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Larry Kramer

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I. INTRODUCTION

When the federal courts were created, deciding diversity cases was one of their most important functions. Indeed, without diversity jurisdiction, "the circuit courts created by the First Judiciary Act would have had very little to do."[1] At the time, there was not much federal law and thus not much need for federal question jurisdiction. Instead, the most important concerns in establishing federal courts were to "enhance[] awareness in the people of the existence of the new and originally weak central government,"[2] and to foster a secure environment for interstate commerce.[3]

While the grant of diversity jurisdiction apparently served these purposes well, conditions had changed by the end of the nineteenth century. Commerce among the states was flourishing and required less protection from the federal courts. The federal government and the laws it enacted were vastly more important than they had been when the federal courts were established. General federal question jurisdiction had been conferred in 1875, and the business of the federal courts focused increasingly on questions of federal law. These changes soon generated pressures to curtail or eliminate diversity jurisdiction. Roscoe Pound delivered the opening salvo in 1906, describing diversity as "archaic" in a speech to the American Bar Association.[4] Out-

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* Assistant Professor of Law, University of Chicago Law School. This paper was prepared in connection with the author's work as reporter for the Subcommittee on the Role of the Federal Courts and Their Relations to the States of the Federal Courts Study Committee. I am grateful to Dan Meltzer, Alan Morrison, Richard Posner, Judith Resnik and Tom Rowe for their helpful comments and criticism.

1. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 141 (1973).

2. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 101 (1969) [hereinafter ALI STUDY].

3. *See* Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 2 (1948); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

4. Address by Roscoe Pound on the Causes of Popular Dissatisfaction with the Ad-

raged members of the bar accused Pound of attempting to "destroy that which the wisdom of centuries has evolved" and made concerted efforts to prevent his speech from being printed.[5]

The debate begun by Dean Pound continues today, and while its tone has grown more civil, the underlying emotions apparently have not. Few issues of judicial administration have evoked the same degree of concern and attention. Interestingly, the alignment of parties on the diversity question has changed very little since 1906. As one group of researchers observed, "[i]t is not too great a simplification to say that public and private sectors are . . . joined in issue over diversity jurisdiction."[6] Every administration since President Carter's, the Judicial Conference, the American Law Institute, state courts, numerous public interest and legal aid organizations, and most legal scholars support the abolition or curtailment of diversity. Congressman Robert Kastenmeier observed that a listing of the twentieth century critics of diversity jurisdiction "reads like a lawyer's Hall of Fame;" his list, which failed to mention many prominent diversity critics, included Roscoe Pound, Louis Brandeis, Felix Frankfurter, Robert Jackson, Henry Friendly, Charles Alan Wright, Warren Burger and Earl Warren.[7] On the other side of the debate stands the private bar, which has generally opposed changes in diversity jurisdiction.[8] A few judges and academics have also advocated retaining diversity jurisdiction,[9] but the primary support for this position has come from state and national bar associations and the American Trial Lawyers Association.

The bar has successfully blocked most efforts to abolish or curtail diversity jurisdiction. Congress did recently raise the minimal amount in controversy from $10,000 to $50,000, but while it is too early to measure the actual effect of this reform, this increase in the jurisdictional amount is not likely to have

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ministration of Justice (Aug. 26, 1906), *reprinted in* 35 F.R.D. 273, 286-87 (1964).

5. J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 362 (1950).

6. Flango & Boersema, *How Would Proposed Changes in Federal Diversity Jurisdiction Affect State Courts?*, NAT'L CENTER FOR ST. CTS. 1 (Apr. 30, 1989) (quoting Douglas, Celeste & Dawson, *A Justice Impact Statement on the Abolition of Diversity Jurisdiction*, 6 (report submitted to the Department of Justice, (April 1980))).

7. Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 313 (1979).

8. *See* Frank, *Diversity Jurisdiction: Let's Keep It*, 3 ADELPHIA L.J. 75, 76-78 (1984).

9. *See, e.g.*, Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way with Its Feet*, N.Y. ST. B.J., July 1989, at 20; Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964).

much effect given the ease with which a litigant can in good faith plead this amount.[10] The political muscle of the bar being what it is, however, any recommendation to abolish or further curtail diversity jurisdiction will almost certainly fail.

Nevertheless, the continuing existence of diversity jurisdiction is a matter of considerable importance at a time when there is widespread, almost unanimous agreement that steps are needed to ease caseload pressures in the federal courts. Careful examination of the arguments on both sides of this debate makes clear that abolishing or curtailing diversity jurisdiction should be among the first steps Congress takes to alleviate workload problems. While a case could possibly be made for diversity jurisdiction in a world of unlimited resources, few other classes of disputes have a weaker claim on federal judicial resources.[11] Moreover, while eliminating diversity jurisdiction will not alone solve the problem of federal caseload pressures, no other single step can do anywhere near as much. Accordingly, Congress should abolish diversity jurisdiction (subject to three exceptions discussed below). Alternatively, Congress should at least adopt several narrower proposals to curtail diversity jurisdiction in cases where the arguments for retaining this jurisdiction are weakest.

II. THE IMPACT OF DIVERSITY JURISDICTION: CASELOAD STATISTICS

Diversity cases constitute a substantial portion of the federal docket. In 1988, 68,224 cases were filed in the district courts based on diversity of citizenship—28.5% of the district courts' civil docket and 24.1% of the district courts' total docket.[12] During this same year, 4,504 of the 32,686 appeals filed were diversity cases, constituting 13.7% of the appellate docket.[13] In 1987, 67,071 diversity cases were filed, comprising 28% of the district courts' civil docket and 23.8% of the total district court docket.[14] In that year, 13.2% of the docket of the courts of ap-

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10. *See infra* notes 91-95 and accompanying text.

11. *See infra* notes 28-35 and accompanying text.

12. 1988 ADMIN. OFF. OF THE U.S. CTS. ANN. REP., Tables C-2, D [hereinafter 1988 AO REPORT].

13. *Id.* at Table B-1A.

14. 1987 ADMIN. OFF. OF THE U.S. CTS. ANN. REP., Tables C-2, D [hereinafter 1987 AO REPORT].

peals were diversity cases (4,065 of the 30,798 appeals filed).[15] Since at least the early 1970s, diversity cases have consistently accounted for 25% of the district courts' civil docket, 20% of the total district court docket, and 10 to 14% of the docket of the courts of appeals.[16]

To gauge the full impact of diversity cases on the federal courts, we must adjust these raw caseload figures for the difficulty of diversity cases relative to other components of the courts' dockets. With respect to the district courts, two measures suggest that diversity cases are more demanding than the average case. First, diversity cases are overrepresented among trials, which place the greatest demand on the time and energy of federal district judges. In 1987, for example, diversity cases accounted for 42.6% of civil trials and 56.5% of civil jury trials;[17] in 1988, 39.2% of civil trials and 51.5% of civil jury trials were in diversity cases.[18] These percentages have hardly changed since at least the early 1970s.[19] Second, diversity cases are more difficult than average according to a "time and motion" study of federal district judges conducted by the Federal Judicial Center in 1979.[20] The study assigned a weight of 1.2192 to diversity cases, which means that the average diversity case was 22% more demanding than the average case on the district courts' docket as a whole.[21] More recent case weightings indicate that in 1987 the diversity cases that made up 28% of the civil cases filed constituted a much larger 36.5% of the weighted civil caseload.[22]

With respect to the courts of appeals, there is little evidence

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15. *Id.* at Table B-1A.

16. *See* UNITED STATES DEP'T OF JUSTICE COMM. ON REVISION OF THE FED. SYS., THE NEEDS OF THE FEDERAL COURTS (1977) (1976 figures) [hereinafter BORK REPORT]; H. FRIENDLY, *supra* note 1, at 140-41 (1972 figures); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 139-41 (1985) (1983 figures); Butler, *Diversity in the Court System: Let's Abolish It*, 3 ADELPHIA L.J. 51, 54 (1984) (1982 figures). Prior to the 1970s, diversity cases constituted an even larger portion of the federal docket. *See* H. FRIENDLY, *supra* note 1, at 140.

