction for aliens and outsiders from the time of the Hittite Empire to just before the founding of the United States of America. The second section details the history of diversity jurisdiction in the United States from the Constitutional Convention of 1787 to the present. Part III examines the limited record of empirical studies of diversity jurisdiction and the role geographic bias

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12. This Article solely examines filings in federal court and removals from federal court where the action was filed under diversity jurisdiction. For ease of reading, we may avoid repeating this limitation from time to time. Such omissions should not be understood as expanding the scope of actions studied beyond what is noted in this footnote.

13. In a negative correlation, as one variable increases the other decreases. *See, e.g., Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1043 app. n.1 (Colo. 1982) (Lohr, J., dissenting) (explaining correlation coefficient, negative, and positive correlations); DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 4:25 (2020-2021 ed. Dec. 2020) (also explaining correlation coefficient, negative, and positive correlations); Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1, 31 (2009) (further explaining correlations).

14. The percentage of out-of-state plaintiffs or defendants and in-state plaintiffs or defendants should be understood, throughout this Article, as a percentage of that type of litigant in a county and year. Similarly, the filing rate and removal rate should be understood, throughout this Article, as the filing or removal rate in a county in a given year.

15. In a positive correlation, as one variable increases the other also increases. *See e.g., Lujan*, 649 P.2d at 1043 app. n.1 (explaining correlation coefficient, negative, and positive correlations); FAIGMAN, *supra* note 13, at § 4:25 (also explaining positive correlations); Jacobi & Sag, *supra* note 13, at 31 (further explaining positive correlations).

plays in forum choice. Part IV includes our empirical analysis of geographic bias in diversity jurisdiction and demonstrates that geographic bias is not currently an issue in the civil justice system. Finally, Part V provides a short discussion of the implications of the results in this Article and sets the stage for the policy arguments that must follow from such empirical results.

## II. THE HISTORY OF STATE RESPONSES TO GEOGRAPHIC BIAS

From at least the time of the Hittite Empire, states have adopted special rules, procedures, and courts to alleviate the problems caused by geographic bias. A review of the history of State responses to geographic bias will be helpful in establishing how geographic bias became the rationale for American diversity jurisdiction. This review occurs in two sections. The first Section in this Part provides an overview of how states and empires from ancient times to the founding of the United States addressed the threat of bias against alien litigants. The second Section of this Part shifts to the American experience and reviews the textual record of the rationale for diversity jurisdiction from the Constitutional Convention of 1787 to the present. This second review also demonstrates that the rationale for diversity jurisdiction in the United States is to counter geographic bias in state courts.

### *A. From Ancient Empires Through the Founding*

As seen *infra*, the rules that govern the administration of justice have long taken into account the social and economic issues that arise when persons from different geographic locations and states interact and, inevitably, are led into conflict. It is not possible to know the motives behind laws written across a span of three thousand years, but, as we examine those rules, it seems likely that they existed to respond to the dangers that geographic bias posed to commerce, to strengthen social bonds, and to reinforce the state's financial security.

An early example of rules focused on commercial interests between parties from different states can be found in a thirteenth century B.C. edict from the Hittite king Hattušil III to the Ugarit king Niqmepa.<sup>16</sup> The edict states that it has been issued to address difficulties caused by merchants from Ura (likely Hittite subjects) in Ugarit.<sup>17</sup> The edict requires that Ura merchants leave Ugarit during

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16. See Reuven Yaron, *Foreign Merchants at Ugarit*, 4 ISR. L. REV. 70, 71 (1969) (discussing the RS tablets). This edict is found in the Ras Shamra ("RS") documents discovered at Ugarit. *Id.* at 70 n.\* (explaining the meaning of the abbreviation of "RS"). At this time, "Ugarit was a vassal kingdom of the Hittite emperor" and Ugarit's kings were the "rulers and supreme judges of their country." Ignacio Márquez Rowe, *Anatolia and the Levant: Ugarit, reprinted in* 1 A HISTORY OF ANCIENT NEAR EASTERN LAW 719, 720 (Raymond Westbrook ed., 2003) (discussing the structure of the Ugarit government).

17. See Yaron, *supra* note 16, at 71-72 (explaining Clause II of the edict).

the winter,<sup>18</sup> forbids them from acquiring property in Ugarit,<sup>19</sup> and prevents Ura merchants from becoming Ugarit residents if they lose money entrusted to them by their superiors.<sup>20</sup> The edict also requires that the Ugarit merchant, his sons, and his wife be turned over to the Ura merchant if the Ugarit merchant fails to pay what is owed to the Ura merchant.<sup>21</sup>

We also find special rules applicable to insiders and outsiders in ancient<sup>22</sup> religious Jewish law.<sup>23</sup> Under the Written Law,<sup>24</sup> all people Jewish and non-

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18. *Id.* at 71-73 (explaining Clause III of the edict).

19. *Id.* (explaining Clause IV of the edict).

20. *Id.* at 72-74 (explaining Clause V of the edict).

21. *Id.* at 72, 74 (explaining Clause VI of the edict).

22. The use of “ancient” in this context is only intended to indicate that Jewish Law has origins in the distant past and intends no judgment as to the present applicability of that law.

23. It is beyond the scope of this Article to fully discuss the timeline for Jewish Law. For our purposes, it is only necessary to note that such law existed well before the current era and that it provided different laws for people for different categories of people. The Aleppo Codex, “the oldest Hebrew Bible in existence today . . . was written by scribes called Masoretes in Tiberias, Israel, around 930 C.E.” Jennifer Drummond, *The Aleppo Codex*, BIBLE HIST. DAILY (Nov. 27, 2018), <https://www.biblicalarchaeology.org/daily/biblical-topics/hebrew-bible/the-aleppo-codex/> [https://perma.cc/3ECS-8H6X]. Unfortunately, while the Aleppo Codex was complete, on November 30, 1947, in response to the U.N. General Assembly voting in favor of the establishment of a Jewish state, a mob set fire to the synagogue in Aleppo where the codex was stored, destroying multiple pages of the codex. See Ronen Bergman, *A High Holy Whodunit*, N.Y. TIMES, June 25, 2012, at MM30. The Leningrad Codex is “[t]he only complete copy of the Hebrew Bible from the same [time] period.” See Biblical Archaeology Society Staff, *Comparing Ancient Biblical Manuscripts*, BIBLE HIST. DAILY (July 22, 2011), <https://www.biblicalarchaeology.org/daily/biblical-topics/bible-versions-and-translations/comparing-ancient-biblical-manuscripts/> [https://perma.cc/HBC8-7UPW]. There is an earlier translation of the Pentateuch in Greek, the Codex Sinaiticus, from around the fourth century A.D. See T.S. Pattie, *The Codex Sinaiticus*, 3 BRIT. LIBR. J. 1, 1 (Spring 1977) (discussing the Codex Sinaiticus). There are earlier Hebrew fragments of the Pentateuch including the Nash papyrus (around the second century B.C.) and the Dead Sea scrolls (from around third century B.C. to the first century A.D.). See George Anastaplo, *Law & Literature and the Bible: Explorations*, 23 OKLA. CITY U. L. REV. 515, 619 (1998) (discussing the ordering of the Ten Commandments in the Nash papyrus); Isabel Kershner, *Israel Reveals Newly Discovered Fragments of Dead Sea Scrolls*, N.Y. TIMES, March 16, 2021, at A9 (discussing newly discovered fragments of biblical texts). Moreover, we have evidence of the existence, in some form, of the Hebrew Bible from the Ketef Hinnom scrolls dated to the later seventh or early sixth century B.C. containing portions of the Priestly Benediction from the Book of Numbers. See John Nobel Wilford, *Solving a Riddle Written in Silver*, N.Y. TIMES, Sept. 28, 2004, at F00001 (discussing a new analysis of the Ketef Hinnom scrolls). The existence of a Jewish State prior to this point is supported by, for example, Assyrian inscriptions of Shalmaneser III, King of the Neo-Assyrian Empire (reigned 859-824 BCE) that reference Jehu of the house of Omri. See Baruch Halpern, *Yaua, Son of Omri, Yet Again*, 265 BULL. AM. SCHS. ORIENTAL RSCH. 81, 81 (1987) (discussing reference to “Yau(a), son of Omri” in inscriptions of Shalmaneser III dated to 841 B.C.). The earliest reference to an entity called “Israel” is found on an inscription of Pharaoh Merneptah dated to 1207 B.C. See ERIC H. CLINE, 1177 B.C. THE YEAR CIVILIZATION COLLAPSED 92 (Barry Strauss ed., 2014) (discussing the Exodus of the Hebrew people from Egypt).

24. Scholars note two sources of Jewish law: Written Law and Oral Law. See David Hollander, *Jewish Law for the Law Librarian*, 98 L. LIBR. J. 219, 223 (2006) (noting the two

Jewish, are subject to the “Noahide” laws<sup>25</sup> while Jewish persons alone are also subject to the code given to Moses at Sinai (the “Sinaitic” law).<sup>26</sup>

Similar to the edict of Hattušil III, fourth century B.C. Greek city-states entered into treaties with each other to establish laws and procedures that would apply when citizens of one city-state had a legal dispute with citizens of the other.<sup>27</sup> These treaties could include the creation of special tribunals for disputes between citizens and non-citizens.<sup>28</sup> For example, a “convention between the Locrian towns of Oeantheia and Chalaëum” required that:

[i]f the Oeantheian plaintiff was a metoec<sup>[29]</sup> in Chalaëum, the action was to be tried by the ordinary tribunals of Chalaëum consisting of citizens chosen by lot, and that he was entitled to plead through his proxenus. But if he was not a metoec there his suit was to be brought before the specially appointed ζενωδικαί [zenodikai/magistrates] at Chalaëum, and he was empowered to choose from among the leading residents of the town a jury of nine or fifteen citizens according to the

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sources of Jewish law). According to Jewish belief, the Written Law (the Torah or Pentateuch) was given to the Jewish people at Sinai, through Moses, after the exodus from slavery in Egypt. *See id.* (discussing the written and oral sources of Jewish law). Because the Written Law must be interpreted, Moses was also given the Oral Law, which provides both direct explanation of certain laws and techniques for interpreting the Written Law as a legal text. *See, e.g.,* Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 444-45 (1997) (discussing the Written Torah and Oral Torah). “The Oral Law was initially handed down orally from generation to generation, until it was compiled and edited in 220 C.E. by Rabbi Judah Ha-Nasi.” *See* Hollander, *supra* note 24, at 224 (discussing the *Mishna*).

25. The Noahide laws require all people (Jews and non-Jews) to create a judicial system and forbid people from engaging in “bloodshed, theft, sexual immorality, blasphemy, idolatry, [and] eating a limb torn from a live animal.” *See* Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157, 1157 (1991) (listing the Noahide Code’s mandates and prohibitions); *see also* Nahum Rakover, *Jewish Law and the Noahide Obligation to Preserve Social Order*, 12 CARDOZO L. REV. 1073, 1074 (1991) (discussing the Noahide commandments).

26. *See generally* Stone, *supra* note 25, at 1163-64 (discussing historical analysis of Noahide laws); *see also* José Faur, *The Fundamental Principles of Jewish Jurisprudence*, 12 N.Y.U. J. INT’L L. & POL. 225, 226 (1979) (discussing the Noahide laws); Rakover, *supra* note 25, at 1077 (discussing Maimonides’ view that the knowledge of the Noahide commandments arose from tradition, natural law, and the Torah).

27. *See, e.g.,* DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 220-21 (H. H. Scullard ed., 1978) (discussing treaties relating to disputes between citizens and foreigners).

28. *See, e.g.,* 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, 83 (1993) (discussing how Ancient Greeks and Romans created special tribunals for legal conflicts involving aliens).

29. A metoec (also called a “metic”) was a noncitizen resident of the city state who “shared responsibilities for defense of the city but had no political or welfare rights.” Sarah V. Wayland, *Citizenship and Incorporation: How Nation-States Respond to the Challenges of Migration*, 20 FLETCHER F. WORLD AFF. 35, 39 (1996) (discussing the legal status of noncitizens in ancient Greece).

importance of the case. Should the action, however, be brought by a citizen of Chalaëum in the interests of public order, the tribunal was then to be composed of an odd number of jurors, nominated by the demiurgi (*δημοουργοί*), the principal magistrates of the town, and the matter in litigation was to be decided by the majority.<sup>30</sup>

The ancient Greek city-states also developed rules so that contract disputes between Greeks from different city-states were governed by the law of the defendant's domicile (*lex domicilii*) and could only be brought in the defendant's home jurisdiction.<sup>31</sup>

The approach of having different courts for aliens and subjects seen in the ancient Greek convention between the Oeantheia and Chalaëum, was also adopted in Ptolemaic<sup>32</sup> Egypt. When Egyptians and Greeks had a contract dispute, if the contract was in Greek form, then it would be tried before the Greek courts (the chrematists).<sup>33</sup> But if the contract was in Egyptian form, it was tried before Egyptian courts (the laocrites).<sup>34</sup>

The Roman approach to the problem of disputes between citizens and non-citizens evolved over time. Initially, the Romans applied Roman law (*ius civile*) only to disputes between Romans.<sup>35</sup> Conquered people were required to use "their own customary law or the law of their former (conquered) state."<sup>36</sup> This created difficulty when there was a conflict between Romans and peregrines (the conquered subjects of the Roman Empire).<sup>37</sup> To resolve this problem, the Romans eventually "introduce[ed] the institution of the *peregrine praetor* (magistrate)."<sup>38</sup> This institution eventually resulted in the creation of a new

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30. Coleman Phillipson, 1 *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 194 (1911) (internal footnote added).

