The Million-Dollar Diversity Docket

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Congress has always imposed an amount in controversy requirement for general diversity jurisdiction. Congress initially set the jurisdictional amount at $500 in 1789 and has raised it six times, most recently in 1996 to its current $75,000 threshold. That requirement has been described as ensuring that the federal courts not become bogged down by “petty” or “insubstantial” state-law cases.

Given that it has been twenty-five years since the last increase, we are probably overdue for another one. But to what amount? For what purpose? And with what effects on the size and composition of the diversity docket? What would happen if Congress raised the jurisdictional amount from the current $75,000 to, say $250,000? How many cases would that eliminate, and which ones? Would it affect some types of cases, or some types of litigants, more than others? And what if Congress took a much bolder step and raised the jurisdiction amount to $500,000 or even $1 million?

Using a novel hand-coded data set of pleadings in 2,900 cases, we predict the likely effect of increases to the jurisdictional amount at three levels: $250,000, $500,000, and $1 million. Our analysis shows that, while increases do (as they must) result in fewer diversity cases, the decline is neither extreme nor linear, with more than half of the current docket remaining even with an increase to $1 million. Our analysis also shows that the jurisdictional amount is not a neutral throttle. Instead, different areas of law, different parts of the country, and different

*Gene and Elaine Edwards Family Chair in Law, Professor of Law, University of Oklahoma College of Law. We want to thank Bob Bone, Zachary Clopton, Ed Cooper, Seth Endo, Maggie Gardner, William Hubbard, Rick Marcus, Melissa Mortazavi, Jim Pfander, Chief Judge Lee H. Rosenthal, Tom Rowe, Joshua Sellers, and the participants of Emory Center for Federalism and Intersystemic Governance’s Conference on Federal Diversity Jurisdiction for their generous and helpful feedback. We thank our research assistants Cole Brown, Christopher Fry, Hammons Hepner, Daniel Lee, Jared Plaudis, Gatlin Squires, Mallory Sullivent, and Morgan Vastag for their dedication, professionalism, and care.
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litigants are more affected by changes in the jurisdictional amount than others.

Our findings provide new guidance for Congress to consult when evaluating proposed changes to the amount threshold. Informed by how increases to the jurisdictional amount affect both the size and composition of the diversity docket, Congress can determine whether proposed increases achieve legislative goals and serve or disserve jurisdictional policy. For scholars, our empirical work provides a new lens into the ongoing debates about the basic functions and functioning of the federal diversity docket.

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INTRODUCTION

Every year, litigants file around 100,000 new cases in federal court that invoke diversity jurisdiction. That number could be much higher or much lower depending on what amount, if any, Congress sets as an amount in controversy requirement.

Article III authorizes diversity jurisdiction over any case in which any plaintiff is diverse from any defendant (minimal diversity). But the Article III judicial power is not self-executing; rather, Congress must confer it by statute. Whether to confer it, and with what limits or conditions, is up to Congress. Congress could confer none of it, all of it, or any portion or amount in between. Congress has never conferred all of the potential Article III diversity jurisdiction. Not by a long shot. In large part, that is because Congress has always limited the grant of general diversity jurisdiction to cases that exceed a specified amount in controversy.

Since the Judiciary Act of 1789, Congress has used a jurisdictional amount requirement to regulate access to federal court.


2. See State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967) (“Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.”) (emphasis added). Congress has used this “minimal diversity” power to enact the federal interpleader statute, 28 U.S.C. § 1335, the Multiparty, Multiforum Jurisdiction Act, 28 U.S.C. § 1369, and the Class Action Fairness Act’s amendments to the general diversity statute, 28 U.S.C. § 1332(d).

3. See, e.g., Hertz Corp. v. Friend, 130 S. Ct. 1181, 1187-88 (2010) (“The Constitution provides that the ‘judicial Power shall extend’ to ‘Controversies . . . between Citizens of different States.’ This language, however, does not automatically confer diversity jurisdiction upon the federal courts. Rather, it authorizes Congress to do so and, in doing so, to determine the scope of the federal courts’ jurisdiction within constitutional limits.”).