17. 1987 AO REPORT, *supra* note 14, at Table C-4. In 1987, a total of 11,913 civil cases were disposed of during or after trial. Of these, 5,078 were diversity cases. Of the 6,299 civil cases disposed of during or after a jury trial, 3,562 were based on diversity.

18. 1988 AO REPORT, *supra* note 12, at Table C-4. Of the 11,618 civil cases disposed of during or after trial, 4,559 were based on diversity. Of the 5,920 civil jury trials, 3,051 were based on diversity.

19. *See* sources cited *supra* note 16.

20. S. FLANDERS, THE 1979 FEDERAL DISTRICT COURT TIME STUDY (1980).

21. *Id.* at 15.

22. *See* A. PARTRIDGE, THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION 16 (1988).

to judge the difficulty of diversity cases. The number of published opinions of a given type might provide a good measure of difficulty because opinions are generally reserved for the most difficult cases. Unfortunately, there are no published statistics on the subject-matter of written opinions. In his study of the federal courts, Judge Posner examined a sample of opinions from 1983 and found that only 8% were diversity cases.[23] Although by no means representative,[24] this sample suggests that diversity cases may be below average in difficulty at the court of appeals level.

III. The Cases for and Against Diversity Jurisdiction

Before considering the arguments for and against diversity jurisdiction, it is necessary preliminarily to address a point that is sometimes made by advocates of diversity. Noting that diversity has been part of federal jurisdiction since 1789, its proponents claim that so well-established a practice "should not be altered in the absence of a compelling showing of need for change."[25] No one disputes the proposition that Congress should not needlessly disturb the status quo (though it seems evident that if the federal courts were being established for the first time today they would not have diversity jurisdiction). But the question whether to retain diversity jurisdiction cannot be resolved by burdens of persuasion; Congress is not, after all, conducting a jury trial. If Congress concludes that the workload of the federal courts is a problem, the issue then becomes how best to solve the problem. No form of jurisdiction carries a presumption in its favor that does not rest on some reasoned argument. Hence, the question is not whether opponents of diversity jurisdiction can carry some burden of proof. The question is, if decreasing the jurisdiction of the federal courts is necessary, what jurisdiction should be preserved, eliminated, or curtailed? Diversity jurisdiction has no favored status in this analysis.

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23. R. Posner, *supra* note 16, at 139.

24. Judge Posner chose the volume of the Federal Reporter "in which the first opinion was dated January . . . and then counted off the first 100 cases in that or (if necessary) the succeeding volume, subject to the constraint that each circuit be represented in each sample [by] the same proportion that it bore to all signed opinions for the fiscal year." *Id.* at 71.

25. Statement of Robert D. Raven, President, American Bar Association, before the Federal Courts Study Committee, at 4 (March 20, 1989). *See also* Frank, *The Case for Diversity Jurisdiction*, 16 Harv. J. on Legis. 403, 406 (1979); Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A. J. 379 (1960).

Moreover, the point that diversity jurisdiction has been around since 1789 is misleading. For while other facets of federal jurisdiction have steadily expanded over the last century,[26] diversity has been consistently restricted. To be sure, Congress has so far enacted only modest limitations—retaining and then increasing the minimal amount-in-controversy, making corporations citizens of the state in which they have their principal place of business, and limiting removal to out-of-state defendants. Nonetheless, the clear trend to limit diversity stands in sharp contrast to other forms of federal jurisdiction. The history thus suggests that the importance of diversity jurisdiction relative to federal question cases has been diminishing over time.

A. The Case Against Diversity Jurisdiction

The numbers above suggest the most straightforward reason to eliminate diversity jurisdiction: abolishing it will significantly reduce the caseload problem in the federal courts. As Justice Frankfurter put it, "[a]n Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts."[27] Of course, eliminating any 25% share of the federal docket would relieve the federal caseload burden, and just as there should be no presumption in favor of retaining diversity, so there should be no presumption in favor of abolishing or curtailing it. Nonetheless, a number of additional reasons support making a cut here.

First, perhaps no other major class of cases has a weaker claim on federal judicial resources. There is no consensus on precisely how federal jurisdiction should be allocated, but there is agreement on general priorities. And one point on which there is virtual consensus is that state law cases deserve lower priority

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26. For example, a series of statutory changes culminated in 1980 with the elimination of the amount in controversy requirement for cases arising under federal law. And the Supreme Court has rendered decisions extending the pendent jurisdiction of the federal courts, Gibbs v. United Mine Workers of America, 383 U.S. 715 (1966), broadening habeas corpus jurisdiction, Brown v. Allen, 344 U.S. 443 (1953) and Fay v. Noia, 372 U.S. 391 (1963), and allowing removal under certain circumstances on the basis of a federal defense, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). Recent decisions have limited these extensions; *see, e.g.*, Finley v. United States, 109 S. Ct. 2003 (1989) (limiting ancillary jurisdiction); Wainright v. Sykes, 433 U.S. 72 (1977) (limiting habeas corpus jurisdiction), but the overall trend in federal question jurisdiction has plainly been one of expansion.

27. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 651 (1949) (Frankfurter, J., dissenting).

than cases based on federal law. Hence, if something is to be cut to preserve federal judicial resources, diversity should be one of the first items to go.

Advocates of diversity respond that some federal question cases are less important than many diversity cases and could be shifted to the states; favorite examples include the Federal Odometer Act and personal injury claims under the Federal Employer's Liability Act (FELA) and the Jones Act.[28] But whether some federal questions are less "important" than some state law questions is beside the point. Even assuming that there is an objective measure of "importance," federal judicial resources are not reserved for the most important cases; rather, these resources are reserved for the cases in which a federal forum is most appropriate.

The proper question, then, is whether some federal questions are less important *for federal courts to decide*, and the answer to this question seems clear. The federal government already imposes a substantial burden on state courts by requiring them to hear federal question cases concurrently with federal courts. Given this burden, and the constraints of federalism generally, it is inappropriate for Congress to enact a substantive law and require the states to devote judicial resources to administering it without also making federal resources available.

Moreover, while the illustrations offered by the proponents of diversity may be appropriate subjects for docket trimming, cases under the FELA, Jones Act and Odometer Act account for only a tiny fraction of the total federal caseload. Hence, even if these proposals were implemented, they would not significantly reduce the caseload of the federal courts. Certainly adopting these proposals would not do anywhere near as much to reduce the federal caseload as abolishing diversity. The same response applies to the related claim that federal caseload pressures can be reduced by making procedural changes that do not restrict federal jurisdiction, such as increasing the use of case management and ADR.[29] While Congress may want to adopt many of these proposals, such steps alone are not enough.

Second, beyond questions of federalism and the general preference for having federal courts decide federal questions and state courts decide state questions lies a simpler point about ex-

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28. *See, e.g.*, Brieant, *supra* note 9, at 22.

29. *See, e.g., id.*

pertise and the efficient use of resources. Judge Friendly claimed that the "greatest single objection" to diversity "is the diversion of judge-power urgently needed for tasks which only federal courts can handle or which, because of their expertise, they can handle significantly better than the courts of a state."[30] Federal courts are capable of deciding state law questions, but they offer no special advantages in such cases; on most issues, and especially when it comes to interpreting state statutes, the state courts have greater expertise and authority. By the same token, federal jurisdiction does offer special advantages in federal question cases, where the benefits of experience and expertise undoubtedly lie in the federal courts. Thus, diversity jurisdiction forces federal courts to decide issues on which they have no special expertise at the expense of tasks they can perform significantly better than state courts.[31]

Furthermore, federal diversity decisions are less valuable than either state court decisions or federal decisions in federal question cases. After *Erie Railroad v. Tompkins*,[32] the opinion of a federal court sitting in diversity does not constitute precedent within the state system. Federal opinions may, of course, persuade state courts, which led Judge Posner to comment that "the picture of the federal judge as a ventriloquist's dummy is overdrawn."[33] But diversity rulings "are in the nature of an advisory opinion whose contribution to establishing the law is at best uncertain."[34] Diversity thus resembles arbitration because its primary value is limited to resolving the particular dispute before the court. And while it is important to resolve these disputes, it makes more sense to do so in a forum whose rulings provide guidance to other parties interested in avoiding similar disputes. In other words, diversity squanders federal judicial resources by consuming more than a quarter of judges' time on cases that make little contribution to developing any organized body of law.[35]

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30. H. FRIENDLY, *supra* note 1, at 141.