31. *Id.* at 199-200 (discussing a treaty between Athens and Phaselis).

32. The years 305 B.C. to 30 B.C. are called the "Ptolemaic period." J.G. Manning, *The Representation of Justice in Ancient Egypt*, 24 *YALE J.L. & HUMAN.* 111, 117 (2012) (providing the dates of the Ptolemaic period). It is so named because it begins at the reign of Alexander the Great's general Ptolomaeus who ruled Egypt after Alexander's death. See P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"*, 51 *HASTINGS L.J.* 479, 519 (2000) (discussing the history of Egyptian law).

33. See, e.g., Raphael Taubenschlag, *THE LAW OF GRECO-ROMAN EGYPT IN THE LIGHT OF THE PAPHOS Papyrus*, 332 B.C. - 640 A.D. 366-68 (1944) (noting that the court of the chrematistae had jurisdiction over disputes between Greeks as well as Egyptians signing a Greek contract); Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 *AM. J. COMP. L.* 297, 300-01 (1953) (discussing the history of conflicts law).

34. See, e.g., Taubenschlag, *supra* note 33, at 366 (noting that "the local Egyptian court of the laocrites" was competent to hear cases between Egyptians as well as between Greeks and Egyptians provided the contract was Egyptian); Yntema, *supra* note 33, at 300-01 (discussing the history of conflicts law).

35. See Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 *U. PA. J. INT'L ECON. L.* 193, 199 (2005) (discussing the *ius gentium*).

36. *Id.*

37. *Id.*

38. *Id.*

system of private law (*ius gentium*) that, by the third century A.D. effectively replaced or merged with the *ius civile*.<sup>39</sup> Thus, toward the end of the Western Roman Empire, the Romans had, effectively, moved toward applying the same set of laws to every free person within the empire.

Around the sixth century A.D. (after the fall of the Western Roman Empire),<sup>40</sup> Rabbi Nahman, writing in the Babylonian Talmud, adopted a choice of law rule under which the law of the husband's residence applied to a dispute over the ketubah<sup>41</sup> between a woman from Mehoza and her husband from Neharde'a.<sup>42</sup>

As we turn to English history, we see the development of "personal law"—the principle that "the law of the community to which a person belongs determines the law applied to the person and his or her transactions."<sup>43</sup> This type of law is quite similar to that seen in the early days of the Roman Empire as applied to peregrines.<sup>44</sup> Personal law arose because England had "a multiplicity of local communities [that] enforced their laws."<sup>45</sup> For example, King Alfred's (848/49-899) laws noted the existence of different laws in Mercia, Wessex, and Kent.<sup>46</sup> Similarly, "Edgar (959-75) and his descendants admitted the right of the Danes to their own laws."<sup>47</sup> In 1020, King Cnute (990-1035) beseeched his people to obey both ecclesiastic law and secular law.<sup>48</sup> Later that century, the laws of William the Conqueror (1028-1087) established "that England was or had been divided between three laws, the West-Saxon, the Mercian and the Danish."<sup>49</sup> The Normans also introduced the notion of "trial by battle" into England,<sup>50</sup> but, by the reign of Henry I (1068-1135), London, Winchester, and

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39. *Id.* at 200.

40. The Western Roman Empire ended in 476 A.D. See Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L. REV. 389, 411 (1996) (discussing the notary profession in Europe during the Middle Ages).

41. Under Jewish law, a ketubah is a marriage contract given by a husband to his wife that lists his (and, upon his death, his estate's) financial obligations to her. See WILLIAM F. PATRY, 7 PATRY ON COPYRIGHT § 25.4 (March 2020) (discussing the origin of choice of law in the Talmud).

42. See The William Davidson Talmud, *Ketubot* 54a, available at <https://www.sefaria.org/Ketubot.54a?lang=bi> [<https://perma.cc/HT43-GETG>] (providing guidance on what law to use in enforcing a marriage contract between a wife from one jurisdiction and her husband's estate where the husband was from another jurisdiction). The Babylonian Talmud was compiled around the sixth century C.E. See, e.g., *Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter*, 492 U.S. 573, 3095 n.13 (1989) (explaining that the Babylonian Talmud "is a collection of rabbinic commentary on Jewish law that was compiled before the sixth century").

43. MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 7 (1991).

44. See *supra* text accompanying notes 35-39.

45. CONSTABLE, *supra* note 43, at 7.

46. *Id.* at 8.

47. *Id.*

48. See HEINRICH BRUNNER, *THE SOURCES OF ENGLISH LAW* 12 (Ernst Freund trans., 1908) (discussing the decrees of the Code of Cnute).

49. F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 3 (1908).

50. See JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW* 39 (1898) (discussing trial by battle).



Lincoln were granted exceptions from it.<sup>51</sup>

The geographic nature of personal law in England was further entrenched by the existence of local courts.<sup>52</sup> Before the Norman Conquest, each shire had its own shire moot (court of justice).<sup>53</sup> Following the Conquest, these shire moots became county courts<sup>54</sup> that applied geographically local customs in judging disputes and applying the law.<sup>55</sup>

The 1353 Statute of the Staple shows how the idea that one's geographic origin point matters in what law is applicable was expanded to include the idea that a jury should fairly represent the geographic origin of the parties.<sup>56</sup> According to the 1353 Statute:

[i]f a plea or dispute shall be moved before the mayor of the staple between the merchants or officials of the same, and in order to try the truth in this matter an inquest or proof shall be taken, we will that if both parties are foreign, it shall be tried by foreigners; and if both parties are denizens, it shall be tried by denizens, and if one party is denizen and the other alien, the one half of the inquest or proof shall be of denizens and the other half of aliens.<sup>57</sup>

Thus, the Statute of the Staple required the makeup of the jury to, in some way, reflect the geographic origin (foreigner/denizen) of the litigants. The Statute of the Staple's requirement of a trial of one-half citizens and one-half aliens for mixed litigant cases was extended the following year to all foreigners<sup>58</sup> and for any jury on any court.<sup>59</sup> This type of mixed jury acquired the name "jury *de medietate linguae*" in the sixteenth century.<sup>60</sup>

The jury *de medietate linguae* was also applied when the parties were from the same geographic location but were different in, what was considered at the time, some "relevant" way.<sup>61</sup> For example, during the High Middle Ages in England, Jewish people move to England and undertook key economic roles in English society.<sup>62</sup> To protect Jewish people from bias by all-Christian juries,

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51. *Id.* at 40 (noting that battle by trial was "a novel and hated thing in England" and that the exception permitted proof by oath and battle).

52. *See* CONSTABLE, *supra* note 43, at 11 (discussing various courts and their recognition of relevant customs).

53. *See* MAITLAND, *supra* note 49, at 39 (discussing territorial divisions in England).

54. *Id.* at 42.

55. *See* CONSTABLE, *supra* note 43, at 11.

56. *Id.* at 97 (discussing the Statutes of Edward III).

57. Statutes of the Staple, 1353, 27 Edw. 3, stat. 2, § 12.

58. *See* CONSTABLE, *supra* note 43, at 98 (discussing the Statute of the Staple).

59. *Id.* at 100 (discussing the Statute of the Staple).

60. *Id.* at 112 (discussing the jury *de medietate linguae*).

61. *Id.*

62. Prior to the Norman Conquest of England in 1066, there is little evidence of Jewish people residing in England and even less evidence of a settled community. At the same time, there

Jewish people were given a right to a jury *de medietate linguae*—a jury that was one-half Jewish.<sup>63</sup> When the Jewish population was expelled from England in 1290, foreign merchants replaced them as financial agents of the King.<sup>64</sup> This change did not produce specialized merchant law, merchant courts, or adjudicative procedures.<sup>65</sup> Instead, foreign merchants were extended the right to trial by jury *de medietate linguae*—a jury with half of the jurors being from the same country as the foreign merchant—until 1870 when Parliament eliminated the right.<sup>66</sup>

The jury *de medietate linguae* was used in the American Colonies and was known to the Framers. For example, a 1674 Massachusetts trial (which led to King Philip's war)<sup>67</sup> concerning three Native Americans accused of murdering another Native American was held with a mixed jury of White and Native American jurors.<sup>68</sup> Although here, unlike in the standard jury *de medietate linguae*, the role of the Native American jurors was different from that of the White jurors—the Native American jurors “were to perform only auxiliary duty, ‘to be with the said jury, and to heelp to consult and advice with, of, and concerning the premises.’”<sup>69</sup>

In 1783, the Pennsylvania Court of Oyer and Terminer granted a trial *per medietatem lingua*.<sup>70</sup> The Court so granted the trial because “[t]he first legislature under the Commonwealth, has clearly fixed the rule, respecting the extension of British statutes, by enacting, that ‘such of the statutes as have been in force in the late province of Pennsylvania, should remain in force, till altered by the Legislature’” and such a trial right both existed under British rule and

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were robust Jewish communities in continental Europe including lands in France that were part of William the Conqueror's possessions. Following the Norman Conquest in 1066 A.D., Jews began to move to England and play a role in the trades and as financial agents for the King. See, e.g., Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 783 (1994) (discussing the arrival of Jews in medieval England); CECIL ROTH, *A HISTORY OF THE JEWS IN ENGLAND* 3-4 (3rd ed. 1964) (discussing the arrival of Jews in England after the Norman Conquest); ALBERT M. HYAMSON, *A HISTORY OF THE JEWS IN ENGLAND* 1-7 (1908) (discussing the role of Jewish people in England after the Norman Conquest).

63. See Ramirez, *supra* note 62, at 783-84 (discussing the history of Jewish people in England from the period of the Norman conquest to the expulsion of all Jewish people from England in 1290).

64. *Id.* at 784 (discussing the expulsion of Jewish people from England).

65. *Id.* at 785 (discussing the treatment of alien merchants by English courts).

66. *Id.* at 784-87 (providing an overview of the treatment of foreign merchants by the English courts and the elimination of the trial by jury *de medietate linguae*).

67. Yasuhide Kawashima, *The Pilgrims and the Wampanoag Indians, 1620-1691: Legal Encounter*, 23 OKLA. CITY U. L. REV. 115, 119 (discussing how the colonists became more aggressive in expressing their jurisdiction over legal matters).

68. See Mr. Easton of Roade Island, *A Relacion of the Indyan Warre 1675*, in ORIGINAL NARRATIVES OF EARLY AMERICAN HISTORY 7-8 & n.3 (J. Franklin Jameson ed., 1913) (noting that “[t]he jury trying the accused consisted of four Indians and twelve whites”).

69. Kawashima, *supra* note 67, at 130 (quoting VI Records of the Colony of New Plymouth in New England 98 (Heritage Books 1998) (1855)).

70. See *Respublica v. Mesca*, 1 U.S. 73, 75 (1783) (granting trial *per medietatem lingua*).

had not been abrogated in Pennsylvania.<sup>71</sup>

In addition, Kilty notes that the right to a jury *de medietate linguae* was applicable in Maryland in the eighteenth century.<sup>72</sup> For example, in 1748, in Maryland, a trial for murder was tried under a jury of one-half aliens and one-half citizens after the defendant claimed he was a foreigner.<sup>73</sup> By 1789, the right to a trial *per medietatem linguae* was eliminated in Maryland by statute.<sup>74</sup>

The framers of the U.S. Constitution were well aware of the Greek and Roman legal traditions,<sup>75</sup> the practices of the English courts,<sup>76</sup> and the idea of a jury *de medietatem linguae*. For example, James Madison received a letter from Thomas Jefferson contending that jury trials may be inappropriate for “disputes between a foreigner and a native,” but if trial by jury must be used, then “the remedy will be to model the jury by giving the *medietas linguae* in civil as well as criminal cases.”<sup>77</sup>

The idea that one’s geographic origin (one’s place of domicile or residence) matters in what law should be applied and how justice should be administered has been present throughout recorded history. Sometimes, as in the case of Hittite king Hattusili III’s edict, the goal seems to be to protect commercial interests from the natural intrigues that arise when merchants deal with

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71. *Id.* at 74 (noting that “it appears in evidence that . . . a trial *per medietatem lingua* was allowed, in the case of a burglary committed by one Ottenreed, in the mansion house of Mr. Clifford.”).

72. See WILLIAM KILTY, A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES 152, 157 (1811) (discussing statutes made at Westminster in 1357 AD including that “[a]n inquest shall be *de medietate lingua*, where an alien is party”).

73. *Id.* at 152.

74. *Id.* (quoting The Act of 1789, Ch. 22, S. 5).

75. See, e.g., Notes of James Madison (June 6, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 135 (Max Farrand ed., 1911) [hereinafter Farrand] (discussing Greek and Roman class conflict); Notes of James Madison (July 7, 1787), in Farrand, at 553 (noting Governor Morris’ point that the unity of ancient Greece was hampered by the retention of local sovereignty); Melancton Smith, Speech to the N.Y. Convention (June 20, 1788), in 1 DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 195, 232-33 (Jonathan Elliot ed., 1827) [hereinafter DEBATES] (noting that, in both ancient Sparta and Rome, the people were used to a government run by a small group of nobles and that Americans were not).