5. The other major constraint on the diversity docket is the requirement that all plaintiffs be diverse from all defendants (complete diversity). See Strawbridge v. Curtiss, 7 U.S. 267 (1806). Unlike the amount in controversy requirement, the complete diversity requirement is not an explicit textual requirement, nor is it the only way to read the operative language. But that is the way the Supreme Court has read it for over two centuries. Any change will likely have to come from Congress. Cf. Carden v. Arkoma Assocs., 494 U.S. 185, 197 (1990) (emphasizing that changes to federal jurisdiction are matters of policy properly made by Congress rather than the Court).
courts and throttle the number of diversity cases. First set at $500, it now stands at $75,000. Along the way, Congress has increased the jurisdictional amount six times (1802, 1887, 1911, 1958, 1989, and 1996) and lowered it once (1801). It is difficult to overstate the significance of the amount in controversy requirement as a tool for Congress to regulate the diversity docket. Congress could omit it entirely, theoretically opening up the federal courts to untold numbers of penny actions between citizens of different states. Or Congress could all but eliminate the diversity docket by upping the amount threshold into the trillions.

Congress has always trod a middle path, using the amount in controversy as a tool to strike a practical balance that affords access to federal court for many diverse-citizen cases but not all of them. As described in the legislative record accompanying the 1958 increase from $3,000 to $10,000, the goal is to set the amount so that it is “not so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies.”

With this challenge in mind, commentators and legislators periodically propose modifying the amount in controversy. Given that it has been almost 25 years since the last increase, we are probably overdue for another one. But to what amount? And with what effect? What would happen if Congress raised the jurisdictional amount from the current $75,000 to $250,000 or, say, $1 million? How many cases would be eliminated from the

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6. See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (“To ensure that diversity jurisdiction does not flood the federal courts with minor disputes, § 1332(a) requires that the matter in controversy in a diversity case exceed a specified amount, currently $75,000.”). General diversity jurisdiction is not unique in this sense. Class-action jurisdiction under CAFA and statutory interpleader represent two other types of citizenship-based jurisdiction subject to an amount in controversy requirement. See 28 U.S.C. § 1332(d) ($5 million aggregate amount in controversy requirement for diversity-based jurisdiction in class actions); 28 U.S.C. § 1335 ($500 amount in controversy requirement). For over 100 years, the general federal question statute also included an amount in controversy requirement, though Congress abolished it in 1980. See 13D WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3561.1, 172 (2008) (providing a history of the amount in controversy requirement for federal questions jurisdiction).
7. See infra notes 17–19 and accompanying text.
9. See, e.g., Jon O. Newman, The Current Challenge of Federal Court Reform, 108 CAL. L. REV. 905, 913 (2020) (“I would raise the jurisdictional dollar amount substantially. Isn’t it somewhat odd that federal district courts hear diversity cases involving $75,000, but the Texas state courts decided the dispute between Pennzoil and Texaco involving $11 billion?”).
diversity docket? And would certain types of cases, or certain types of litigants, be disproportionately affected?

This Article seeks to assist legislators and scholars in thinking through these questions. Part 1 provides doctrinal and historical background on the amount in controversy requirement. It traces the evolution of the amount in controversy requirement from the founding to today, highlighting the different reasons Congress has given over the years for making increases.

Part 2 introduces our data and approach. To inquire what would happen if Congress raised the amount in controversy, we ask how current diversity jurisdiction cases would fare under a raised amount in controversy standard. Our findings are based on a time-consuming data collection effort of pleadings in 2900 cases. We primarily utilize two methods to analyze our data: modified Kaplan-Meier survival functions and Cox Proportional Hazard Regression models. Both of these methods originate in the vast literature on survival methods and estimators. Our methodological contribution in this part is to re-conceptualize the use of survival methods. Instead of asking on which day a machine fails, we ask at which jurisdictional amount a case fails. We collected survival data at three amount thresholds: $250,000, $500,000, and $1 million.

Part 3 presents our main findings. We begin by examining the expected reduction in the overall number of diversity cases. Increasing the amount in controversy could create a significant but non-linear decrease in the overall size of the diversity docket. Roughly tripling the amount to $250,000 would likely eliminate about 20% of the diversity docket. Larger increases would have declining marginal effects. Even if the amount threshold were raised to $1 million (over thirteen times the current amount), well over half of the current diversity docket would survive. At least based on the median case, the diversity docket is already a “million-dollar diversity docket.”