31. This point has been made many times over the years. In addition to Judge Friendly, see BORK REPORT, *supra* note 16, at 14; Butler, *supra* note 16, at 61; Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, N.Y. ST. B.J., July 1989, at 14, 16.

32. 304 U.S. 64 (1938).

33. R. POSNER, *supra* note 16, at 144.

34. Butler, *supra* note 16, at 61.

35. This point has also been made many times over the years. *See, e.g.*, 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601, at 353 (2d

Third, diversity jurisdiction is frequently a source of friction between state and federal courts.[36] In addition to the tensions resulting from both obvious and subtle disagreements in interpreting state law, it is not uncommon for a party to commence an action based on diversity jurisdiction that is identical to an action already pending in state court, or vice-versa. This leads to a variety of problems as courts in two independent judicial systems strive to preserve the integrity of their own decisionmaking process without needlessly trampling on the prerogatives of the other.

Fourth, the desire to minimize these frictions and to avoid federal interference with the development of state substantive law generates complex procedural problems that make it more expensive and time-consuming to litigate diversity cases. Some of these problems, such as the difficulties associated with administering the *Erie* doctrine, are familiar. Similarly, most commentators recognize the problem faced by a federal court when state law is unclear: "[w]hereas the highest court of the state can 'quite acceptably ride along a crest of common sense, avoiding the extensive citation of authority,' a federal court often must exhaustively dissect each piece of evidence thought to cast light on what the highest court would ultimately decide."[37]

Diversity cases also frequently raise intricate problems of abstention and management of concurrent litigation.[38] More important, the need to prevent excessive federal usurpation of state jurisdiction led to the "complete diversity" rule of *Strawbridge v. Curtiss*.[39] Professor Rowe has documented the "pernicious effects" of this rule, including: (1) disputes in determining citizenship; (2) problems associated with determining the proper alignment of parties; (3) litigation required to determine whether diversity has been created improperly through collusive

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ed. 1984) [hereinafter WRIGHT, MILLER & COOPER] (citing authorities). As discussed below, to the extent that federal decisions in diversity cases do still "make" common law, this is a disadvantage that supports abolishing diversity. *See infra* note 42 and accompanying text.

36. *See* BORK REPORT, *supra* note 16, at 14; Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 ALB. L. REV. 151, 154 (1987).

37. H. FRIENDLY, *supra* note 1, at 142 (quoting Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 322 (1967)).

38. *See, e.g.*, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976). *See generally* Miner, *supra* note 36, at 156-57.

39. 7 U.S. (3 Cranch) 267 (1806).

assignment of claims or appointment of a representative; (4) problems in adjudicating questions of "indispensable," "necessary" and "proper" parties under Federal Rule of Civil Procedure 19, and what to do when joining these parties will destroy diversity; (5) similar problems in litigating questions of permissive intervention and intervention of right; (6) questions raised by attempts to remove "separate and independent" claims under 28 U.S.C. section 1441; and (7) the wide variety of problems that arise in sorting out difficult issues of pendent and ancillary jurisdiction.[40] To these one may add the need to administer the judge-made exceptions for domestic relations and probate cases.

Fifth, diversity jurisdiction reduces pressure to improve state judicial systems. Diversity provides litigants who satisfy its requirements a choice of forums, enabling them to pick the court that is "better" for them in any particular case. As such, its continued existence "diminishes the incentives for state court reform by those influential professional groups who, by virtue of diversity jurisdiction, are able to avoid litigation in the state courts."[41]

Sixth, while it would be an overstatement to say that there are no benefits from diversity jurisdiction, most of its original justifications no longer exist. Commercial interests still appreciate the option of bringing or removing a case into federal court, but the interstate market is today sufficiently robust and established that this protection is unnecessary. Similarly, even if *Erie* did not eliminate the role of the federal courts in making common law, their contribution in this area is much reduced from the nineteenth century. Indeed, to the extent that the federal courts do still make and shape common law after *Erie*, this should be regarded as a *disadvantage* of retaining diversity.[42]

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40. Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979). *See also* Currie, *The Federal Courts and the American Law Institute (Part I)*, 36 U. CHI. L. REV. 1 (1968); Miner, *supra* note 36, at 154-58; Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247.

41. WRIGHT, MILLER & COOPER, *supra* note 35, § 3601, at 354 & n.63 (citing authorities).

42. One recent study notes that federal courts cite their own precedent rather than state court decisions in diversity cases at rates approaching pre-*Erie* levels. R. POSNER, *supra* note 16, at 145-46. This, in turn, suggests the likely reemergence of pre-*Erie* problems of non-uniform substantive law and forum-shopping. Landes & Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367, 380-82 (1980). *Erie* it turns out, may not have gone far enough, and satisfying the concerns that led the Court to overrule Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), may require abolish-

One benefit of diversity jurisdiction undoubtedly remains. As the bar's overwhelming support for this jurisdiction demonstrates, diversity provides a forum that litigants (or at least their lawyers) find desirable and satisfactory. In addition to the tactical advantages a federal forum may offer, out-of-state attorneys may be more familiar with the federal rules of procedure and may desire the benefits such procedures provide. Proponents of diversity frequently claim that the desire of lawyers to preserve the option of choosing an appropriate forum is itself a strong reason for retaining diversity jurisdiction.[43] However,

> [t]he value of giving lawyers a tactical choice they would not otherwise have, and of affording lawyers a greater opportunity to litigate in federal court, cannot in itself warrant so great a commitment of federal resources. Yet these advantages might well encourage trial lawyers to cling to the jurisdiction regardless of other considerations.[44]

Forum shopping is regarded as an undesirable form of strategic behavior in every other context because it encourages wasteful investment of resources by both parties and courts.[45] It is no less undesirable here. Lawyers may appreciate the tactical benefits of being able to choose the best forum for their clients. Those who benefit from such options usually do. But as Professors Wright, Miller and Cooper point out, "[t]o the extent this type of forum shopping exists, as it surely does, it seems more an abuse of concurrent jurisdiction than an argument for the retention of diversity jurisdiction."[46]

B. The Case for Diversity Jurisdiction

Advocates of diversity jurisdiction have advanced many arguments over the years, a number of which merit serious consideration. Before turning to these, however, we should dismiss some makeweight arguments. Thus, proponents of diversity sometimes characterize it as a social service, akin to the school lunch program or the federal highway program, and suggest that opponents of diversity are hypocrites for not advocating the abo-

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ing diversity jurisdiction altogether.

43. *See, e.g.*, Frank, *supra* note 25, at 408-09; Frank, *supra* note 8, at 81-82.

44. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 327-28 (1977).

45. *See, e.g.*, Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 9-10 (1963).