76. See, e.g., Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 535 (discussing how the English corporate law influenced and developed into the American practice of judicial review); Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WAS. L. REV. 495, 525 (1983) (“In drafting article III, the framers were no doubt influenced by the traditional practices of local courts in England”); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 834 n.12 (1989) (“In addition to natural law, the Framers were likely influenced by English parliamentary and colonial practice”).

77. Letter from Thomas Jefferson to James Madison (July 31, 1788), NATIONAL ARCHIVES, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-13-02-0335> (last visited Oct. 16, 2021) [<https://perma.cc/7DE4-JALQ>].

different, and competing, states.<sup>78</sup> At other times, as in the case of the jury *de medietate linguae*, the State has been concerned that parties to the transaction will be disadvantaged through cultural misunderstanding, lack of knowledge, or bias against the alien or foreign litigants. And, for long-lasting empires, like the Western Roman Empire (and, based on the results from the Study discussed *infra* Part IV, the United States), the idea of personal law and geographic bias fades over time as the separate pieces of empire knit together to form a single, unified entity.<sup>79</sup> Sadly, because we lack any information as to the intent of the law, we are limited to mere speculation.

### *B. From the Founding to the Present*

Thus far, we have examined the role one's geographic origin played in the history of the law and judicial systems prior to the founding of the United States. Because of a lack of evidence as to the intent of those laws, we can only speculate as to why states and empires created special rules for aliens and foreigners. This changes as we turn to the American experience where we have ample textual evidence explaining the rationale for federal diversity jurisdiction and why the Diversity Clause was included in the U.S. Constitution.<sup>80</sup>

This subsection reviews the textual record relating to the rationale for diversity jurisdiction from (1) the Constitutional Convention of 1787, (2) the state ratification conventions, (3) the legislative history of the Diversity Clause as enacted in law, (4) seventeen U.S. Supreme Court opinions, and (5) scholarly works. Combined, this record demonstrates that concern over the negative impact of geographic bias on out-of-state litigants is the rationale for diversity jurisdiction.

*1. An Unexplained Birth.*—The Constitution, as adopted and promulgated by the Constitutional Convention of 1787, includes the Diversity Clause.<sup>81</sup> Such inclusion entails that the Framers were concerned about the treatment of out-of-state litigants in state courts.<sup>82</sup> But, relative to its inclusion in the draft of the Constitution as promulgated by the Convention, that is all we know. The records of the proceedings of the Convention are silent as to why the Diversity Clause was included in the Constitution.<sup>83</sup>

This absence of justification for the Diversity Clause may be due, in part, to the secrecy rules adopted by the Convention,<sup>84</sup> which have resulted in there

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78. See Yaron, *supra* note 16, at 71-72 (explaining Clause II of the edict).

79. *Id.*

80. See discussion *infra* Sections II.B.2-4.

81. See U.S. CONST. art. III, § 2.

82. See *id.* (extending the judicial power to disputes between citizens of different states).

83. See *infra* notes 84-89, 100-02 and accompanying text.

84. Those rules required “[t]hat no copy be taken of any entry on the journal during the sitting of the House without the leave of the House. That members only be permitted to inspect the journal. That nothing spoken in the House be printed, or otherwise published, or communicated

being limited information about the proceedings of the Convention.<sup>85</sup> One source of such information is the notes taken by James Madison of the debates at the Convention<sup>86</sup> which were published in 1840.<sup>87</sup> Additional information about the proceedings can be found in diary entries from Robert Yates, Rufus King, James McHenry, and Alexander Hamilton, as well as in the *Journal* which is primarily “a calendar of resolutions and votes.”<sup>88</sup> Unfortunately, these records do not provide any explanation for why the Diversity Clause was proposed and adopted.<sup>89</sup>

A version of the Diversity Clause first appears in the Virginia Plan proposed by Governor Edmund Randolph<sup>90</sup> which states:

[T]hat the jurisdiction of inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas; captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.<sup>91</sup>

Given Governor Randolph’s inclusion of a diversity clause in the Virginia Plan, it is, at first, surprising to find that, on June 13, 1787, he proposed a resolution

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without leave.” See 1 Farrand, *supra* note 75, at 15 (providing the *Journal* entry from Tuesday May 29, 1787).

85. See William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 197-98 (2012) (discussing the Convention of 1787).

86. *Id.* at 198; see also 3 Farrand, *supra* note 75, at 421 (stating, in a letter of Jefferson to Adams of August 10, 1815: “Do you know that there exists in manuscript the ablest work of this kind ever yet executed, of the debates of the constitutional convention of Philadelphia in 1788? The whole of every thing said and done there was taken down by Mr. Madison, with a labor and exactness beyond comprehension.”).

87. William Ewald and Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 3 PA. MAG. OF HIST. & BIOGRAPHY 227, 229 (2011) (discussing the proceedings of the Constitutional Convention). The official *Journal* of the Convention was published in 1819, “it was not deeply information [because it] contained little more than a record of the formal votes.” *Id.*

88. See *id.* at 197.

89. See *supra* notes 84-89, 100-02 and accompanying text.

90. While a number of plans for a federal judiciary were proposed at the Constitutional Convention only the Virginia Plan included a reference to what we would call diversity jurisdiction. See James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 1-2 (1964) (discussing the history of the Diversity Clause) (emphasis added). See also Justice Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 485 (1928) (noting that “[t]he textual history of the diversity clause begins with the introduction of certain resolutions by Randolph on May 29, 1787”).

91. *Variant Texts of the Virginia Plan, Presented by Edmund Randolph to the Federal Convention, May 29, 1787, text A, reprinted in* Charles C. Tansill, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 955 ¶ 9 (1927) (emphasis added).

to the Committee of the Whole House<sup>92</sup> that both limited national jurisdiction and excluded a diversity clause.<sup>93</sup> This resolution passed.<sup>94</sup> Then, on July 18, 1787, he made a motion limiting national jurisdiction that also excluded language relating to diversity jurisdiction.<sup>95</sup> That motion passed.<sup>96</sup>

It is likely that Governor Randolph proposed these limited versions of national judicial power in order to avoid unproductive debate at the Convention and move the issue to a sub-committee (“the Committee of the Detail”)<sup>97</sup> which could more easily work out the scope of the national judicial power.<sup>98</sup> This conclusion is supported by the Committee of Detail producing a draft of the Constitution with a broader scope of national jurisdiction than in Governor Randolph’s June 13 and July 17 motions, and that included the Diversity Clause.<sup>99</sup>

As with the Convention in general, the records relating to the discussions of the Committee of Detail are extremely limited and are primarily found in the papers of James Wilson (“the Wilson Papers”).<sup>100</sup> While the versions of the U.S. Constitution in the Wilson Papers do include copies of the Diversity Clause<sup>101</sup> they do not provide any evidence as to why the Diversity Clause was included.<sup>102</sup>

Given the total lack of information as to the purpose of the Diversity Clause as proposed during the Convention, we must turn to later records relating to it

92. The Committee of the Whole was the same as the Convention except, when acting as the Committee of the Whole the parliamentary rules were more flexible than the Convention. Ewald, *supra* note 85, at 199 & n.4 (discussing the rationale for a break in the Convention’s work and delegation of that work to the Committee of Detail).

93. *See id.* at 223-24 (limiting national jurisdiction “to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony.”).

94. *See id.*

95. *See* 2 Farrand, *supra* note 75, at 39 (proposing “[t]hat the jurisdiction of the national Judiciary shall extend to cases arising under the laws passed by the general Legislature, and to such other questions as involve the National peace and harmony”).

96. *See id.*

97. *Id.* at 23. The Committee of Detail was created by the Constitutional convention to take the Resolutions passed by the Convention and work them into a draft Constitution. There were five Committee members: Nathaniel Gorham, Oliver Ellsworth, James Wilson, Edmund Randolph, and John Rutledge. *See* Ewald, *supra* note 85, at 202-03 (discussing the formation of the committee).

98. *See* Farrand, *supra* note 75, at 238 (stating Governor Randolph’s observation of how difficult it was to establish the powers of the judiciary and that “once established, it will be the business of a sub-committee to detail it”).

99. *See id.*, at 172-73 (noting that the jurisdiction of the Supreme Court shall extend to disputes between citizens of different states and that “[t]he Legislature may assign any part of th[is] Jurisdiction . . . in the Manner and under the Limitations which it shall think proper to such inferior courts as it shall constitute from Time to Time”).

100. *See* Ewald, *supra* note 85, at 204-08 (discussing the history of documents relating to the Committee of Detail).

101. 2 Farrand, *supra* note 75, at 147, 173.

102. *See generally id.* at 129-89.

to understand the rationale for including it in the Constitution.

2. *Early Expressions of the Rationale for Diversity Jurisdiction.*—While the records of the Constitutional Convention of 1787 are silent as to the rationale for including the Diversity Clause in the Constitution, the state ratification conventions provide considerable insight. The issue of diversity jurisdiction formed a minor part of the debates on federal judicial power which primarily focused on concerns about (1) federal courts lacking a right to jury trial,<sup>103</sup> (2) plaintiffs using the difficulty (and expense) of defendants traveling to distant federal courts to gain an unfair advantage in litigation,<sup>104</sup> (3) the difficulty in determining venue and choice of law,<sup>105</sup> (4) federal judges lacking understating of state law,<sup>106</sup> and (5) the possibility that the federal courts would eliminate the need for state courts.<sup>107</sup> The portion of the debates that related to the Diversity

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103. See, e.g., Commonwealth of Massachusetts Recommendations for Alterations and Provisions to be Introduced into the Constitution, 2 DEBATES, *supra* note 75, at 177 (recommending modification of the Federal Constitution to require that “[i]n civil actions between citizens of different states, every issue of fact, arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it.”); State of New Hampshire Recommendations for Alterations and Provisions to be Introduced into the Constitution, 1 DEBATES, *supra* note 75, at 326 (recommending that the Constitution include the clause that “In civil actions between citizens of different states, every issue of fact, arising in actions at common law, shall be tried by jury, if the parties, or either of them, request it”); Letter of Richard Henry Lee to Governor Randolph of Virginia, 1 DEBATES, *supra* note 75, at 503-05 (raising the concern that federal courts lack a jury right); Remarks of Mr. Thomas M’Kean Delegate to the Convention of the State of Pennsylvania, 2 DEBATES, *supra* note 75, at 539-40 (noting that “trial by jury is the best mode that is known”). We also find objection to the National Judiciary’s lack of a right to a jury in the newspapers. For example, in the October 10th, 1787 “Letter of a Federal Farmer” the anonymous author raises concerns that trials in State courts would be before a jury but, absent legislation by the federal Congress, those same actions brought in Federal Courts would, primarily, not be before a jury. See The Federal Farmer, LETTER III, OCTOBER 10, 1787, available at [https://www.gutenberg.org/files/47110/47110-h/47110-h.htm#Page\\_134](https://www.gutenberg.org/files/47110/47110-h/47110-h.htm#Page_134) [<https://perma.cc/JC54-UGAZ>].

104. See e.g., Letter of Richard Henry Lee to Governor Randolph of Virginia, 1 DEBATES, *supra* note 75, at 503-05 (raising the concern that cases will “be tried in a distant court”); Remarks of Mr. George Mason Delegate to the Convention of the Commonwealth of Virginia, 3 DEBATES, *supra* note 75, at 526 (noting the ease with which choosing a federal court far from the defendant’s home could “involve you in trouble and expense”); Remarks of the Honorable Samuel Spencer Delegate to the Convention of the State of North Carolina, 4 DEBATES, *supra* note 75, at 138 (noting that in diversity actions brought in federal court “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”).

105. Remarks of Mr. Patrick Henry Delegate to the Convention of the Commonwealth of Virginia, 3 DEBATES, *supra* note 75, at 542 (asking “in what courts are they to go and by what law are they to be tried ? Is it by a law of Pennsylvania or Virginia? Those judges must be acquainted with all the laws of the different states.”).

106. See *id.*

107. See e.g., State of New Hampshire Recommendations for Alterations and Provisions to be Introduced into the Constitution, 1 DEBATES, *supra* note 75, at 326 (proposing that “[a]ll common-law easements between citizens of different states shall be commenced in the common-law courts of the respective states”); Remarks of Mr. Madison a Member of the Federal Convention before the Convention of the Commonwealth of Virginia, 3 DEBATES, *supra* note 75, at 537-38

Clause were narrowly focused on concerns about geographic bias including concerns that geographic bias would harm commercial interests.

This concern with geographic bias is evident in the remarks of Mr. James Wilson, a member of the Federal Convention and delegate to the Pennsylvania Convention,<sup>108</sup> who notes that trust in the inter-state commercial system requires something like an impartial (federal) judicial system:

[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? It is true that, under this Constitution, these particular iniquities may be restrained in future; but, sir, there are other ways of avoiding payment of debts. There have been instalment acts, and other acts of a similar effect. Such things, sir, destroy the very sources of credit. Is it not an important object to extend our manufactures and our commerce? This cannot be done, unless a proper security is provided for the regular discharge, of contracts. This security cannot be obtained, unless we give the power of deciding upon those contracts to the general government.<sup>109</sup>

James Madison, despite thinking diversity jurisdiction was a matter of little concern,<sup>110</sup> also noted that it was necessary to avoid the possibility of “a strong prejudice . . . in some states[] against the citizens of others[] who have claims against them.”<sup>111</sup> Madison further argues that avoiding local prejudice will be favorable to the commercial interests of the states:

Let me observe that, so far as the judicial power may extend to controversies between citizens of different states, and so far as it gives them power to correct, by another trial, a verdict obtained by local

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(responding to concerns that the federal “this jurisdiction would extend to all cases, and annihilate the state courts”); Remarks of Mr. Patrick Henry Delegate to the Convention of the Commonwealth of Virginia, 3 DEBATES, *supra* note 75, at 542 (replying to Mr. Madison by stating that “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.”).