We then examine whether these putative increases would affect different components of the diversity docket differently. Jurisdictional amounts are not neutral throttles. They do not modulate all cases evenhandedly. A change in the required amount in controversy would have a disparate impact across the country, with some districts being affected roughly twice as much as others. And increasing the amount in controversy would disproportionately impact removed cases, cases that eventually are
transferred to MDL proceedings, and cases with pro se litigants. Thus, setting the amount in controversy at any level entails normative choices about which cases to bless and curse with a federal forum and which to shun.

Part 4 sketches out some of the implications of these findings. Congress historically has used the amount in controversy requirement to modulate the size of the diversity docket. That function certainly still exists, and our data can assist Congress in that enterprise. Congress could use our data, for example, to calculate the likely impact of a proposed increase, both in terms of how many cases would be eliminated and which ones. Congress could then make an informed decision about whether a proposed increase achieved a desired effect and whether any side effects on the composition of the surviving cases were acceptable. But Congress could also use our data proactively to reshape the diversity docket, adopting increases not in spite of their differential impacts but in pursuit of them.

I. A BRIEF HISTORY OF THE AMOUNT IN CONTROVERSY REQUIREMENT

This section traces the history of the amount in controversy requirement for general diversity jurisdiction. We begin at the founding, examining the circumstances that led to the inclusion of an amount in controversy requirement for diversity jurisdiction in the First Judiciary Act. We then track the changes to the amount requirement over the ensuing 230 years to its current figure of $75,000. Finally, we attempt to identify the policy goals behind the amount in controversy requirement. Important questions to explore include what purpose the amount in controversy requirement serves, why it was set originally at $500, and what factors have motivated Congress to make periodic adjustments.

A. The Amount in Controversy Requirement From 1789 to Present

Nothing in the Constitution limits access to the federal courts based on the amount in dispute. But Article III gives Congress

10. See James M. Underwood, The Late, Great Diversity Jurisdiction, 57 CASE W. L. REV. 179, 218 (2006) (“There is no doubt that Article III in no way requires there to be any minimum amount in controversy for Congress to permit district courts to exercise any type
broad powers to increase or decrease the flow of cases into federal courts. A key technique available to Congress—and one that it has used in numerous ways since the Founding—is to limit access based on the amount in controversy in the dispute.\textsuperscript{11}

No aspect of federal jurisdiction illustrates this structure more lucidly than diversity jurisdiction. New law students are often surprised to learn that the amount in controversy requirement for diversity jurisdiction is statutory, not constitutional. Article III explicitly provides for the possibility of diversity jurisdiction, but it imposes no amount in controversy requirement.\textsuperscript{12} If Congress wanted to, it could confer diversity jurisdiction over penny disputes. On the other hand, Congress is not obligated to confer any

of constitutional subject matter jurisdiction.”). The only amount threshold in the Constitution is found in the Seventh Amendment, which preserves the right of trial by jury in cases where the value in controversy exceeds twenty dollars. U.S. Const. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”). That provision, however, speaks to practice in, rather than access to, the federal courts. The likely purpose of the $20 threshold was to give Congress the option of creating a federal small claims court in which judges presided without juries. See Margreth Barrett, The Constitutional Right to Jury Trial: A Historical Exception for Small Monetary Claims, 39 Hastings L.J. 125, 129 (1987).

11. While the amount in controversy requirement is most often associated with the general diversity statute, Congress has used an amount in controversy requirement in many other contexts to regulate access to federal courts. For over a century, from 1875 until 1980, the general federal question statute contained an amount in controversy requirement. See 13D Wright & Miller, Federal Practice and Procedure § 3561.1 (2008) (providing a history of the amount in controversy requirement for federal questions jurisdiction). Even now there are small pockets of federal law that can only be invoked in federal court if an amount in controversy requirement is met. Statutory interpleader actions are subject to a modest $500 amount in controversy requirement. See 28 U.S.C. § 1335. Similarly, certain civil suits against the United States are subject to a $10,000 amount in controversy maximum. See 28 U.S.C. § 1346. And subject to various limitations, the Class Action Fairness Act provides for diversity jurisdiction where aggregated class claims exceed $5 million. See 28 U.S.C. § 1332(d)(2).