46. WRIGHT, MILLER & COOPER, *supra* note 35, § 3601, at 360.

lition of other social services as well.[47] But even if federal jurisdiction is seen as a social service, the utility of this particular part of that service ranks low on any scale of federal priorities. As Congressman Kastenmeier points out, a major share of the benefits of diversity jurisdiction go to attorneys on contingent fees and to large corporations; if the question is which social services should be cut, "programs" like this should be among the first.[48]

Another makeweight argument sometimes advanced in support of diversity jurisdiction is that it is useful in "keeping federal judges from becoming narrow technicians, specializing in esoteric federal statutes and occasional constitutional questions, and in helping them maintain closer touch with the mainstream of common law tort and contract litigation."[49] Whatever force there may have been to this argument when it was first advanced in the early 1960s,[50] "[a] look at the breadth of the caseload that routinely comes before federal judges now is enough to dispel this illusion."[51] Moreover, many areas of federal law—labor, securities, ERISA, and civil rights law come immediately to mind—rely on common law principles of tort or contract and thus keep judges abreast of developments in these fields.

Finally, advocates of diversity jurisdiction say that there is great educational value in having the state and federal judicial systems interact. Lawyers bring experience gained in one system back to the other, where it may serve as the basis for beneficial reforms; the adoption by many states of rules of procedure and evidence modeled after the federal rules is cited (without evidence of causation) as an example of this successful interaction.[52] But while state and federal systems probably have much to learn from one another, their mutual education does not require diversity jurisdiction. First, even without diversity, lawyers whose practice is primarily local have myriad opportunities to litigate in federal court. " 'Ordinary lawyers' appear frequently

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47. *E.g.*, Frank, *supra* note 25, at 405-06; Frank, *supra* note 8, at 79.

48. Kastenmeier & Remington, *supra* note 7, at 314 n.60; H. FRIENDLY, *supra* note 1, at 146-47. *See also infra* note 104 and accompanying text (45% of diversity cases involve corporations).

49. Shapiro, *supra* note 44, at 322.

50. Moore & Weckstein, *supra* note 9, at 23.

51. Feinberg, *supra* note 31, at 18. *See also* H. FRIENDLY, *supra* note 1, at 144.

52. *See, e.g.*, Frank, *supra* note 25, at 409; Shapiro, *supra* note 44, at 324-26; Statement of Robert D. Raven, *supra* note 25, at 5-6.

as assigned counsel in federal criminal cases and state and federal habeas corpus petitions and, on a retained basis in all sorts of cases governed by federal law . . . ."[53] Thus, a few lawyers may no longer have much reason to litigate in federal court, but a substantial portion of the bar—including probably its most influential members—will maintain practices in both systems. In addition, "even if diversity jurisdiction were restricted or abolished, a substantial number of cases involving significant state matters still would be adjudicated in federal courts. . . ."[54] Finally, there are many other media for exchange and education, such as law reviews, judicial conferences, the National Center for State Courts, and the State Justice Institute. Hence, abolishing diversity will not impede the exchange of ideas between state and federal systems.

Having disposed of these weak arguments for retaining diversity jurisdiction, I now turn to three more substantial arguments: (1) that abolishing diversity merely shifts the caseload burden from the federal to the state system; (2) that diversity should be retained because the quality of justice provided by federal courts is superior to that provided by state courts; and (3) that diversity jurisdiction is necessary to protect out-of-state parties from local bias.

1. Abolishing diversity jurisdiction merely shifts the caseload burden to the states

Proponents of diversity argue that there is no virtue in lessening the burden on federal courts by dumping these cases into equally crowded state courts. John Frank likens the abolition of diversity to a "jurisdictional variation of the old three-shell game" in which the 68,000 diversity cases disappear from under the shell of the federal walnut only to reappear under a state court shell.[55] Furthermore, Mr. Frank suggests, the practical result of this shift is unfair both to state courts and to litigants. It is unfair to state courts because it increases their already substantial caseload burden; it is unfair to litigants because it produces additional delay in the disposition of their cases.

One point should be kept in mind in evaluating these arguments. Whatever the burden of deciding diversity cases, that

53. H. FRIENDLY, *supra* note 1, at 144-45.
54. WRIGHT, MILLER & COOPER, *supra* note 35, § 3601, at 361.
55. Frank, *supra* note 25, at 412.

burden is reduced when these cases are decided in state rather than federal courts because, as explained above, much time and effort now expended in diversity cases is spent on procedural issues that would no longer exist if these cases were in state court.[56] It is thus more efficient to return these cases to state courts.

The argument still merits serious consideration, however, for even the reduced burden of handling so many cases could be substantial. Of course, the claim that abolishing diversity jurisdiction unfairly burdens state courts would have more force if it were made by the state court judges themselves, rather than by members of the bar interested in preserving a valuable tactical option. But state court judges do not oppose abolishing diversity jurisdiction. On the contrary, the Conference of Chief Justices has long taken the position that the state courts "are able and willing to provide needed relief to the federal court system [by] the assumption of all or part of the diversity jurisdiction presently exercised by federal courts."[57]

Moreover, once the difference in size between the state and federal judicial systems is taken into account, it turns out that the burden imposed on the state courts from assuming this jurisdiction is small. For example, a 1978 study conducted by the National Center for State Courts found that total abolition of diversity would increase the state court caseload by an average of only 1.03%.[58] This is compared to a 25% decrease in the caseload of the federal courts. In Mr. Frank's terms, the diversity "pea" may remain the same, but since the size of the state shell dwarfs the federal shell, the pea is less of a problem.

While this statistic is suggestive, Congress must also be concerned with the possibility that diversity cases are distributed unevenly so that abolishing diversity jurisdiction would impose an unmanageable burden on some states. A more recent study conducted by the National Center for State Courts, however, lays this concern to rest.[59] Using 1987 data, researchers analyzed the effects of abolishing diversity on a state-by-state basis. They

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56. *See* Butler, *supra* note 16, at 64. *See also supra* notes 37-40 and accompanying text.

57. *See* Butler, *supra* note 16, at 64-65 (quoting a 1977 resolution of the Conference of Chief Justices and statements to Congress on behalf of the Conference in 1982 and 1983).

58. Flango & Blair, *The Relative Impact of Diversity Cases on State Trial Courts*, STATE CT. J., Summer 1978, at 20, 22-23.

59. Flango & Boersema, *supra* note 6.

found that the more populous states would receive the most diversity cases; for example, "[t]he eight states of California, New York, Texas, Pennsylvania, Florida, Illinois, Ohio and Michigan have 48% of the population of the United States and would receive 48% of the diversity cases."[60] Table I lists the states according to population and indicates the state-by-state distribution of diversity cases in the event of abolition.

TABLE I[61]

FEDERAL DIVERSITY CASES BY STATE

States	State Populations (in thousands)	Total Number of Federal Diversity Filings
California	27663	4182
New York	17825	5482
Texas	16789	5537
Florida	12023	1787
Pennsylvania	11936	5642
Illinois	11582	5532
Ohio	10784	1503
Michigan	9200	2117
New Jersey	7672	2025
North Carolina	6413	644
Georgia	6222	1961
Virginia	5904	1480
Massachusetts	5855	1233
Indiana	5531	1179
Missouri	5103	1449
Tennessee	4855	1252
Wisconsin	4807	430
Washington	4538	568
Maryland	4535	1037
Louisiana	4461	2759
Minnesota	4246	491
Alabama	4083	1416
Kentucky	3727	803
South Carolina	3425	1073
Arizona	3386	417

60. *Id.* at 51.
61. *Id.* at 51.

Colorado	3296	512
Puerto Rico	3292	299
Oklahoma	3272	2024
Connecticut	3211	1289
Iowa	2834	377
Oregon	2724	496
Mississippi	2625	1630
Kansas	2476	606
Arkansas	2388	882
West Virginia	1897	604
Utah	1680	392
Nebraska	1594	343
New Mexico	1500	459
Maine	1187	185
Hawaii	1083	606
New Hampshire	1057	238
Nevada	1007	537
Idaho	998	185
Rhode Island	986	310
Montana	809	396
South Dakota	709	180
North Dakota	672	119
Delaware	644	200
District of Columbia	622	1053
Vermont	548	132
Alaska	525	139
Wyoming	490	216

While population is one way to measure the relative burden imposed on states from abolishing diversity jurisdiction, the existing caseload of the state courts provides a better measure. How large an increase in the state courts' caseload does abolition of diversity entail? While data on state courts are incomplete, the National Center for State Courts' evaluation suggests that on a per state basis the increase is spread fairly evenly. Researchers were able to generate the percentage increase in tort and contract cases in twenty-two states from abolishing diversity, and with one exception, the increase in state court caseload was less than 10% and generally ranged between 3% and 6%. These data are presented in Table II.