108. *See* 2 DEBATES, *supra* note 75 (listing Mr. Wilson as “a Member of the Federal Convention”); *see id.* at 415 (listing James Wilson as one of the delegates for the Convention).

109. Remarks of Mr. James Wilson James Delegate at the Convention of the State of Pennsylvania, 2 DEBATES, *supra* note 75, at 491-92.

110. *See* Remarks of James Madison a Member of the Federal Convention before the Convention of the Commonwealth of Virginia 3 DEBATES, *supra* note 75, at 533 (stating that “[a]s to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance.”)

111. *Id.*



prejudices, it is favorable to those states which carry on commerce. There are a number of commercial states which carry on trade for other states. Should the states in debt to them make unjust regulations, the justice that would be obtained by the creditors might be merely imaginary and nominal. It might be either entirely denied, or partially granted. This is no imaginary evil. Before the war, New-York was to a great amount a creditor of Connecticut: While it depended on the laws and regulations of Connecticut, she might withhold payment. If I be not misinformed, there were reasons to complain. These illiberal regulations and causes of complaint obstruct commerce. So far as this power may be exercised, Virginia will be benefited by it.<sup>112</sup>

This focus on geographic bias is also present in the remarks of Mr. Edmund Pendleton, President of the Convention of Commonwealth of Virginia:<sup>113</sup>

But the principal objection of that honorable gentleman was, that jurisdiction was given it in disputes between citizens of different states. I think, in general, those decisions might be left to the state tribunals; especially as citizens of one state are declared to be citizens of all. I think it will, in general, be so left by the regulations of Congress. But may no case happen in which it may be proper to give the federal courts jurisdiction in such a dispute? Suppose a bond given by a citizen of Rhode Island to one of our citizens. The regulations of that state being unfavorable to the claims of the other states, if he is obliged to go to Rhode Island to recover it, he will be obliged to accept payment of one third, or less, of his money. He cannot sue in the Supreme Court, but he may sue in the federal inferior court; and on judgment to be paid one for ten, he may get justice by appeal. Is it an eligible situation? Is it just that a man should run the risk of losing nine tenths of his claim? Ought he not to be able to carry it to that court where unworthy principles do not prevail?<sup>114</sup>

We also see allusion to geographic bias in the remarks of Mr. William Grayson: “[b]ut, Sir, the citizens of different states are to sue each other in these courts. No reliance is to be put on the state judiciaries. The fear of unjust regulations and decisions in the states is urged as the reason of this

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112. 3 DEBATES, *supra* note 75, at 535.

113. *See* 3 DEBATES, *supra* note 75 (listing President and speakers’ names).

114. *See* Remarks of Mr. Edmund Pendleton, President of the Convention of the Commonwealth of Virginia, 3 DEBATES, *supra* note 75; Remarks of James Madison a Member of the Federal Convention before the Convention of the Commonwealth of Virginia 3 DEBATES, *supra* note 75, at 549.

jurisdiction.”<sup>115</sup>

Mr. Davie, a delegate to the North Carolina Convention, noted that diversity jurisdiction supported the need for impartiality and linked that impartiality with commercial interests:

The security of impartiality is the principal reason for giving up the ultimate decision of controversies between citizens of different states. It is essential to the interest of agriculture and commerce that the hands of the states should be bound from making paper money, instalment laws, or pine-barren acts. By such iniquitous laws the merchant or farmer may be defrauded of a considerable part of his just claims. But in the federal court, real money will be recovered with that speed which is necessary to accommodate the circumstances of individuals. The tedious delays of judicial proceedings, at present, in some states, are ruinous to creditors. In Virginia, many suits are twenty or thirty years spun out by legal ingenuity, and the defective construction of their judiciary. A citizen of Massachusetts or this country might be ruined before he could recover a debt in that state. It is necessary, therefore, in order to obtain justice, that we recur to the judiciary of the United States, where justice must be equally administered, and where a debt may be recovered from the citizen of one state as soon as from the citizen of another.<sup>116</sup>

When discussing federal diversity jurisdiction, the delegates to the state ratification conventions agree that diversity jurisdiction was included in the federal judicial power as an antidote to geographic bias. Thus, the early view was that the rationale for diversity jurisdiction was to avoid geographic bias.

3. *Congress's Concerns.*—The legislative record also supports the views expressed at the state ratification conventions—diversity jurisdiction is based on the goal of remedying the ills of geographic bias. The Constitution does not itself create courts that could exercise diversity jurisdiction; instead, it grants such power to Congress.<sup>117</sup> Congress, through the Act of September 24, 1789, created diversity jurisdiction and granted circuit courts original jurisdiction over:

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115. Remarks of Mr. William Grayson, Delegate to the Convention of the Commonwealth of Virginia, 2 DEBATES, *supra* note 75, at 415; *see also*, Remarks of James Madison, Member of the Federal Convention before the Convention of the Commonwealth of Virginia 3 DEBATES, *supra* note 75, at 566.

116. Remarks of Mr. Davie, Delegate to the Convention of the State of North Carolina, 4 DEBATES, *supra* note 75; Remarks of James Madison, a Member of the Federal Convention before the Convention of the Commonwealth of Virginia, 3 DEBATES, *supra* note 75, at 159.

117. *See* U.S. CONST. art. III, §§ 1 & 2 (creating the federal judicial power which “shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish” and providing that Congress could grant those courts jurisdiction over “Controversies . . . between Citizens of different States”).

all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.<sup>118</sup>

The early legislative history of diversity jurisdiction provides no direct insight into its purpose. But, by the mid-nineteenth century, the legislature began to undertake action, and create a record, that demonstrated that diversity jurisdiction was intended to counter geographic bias. For example, in 1867, Congress modified diversity removal jurisdiction to include any situation where the litigant “has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit.”<sup>119</sup>

Changes in the late nineteenth century<sup>120</sup> resulted in a greatly expanded scope for diversity jurisdiction and produced a troubling (to Congress) increase in the caseload of the federal courts.<sup>121</sup> As a result, Congress, through the Act of March 3, 1887, restricted diversity jurisdiction<sup>122</sup> including: raising the amount-in-controversy requirement to \$2,000;<sup>123</sup> limiting the right to remove diversity

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118. Act of September 24, 1789, ch. 20, § 12, 1 Stat. 73, 78.

119. Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, 559.

120. For example, the Act of March 3, 1875 expanded diversity jurisdiction to allow suits to be brought in federal court in states other than the state of the citizenship of the litigants. Act of March 3, 1875, Ch. 137, § 1, 18 Stat. 470, 470. This allowed a suit by a plaintiff from New York to be filed in New Jersey against a defendant from Pennsylvania. The 1875 Act also allowed either the plaintiff or defendant to remove to federal court where there would be diversity jurisdiction. *See id.* at § 2 (providing “[t]hat any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds . . . the sum or value of five hundred dollars . . . in which there shall be a controversy between citizens of different States . . . either party may remove said suit into the circuit court of the United States for the proper district”). For multi-party suits in state court, the Act also allowed any one of the plaintiffs or defendants to remove the entire suit to federal court providing they could meet the requirements of diversity jurisdiction. *See id.* at § 2 at 471 (providing that “when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United State for the proper district”).

121. For example, in raising the amount-in-controversy requirement, the legislature expressed its goal of decreasing the load on the federal courts. *See* 18 Cong. Rec. 610, 613-14 (Jan. 13, 1887) (Remarks of Rep. Culberson) (noting both that the population of the United States had grown from 4 million in 1789 to 54 million in 1887 and that “[t]he amount of business of the country in the courts then and now sustain no comparison whatever.”).

122. *See* Moore & Weckstein, *supra* note 90, at 8 (discussing history of the diversity clause).

123. Act of March 3, 1887, Ch. 373, § 1, 24 Stat. 552, 552 (requiring that “the matter in dispute exceed[], exclusive of interest and costs, the sum or value of two thousand dollars . . . in which there shall be a controversy between citizens of different States”).

action to nonresident defendants;<sup>124</sup> and restricting venue to the district where a defendant was an inhabitant (not where he might be found), with the exception that in diversity suits only, venue was proper in the district of the residence of the plaintiff or the defendant.<sup>125</sup> Despite restricting access to diversity jurisdiction, Congress continued to allow removal from state courts when geographic bias would prevent the litigant from obtaining justice in the state court.<sup>126</sup>

In 1948, Congress eliminated the requirement to show geographic bias in order to remove a diverse case to federal court.<sup>127</sup> At the same time, Congress added a requirement that, regardless of diversity of citizenship, an action cannot be removed to federal court if the defendant is a citizen of the state in which the action was brought.<sup>128</sup> This change supports the proposition that diversity jurisdiction is intended to protect out-of-state litigants against in-state bias because in-state defendants are not subject to geographic bias and, as such, should not be allowed to remove to federal court even if the action otherwise meets the requirements of diversity jurisdiction.

In 1978, the Committee on the Judiciary submitted a report to the house of representatives in which it proposed eliminating diversity jurisdiction.<sup>129</sup> The Committee contended “that the abolition of diversity jurisdiction is an important step in reducing endemic court congestion and its insidious effects on litigants.”<sup>130</sup> The Committee also referenced the ongoing concern about geographic bias when it stated that in “*the committee’s view . . . it is doubtful that prejudice against an individual because he is from another State is any longer a significant factor in this country’s State courts.*”<sup>131</sup> Similarly, when the Federal Courts Study Committee<sup>132</sup> issued its report in 1990 it noted the ongoing concern with geographic bias “conced[ing] that [local bias in state courts] may be a problem in some jurisdictions, but we do not regard it as a compelling

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124. See Act of March 3, 1887, ch. 373, § 2, 24 Stat 553; Act of Aug. 13, 1888, ch. 866, § 2, 25 Stat. 434.

125. See Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552; Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433.

126. See Act of March 3, 1887, ch. 373, § 2, 24 Stat 553 (enacting legislation allowing removal from state court in action where the parties are diverse “when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant [sic] may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause”).

127. See Act of June 25, 1948, ch. 646, 62 Stat. 869, 937-38 (providing the text of section 1441 stating the types of actions removable); see Moore & Weckstein, *supra* note 90, at 10-11 (discussing the 1948 Act).

128. See Act of June 25, 1948, ch. 646, 62 Stat. 869, 938 (providing the text of section 1441(b) which states “[a]ny other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought”).

129. H.R. Rep. No. 95-893, at 1 (1978).

130. *Id.* at 2.

131. See *id.* at 4 (expressing opinion as to need for diversity jurisdiction) (emphasis added).

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

justification for retaining diversity jurisdiction.”<sup>133</sup>

As this review of the legislative history of diversity jurisdiction shows, Congress and those appointed by Congress to study diversity jurisdiction understand diversity jurisdiction to be a remedy for the problem of geographic bias. Such a result is consistent both with our evidence *supra* from the state ratification conventions and *infra* from the U.S. Supreme Court.

4. *The U.S. Supreme Court Agrees.*—Regardless of Congress’ or the Framers’ intent, starting with *United States v. Deveau* in 1809<sup>134</sup> and continuing through 2021 in *Texas v. California*,<sup>135</sup> the U.S. Supreme Court has made clear that the principal purpose of diversity jurisdiction is to prevent bias against out-of-state litigants in state court.<sup>136</sup> Such long-standing and consistent precedent strongly supports the view that avoiding geographic bias is the principal purpose of the Diversity Clause and the rationale for diversity jurisdiction.

The 1809 opinion of the Court in *Bank of U.S. v. Deveaux* is the earliest U.S. Supreme Court opinion linking diversity jurisdiction with the purpose of creating an impartial court.<sup>137</sup> The Bank of the United States brought suit in the Circuit Court for the District of Georgia to establish that the state of Georgia did not have the right to tax the bank.<sup>138</sup> The Court held that the federal judiciary was created out of the concern that state courts might not treat persons from

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133. See FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (1990).

134. See *United States v. Deveaux*, 9 U.S. 61, 87-88 (1809) (holding the purpose of diversity jurisdiction is to address fear of bias in the state court against out-of-state litigants).

135. See *Texas v. California*, 141 S. Ct. 1469 (2021) (mem.) (Alito, J., dissenting) (discussing diversity jurisdiction in the context of a hypothetical problem).

136. A chronological list, from earliest to most recent, of such cases includes: *United States v. Deveaux*, 9 U.S. 61, 87-88 (1809) (Marshall, Ch. J.) (holding that diversity jurisdiction primary intent is to avoid in-state bias against out-of-state litigants); *Pease v. Peck*, 59 U.S. 595, 599 (1855) (Grier, J.) (same); *Burgess v. Seligman*, 107 U.S. 20, 34 (1883) (Bradley, J.) (same); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (Gray, J.) (same); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) (Brandeis, J.) (same); *Guaranty Trust Co. of N.Y. v. York*, 362 U.S. 99, 111 (1945) (Frankfurter, J.) (same); *Nat. Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 622 (1949) (Rutledge, J., concurring) (noting that diversity jurisdiction was “designed to nullify” local prejudice); *McGautha v. California*, 402 U.S. 183, 261 n.11 (1971) (Brennan, J., dissenting) (discussing diversity jurisdiction in the context of the *Thibodaux* and *Mashuda* opinions); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 n.6 (1995) (Souter, J.) (recognizing “concern with local bias” in the creation of diversity jurisdiction); *Hertz Corp. v. Friend*, 559 U.S. 77, 85 (2010) (Breyer, J.) (holding that the basic rationale of diversity jurisdiction to protect litigants “from local prejudice against out-of-state parties”); *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (Thomas, J.); *Texas v. California*, 141 S. Ct. 1469 (2021) (mem.) (Alito, J., dissenting) (discussing diversity jurisdiction in the context of a hypothetical problem).