12. See 14AA Wright & Miller, Federal Practice and Procedure § 3701, 246–47 (2011). The framers were certainly familiar with the concept of using an amount in controversy requirement to limit court access because such mechanisms were common in the states. See Thomas E. Baker, The History and Tradition of the Amount in Controversy Requirement: A Proposal to “Up the Ante” in Diversity Jurisdiction, 102 F.R.D. 299, 302-03 (1984). But if the framers ever discussed including an amount in controversy requirement in Article III, no records preserve what was said. See Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483, 484 (1928). The idea of a Constitutional amount in controversy requirement was discussed in some states during the ratification process See Baker, supra, at 303; Friendly, supra, at 499; Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789, at 20 (Wythe Holt & L.H. LaRue eds., 1990). Once the Constitution was ratified, the debate shifted to Congress.
diversity jurisdiction on the lower federal courts. Thus, whether to limit diversity jurisdiction through an amount in controversy requirement and, if so, the amount at which to set it are matters that the Constitution leaves to Congress’s judgment.

The general diversity jurisdiction statute has—and always has had—an amount in controversy requirement. Congress included a $500 amount in controversy requirement when it first conferred diversity jurisdiction in the Judiciary Act of 1789. As shown in Table 1, in the 230 years since then, Congress has changed the statutory amount required seven times.

Table 1: Summary of Legislation concerning Amount in Controversy in Diversity Jurisdiction

<table>
<thead>
<tr>
<th>Year</th>
<th>Statutory Amount</th>
<th>Interval Since Last Change</th>
<th>Percentage Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>1789</td>
<td>500</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1801</td>
<td>400</td>
<td>12 years</td>
<td>-20%</td>
</tr>
<tr>
<td>1802</td>
<td>500</td>
<td>1 year</td>
<td>25%</td>
</tr>
<tr>
<td>1888</td>
<td>2,000</td>
<td>86 years</td>
<td>300%</td>
</tr>
<tr>
<td>1911</td>
<td>3,000</td>
<td>23 years</td>
<td>50%</td>
</tr>
<tr>
<td>1958</td>
<td>10,000</td>
<td>47 years</td>
<td>233%</td>
</tr>
<tr>
<td>1988</td>
<td>50,000</td>
<td>30 years</td>
<td>400%</td>
</tr>
<tr>
<td>1996</td>
<td>75,000</td>
<td>8 years</td>
<td>50%</td>
</tr>
</tbody>
</table>

With one notable exception, the trend has been consistently—albeit intermittently—upward. The exception happened in 1801, when the amount required was reduced from $500 to $400 as part of the Midnight Judges Act passed by the outgoing Federalist Congress. Though no conclusive record exists of the reason for the reduction, some have speculated that it was designed to provide a

15. See Judiciary Act, 1 Stat. 73, §§ 11–12 (1789).
federal forum for claims arising out of the confiscated Lord Fairfax estate.\textsuperscript{17} The era of the Midnight Judges Act did not last long. Now in the hands of the Democratic-Republican Party, Congress repealed the Act the following year, reinstating the $500 amount in controversy requirement.\textsuperscript{18}

Since 1802, the amount in controversy requirement for diversity jurisdiction has risen periodically to its current $75,000 level. There is no clear pattern to the timing of the increases. Congress waited almost 100 years (1789–1887) before raising the amount above its original $500. Later changes have come at intervals between as much as 47 years (1911–1958) and as little as 8 years (1988–1996), with an average interval during this period of 28 years. Based on that schedule, the next increase might be expected in 2024. There is also no clear pattern to the size of the increases. Three of the increases (1888, 1958, 1988) have tripled the amount or more, while two of them (1911 and 1996) increased the amount by just 50%.

While there is a positive correlation between the interval between increases and their size,\textsuperscript{19} it is weak and does not suggest that Congress has been following any type of formula. When Congress increased the amount in controversy in 1911, it did so after 23 years and increased it by just 50%. But when Congress increased the amount in controversy in 1988, it did so after just 30 years and increased it by 400%. If one is to try to understand Congress’s activity, one must look beyond the data set out in Table 1.