TABLE II[62]

POTENTIAL INCREASE IN TORTS AND CONTRACTS PER STATE

States	State Torts and Contracts	Percent Increase in Torts and Contracts
New York	116188	5
Texas	97599	6
Florida	92529	2
North Carolina	13805	5
Massachusetts	18245	7
Missouri	18054	8
Tennessee	21854	6
Wisconsin	51868	1
Washington	22359	3
Maryland	20261	5
Minnesota	19499	2
Arizona	37940	1
Colorado	22645	2
Puerto Rico	9755	3
Connecticut	36561	3
Kansas	12893	4
Arkansas	32506	3
New Mexico	15771	3
Maine	2868	6
Hawaii	3475	17
Montana	6026	6
North Dakota	4145	3

Perhaps the best measure of the burden imposed on the states from abolishing diversity is the increase in cases per judge. As Table III illustrates, this increase ranges from a low of two in Wisconsin and Minnesota to a high of thirty-five in South Carolina. In most states, the increase in filings per judge is in the low teens.

62. *Id.* at 66.

TABLE III[63]

1987 DIVERSITY FILINGS PER JUDGE BY POPULATION

States	Number of General Jurisdiction Judges	Total Diversity Cases	Total Cases Per Judge
California	724	4182	6
New York	387	5482	14
Texas	375	5537	15
Florida	362	1787	5
Pennsylvania	330	5642	17
Illinois	363	5532	15
Ohio	339	1503	4
Michigan	196	2117	11
North Carolina	72	644	9
Georgia	135	1961	15
Virginia	122	1480	12
Massachusetts	61*	1233	20
Indiana	206	1179	6
Missouri	133	1449	11
Tennessee	128	1252	10
Washington	133	568	4
Maryland	109	1037	10
Louisiana	192	2759	14
Alabama	124	1416	11
Kentucky	91	803	9
South Carolina	31	1073	35
Arizona	101	417	4
Colorado	121	512	4
Puerto Rico	92	299	3
Oklahoma	71	2024	29
Iowa	100	377	4
Oregon	85	496	6
Mississippi	79	1630	21
Kansas	146	606	4
Arkansas	70	882	13
West Virginia	60	604	10
Utah	29	392	14
Nebraska	48	343	7

63. *Id.* at 58.

*Superior Court Department judges only.

New Mexico	59	459	8
Maine	16	185	12
Hawaii	24	606	25
New Hampshire	25	238	10
Nevada	35	537	15
Idaho	33	185	6
Rhode Island	19	310	16
Montana	41	396	10
South Dakota	35	180	5
North Dakota	26	119	5
Delaware	17	200	12
Alaska	29	139	5
Wyoming	17	216	13

States with Non-Comparable Judge Figures[64]

New Jersey	321	2025	6
Wisconsin	197	430	2
Minnesota	224	491	2
Connecticut	139	1289	9
District of Col.	51	1053	21
Vermont	25	132	5

Of course, these data are still incomplete without some sense of what the new diversity cases would mean to state judges. We may hesitate to abolish diversity if adding fourteen cases doubles the work of state judges, but not if it increases their load by only a fraction. Once again, this determination is difficult because state court data are incomplete. However, the figures compiled by the National Center for State Courts enable us to make a comparison in twenty-two states. Table IV reports these data, providing the percentage increase per judge in the workload of state judges were Congress to eliminate diversity. In fact, Table IV exaggerates the size of the increase because the state figures reflect only tort and contract cases, while the federal figures include all diversity cases. Hence, the actual increase in the per judge burden would be considerably smaller. Even so, only in Hawaii—where the existing caseload is relatively

64. Flango & Boersema, *supra* note 59, at 58. In these states, it was not possible to distinguish between general jurisdiction judges, who are likely to be assigned former diversity cases, and judges in courts of limited or special jurisdiction. Accordingly, the effects of abolishing diversity on individual judges may be underestimated. *Id.* at 44-45.

light—would the state court judges experience an increase greater than 10%. In other states, abolishing diversity jurisdiction would increase the judges' workload by approximately 2 to 6%, and generally by less than 5%.

TABLE IV[65]

POTENTIAL INCREASE IN FILINGS PER JUDGE

States	State Torts and Contracts	Number of General Jurisdiction Judge	Total Cases per Judge	Diversity Cases to Be Added per Judge	Percent Incr.
New York	11188	387	300	14	4.6
Texas	97599	375	60	15	5.7
Florida	92529	362	256	5	1.9
N. Carolina	13805	72	192	9	4.6
Massachusetts	18245	61	299	20	6.7
Missouri	18054	133	136	11	8.1
Tennessee	21854	128	167	10	5.9
Washington	22359	133	168	4	2.3
Maryland	20261	109	186	10	5.4
Arizona	37940	101	376	4	1.1
Colorado	22645	121	187	4	2.1
Puerto Rico	9755	92	106	3	2.8
Kansas	12893	146	88	4	4.5
Arkansas	32506	70	464	13	2.8
New Mexico	15771	59	267	8	3.0
Maine	2868	16	179	12	6.7
Hawaii	3475	24	145	25	17.2
Montana	6026	41	147	10	6.8
North Dakota	4145	26	159	5	3.1
States with Non-Comparable Judge Figures[66]					
Wisconsin	51868	197	263	2	0.7
Minnesota	19499	224	87	2	2.3
Connecticut	36561	139	263	9	3.4

These data should allay fears that shifting diversity cases to the state courts will impose a substantial new burden on the states. On the contrary, the potential burden on state courts appears insignificant—especially when compared to the relief eliminating diversity would provide to the federal courts.

65. Compiled from data presented in *id.* at 58, 66.
66. *See supra* note 64.

What about the question of unfairness to litigants from added delay in the disposition of cases? The concern is not that disposing of these cases will take longer than it presently takes to dispose of such cases in state courts. The magnitude of the increase in state court dockets from abolishing diversity jurisdiction is too small to create a noticeable increase in disposition times. Rather, the added delay feared by proponents of diversity derives from the fact that state courts are slower than federal courts.[67] In reality, while federal courts are faster than state courts in some places, in other jurisdictions the time from filing to disposition is faster in the state courts.[68] Nonetheless, in many states depriving litigants of a federal forum definitely translates into a longer time to disposition.

The question is, why is this unfair to these litigants? If anything, what is unfair is that existing law gives some litigants the benefit of a federal forum that is denied to others solely because these litigants have the good fortune to face an adversary from another state. There is nothing unfair about placing all parties with state law claims on an equal footing. Abolishing diversity jurisdiction does nothing more than take a windfall benefit away from a class of litigants having no claim to special treatment. If justice in the state judicial systems is too slow, the solution is for state lawmakers to improve the state courts, not to select a class of favored litigants (a class that consists disproportionately of large corporations[69]) and give them the benefits of faster federal courts. Indeed, as noted above, a number of commentators argue that diversity jurisdiction should be abolished because it diminishes incentives for state court reform.[70]

2. *Federal courts provide a superior quality of justice*

Another argument advanced in support of retaining diversity jurisdiction is that the quality of justice provided by federal courts is superior to that provided by state courts.[71] This claim

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67. *See, e.g.*, Frank, *supra* note 25, at 412-13.

68. *Compare* 1988 AO REPORT, *supra* note 12, at Table C-5 (filing to disposition time intervals for federal courts) *with* B. MAHONEY, CHANGING TIMES IN TRIAL COURTS App. B. (1988) (filing to disposition time intervals for state courts in 17 cities, using 1985 figures).