137. See *Bank of U.S. v. Deveaux*, 9 U.S. 61, 68 (1809) (Marshall, C. J.) (discussing how the Court’s jurisdiction is limited to “to controversies between citizens of different states”).

138. See Leo E. Strine, Jr. & Nicholas Walter, 91 NOTRE DAME L. REV. 877, 901-02 (2016) (discussing the U.S. Supreme Court decision in *Bank of U.S. v. Deveaux*).

other jurisdictions impartially.<sup>139</sup>

Forty-six years later, in 1855, in *Pease v. Peck*, where an action for debt had been objected to on the basis of the statute of limitations,<sup>140</sup> the court restated its view that diversity jurisdiction was intended to provide an impartial forum for out-of-state litigants.<sup>141</sup> In 1883, in *Burgess v. Seligman*, the Court, once again, expressed the view that avoidance of geographic bias lay at the heart of diversity jurisdiction.<sup>142</sup> Here the Court was asked to overturn the decision of the federal circuit court based, in part, on Missouri Supreme Court opinions that had reached a conclusion adverse to the federal circuit courts but that had been decided after the federal circuit court decisions.<sup>143</sup> In support of the federal court's right to independent judgment, the Court noted that "the very object of giving the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views[.]"<sup>144</sup> In *Barrow S.S. Co. v. Kane*, the Court argued that the federal courts had a right to decide a case in which the forum state lacked any statute granting the state jurisdiction over the matter.<sup>145</sup> In support of its argument that the federal courts had the right to hear such matters, the court noted that the "object" of the Diversity Clause was "to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides."<sup>146</sup>

The first twentieth-century case addressing avoidance of geographic bias as the rationale for diversity jurisdiction is *Erie Railroad Co. v. Tompkins*.<sup>147</sup> In *Erie*, the Court was asked to determine whether federal general law or the law of the Pennsylvania (the *situs* of the injury) should be applied in an action arising under tort law.<sup>148</sup> In concluding that the law of Pennsylvania should be applied, the Court noted that conflicts had arisen between federal and local decisions resulting in "grave discrimination by non-citizens against citizens" through the

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139. See *Deveaux*, 9 U.S. at 87 (noting that regardless of whether state tribunals will be fair to all parties, the federal courts were created due to concern that they will not be fair).

140. See *Pease*, 59 U.S. at 595 (providing the original cause of action).

141. See *id.* at 599 (holding that "[t]he theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners").

142. See *Burgess v. Seligman*, 107 U.S. 20, 32-33 (1883) (Bradley, J.).

143. See *id.*

144. See *id.* at 34.

145. See *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 105 (1898) (Gray, J.) (noting that the defendant steamship company, a foreign corporation, claimed that by engaging in business in New York it consented to being sued there "only as authorized by the statutes of the State").

146. See *id.* at 111.

147. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938) (Brandeis, J.).

148. See *id.* at 69-70.

strategic use of choice of venue.<sup>149</sup> In support of its decision, the Court compared this result to the rationale for the grant of diversity jurisdiction: “to prevent apprehended discrimination in state courts against those not citizens of the State.”<sup>150</sup>

Five years later, in *Burford v. Sun Oil Co.*, the Court decline to grant federal jurisdiction over a matter when the issue “so clearly involves basic problems of Texas policy” and, as a result, “equitable discretion should be exercised to give the Texas courts the first opportunity to consider them.”<sup>151</sup> In his dissent, Justice Frankfurter objected on the grounds that “the basic premise of federal jurisdiction based upon diversity of the parties’ citizenship is that the federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts.”<sup>152</sup> In arguing for this position, Justice Frankfurter noted that:

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. To avoid possible discriminations of this sort, so the theory goes, a citizen of a state other than that in which he is suing or being sued ought to be able to go into a wholly impartial tribunal, namely, the federal court sitting in that state.<sup>153</sup>

Justice Frankfurter then relied upon the view that diversity jurisdiction is a remedy to geographic bias when he argued that “[t]he Congressional premise of diversity jurisdiction is that the possibility of unfairness against outside litigants is to be avoided by providing the neutral forum of a federal court.”<sup>154</sup>

Two years later, *Guaranty Trust Co. of New York v. York* clarified whether the rule of *Erie v. Tompkins* required the federal courts, sitting in diversity, to apply the state statute of limitations in deciding an action.<sup>155</sup> In concluding that the statute of limitations was a substantive law such that the federal courts must apply it in deciding cases, the court relied on the basis for diversity jurisdiction—that it “is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias.”<sup>156</sup>

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149. *See id.* at 74-75 (noting that the rule in *Swift v. Tyson* “introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.”).

150. *See id.* at 74.

151. *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943) (Black, J.).

152. *Id.* at 336-37 (Frankfurter, J., dissenting).

153. *Id.* at 336.

154. *Id.* at 345.

155. *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 107-08 (1945) (Frankfurter, J.).

156. *Id.* at 111.

In *Angel v. Bullington*, the Court addressed the issue of whether a “judgment in the North Carolina [state] court precluded the right thereafter to recover on the same cause of action in the federal court.”<sup>157</sup> In holding that the federal court should not grant jurisdiction, the Court reasoned that a federal court acting under diversity jurisdiction cannot provide a remedy withheld under state law because to do so would prejudice local citizens, and such prejudice runs counter to diversity jurisdiction’s purpose of preventing discrimination against outsiders.<sup>158</sup> Two years later, the Court was required to address a circuit court decision, *Woods v. Interstate Realty Co.*, that conflicted with the holding in *Angel v. Bullington*.<sup>159</sup> In reversing that circuit court decision, the Court held that allowing federal courts—sitting in diversity—to hear matters that would be barred under state law “would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie Railroad Co. v. Tompkins* was designed to eliminate.”<sup>160</sup>

Justice Rutledge, concurring in *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*, which held that a plaintiff from the District of Columbia could commence an action in the federal court on the basis of diversity jurisdiction,<sup>161</sup> acknowledged that there was a “scholarly dispute over the substantiality of those local prejudices which, when the Constitution was drafted, the grant of diversity jurisdiction was designed to nullify.”<sup>162</sup> In another concurrence, here to *Lumbermen’s Mutual Casualty Co. v. Elbert*, Justice Frankfurter noted that the Constitutional “power of Congress to confer [diversity] jurisdiction was based on the desire of the Framers to assure out-of-state litigants courts free from susceptibility to potential local bias.”<sup>163</sup>

Justice Brennan (joined by Justices Douglas and Marshall) dissented to *McGautha v. California* and, in discussing how the Court has historically addressed unconstitutionally overbroad statutes, noted that:<sup>164</sup>

[t]aken together . . . Thibodaux and Mashuda may stand for the proposition that the possibility of bias that stands at the foundation of federal diversity jurisdiction may nevertheless be discounted if that bias could be given effect only through a decision that will have inevitable

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157. *Angel v. Bullington*, 330 U.S. 183, 186 (1947) (Frankfurter, J.).

158. *Id.* at 192.

159. *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (Douglas, J.).

160. *Id.* at 538.

161. *Nat’l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 603-604 (1949) (Rutledge, J., concurring).

162. *Id.* at 622.

163. *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring).

164. *McGautha v. California*, 402 U.S. 183, 185-86 (1971) (Harlan, J.).



repercussions on a matter of fundamental state policy.<sup>165</sup>

In *Iowa Mutual Insurance Co. v. LaPlante*, the Court was asked to determine if the District Court had jurisdiction when the tribal court in a prior-filed action had not ruled on its own jurisdiction.<sup>166</sup> In arguing its position, Iowa Mutual claimed that the underlying policies of diversity jurisdiction— incompetence and local bias—supported granting the federal courts jurisdiction.<sup>167</sup> The Court rejected this argument while recognizing the role of avoiding bias as a basis for the grant of diversity jurisdiction by noting that “the Indian Civil Rights Act, 25 U.S.C. § 1302, provides non-Indians with various protections against unfair treatment in the tribal courts.”<sup>168</sup>

The Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* addressed whether a tort action, arising from the Respondent driving piles into the riverbed above a freight tunnel, was within federal admiralty jurisdiction.<sup>169</sup> In discussing the Plaintiff’s argument, the Court notes, in dicta, that it is possible that the “first Congress saw a value in federal admiralty courts beyond fostering uniformity of substantive law, stemming, say, from a concern with local bias similar to the presupposition for diversity jurisdiction.”<sup>170</sup>

Discussing the history of the Court’s precedent relating to a corporation being a citizen of the state in which it was incorporated, in *Hertz Corp. v. Friend* the Court noted that the rule adopted “was at odds with diversity jurisdiction’s basic rationale, namely, opening the federal courts’ doors to those who might otherwise suffer *from local prejudice against out-of-state parties*.”<sup>171</sup> And, in *Home Depot U.S.A., Inc. v. Jackson*, the Court notes, in discussing that federal courts are courts of limited jurisdiction, that the purpose of diversity jurisdiction is to “provide[] a neutral forum for parties from different States.”<sup>172</sup>

Finally, in *Texas v. California*, Justice Alito dissented from the majority’s decision to deny the State of Texas’ motion to file a bill of complaint.<sup>173</sup> In so arguing, he relied upon a hypothetical in which a judge refused to grant diversity jurisdiction because the judge determined that the concerns about providing a neutral forum for out-of-state parties were no longer relevant.<sup>174</sup> Justice Alito noted that “[u]nlike the regional courts of appeals, the federal district courts, and the state courts, we are not tied to any region or State and were therefore

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165. *Id.* at 261 n.11 (Brennan, J., dissenting)

166. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 11 (1987) (Marshall, J.).

167. *Id.* at 18-19.

168. *Id.* at 19.

169. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 530 (1995) (Souter, J.).

170. *Id.* at 546 n.6.

171. *Hertz Corp. v. Friend*, 559 U.S. 77, 85 (Breyer J.) (emphasis added).

172. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (Thomas, J) (internal quotation marks omitted).

173. *Texas v. California*, 141 S. Ct. 1469 (Mem) (Alito, J., dissenting) (2021).

174. *Id.* at 1469.

entrusted with the responsibility of adjudicating cases where the suspicion of local bias may run high.”<sup>175</sup>

As these seventeen U.S. Supreme Court opinions make clear, diversity jurisdiction is, at its core, based on the fear of geographic bias and the desire to avoid it by providing a neutral forum for out-of-state litigants.

5. *Geographic Bias Is the Rationale for Diversity Jurisdiction.*—Diversity jurisdiction has been construed in the state ratification conventions, in its legislative history, and in the Supreme Court as being based on a desire to mitigate the effects of geographic bias. Legal scholars also agree that countering geographic bias is the rationale for diversity jurisdiction.<sup>176</sup> Having thus established geographic bias as the rationale for diversity jurisdiction, we now turn to demonstrating that geographic bias is not an issue in the state courts, and that diversity jurisdiction is no longer justified by its rationale.

### III. THE HISTORICAL EMPIRICAL EVIDENCE: SURVEYS OF ATTORNEYS

As we have seen, the state ratification conventions, Congress, the Supreme Court, and legal scholars agree that geographic bias is the rationale for federal diversity jurisdiction. The question this Article seeks to answer is whether that rationale is valid in today’s America. As we show in Part IV, our empirical study finds that it is not. Before reporting on the results of our empirical study, it will

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175. *Id.* at 1472.