**B. Policy and Goals of the Amount in Controversy**

From the founding, the amount in controversy requirement has been seen as a key tool to keep the diversity docket in check. In the framers’ era, the Anti-Federalist opponents of the proposed federal judiciary preferred that Article III not provide for diversity jurisdiction at all, but also urged amount in controversy limits as a fallback.\textsuperscript{20} In more recent times, opponents of diversity jurisdiction


\textsuperscript{18} See Baker, supra note 12, at 307.

\textsuperscript{19} The three largest increases occurred after the three longest intervals, while the two smallest increases occurred after the two shortest intervals.

\textsuperscript{20} See Baker, supra note 12, at 303; RITZ, supra note 12, at 20.
pressed for its abolition but also called for increases to the amount in controversy requirement (and other reforms) as a fallback.\textsuperscript{21} Thus, for opponents of diversity jurisdiction, the amount in controversy requirement has long functioned as a type of damage control mechanism.

But the amount in controversy requirement isn’t just a compromise made to appease the opposition. At the founding and now, supporters of diversity jurisdiction have shared the view that there should be some amount threshold.\textsuperscript{22} Without one, diversity jurisdiction would extend to the smallest of cases, intruding too deeply into state affairs and needlessly burdening federal resources.\textsuperscript{23} The question has never been whether to have an amount in controversy requirement but the amount at which it should be set to properly allocate diverse-citizen cases between the state and federal courts.

1. At the Founding

To identify the purpose of the amount in controversy requirement, we must first understand the purpose of diversity jurisdiction. The historic purpose of diversity jurisdiction was to provide out-of-state litigants with a judicial forum they trust to deliver fair and impartial justice.\textsuperscript{24} In part, the advocates of diversity jurisdiction expressed the concern, oft repeated by the Supreme Court\textsuperscript{25} and familiar to law students today, that out-of-

\begin{thebibliography}{99}
  \bibitem{21} See, e.g., Larry Kramer, Diversity Jurisdiction, 1990 BYU L. REV. 97, 124 (1990) (proposing that the amount be effectively increased by measuring only economic damages and excluding pain and suffering damages and punitive damages); Thomas D. Rowe, Jr., Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 HARV. L. REV. 963, 966 (1979).
  \bibitem{22} See Friendly, supra note 12, at 501. (“It seems to have been recognized from the start that there must be a jurisdictional amount.”).
  \bibitem{23} See infra notes 37–40 and accompanying text.
  \bibitem{24} See Scott Dodson, Beyond Bias in Diversity Jurisdiction, 69 DUKE L.J. 267, 271–83 (2019) (tracing the bias rationale from the founding to the modern era).
  \bibitem{25} See, e.g., Barrow S.S. Co. v. Kane, 170 U.S. 100, 111 (1898) (“The object of the provisions of the constitution and statutes of the United States, in conferring upon the [lower] [c]ourts of the United States jurisdiction of controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides.”); Martin v. Hunter’s Lessee, 14 U.S. 304, 347 (1816) (“The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes

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state litigants might encounter biased judges and juries in the state courts. 26 But fear of local bias was not the only concern driving the push to provide a federal forum. Many state court systems employed practices that did little to inspire confidence. 27 Commercial interests also worried about pro-debtor legislatures. 28 Some have argued that these concerns were overstated. 29 But even if the claims of local bias were unfounded, and even if the state courts could in fact be trusted, the perceptions and emotions that fueled those concerns were still a powerful force that threatened to frustrate the unquestioned federal interest in promoting a robust and integrated national economy. As Frankfurter and Landis put it, “[t]his fear of parochial prejudice, dealing unjustly with litigants from other states and foreign countries, undermined the sense of security necessary for commercial intercourse.” 30 Diversity jurisdiction would provide out-of-state citizens a forum they could trust, thereby giving them more confidence to engage in interstate activities. 31

The Federalist advocates prevailed, and Congress included diversity jurisdiction in the Judiciary Act of 1789. It was a victory born of compromise. While the Act created a national judiciary and

26. See Wright & Miller, Federal Practice and Procedure § 3601, at 12–15 (13th ed. 2009); Friendly, supra note 12, at 492–93; Warren, supra note 17, at 83 (“The chief and only real reason for this diverse citizenship jurisdiction was to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in a State Court against foreigners or non-citizens.”); Frankfurter & Landis, supra note 16, at 8, n.15; see also The Federalist No. 80 (Alexander Hamilton) (citing risk of local bias as supporting a national judiciary to hear claims between citizens of different states).