69. *See* Kastenmeier & Remington, *supra* note 7, at 314 n.60; A. PARTRIDGE, *supra* note 22, at 30-31 (45% of diversity cases involve corporations).

70. *See supra* note 41 and accompanying text.

71. *See, e.g.*, Shapiro, *supra* note 44, at 328-29; Frank, *supra* note 25, at 410; WRIGHT, MILLER, & COOPER, *supra* note 35, § 3601, at 359.

is difficult to prove, in part because the subject is too sensitive to yield robust debate. Some commentators flatly deny that there is any difference in the quality of justice provided by state and federal courts, while others express at least tentative support for the proposition.[72] The quality of judges and courts undoubtedly varies over time as well as from place to place. Indeed, this is precisely why the bar regards it as so important to preserve its forum shopping options.

In any event, even if federal courts are on average better than state courts, why is this a reason for retaining diversity jurisdiction? The response made to the argument that federal courts are faster applies here as well: if state courts are inadequate, improve them. Diversity jurisdiction simply confers an unwarranted privilege on some state law claimants while leaving others to the supposedly inadequate state courts. As such, and especially because the claimants able to obtain a federal forum consist disproportionately of the powerful and influential, the existence of diversity reduces pressures to reform the state system. Finally, because diversity increases the federal docket by at least 25%, its retention diminishes the quality of justice received by other federal claimants who are clearly entitled to the benefits of a federal forum.

Some proponents of diversity concede that it is not unfair to tell litigants to use their votes and lobbying power to improve the quality of justice in their own state courts. But, they say, saddling out-of-state litigants with the shortcomings of another state's courts is another matter altogether.[73] In the first place, the most this argument suggests is that only out-of-state parties should be able to invoke diversity jurisdiction, an alternative discussed below. But even advanced only for this narrower proposition, the superficial appeal of the argument is misleading. Once the out-of-state party sues in another state's federal courts, the federal court must apply that state's substantive law (including its choice of law rules) however much this disadvantages the out-of-state plaintiff.[74] Yet the out-of-state party had no say in making that law. This is the usual rule: a state need

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72. *Compare* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (state courts are as good) *with* R. POSNER, *supra* note 16, at 144 (some evidence suggests that federal courts are better) *and* WRIGHT, MILLER & COOPER, *supra* note 35, § 3601, at 359 (same).

73. *See* Shapiro, *supra* note 44, at 329.

74. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

only treat out-of-state parties no worse than it treats its own citizens, protecting the out-of-staters through virtual representation. Nothing about diversity jurisdiction warrants making an exception to this rule.

3. The problem of bias against out-of-staters

The "traditional, and most often cited, explanation of the purpose of diversity jurisdiction" is that it protects outsiders from state court discrimination.[75] While many commentators have treated this as the only historical justification for diversity, twentieth century scholarship suggests that bias may have been less important in the creation of diversity jurisdiction than the desire to protect commercial interests from pro-debtor state courts.[76] In any event, advocates of diversity jurisdiction argue that bias is a problem and that it necessitates diversity jurisdiction, and many of their opponents regard this as the strongest argument for diversity jurisdiction.[77]

Like the argument about the quality of justice, the bias argument is difficult to evaluate. The empirical data are sparse and inconsistent, suggesting that lawyers in some (mostly rural) areas still fear bias, while lawyers in other areas do not.[78] Unfortunately, these studies test only lawyers' fears, not the reality of bias or even the fears of clients. Opponents of diversity jurisdiction assert that bias against non-residents has largely been replaced by other biases.[79] Advocates concede that xenophobia is less of a problem today than it was in the nineteenth century, but contend that "anyone who believes that there is no local chauvinism in the state courts is hiding his head somewhere."[80] Opponents respond that the few cases in which bias against out-of-staters appears are the exceptions that prove the rule.

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75. WRIGHT, MILLER & COOPER, *supra* note 35, § 3601, at 338.

76. *See, e.g.*, Friendly, *supra* note 3 (arguing that protection of commercial interests was an important consideration); R. POSNER, *supra* note 16, at 141-42 (same).

77. Among advocates of diversity jurisdiction, see for example Brieant, *supra* note 9, at 21; Frank, *supra* note 25, at 409-10; Statement of Robert D. Raven, *supra* note 25, at 5. Among opponents of diversity jurisdiction, see for example H. FRIENDLY, *supra* note 1, at 146 (the only justification with "the slightest substance"); Currie, *supra* note 40, at 4 (the "most respectable argument").

78. *See* J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS 260 (5th ed. 1989) [hereinafter CIVIL PROCEDURE]; Flango & Boersema, *supra* note 6, at 2-3; R. POSNER, *supra* note 16, at 142-43.

79. *See, e.g.*, H. FRIENDLY, *supra* note 1, at 146; CIVIL PROCEDURE, *supra* note 78, at 261-62.

80. Brieant, *supra* note 9, at 21.

It seems clear that many other types of bias are far more prevalent today and far more likely to influence litigation than bias against citizens of other states. Judge Friendly has argued persuasively, for example, that in cases between corporations, or where the in-state party is a corporation, prejudice against the out-of-state party *qua* out-of-stater probably is non-existent. Even in personal injury cases between individuals, any prejudice against an out-of-state defendant more likely stems from the jury's suspicion that he or she is insured than from his residence.[81]

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

> [t]his is an exceedingly scant basis for a jurisdiction that makes up over 25% of the civil docket of the district courts. Whatever may be thought of the proposition that it is better for a thousand guilty to go free rather than have one innocent man suffer, the use of scant federal judge-power cannot be justified simply on the basis that in the small proportion of diver-

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81. H. FRIENDLY, *supra* note 1, at 147-48. Lost in today's debate over diversity jurisdiction is the difference in the quality and degree of the bias feared by the framers of the diversity clause. In his autobiography, for example, Benjamin Franklin describes his first arrival in Philadelphia from Boston. His description has the feel of a visit to a foreign nation. It took Franklin three days to make this short trip. The clothing was different, the accents were different, the money was different. In one passage, Franklin relates how he

> ask'd for Bisket, intending such as we had in Boston, but it seems they were not made in Philadelphia, then I ask'd for a threepenny Loaf, and was told they had none such: so not considering or knowing the Difference of Money and the greater Cheapness nor the Names of his Bread, I bad him give me three penny worth of any sort. He gave me accordingly three great Puffy Rolls. I was surpriz'd at the Quantity, but took it, and having no room in my Pockets, walk'd off, with a roll under each Arm, and eating the other.

THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 75-76 (L. Labaree ed. 1964). Differences among states and regions still remain, and these are occasionally the source of prejudice. But between mass communications and our long common history, such problems are reduced by an order of magnitude from the eighteenth century.

sity cases where prejudice against the out-of-stater may exist, a federal court might be of some help in a few.[82]

IV. Recommendation: Abolition of Diversity with Three Exceptions

On balance, the case for abolishing diversity jurisdiction is clear. I stress the "on balance," because one cannot say that there are *no* reasons to retain diversity jurisdiction. Some of the arguments for diversity jurisdiction have merit, and in a world of unlimited resources, a case could be made for keeping these cases in the federal courts. Even in such a world the case would be exceedingly weak given the arguments above. In any event, in *this* world it is clear that the federal system can no longer afford the luxury of diversity jurisdiction.

If Congress does abolish diversity jurisdiction, it should delay the effective date of any legislation to give states a chance to prepare to receive these cases. In addition, Congress should recognize three exceptions to general abolition. These uncontroversial expectations are accepted by even the staunchest opponents of diversity.