176. In the absence of a record from the Framers, scholars have proposed several theories supporting diversity jurisdiction. *See, e.g.*, Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L. Q. 119, 123-24 (2003) (“Two major theories occupy the consensus positions as to the historical purpose of diversity jurisdiction. . . . [one is ] to protect out-of-state litigants from bias by state courts . . . [the other] is that state legislatures, rather than state courts, were biased at against commercial interests”); Stone Grissom, *Diversity Jurisdiction: An Open Dialogue in Dual Sovereignty*, 24 HAMLINE L. REV. 372, 374 (2001) (“There are two conventional and somewhat competing theories concerning the initial justifications for diversity jurisdiction”). One theory is that diversity jurisdiction is meant to counter prejudice and bias against out-of-state residents in state court. *See, e.g.*, Bassett, *supra* note 176, at 119-20 (“The traditional, most common explanation of diversity jurisdiction’s purpose is the protection of out-of-state litigants from local bias by state courts”). Another theory is that diversity jurisdiction arises out of a “perceived hostility by the state courts and legislatures toward commercial interests.” *See, e.g.*, Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEXAS L. REV. 79, 81 (1993) (noting that “the drafting and ratification history supports the conclusion that diversity was intended at least in part as a protection against aberrational state laws, particularly those regarding commercial transactions”); Justice Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 497-98 (1928) (noting that while “there was little cause to fear state tribunals would be hostile to litigants from other states,” the “commercial interests of the country were reluctant to expose themselves to the hazards of litigation before [state] courts”). A third is that diversity jurisdiction was part of “the Framers’ . . . desire to circumvent state court *juries* rather than state judges or legislatures.” *See* Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U.L. REV. 997, 1004 (2007) (emphasis added). Regardless of the theory, they all agree that diversity jurisdiction is intended to limit the effects of geographic bias.

be useful to examine previously completed empirical studies of geographic bias.<sup>177</sup>

All the empirical studies found by the Author date from between 30 and 60 years ago. And all but one of the surveys support the conclusion that attorneys believed, during that time, that geographic bias was a relevant factor in deciding whether to file in, or remove to, federal court. For example, in 1962, Summers surveyed eighty-two attorneys in the Eastern and Western Districts of Wisconsin.<sup>178</sup> Summers concluded that geographic bias was relevant to decisions about where to file but that it was not a leading factor (it was tenth out of fourteen factors).<sup>179</sup> The relatively low importance of geographic bias found in Summers' survey is countered by a survey taken at the same time, described in the *Virginia Law Review*, of 1,100 practicing attorneys in Virginia where geographic bias was found to be the second and third most-cited reasons for filing in federal court.<sup>180</sup>

The problem of not being able to pin down the importance of concerns about geographic bias also arose in later surveys. For example, Goldman and Marks surveyed "405 attorneys . . . from the metropolitan Chicago area,"<sup>181</sup> and found that, while "local bias" was cited as a reason among those attorneys filing in federal court 40% of the time, the relative importance of the factor was not captured due to the survey design.<sup>182</sup> Goldman and Marks also found that for attorneys filing in state court, "local bias" was a reason to file in federal court fifty-three percent of the time.<sup>183</sup> Unfortunately, that result was of no statistical value because of a low response rate (only nineteen out of 205 attorneys responded to the survey).<sup>184</sup>

While Goldman and Marks at least found some evidence that attorneys were concerned about geographic bias, Perlstein, in 1981, using survey data of

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177. A mature legal science benefits from the insight provided by well-designed empirical studies of legal phenomena. Kathryn Zeiler, *The Future of Empirical Legal Scholarship: Where Might We Go from Here?*, 66 J. LEGAL EDUC. 78, 80 (2016) (noting that empirical studies "contribute[] both to the development of a mature legal science, which aids in our endeavor to accurately describe and explain what we observe, and to informed policymaking") (internal quotation marks omitted).

178. Marvin R. Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 936-37 (1962) (discussing empirical study methodology).

179. *Id.* at 937-38.

180. *The Choice between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178, 178-79 & Table I (1965) (finding the second most cited reason for preferring federal court as a plaintiff was local prejudice against an out-of-state plaintiff and the third most cited reason for preferring state court as a plaintiff was local prejudice against an out-of-state defendant).

181. Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J.L. STUD. 93, 95 (1980).

182. *Id.* at 97-99.

183. *Id.* at 100.

184. *Id.* at 101.

attorneys' responses to hypothetical cases,<sup>185</sup> found no statistically significant evidence that attorneys believe state courts are biased against out-of-state litigants.<sup>186</sup>

Later surveys expanded the geographic reach of the regions surveyed and, as a result, helped clarify the scope and meaning of geographic bias. Bumiller, for example, surveyed "a random sample of attorneys . . . from diversity cases in four federal courts" and "a sample of attorneys [drawn from] corresponding state courts."<sup>187</sup> While there was evidence for the existence of geographic bias in her survey,<sup>188</sup> she concluded that the "bias influencing attorneys' decisions, unlike the original justification for diversity jurisdiction, is apparently neither regional bias nor particular hostility due to 'state' residence, but fear of favoritism to local interests."<sup>189</sup> In analyzing these results, Bumiller contends that a difference in the importance of geographic bias may be more prevalent in a rural setting than an urban setting because in the rural setting "fear of favoritism to local interests" is a larger problem.<sup>190</sup>

Miller used a greatly expanded geographic region in his survey by sampling attorneys who were "randomly selected from all removal cases filed in federal district courts during FY 1987."<sup>191</sup> He found geographic bias<sup>192</sup> but also that the prevalence of geographic bias against out-of-state defendants was regional and against anyone from outside the local area.<sup>193</sup>

In 1991, Flango surveyed attorneys from "the Eastern District of Texas, the Southern District of West Virginia, and the Northern District of Ohio."<sup>194</sup> He found that "[t]he most important items to *all* attorneys when considering choice of law forum are the overall competence of the judiciary and the non-residence status of the clients."<sup>195</sup> Seventy-one percent of the attorneys in the federal sample and sixty-three percent of the attorneys in the state sample considered non-resident status of their client to be a significant factor in choice of forum.<sup>196</sup>

Overall, these surveys support the conclusion that from the 1960s to the beginning of the 1990s, attorneys considered geographic bias as a factor in in

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185. Jolanta Juskiewicz Perlstein, *Lawyers' Strategies and Diversity Jurisdiction*, 3 L. & POL'Y Q. 321, 324 (1981).

186. *Id.* at 327.

187. See Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 L. & SOC'Y REV. 749, 753 (1980).

188. *Id.* at 760.

189. *Id.* at 761.

190. *Id.* at 760-761.

191. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 393 (1992) (describing the design of the study).

192. *Id.* at 408-10 (discussing results of study).

193. *Id.* at 410-11.

194. Victor E. Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41, 46 (1991).

195. *Id.* at 54.

196. *Id.* at 56.

choosing to file in federal or state court. We now turn to whether geographic bias remains a factor in forum choice.

#### IV. THE STUDY: EMPIRICAL EVIDENCE ELIMINATING THE RATIONALE

There are two central problems with the surveys discussed in Part III. First, they represent the views of attorneys from between thirty and sixty years ago and, therefore, do not represent the current state of affairs.<sup>197</sup> In addition, they were efforts to measure what factors attorneys *believed* they had previously used in choosing to file a diversity-eligible action in federal or state court.<sup>198</sup> As we know, there are many reasons that people can misreport why they chose a certain action in the past.<sup>199</sup> As such, the survey data provides only indirect, and potentially inaccurate, evidence from outside the current period as to whether geographic bias is a factor in forum choice. To avoid these problems, our study directly measures the underlying phenomena (filing and removal rates in the federal courts and a litigant's out-of-state status) to determine whether geographic bias is a factor in forum choice using data from over one million cases across the last thirty years.<sup>200</sup> Based on this analysis, we conclude that geographic bias is not currently an issue in diversity jurisdiction.

This Part proceeds in two steps. In Part IV Section A, we explain what data was used in the study. In Part IV Section B, we demonstrate that geographic bias is not a factor in forum choice in diversity actions in two ways. First, we establish that a litigant's out-of-state or in-state status has no statistically significant effect on filing or removal rates. This, by itself, establishes that geographic bias is not a factor in forum choice. Second, we engage in a thought experiment and assume, contrary to the facts, that the out-of-state or in-state status of litigants is a factor in forum choice. We then demonstrate that even if geographic bias were a factor in forum choice it would be a *de minimis* (irrelevant) factor. This result further supports the conclusion that geographic bias is not a factor in choosing to file in, or remove to, federal court.

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197. The earliest study was published in 1962. Summers, *supra* note 178. The most recent study related to "diversity cases filed in the statistical year ending June 30, 1990." Flango, *supra* note 194, at 47.

198. One survey looked at prospective cases using hypotheticals, but the logic remains. See Perlstein, *supra* note 185, at 324 (describing Perlstein's study using hypotheticals).

199. For example, surveys may be biased when the respondents "are concerned about how" their responses "would reflect on how they are viewed." ROBERT M. GROVES ET AL., SURVEY METHODOLOGY 52 (2004) (describing how respondents' reactions to questions about drug use may differ from the true answer). In our case, some attorneys may wish to appear more strategic than they are and therefore falsely claim consideration of geographic bias in their analysis of venue. In addition, because surveys are asking respondents to remember, we must take into account the failings of memory. See *id.* at 213-18 (discussing the need to recall information in answering questions from a survey and potential issues as to memory.).

200. See *infra* text accompanying notes 201-207 (discussing the data used in our study).

A. *One Million Records of Filings and Removals from 1990 to 2019*

The Federal Judicial Center (“FJC”) publishes data on federal filings and removals through the Administrative Office of the U.S. Courts’ Integrated Data Base.<sup>201</sup> This database comprises 9.3 million records corresponding to “civil case and criminal defendant filings and terminations in the district courts, along with bankruptcy court and appellate court case information” spanning the years 1901 to 2021.<sup>202</sup> For purposes of this study, we used this database<sup>203</sup> to create a dataset relating to federal civil actions (filings and removals) arising under diversity jurisdiction from 1990 to 2019.<sup>204</sup> Records relating to class actions and to actions that had county-code designations that did not match those in the U.S. Census data were removed from our dataset. This produced a dataset containing 1,059,564 records corresponding to 574,083 filings and 485,481 removals.

The data from the FJC database does not incorporate demographic information about a litigant (e.g., race, poverty status, or whether the individual lives in a rural or urban area).<sup>205</sup> As this demographic data is necessary to have an accurate model of filing and removal rates, we were required to find a source for that information. Relevant demographic information is available from the

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201. See FEDERAL JUDICIAL CENTER, *Integrated Database (IDB)*, <https://www.fjc.gov/research/idb> (last visited 12/7/2021) [perma.cc/M73F-EXJ6].

202. *Id.* While the dataset contains records with filing dates as early as 1901, given the small number of such files, and this Article’s interest in the present importance of geographic bias in diversity jurisdiction, records from cases filed prior to 1990 are ignored.

203. The layout and meaning of the data are described in two Codebooks. One codebook covers data from 1970 to 1987. FEDERAL JUDICIAL CENTER, INTEGRATED DATA BASE CIVIL CODEBOOK (Aug. 26, 1988), available at <https://www.fjc.gov/sites/default/files/idb/codebooks/Civil%20Codebook%201970-1987.pdf> [perma.cc/29YV-6TW7] [hereinafter “CODEBOOK 1970-87”]. The other codebook covers data from 1988 forward. FEDERAL JUDICIAL CENTER, INTEGRATED DATA BASE CIVIL CODEBOOK (Aug. 26, 1988), available at <https://www.fjc.gov/sites/default/files/idb/codebooks/Civil%20Codebook%201988%20Forward.pdf> [perma.cc/16GG-TMWG] [hereinafter “CODEBOOK 1988-2020”]. To limit the cases to only original proceedings, we must limit to just those cases whose “ORIGIN” field is set to 1. See, e.g., CODEBOOK 1988-2020, *supra* note 203, at 2-3 (explaining the meaning of the “ORIGIN” field).

204. In response to the rise in the infection and hospitalization rate for COVID-19, U.S. District Courts undertook several actions that could have affected filing and removal rates in unexpected and unknown ways. For example, On March 23, 2020, the United States District Court for the Northern District of Florida filed an administrative order that required “[i]n-person hearings, when possible, [to be] converted to telephonic or video conference hearings” and closed all Court locations to the public “except for those individuals who are required to attend in-person hearings, trials, or other necessary matters before the Court.” See *In re: Court Operations Under the Exigent Circumstances Created by Covid-19*, Administrative Order No. 4:95mc40111, N.D. Fla. 2-3 (Mar. 23, 2020). In addition, starting in mid-October 2020, a number of U.S. District Courts suspended jury trials and grand jury proceedings. See *Courts Suspending Jury Trials as Covid-19 Cases Surge*, U.S. CTS., (Nov. 20, 2020), <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge> [perma.cc/4B6R-AG7R] (discussing U.S. district court responses to Covid-19). Because these changes may affect filing and removal rates in unique and unknown ways, we limit our analysis to data from before 2020.

205. See generally CODEBOOK 1970-87, *supra* note 203; CODEBOOK 1988-2020, *supra* note 203.

U.S. Census Bureau and the National Center for Health Statistics but only at the level of the county and year.<sup>206</sup> As a result, in order to use the demographic data, it was necessary to aggregate the dataset from the FJC by county and year to make it conform to the demographic data. This produced a dataset with 94,299 entries relating to filings in federal court and 94,294 entries relating to removals from federal court. Each entry in this dataset contained a count of filings or removals in a given county and year. Data from the U.S. Census and National Center for Health Statistics was then used to add information as to the county's total population, percentage of population by race and ethnicity, poverty-rate, and rural-urban status in a given year. Finally, the counts of filings and removals were modified, respectively, to be filing rates per 1,000 people and removal rates per 1,000 people in a given year and county.<sup>207</sup>

### *B. Geographic Bias Is Dead*

Our empirical analysis is broken into three steps. In the first step, we explain the three models we use to measure the effect of geographic bias on filing and removal rates. In step two, we use regression analysis of these models to show that geographic bias is not a statistically significant factor for filing or removal rates. Finally, we assume what we know to be false—that geographic bias is a relevant factor—to measure how important a factor geographic bias could be relative to other factors in the model. As discussed *infra*, this part of the analysis shows that even if geographic bias were a statistically significant factor, it is a *de minimis* factor in the decision as to where to file in or to remove to federal court. From these results, we may confidently conclude that geographic bias is no longer a significant factor in forum choice in diversity actions.