27. See Friendly, supra note 12, at 497–98.

28. See id. at 495; Wright & Miller, supra note 26, § 3601, at 15–16.

29. See Friendly, supra note 12, at 493–95 (concluding that an examination of reported case outcomes from the states during the period under the Articles of Confederation disclosed no evidence of local bias).


31. See Wright & Miller, supra note 26, § 3601, at 18–20.
established diversity jurisdiction, it did not extend the jurisdiction of the federal courts to the fullest extent of Article III. Most notably, it contained no provision for a general federal question jurisdiction. The scope of the diversity jurisdiction conferred in the Act reflects a further compromise. The opponents of diversity jurisdiction had long viewed an amount in controversy requirement as a way to blunt the impact of diversity jurisdiction should it come to exist. While they failed in their efforts to enshrine an amount in controversy requirement in the Constitution, they achieved a partial victory in Congress with the inclusion of a $500 amount in controversy requirement in the Act. Diversity jurisdiction would exist, but it would be limited.

Though 200 years of diversity practice has conditioned us to reflexively think of using the amount in controversy as a limiting factor, it is not the only way one could cabin the diversity docket. The most likely alternative would be to exclude particular types of cases. For example, Congress could cut the diversity docket drastically—some estimate by roughly 50%—by excluding personal injury suits. But the first Congress obviously took a different path, choosing to restrict diversity access based on the amount in controversy. That choice makes sense in light of the anti-bias rationale for diversity jurisdiction prevailing at the time.

32. See Baker, supra note 12, at 303; see also Warren, supra note 17, at 67—68, 131.
33. See FRANKFURTER & LANDIS, supra note 16, at 10–11.
34. See supra note 12. A proposal to create a constitutional amount in controversy requirement of $1500 was even made while Congress was debating the First Judiciary Act. See Baker, supra note 12, at 304; Warren, supra note 17, at 127.
35. The “domestic relations” exception to diversity jurisdiction can be viewed as a type of subject-matter exclusion. See Ankenbrandt v. Richards, 504 U.S. 689 (1992). The exclusion is indirect, however, in that the matters that fall within the domestic relations exception are excluded because they are not considered “civil actions” as that term is defined in the diversity statute, and not because they are prohibited by a specific exclusion. Id. at 700.
37. Some scholars today emphasize that the constitutional authority for diversity jurisdiction has been harnessed to serve other purposes, most notably to create a federal forum for complex cases that might not be able to be brought, or would proceed inefficiently, in state court. See Dodson, supra note 24, at 301–08; Thomas D. Rowe, Jr. & Kenneth D. Sibley, Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction, 135 U. PA. L. REV. 7, 22 (1986). For example, Congress has tapped into its Article III diversity authority to pass the Federal Interpleader Act, the Multiparty Multiforum Trial Jurisdiction Act of 2002, and the Class Action Fairness Act of 2005, all of which create a federal forum for efficient
There is no intuitive reason to think that outsiders are more or less at risk of being hometowned in contract or tort cases. But in either case type, the potential for harm—at least as measured in financial impact—is greatest as the stakes rise.\textsuperscript{38} A properly calibrated amount in controversy requirement provides protection in cases where the risk of financial harm is greatest, while limiting federal intrusion into everyday affairs unlikely to disrupt interstate commerce.\textsuperscript{39} “The decision to control caseloads by means of a jurisdictional minimum, then, reflects a congressional decision to arrange priorities according to a case’s financial worth.”\textsuperscript{40}

That still leaves the line to be drawn.\textsuperscript{41} When Congress drew the line for the first time in the Judiciary Act of 1789, it drew it at $500.\textsuperscript{42} The $500 figure can be traced back to Oliver Ellsworth, who had been given principal drafting responsibility for the proposed judiciary act.\textsuperscript{43} No record exists why Ellsworth selected $500. There is also no record of any debate in Congress about whether $500 was the right figure.

In summary, when Congress included an amount in controversy requirement in the Judiciary Act of 1789, it was primarily motivated by judicial federalism.\textsuperscript{44} Its objective was to strike a proper balance between the federal interests served by diversity jurisdiction and a proper respect for the state judicial systems. Congress chose to strike that balance by restricting access to the federal courts to suits with a value exceeding $500.