A. *Suits Involving Aliens*

A recent study by the Federal Judicial Center estimates that preserving diversity jurisdiction only in suits between a citizen of the United States and a foreign state or its citizens would still reduce the number of diversity cases by almost 92%.[83] Here, where the burden is slight,

> [i]t is important in the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided. This objective can best be achieved by giving the foreigner the assurance that he can have his case tried in a court with the best procedures the federal government can supply and with the dignity and prestige of the United States behind it.[84]

The federal government is responsible, and is sometimes required by treaty, to provide aliens access to justice according to standards recognized in international law. Under international

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82. H. Friendly, *supra* note 1, at 149.
83. A. Partridge, *supra* note 22, at 23-24.
84. ALI Study, *supra* note 2, at 108.

law, moreover, the federal government is responsible for any denial of justice by a state court, even though the federal government has no direct authority over these tribunals. The State Department takes the position that while the federal government "has great confidence in the competence, integrity and impartiality of the state court systems, the availability of civil jurisdiction in federal courts under a single nationwide system of rules tends to provide a useful reassurance to foreign governments and their citizens."[85]

While preserving alienage jurisdiction, Congress should nevertheless modify it in several respects. First, as explained by Professor Rowe, the need for complete diversity in suits involving aliens is small compared to the costs this requirement entails.[86] Accordingly, Congress should require only minimal diversity in such cases. Second, the 1988 amendments to 28 U.S.C. section 1332 make any alien "admitted to the United States for permanent residence" a citizen of the state in which the alien is domiciled for diversity purposes.[87] While it makes sense to treat aliens domiciled in the United States as citizens for these purposes, the provision overlooks aliens who are United States domiciliaries but who have not been formally admitted for permanent status, such as refugees, aliens residing under amnesty, aliens with temporary visas who are applying for permanent status, and illegal aliens. There is no reason to exclude these aliens, and Congress should therefore amend section 1332(a) to refer to an alien's domicile without regard for his or her status under the immigration laws. Third, by making aliens who are domiciled in the United States citizens for diversity purposes, the new provision arguably allows such aliens to sue or be sued by other aliens—a jurisdiction not allowed by article III. Similar constitutional problems have been raised in connection with foreign corporations whose principal place of business is in the United States: section 1332(c) arguably permits these corporations to sue or be sued by another foreign national or foreign corporation.[88] Congress could remove these ambiguities by adding a pro-

85. *Diversity of Citizenship Jurisdiction—1982: Hearings on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Comm. on the Judiciary*, 97th Cong., 2d Sess. 336 (1982) (letter from State Department dated Aug. 9, 1982).

86. Rowe, *supra* note 40, at 966-68.

87. 28 U.S.C. § 1332(a) (1982), *as amended by* Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4646 (1988).

88. *See* Note, *Alien Corporations and Federal Diversity Jurisdiction*, 84 COLUM. L.

vision to section 1332 stating that no foreign state, national, or corporation may invoke jurisdiction under section 1332 against another foreign state, national or corporation.

B. Interpleader

It also makes sense to retain federal jurisdiction over actions in the nature of an interpleader, as currently provided in 28 U.S.C. section 1335. The Federal Judicial Center's study on diversity jurisdiction found the impact of interpleader to be negligible,[89] and commentators unanimously agree that the federal courts provide a service in these cases that state courts may not be able adequately to provide.[90]

C. Complex Multistate Litigation

Limitations on the *in personam* jurisdiction of state courts and on state rules governing service of process may preclude joining in a single state all parties necessary to resolve certain complex cases. The federal courts have filled this gap well, and various projects are currently under way to improve the capacity of the federal courts to handle these cases. Both the American Bar Association and the American Law Institute are currently examining the problem of complex litigation. While these particular proposals have serious drawbacks, Congress should certainly consider preserving federal jurisdiction in some classes of complex cases. A federal forum can reduce repetitive litigation and facilitate obtaining uniform results for similarly situated claimants. Indeed, Congress may want to broaden jurisdiction in these cases by eliminating the complete diversity requirement.

V. Alternative Recommendations

If Congress is not inclined to abolish diversity jurisdiction, it can at least take steps to reduce the number of cases brought under this head of jurisdiction. The discussion below considers three alternatives to eliminating diversity that are also likely to

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Rev. 177 (1984); Note, *Diversity Jurisdiction over Alien Corporations*, 50 U. Chi. L. Rev. 1458 (1983).

89. A. Partridge, *supra* note 22, at 8-9.

90. Butler, *supra* note 16, at 71.

have a significant impact in reducing the number of diversity cases.

A. *Measure the Jurisdictional Amount in Actual Damages*

Public Law 100-702, which was enacted in 1988, raised the amount-in-controversy requirement for diversity cases from $10,000 to $50,000. The law's sponsors claimed that this increase would reduce the diversity workload by 40%.[91] While the actual impact of the legislation is yet to be determined, this estimate seems hopelessly optimistic. The Federal Judicial Center Study, for example, predicts that raising the jurisdiction amount to $50,000 will eliminate only 11% of the cases.[92]

Even 11% may be optimistic. Under present law, the amount-in-controversy may include not only punitive damages, but also "soft" damages such as pain and suffering, mental anguish, loss of consortium, and the like. In addition, the parties may include in the jurisdictional amount attorneys' fees allowed in a contract or by statute.[93] All these figures are easily manipulated. As Judge Mikva explained in testimony before a House subcommittee, the $50,000 threshold is "kind of a puffing game that you play with the lawyers . . . ."[94] Given the malleability of the elements that make up the amount-in-controversy, many lawyers will find it easy to inflate their clients' claims to meet the $50,000 threshold.[95]

Restricting the damages that may be included in the jurisdictional amount would put some teeth into the amount-in-con-

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91. 134 CONG. REC. H7453 (daily ed. Sept. 13, 1988) (statement of Rep. Kastenmeier); 134 CONG. REC. S16295 (daily ed. Oct. 14, 1988) (statement of Sen. Heflin).

92. A. PARTRIDGE, *supra* note 22, at 13-14.

93. 14A WRIGHT, MILLER & COOPER, *supra* note 35, § 3712, at 176-78. Attorneys' fees were demanded in 141 of the 386 cases studied by the Federal Judicial Center and were unliquidated in 125 of these cases. A. PARTRIDGE, *supra* note 22, at 13. Presumably, these were mostly contract cases.

94. *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Committee on the Judiciary*, 100th Cong., 1st & 2d Sess., pt. 1, at 313 (1988) (statement of Hon. Abner J. Mikva, Judge, D.C. Cir.).

95. The National Center for State Courts conducted a study which suggests that a much higher proportion of present diversity cases would be eliminated. *See* Flango & Burns, *The Effect of Recent Changes in Federal Diversity Jurisdiction on the State Courts*, ST. CT. J., Spring 1989, at 4. But this study was concerned with the distributional effects of raising the jurisdictional amount, and the researchers made the unwarranted assumption that each case in which less than $50,000 was pleaded under the old law would revert to the state courts. It is therefore entitled to little weight.

troversy requirement, thereby limiting diversity jurisdiction along the lines contemplated by Congress when it enacted Public Law 100-702. The Federal Judicial Center estimates that excluding punitive damages, non-economic damages and attorneys' fees from the calculation of the jurisdictional amount would increase the percentage of cases in which diversity jurisdiction was eliminated from 11% to 25%.[96] The author of the study adds that "based on impressions formed from reading the complaints in these cases, there is strong reason to suspect that many of the cases in the Information inconclusive column" (which constituted 45% of the cases) would fail to satisfy the $50,000 limit.[97]

The House Report accompanying the bill that became Public Law 100-702 indicates that Congress wanted district courts to use Rule 11 sanctions to prevent attorneys from meeting the $50,000 threshold by exaggerating their clients' damages and costs.[98] It will be difficult, however, to hold a lawyer or client responsible for seeking punitive damages or damages for pain and suffering in amounts greater than $50,000. Sanctions would be more effective if the jurisdictional amount were calculated without reference to the various elements described above. Under such a formula, past and probable future damages would be more easily computed, assessment of the value of non-monetary losses would be unnecessary, and exaggerated claims could be more easily identified.