1. *Three Models of Forum Choice.*—In order to measure the statistical significance<sup>208</sup> of geographic bias we must have a model that represents the

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206. See, e.g., U.S. CENSUS BUREAU, COUNTY INTERCENSAL TABLES 1980-1990, <https://www.census.gov/data/tables/time-series/demo/popest/1980s-county.html> [perma.cc/5CTB-MEHV] (follow “1980-1989” hyperlink to download the excel file for U.S. population by race from 1980 to 1989); CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS, NCHS URB.-RURAL CLASSIFICATION SCHEME FOR CNTYS., NCHSUrbruralcodes.xls, [https://www.cdc.gov/nchs/data/data\\_acces\\_files/NCHSURCodes2013.xlsx](https://www.cdc.gov/nchs/data/data_acces_files/NCHSURCodes2013.xlsx) [perma.cc/9DP4-YF83].

207. As a county's population grows, that growth itself can increase the number of filings and removals. Similarly, as the county's population declines, that decline itself can decrease the number of filings and removals. As a result, a model based solely on counts of filings or removals might attribute causal effects to variables that are due to changes in the size of the county's population. To avoid this type of misleading result, we use a stable and consistent measure: count per 1,000 people in a county. In particular, we convert number of filings to filings per 1,000 people in a county in a year and removals to removals per 1,000 people in a county in a year.

208. Statistical significance is a measure of how likely a result from a regression analysis is due to chance. It is often represented by a “*p*-value.” A *p*-value of 0.05 means that the result found will be due to chance 5% of time. DAVID HENSHER, JOHN M. ROSE, & WILLIAM H. GREENE,

relationship between a litigant's out-of-state status and federal court filing and removal rates. The core of our model arises from the following hypotheses:

- H1: If geographic bias is a factor in forum choice, then in-state plaintiffs should prefer to file in state court to take advantage of state court bias against out-of-state defendants.
- H2: If geographic bias is a factor in forum choice, then out-of-state plaintiffs should prefer to file in federal court to avoid state court bias against out-of-state plaintiffs.
- H3: If geographic bias is a factor in forum choice, then out-of-state defendants will prefer to remove from state court to federal court in order to avoid state court bias against out-of-state defendants.

If true, these three hypotheses entail that if geographic bias exists in diversity actions, we should find the following in the empirical record of federal court filings and removals:

- E1: As the proportion of out-of-state defendants rise in a population, the federal court filing rate should decline because in-state plaintiffs will preferentially file in state court and avoid filing in federal court.
- E2: As the proportion of out-of-state plaintiffs rise in a population, the federal court filing rate should increase because out-of-state plaintiffs will preferentially file in federal court and avoid filing in state court.
- E3: As the proportion of out-of-state defendants rise in a population, the federal removal rate should increase because out-of-state defendants will preferentially remove to federal court to avoid litigating in state court.

Based on these hypotheses and expected effects our model must, at its core, examine the effect changes to the proportion of out-of-state defendants or out-of-state plaintiffs have on filing or removal rates. This would produce the

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APPLIED CHOICE ANALYSIS: A PRIMER 46-47 (2005). Often studies will rely upon a *p*-value of 0.05 as the cut-off for statistical significance. *See, e.g., id.*; SCOTT E. MAXWELL & HAROLD D. DELANY, DESIGNING EXPERIMENTS AND ANALYZING DATA: A MODEL COMPARISON PERSPECTIVE 47 (2nd ed. 2004) (noting that a *p*-value of 0.05 is consistent with general practice). Because our study covers thirty years of data, using a *p*-value of 0.05 would mean that it would be likely that between 1 and 2 statistically significant results would be due to chance. To avoid that result, we use a *p*-value of 0.01 which corresponds to a 1% (1 in 100) probability that the results are due to chance.



following models:

$$FilingRate_{c,t} = \beta_0 + \beta_1 OOS\_Def_{c,t} + \mu_{c,t} \quad \text{Model N}_1^{209}$$

$$FilingRate_{c,t} = \beta_0 + \beta_1 OOS\_Pltf_{c,t} + \mu_{c,t} \quad \text{Model N}_2^{210}$$

$$RemovalRate_{c,t} = \beta_0 + \beta_1 OOS\_Def_{c,t} + \mu_{c,t} \quad \text{Model N}_3^{211}$$

Based on the Author's prior research<sup>212</sup> and the results of the Bumiller's survey,<sup>213</sup> we know these models are too simple (naïve) to accurately account for filing rates. To make the models more accurate, we must add independent variables that measure race, ethnicity, poverty-rate, and population density (the urban or rural status) by county and year. In addition, we will need to add a series of dummy variables representing U.S. jurisdictions to account for unknown state-level effects.<sup>214</sup> This produces the following models (which will be used in our analysis):

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209. *FilingRate<sub>c,t</sub>* is the dependent variable and represents the filing rate, per 1,000 people, in county *c* and year *t*; *OOS\_Def<sub>c,t</sub>* is the percent of filings and removals, respectively, with out-of-state defendants in county *c* and year *t*;  $\beta_0$  is the x-intercept, and  $\beta_1$  is the correlation coefficient for *OOS\_Def<sub>c,t</sub>*.

210. *OOS\_Pltf<sub>c,t</sub>* is the percent of filings and removals, respectively, with out-of-state plaintiffs. All other variables remain the same as in Model B1.

211. *RemovalRate<sub>c,t</sub>* is the dependent variable and represents the removal rate, per 1,000 people, in county *c* and year *t*. All other variables remain the same as in Model B1.

212. From the Author's work, we know that factors like race, ethnicity, and poverty-rate are relevant to filing rates. See Scott DeVito, *Of Bias and Exclusion: An Empirical Study of Diversity Jurisdiction, Its Amount-in-Controversy Requirement, and Black Alienation from U.S. Civil Courts*, 13 GEO. J. L. & MOD. CRITICAL RACE PERSP. 1, 25 (2021) (finding that "as the percentage of Black people in a community rise, the filing rate declines. . . . [and that] as the percentage of White people in a community rise, the filing rate increases."); *id.* at 29 (finding that "[t]he greater the poverty-rate, the greater the filings in federal court.").

213. From the work of Bumiller, we know that measures of population density (whether a county is rural or urban) affect results relating to geographic bias. See Bumiller, *supra* note 187, at 760-61.

214. Ideally, when comparing data from two different populations, we would like the statistical properties of the populations to be the same for each population. When this occurs, we have homogeneity. We have heterogeneity where there may be unobserved relevant variables that are correlated with the observed variables and the value of those variables may differ from subject to subject. See DAMODAR GUJARATI, *ECONOMETRICS BY EXAMPLE* 282 (2011). One way of limiting the effects of heterogeneity is to create a regression formula that contains a set of dummy variables to capture the heterogeneity. See Andrew W. Jurs & Scott DeVito, *A Tale of Two Dauberts: Discriminatory Effects of Scientific Reliability Screening*, 79 OHIO ST. L.J. 1107, 1132 (2018) (noting "use of dummy variables to minimize the potential for heterogeneity . . . produc[ing] misleading results"); GUJARATI, *supra* note 214, at 283 (explaining dummy variables in the context of fixed effects analysis). Dummy variables are variables that have a value of 1 if a condition is met and a value of 0 otherwise. *Id.* at 47. In our case, to capture state-level heterogeneity, we create one dummy variable for each state.

$$\begin{aligned} \text{FilingRate}_{c,t} = & \beta_0 + \beta_1 OOS\_Def_{c,t} + \beta_2 \%White_{c,t} + & \text{Model} \\ & \beta_3 \%HispanicLatinx_{c,t} + \beta_4 \%PovertyRate_{c,t} + & M_1^{215} \\ & \beta_5 Rural_{c,t} + \eta_1 State_1 + \eta_2 State_2 + \dots + \eta_{50} State_{50} + \\ & \mu_{c,t} \end{aligned}$$

$$\begin{aligned} \text{FilingRate}_{c,t} = & \beta_0 + \beta_1 OOS\_Pltf_{c,t} + \beta_2 \%White_{c,t} + & \text{Model} \\ & \beta_3 \%HispanicLatinx_{c,t} + \beta_4 \%PovertyRate_{c,t} + & M_2^{216} \\ & \beta_5 Rural_{c,t} + \eta_1 State_1 + \eta_2 State_2 + \dots + \eta_{50} State_{50} + \\ & \mu_{c,t} \end{aligned}$$

$$\begin{aligned} \text{RemovalRate}_{c,t} = & \beta_0 + \beta_1 OOS\_Def_{c,t} + \beta_2 \%White_{c,t} + & \text{Model} \\ & \beta_3 \%HispanicLatinx_{c,t} + \beta_4 \%PovertyRate_{c,t} + & M_3^{217} \\ & \beta_5 Rural_{c,t} + \eta_1 State_1 + \eta_2 State_2 + \dots + \eta_{50} State_{50} + \\ & \mu_{c,t} \end{aligned}$$

2. *No One Cares About Geographic Bias.*—With these models in hand, we may begin to analyze whether geographic bias is a statistically significant factor for filing or removal rates. In this analysis, we first look at the statistical significance of geographic bias for filings and then for removals. In addition, because we believe that the effects of geographic bias might be different for artificial persons (corporations, partnerships, etc.) than for natural persons, we performed separate analyses for natural and artificial persons. The results of these various sub-analyses are all consistent with each other—geographic bias is of little statistical significance as a factor in forum choice and, as a result, we may conclude that diversity jurisdiction is no longer supported by its rationale.

We began with an analysis of the dataset containing just natural persons. Performing a regression analysis for each year in the dataset, using model M<sub>1</sub> (correlation between filing rates and out-of-state defendants), we found a statistically significant correlation between filing rate and the proportion of out-of-state defendants just once in thirty years—while other factors like race, ethnicity, poverty rate, and rural or urban status are much more frequently statistically significant (see Table 1).

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215. *FilingRate<sub>c,t</sub>* is the dependent variable and represents the filing rate, per 1,000 people, in county *c* and year *t*; *OOS\_Def<sub>c,t</sub>* is the percent of filings with out-of-state defendants in county *c* and year *t*;  $\beta_0$  is the x-intercept;  $\beta_1$  is the correlation coefficient for *OOS\_Def<sub>c,t</sub>*; *%White*, *%HispanicLatinx*, and *%PovertyRate*, respectively, stand for percent of a county that is White, Hispanic or Latinx, or in poverty; *Rural* is a binary variable where a 0 means the county is urban while a 1 means the county is rural; the related  $\beta$ 's for each of these variables are their correlation coefficients; *State<sub>i</sub>* is a binary variable that is 1 if the county is in that state and 0 otherwise; and the  $\eta_i$ 's are the correlation coefficients for the *State* variables.

216. *OOS\_Pltf<sub>c,t</sub>* is the percent of filings with out-of-state plaintiffs. All other variables remain the same as in Model M<sub>1</sub>.

217. *RemovalRate<sub>c,t</sub>* is the dependent variable and represents the removal rate, per 1,000 people, in county *c* and year *t*; *OOS\_Def<sub>c,t</sub>* is the percent of removals with out-of-state defendants in county *c* and year *t*. All other variables remain the same as in Model M<sub>1</sub>.

Number of years we find each variable statistically significant at $p$ -value of 0.01	
Independent Variable	Count
Out-of-State Defendant	1 out of 30
Race	9 out of 30
Hispanic	10 out of 30
Poverty Rate	13 out of 30
Rural/Urban	29 out of 30

Table 1: Regression analysis on filing rates data set containing just natural persons using Model  $M_1$  (by Author).

On its face, this demonstrates that the out-of-state status of the defendant, where the litigants are natural persons, is not a factor in where plaintiffs choose to file their cases. This provides direct and clear evidence that geographic bias is no longer a factor in forum choice.

If we perform a regression analysis using model  $M_2$  (correlation between filing rates and out-of-state plaintiffs), we find geographic bias to be a statistically significant factor in just 3 out of 30 years with other factors having considerably higher rates of significance (see Table 2).

Number of years we find each variable statistically significant at $p$ -value of 0.01	
Independent Variable	Count
Out-of-State Plaintiff	3 out of 30
Race	7 out of 30
Hispanic	10 out of 30
Poverty Rate	13 out of 30
Rural/Urban	29 out of 30

Table 2: Regression analysis on filing rates data set containing just natural persons using Model  $M_2$  (by Author).

While this result is less striking than our previous result, finding geographic bias to be statistically significant in 1 of every 10 years where the parties are natural persons and the plaintiff is from out-of-state strongly reinforces our conclusion that geographic bias is not a concern for those filing in federal court.

If we change datasets to one that only contains artificial persons, we find very similar results. For example, using model  $M_1$ , we once again find the proportion of out-of-state defendants in a county is only a statistically significant factor for filing rates in 1 out of 30 years (see Table 3).

Number of years we find each variable statistically significant at $p$ -value of 0.01	
Independent Variable	Count
Out-of-State Defendant	1 out of 30
Race	1 out of 30
Hispanic	4 out of 30
Poverty Rate	6 out of 30
Rural/Urban	1 out of 30

Table 3: Regression analysis on filing rates data set containing just artificial persons using Model M<sub>1</sub> (by Author).

And for artificial persons who are out-of-state plaintiffs, a plaintiff's out-of-state status matters just twice in 30 years (see Table 4).

Number of years we find each variable statistically significant at $p$ -value of 0.01	
Independent Variable	Count
Out-of-State Plaintiff	2 out of 30
Race	1 out of 30
Hispanic	4 out of 30
Poverty Rate	5 out of 30
Rural/Urban	28 out of 30

Table 4: Regression analysis on filing rates data set containing just artificial persons using Model M<sub>2</sub> (by Author).