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aggregate litigation. See Dodson, supra note 24, at 301–08. But the fact that Congress can use—and has used—its Article III diversity power to achieve other goals does not alter the fact that all historic accounts suggest that when Congress used its Article III diversity power in 1789 to create “diversity jurisdiction” as we commonly understand it, Congress’s purpose was to counteract the threat (real or perceived) of local bias against out-of-state litigants.

\textsuperscript{38} See Baker, supra note 12, at 320.  
\textsuperscript{39} See U.S. DEP’T OF JUST., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 39 (1990) (“To limit federal court intrusion into everyday lawsuits, the first Congress established a jurisdictional minimum of $500.”).  
\textsuperscript{40} 15A MOORE’S FEDERAL PRACTICE, § 102.100.  
\textsuperscript{41} See Baker, supra note 12, at 301–02.  
\textsuperscript{42} See Judiciary Act, supra note 15.  
\textsuperscript{43} Id. Ellsworth mentioned the $500 figure in a letter he wrote to Judge Richard Law during the Committee process. See id. at 500–01; Warren, supra note 17, at 60–61.  
\textsuperscript{44} See Baker, supra note 12, at 305–06.
2. As the Amount Has Changed

Changes to the amount in controversy requirement were inevitable. The federal courts established by the Judiciary Act of 1789 were a grand experiment. Along with many other features of the federal court system, the $500 amount in controversy requirement would be tested in the field. Would the $500 threshold in fact strike a happy balance between the competing federal and state interests? Some expected a quick round of changes as defects were exposed and consequences made clear. In the longer run, like any fixed-amount threshold based on the conditions of the day, the $500 figure was certain to be in need of updating at some point to adjust for changed conditions, including simple inflation.

In the 230 years since 1789, Congress has raised the amount in controversy requirement five times (setting aside the reinstatement to $500 after the short-lived reduction to $400 brought about by the Midnight Judges Act). As discussed later, the three most recent increases were inflation adjustments. They were not designed to bump up the stakes required for diversity jurisdiction but to have the dollar threshold reflect the stakes previously set. In contrast, the first two increases were overtly designed to raise the stakes required with the goal of shrinking the diversity docket.

The first real increase took place in 1887, when Congress raised the required amount to $2,000. It had been a century since Ellsworth fixed his eye on $500. Our modern sense of economics might lead us to conclude that the increase was an adjustment for a century’s worth of inflation, but in fact overall inflation during that period had been modest. As shown in Figure 1, if the goal had been simply to adjust for inflation, the increase would have been only to $540. Instead, Congress was reacting to a docket crisis in the federal courts, and it reacted by (among other things) eliminating the bottom tier of the diversity docket.

45. See FRANKFURTER & LANDIS, supra note 16, at 5 (asserting that “the Judiciary Act was avowedly experimental”).
46. See Baker, supra note 12, at 304.
47. See supra Table 1.
48. See infra notes 62–78 and accompanying text.
Notes: For visual clarity, the vertical axis represents logged-dollar amounts. The horizontal axis represents time. The red lines are the active statutory amount. The thick black lines represent the inflation-adjusted statutory amount. The light gray lines represent continued inflation-adjusted statutory amounts (assuming there had been no change in the statutory amount). For example, the bottom gray line represents the inflation-adjusted value of the 1789 jurisdictional amount.
In the years following the Civil War, the federal docket was bursting at the seams.\textsuperscript{50} Part of it stemmed from the growth of the country. The country’s population had expanded tenfold since 1789, generating more and more disputes.\textsuperscript{51} But other major causes included the enactment of general federal question jurisdiction in 1875, an increase in diversity jurisdiction caused by the developing doctrine of corporate citizenship, and the creation of new grounds for removal.\textsuperscript{52} The federal judiciary was overwhelmed with cases. Faced with a choice of either greatly expanding the size of the federal judiciary or reducing its statutory jurisdiction, Congress pursued the latter.\textsuperscript{53} Among the many changes was to reduce the diversity docket by quadrupling the amount in controversy requirement to $2,000.\textsuperscript{54}