B. Prohibit In-State Plaintiffs from Invoking Diversity Jurisdiction

Of the various arguments offered in support of diversity jurisdiction, the only credible one is that diversity is needed to protect out-of-state litigants from bias. But this argument provides no support for allowing in-state plaintiffs to invoke diversity jurisdiction. Out-of-state defendants are already barred by 28 U.S.C. section 1441(b) from removing a case based on diversity jurisdiction. A similar provision denying plaintiffs the right to bring diversity claims in their home state seems both sensible and fair.

At first blush, the potential impact of this reform looks to be great. A study by the National Center for State Courts esti-

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96. A. PARTRIDGE, *supra* note 22, at 19-20.
97. *Id.* at 20.
98. H.R. REP. No. 100-889, 100th Cong., 2d Sess., pt. 1, at 45 (1988).

mates that barring in-state plaintiffs would eliminate diversity jurisdiction in 49% of the cases;[99] a less comprehensive study by the Federal Judicial Center places the figure at 44%.[100] The Federal Judicial Center Study also notes that tort cases constitute a disproportionate number of the cases filed by in-state plaintiffs.[101] Since these cases tend to be more burdensome than contract and property cases, the raw percentages may understate the full relief this proposal might provide to the federal courts.[102]

Further consideration suggests that these estimates are probably optimistic. The plaintiff who still desires a federal forum can simply file in another state. And while this kind of forum shopping is obviously more costly than inflating an *ad damnum* clause to meet the $50,000 threshold, many plaintiffs may still choose to sue in a federal court in defendant's home state. Moreover, even if the plaintiff stays at home and sues in state court, many cases will be removed to federal court by the defendant. But this should not prevent Congress from barring in-state plaintiffs from invoking diversity jurisdiction. This reform will surely provide at least *some* relief to the federal courts, and there is simply no colorable argument for giving in-state plaintiffs a federal forum.

C. *Make Corporations Citizens of Every State in Which They Are Licensed to Do Business*

Under present law, a corporation is treated as a citizen of any state in which it is incorporated and of the state in which it has its principal place of business.[103] But the mere fact that a company is incorporated elsewhere is not likely to cause much bias if the corporation has local offices or employees or transacts substantial business in the state. In addition, Judge Charles Joiner notes that by giving multistate corporations a choice of

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99. Flango & Boersema, *supra* note 6, at 76-78.

100. A. PARTRIDGE, *supra* note 22, at 34.

101. *Id.*

102. *Id.* at 34-35. Partridge reports that the cases eliminated had an average weight of 1.3158 as compared with 1.2439 for the cases that were not affected. *Id.*

103. 28 U.S.C. § 1332(c)(1) (1982), *as amended by* Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4646 (1988). In direct actions against insurance companies, the insurer is also made a citizen of any state in which the insured is a citizen.

forum that is denied to their local competitors, diversity jurisdiction gives multistate corporations an unfair advantage.[104]

The most extreme proposal to restrict corporate access to federal courts in diversity cases is to make corporations "citizens" of any state in which they do business. Unfortunately, this proposal would require courts to make what is often a difficult jurisdictional determination concerning where a corporation does business. Making this determination could be especially troublesome in suits between corporations, where the need to determine every state in which both corporations may have done business could become a discovery nightmare. A standard like "doing business" is not easily verifiable and poses significant risks of wasting judicial resources if the parties do not learn of a state in which both do business until late in the litigation. One way to avoid such problems would be to make corporations citizens of every state in which they do "substantial" business, but that standard is inherently ambiguous and simply invites more controversy.

To avoid these problems, Judge Joiner proposes making corporations citizens of every state in which they are *licensed* to do business.[105] Both the Judicial Conference and the Department of Justice support this bright-line rule, which eliminates the problems associated with a test that turns on whether the corporation does business in the state. Moreover, the licensing proposal would still substantially reduce litigation based on diversity. Indeed, the Federal Judicial Center's study estimates that treating corporations as citizens of every state in which they are licensed to do business would reduce the number of diversity cases by 45%.[106]

Several aspects of this proposal require clarification. First, what about federally-chartered corporations, which do not require state licenses to do business? The authorizing federal statute or charter usually sets forth the permissible activity for such corporations. The Amtrak statute, for example, provides that Amtrak "shall be deemed to be qualified to do business in each State in which it performs any activity authorized under this chapter."[107] Accordingly, federally-chartered corporations could

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104. Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 JUDICATURE 291 (1987).

105. *Id.* at 291-92.

106. A. PARTRIDGE, *supra* note 22, at 30-31.

107. 45 U.S.C. § 546(m) (1982).

be deemed citizens of any state in which they are authorized to do business.[108] While this resembles the original proposal making corporations citizens of any state in which they do business, the number of federally-chartered corporations is sufficiently small to prevent this from becoming a significant problem.

Second, one can argue that the proposal may reward corporate violations of state licensing laws. Presumably, however, a corporation would not be permitted to obtain diversity jurisdiction by denying citizenship in a state in which it had not complied with state licensing laws; nor would a corporation be permitted to defeat diversity jurisdiction by claiming citizenship in such a state. In this way, no corporation could benefit from noncompliance with state licensing laws. The courts could implement a system of cost and fee shifting to deter litigation about whether a corporation complied with state licensing laws. It is impossible to estimate the volume of litigation that would ensue over such questions, but the issues are likely to be straightforward enough to keep it small.

Finally, there is the question of the status of the so-called "forum doctrine," which makes a plaintiff corporation that is a citizen of the forum state a citizen of only that state for purposes of diversity jurisdiction. Thus, if a New York corporation licensed to do business in New York and Pennsylvania sues an Illinois corporation licensed to do business in Illinois and Pennsylvania, diversity jurisdiction would exist if the New York corporation sued in New York or Illinois, but nowhere else.

Two reasons may be advanced for using the forum doctrine under the proposed expansion of corporate citizenship. First, applying the forum doctrine would further reduce discovery problems. With this doctrine in place, a corporation suing in a state in which it is a citizen need only determine whether a defendant corporation is licensed to do business in that state; without the forum doctrine, the plaintiff must determine whether both corporations are licensed to do business in any of the fifty states or in the territories. But determining where a corporation is licensed to do business should be easy, so this is not a very forceful argument. A second rationale for applying the forum doctrine is that it is unfair to deny diversity jurisdiction simply because two corporations happen to be licensed in some state that has absolutely nothing to do with the case. But

108. *See* A. PARTRIDGE, *supra* note 22, at 31.

such cases appear to be extremely rare. The Federal Judicial Center's sample, for example, apparently contained no cases in which jurisdiction would have been denied on the ground of shared citizenship in a third state.

At the same time, adopting the forum doctrine makes access to federal court easier for corporations that are citizens of the forum state and therefore do not suffer from local bias than for corporations that are not citizens of the forum state but that may do business in some shared third state. Thus, the forum doctrine encourages corporations to invoke diversity jurisdiction in states where they are citizens.

For these reasons, Congress should simply reject the forum doctrine.[109] If, however, Congress finds the justifications for the forum doctrine persuasive, it can choose a middle course that addresses these concerns without encouraging suits by in-state plaintiffs. This alternative is to supplement the existing definition of corporate citizenship by making a corporation a citizen of (1) any state in which it is incorporated, (2) the state in which the corporation has its principal place of business, *and* (3) the forum state if the corporation is licensed to do business in that state. This middle ground puts multistate corporations on an equal footing with local businesses without encouraging suits by in-state corporations.[110]

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109. Of course, Congress could render the forum doctrine question moot by adopting the proposal precluding in-state plaintiffs from invoking diversity jurisdiction.

110. *See* Reavley, *Diversity Jurisdiction*, at 26-27 (report submitted to the Federal-State Jurisdiction Committee of the Judicial Conference of the United States (May 17, 1989)).