Interestingly, the race, ethnicity, and poverty rate factors in the artificial person dataset are much less frequently statistically significant factors in whether to file in federal court than in the case of natural persons. While it is premature to draw conclusions, the Author wonders whether the differences between the natural person and artificial person results provide support for the conclusion that there is ongoing bias against natural litigants of a specific race, ethnicity, or economic status. Unfortunately, given the complexity of an analysis of this issue, the Author may only speculate at this time.

In the previous models we examined geographic bias in the context of filing rates. We now shift to removal rates and find that geographic bias is also not a statistically significant factor in an out-of-state defendant's decision to remove to federal court. When we limit our dataset to just natural persons and examine the relationship between being an out-of-state defendant and removal rates,<sup>218</sup>

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218. Our model for removal rates is identical to that of M2 except that the dependent variable is removal rate per 1,000 people in the county not filing rate per 1,000 people.

we see that the defendant's out-of-state status is never a statistically significant factor for removal rates—but it is for our other factors (see Table 5).

Number of years we find each variable statistically significant at $p$ -value of 0.01	
Independent Variable	Count
Out-of-State Defendant	0 out of 30
Race	2 out of 30
Hispanic	7 out of 30
Poverty Rate	15 out of 30
Rural/Urban	26 out of 30

Table 5: Regression analysis on removal rates data set containing just natural persons (by Author).

Limiting our dataset to artificial persons, we see that being an out-of-state defendant is a statistically significant factor for the decision to remove to federal court just 2 times in 30 years (see Table 6).

Number of years we find each variable statistically significant at $p$ -value of 0.01	
Independent Variable	Count
Out-of-State Defendant	2 out of 30
Race	3 out of 30
Hispanic	3 out of 30
Poverty Rate	8 out of 30
Rural/Urban	26 out of 30

Table 6: Regression analysis on removal rates data set containing just artificial persons using (by Author).

These results demonstrate that geographic bias is not a significant factor in the decision to remove to federal court. If geographic bias was real, then out-of-state defendants should prefer to remove from state court to federal court. But, as we have seen, they do not.

When we combine these results relating to removals with our results showing that filing in federal courts is not related to the defendant's or plaintiff's out-of-state status, we can only draw one conclusion—geographic bias is no longer a problem in state courts. And, as a result, the very rationale that Congress and the Court have used to justify diversity jurisdiction is no longer valid.

*3. The Least Impactful Variable.*—The previous subsection makes clear that geographic bias is not a statistically significant factor in forum choice. To further support that conclusion, we now engage in a thought experiment where

we assume that all the variables in our models, including those relating to geographic bias, are causal factors for filing and removal rates. When we do so, we see that race, ethnicity, and poverty-rate are far more important factors (up to fifteen times more important) in filing and removal rates than is geographic bias. As a result, even if we were to assume that geographic bias is a statistically significant factor in filing or removal rates (which we know it is not), it is the least, by far, important factor in forum choice. Thus, geographic bias is both not a factor in forum choice (as shown by our analysis of statistical significance) and, even if it were, it is such an unimportant factor that it fails to provide any foundation upon which diversity jurisdiction could be justified.

The irrelevance of geographic bias to filing and removal rates is supported by the relatively<sup>219</sup> small size of the correlation coefficients for the variables that measure geographic bias. For example, filing rates are impacted nearly eight times as much by race and ethnicity and nearly ten times as much by poverty rate than by the percentage of filers who are natural persons and out-of-state defendants (see Table 7).<sup>220</sup> In addition, filing rates are impacted five times as much by race, ten times as much by ethnicity, and fourteen times as much by poverty rate than by the percentage of filers who are artificial persons and out-of-state defendants (see Table 7).

Relative size of correlation coefficients for statistically significant years relative to filing rates		
Independent Variable	Natural Persons	Artificial Persons
Out-of-State Defendant	1.00	1.00
Race	7.81	5.03
Hispanic	7.69	10.02
Poverty Rate	9.63	14.13

Table 7: Correlation coefficients for variables that measure geographic bias relative to out-of-state defendant filing rates (by Author).

We have a smaller, but still large, difference when examining out-of-state plaintiffs. Here, filing rates are impacted nearly three times as much by race and ethnicity, and three and a half times as much by poverty rate than by the percentage of filers who are natural persons and out-of-state plaintiffs (see Table

219. We use standardized regression coefficients (commonly called “beta” coefficients). Beta coefficients enable us to directly compare change (and ensure it is comparable change) because beta coefficients transform the non-standard coefficients onto the same scale (with a mean of 0 and a standard deviation of 1). See DAMODAR N. GUJARATI & DAWN C. PORTER, *ESSENTIALS OF ECONOMETRICS* 162 (4th ed. 2010) (discussing standardized variables and beta coefficients).

220. We exclude the variable for urban and rural status in our discussion because it is a categorical variable (0 or 1) while our other variables are continuous (anywhere, inclusively, between 0.0 and 1.0) and they are therefore not comparable for the purposes of this section.

8). In addition, filing rates are impacted three times as much by race, six and a half times as much by ethnicity, and nine times as much by poverty rate than by the percentage of filers who are artificial persons and out-of-state defendants (see Table 8).

Relative size of correlation coefficients for statistically significant years relative to filing rates		
Independent Variable	Natural Persons	Artificial Persons
Out-of-State Plaintiff	1.00	1.00
Race	2.82	3.13
Hispanic	2.81	6.53
Poverty Rate	3.49	9.01

Table 8: Correlation coefficients for variables that measure geographic bias relative to out-of-state plaintiff filing rates (by Author).

Finally, we have similar results when examining removals. Removal rates are impacted nearly 5 times as much by race, eight times as much by ethnicity, and seventeen times as much by poverty rate than by the percentage of filers who are natural persons and out-of-state defendants (see Table 9). And filing rates are impacted five and a half times as much by race and ethnicity, and nine times as much by poverty rate than by the percentage of filers who are artificial persons and out-of-state defendants (see Table 9).

Relative size of correlation coefficients for statistically significant years relative to removal rates		
Independent Variable	Natural Persons	Artificial Persons
Out-of-State Defendant	1.00	1.00
Race	4.72	5.54
Hispanic	7.89	5.52
Poverty Rate	16.73	9.09

Table 9: Correlation coefficients for variables that measure geographic bias relative to out-of-state defendant removal rates (by Author).

As these results show, not only is geographic bias not a statistically significant factor for filing or removal rates, even if we were to assume geographic bias was a factor in filing or removal rates, geographic bias would be, by far, the least important factor in forum choice. This is further evidence that geographic bias is not present in the court system and that geographic bias does not provide a rationale for diversity jurisdiction.

4. *Useless for Prediction and Explanation.*—Geographic bias has little statistical significance as a factor in forum choice. In addition, even if we were

to assume that all of the factors in our model, except for rural/urban, are causal factors for filing and removal rates, geographic bias is the least important factor. Finally, as we discuss *infra*, the removal of geographic bias variables from our models has only a *de minimis* effect on those models' ability to explain filing or removal rates.

When dealing with a model with multiple independent variables we can use the model's coefficient of multiple determination (the model's  $R^2$ ) to measure how well a model accounts for variation in the dependent variable; in essence, the  $R^2$  tells us how well the model predicts or explains the dependent variable.<sup>221</sup>  $R^2$  can take on a range of 0.00 (0%) where it predicts none of the behavior of the dependent variable or it can explain 1.00 (100%) of the behavior of the dependent variable.<sup>222</sup> Our models attempt to explain the behavior of the filing rate and removal rate using variables relating to geographic bias, race, ethnicity, poverty-rate, and geographic density.

Were geographic bias a factor in filing or removal rates, we would expect the removal of variables accounting for geographic bias to produce a large change in the model's  $R^2$ —its ability to account for variation in the filing or removal rates. But when we remove geographic bias variables from our models, we see only a *de minimis* change in the model's ability to explain filing or removal rates. (See Table 10)

% Change in $R^2$ after removal of geographic bias terms		
Independent Variable	Natural Persons	Artificial Persons
Out-of-State Defendant (filings)	-0.39%	-0.52%
Out-of-State Plaintiff M2 (filings)	-0.68%	-0.71%
Out-of-State Defendant (removals)	-0.12%	-0.45%

Table 10: Percent Change in  $R^2$  after removal of geographic bias terms (by Author).

Because removing geographic bias variables from the models produces only a *de minimis* effect on the models' ability to predict or explain filing and removal rates, we must conclude that geographic bias is not currently a factor in forum choice.

We have shown that over the last thirty years, geographic bias has rarely been a statistically significant factor for filing or removal rates, that even if we were to take geographic bias as a factor in filing or removal rates, its relative effect on filing and removal rates is marginal compared to other variables, and that removal of geographic bias variables from our model of filing and removal rates has almost no discernible effect on the models' predictive ability. Such

221. See Vern R. Walker, *Restoring the Individual Plaintiff to Tort Law by Rejecting "Junk Logic" About Specific Causation*, 56 ALA. L. REV. 381, 422 (2004) (discussing the coefficient of multiple determination).

222. See *id.*



results indicate that geographic bias is not a factor in a litigants' decisions to file in federal or a state court or to remove to federal court, and, as a result, relying on geographic bias as a rationale for diversity jurisdiction is contrary to the facts.

#### V. THE END OF DIVERSITY JURISDICTION?

The view that geographic bias justifies the existence of diversity jurisdiction is false. As we have shown, there is no connection between a litigant's in-state or out-of-state status and filing or removal rates. The result of our study will likely lead policy makers to reassess the value of diversity jurisdiction and whether it should be eliminated or modified. Because this Article's purpose was to determine whether geographic bias was a factor in forum choice, it is beyond this Article's scope (and space constraints) to engage in an in-depth policy analysis. Nonetheless, five issues supporting elimination or modification of diversity jurisdiction are worth mentioning: costs, judicial reform, facts, false narratives, and at-risk populations.

First, diversity jurisdiction greatly increases the costs of the federal courts and the caseloads of federal judges. In 2020, of the 332,732 cases pending in Federal Court, 140,812 (42%) arose under diversity jurisdiction.<sup>223</sup> The most recent estimate (in 1988) of the annual cost of federal diversity jurisdiction found that diversity jurisdiction cost the federal government \$131,306,263 a year.<sup>224</sup> Given our ever-rising national debt, the pressure to cut the federal budget, and Congress' repeated attempts to eliminate or limit diversity jurisdiction, it is possible that Congress will see these results as a rationale for either eliminating or sharply curtailing diversity jurisdiction.

With regard to judicial reform, some have argued that the elimination of diversity jurisdiction would help eliminate improper manipulation of the judicial system by "intelligent lawyers" that result in "inconsistent decision making, unequal protection of the laws, and an incomprehensible judicial system."<sup>225</sup> Others believe that, following *Erie Railroad Co. v. Tompkins*, federal diversity jurisdiction creates conflicts between the federal and state systems and "amounts to an intrusion into the ambit of the state courts . . . ."<sup>226</sup> These reformers could argue that we should eliminate diversity jurisdiction to improve consistency in the judicial system and avoid forum shopping.

Two factual issues also support eliminating or modifying diversity jurisdiction. First, if the Courts and Congress continue to justify diversity

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223. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, TABLE C-2-U.S. DISTRICT COURTS-CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS (March 31, 2020), <https://www.uscourts.gov/file/28151/download> [perma.cc/8PNS-JLW7].

224. ANTHONY PARTRIDGE, THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION 8 & TABLE 1 (Federal Judicial Center 1988).

225. Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 315 (1979).

226. Howard C. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347, 350 (1976).

jurisdiction as a necessary response to geographic bias, their justification of would be based on something we now known to be factually false. This could undermine trust in the judicial system. In addition, continuing to ground diversity jurisdiction in geographic bias presents a false narrative about the United States. Resorting to geographic bias as a rationale entails that we live in a country where cross-state bias, hate, and distrust are core features of the American psyche. But, as our study shows, this is not the case. At least one kind of bias, geographic bias, has been eroded by time. To say otherwise presents a false, and harmful, narrative about American society.

On the other hand, eliminating diversity jurisdiction could affect a wide range of at-risk persons. Our analysis shows that race, ethnicity, poverty-status, and population density affect filing rates in diversity actions.<sup>227</sup> As such, eliminating diversity jurisdiction might negatively impact these groups by eliminating a setting in which they feel safe to litigate. For example, we know that Black Americans are systematically missing from the civil justice system due to distrust in the justice system.<sup>228</sup> Removing a litigation pathway for those Black litigants willing to sue in federal court, and thereby willing to trust the judicial system, would be counterproductive. Similarly, litigants in rural or high-poverty-rate counties may feel that the state or county courts lack the resources or have lower caliber judges than the federal courts. If this is true, then removing federal diversity jurisdiction would force these litigants into courts they believe are inadequate. Such action could erode trust in the judicial system.

A proper discussion of any one of these issues would easily fill a law review article of its own. Moreover, legal scholars will undoubtedly find other issues relating to the elimination or modification of diversity jurisdiction. As a result, this Article can only mention these problems and conclude by restating this Article's central thesis: The empirical evidence establishes that geographic bias is no longer a factor in forum choice and, as a result, diversity jurisdiction can no longer be justified by its role in mitigating such bias.

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227. See discussion *supra* Section IV.B.

228. See DeVito, *supra* note 212, at 6.