The 1887 change marked a significant shift in Congress’s approach to federal jurisdiction. The federal courts were now in the “federal question” business, and Congress freed up resources for it by striking a new judicial federalism balance for diversity jurisdiction.\textsuperscript{55} In justifying the increase to $2,000, the proponents also stressed a goal of protecting persons involved in small state-law disputes from the assertedly higher cost and longer disposition time of litigating in federal court.\textsuperscript{56}

\begin{footnotes}
\footnotenum{50} See F RANKFURTER AND LANDIS, supra note 16, at 60 (describing “an enormous increase in the business of the district and the circuit courts”); id. at 86 (stating that the lower courts “were staggering under a load which made speedy and effective judicial administration impossible”).
\footnotenum{52} See F RANKFURTER AND LANDIS, supra note 16, at 60–69.
\footnotenum{53} See id. at 88–94; Baker, supra note 12, at 307–08.
\footnotenum{54} See F RANKFURTER AND LANDIS, supra note 16, at 93–95; Felix Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 CORNELL L.Q. 499, 513 (1928) (discussing the new restrictions on diverse-citizenship cases).
\footnotenum{55} The view that the primary mission of the federal courts is to resolve federal-law cases has become sufficiently entrenched that, a century later, the Federal Courts Study Committee described the amount in controversy requirement as “a pragmatic but essentially arbitrary attempt to limit the diversion of federal courts from their primary role of litigating federal constitutional and statutory issues.” See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (1990) [hereinafter FCSC REPORT].
\footnotenum{56} See 18 Cong. Rec. 613 (Jan. 13, 1887) (remarks of Rep. Culbertson) (“The object of the bill is to diminish the jurisdiction of the circuit courts and the Supreme Court of the United States, to promote the convenience of the people, and to lessen the burden and expense of litigation.”); 18 Cong. Rec. 2544 (Mar. 2, 1887) (remarks of Sen. Edmunds)
\end{footnotes}
Just twenty-three years later, in 1911, Congress raised the amount threshold from $2,000 to $3,000 as part of a comprehensive Revision of the Judicial Code.\(^57\) The main focus of reform at that moment was to restructure the lower federal courts by fusing the old district and circuit courts, both endowed with various types of original jurisdiction, to create a single trial-level court.\(^58\) In the process, Congress made several adjustments to the jurisdiction of the district courts, including raising the amount in controversy requirement by 50% to $3,000.\(^59\) The reasons given were the same ones that prevailed in 1888—cutting the diversity docket would help alleviate the burden on the federal judiciary and spare litigants with smaller claims from the higher expense of the federal courts.\(^60\) Once again, inflation had nothing to do with it.\(^61\) As shown by Figure 1, the inflation-adjusted value of a $2,000 claim in 1888 was still $2,000 in 1911. Thus the increase, though modest in size, was intended not to maintain an inflation-adjusted balance but to once

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\(^57\) Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1091. The revision of the Judicial Code was itself part of the comprehensive revision of the Laws. See Frankfurter & Landis, supra note 16, at 130–31,141.  
\(^58\) See Frankfurter & Landis, supra note 16, at 133.  
\(^59\) The House had approved an amendment that would have raised it to $5,000. See 46 Cong. Rec. 1077 (Jan. 18, 1911). However, the Senate resisted the higher increase and the House yielded. See Frankfurter and Landis, supra note 16, at 141.  
\(^60\) See Baker, supra note 12, at 310–11. This time, the discussion about protecting litigants from the expense of federal court centered on the effect the increase would have on removal. During a House debate, a number of speakers asserted that ordinary plaintiffs with $4,000-level claims were foregoing damages in state court to stay under the $2,000 amount in controversy requirement and avoid removal to the more expensive “rich man’s” federal court. Thus, for many, the primary benefit of raising the amount in controversy to $5,000 was to increase the ability of the “poor man” to seek justice in his own courts without threat of removal. See 46 Cong. Rec. 1074 (Jan. 18, 1911) (remarks of Rep. Graham); id. at 1075 (remarks of Rep. Sims); id. at 1076 (remarks of Rep. Cullop).  
\(^61\) One Representative did invoke inflation, stating that “[f]ive hundred dollars [in 1789] was more to the poor man than $5,000 now.” Id. at 1075 (remarks of Rep. Mann). No other mention of inflation appears, and historic inflation statistics refute the assertion.
again alter the judicial federalism status quo by ratcheting up the stakes required for diversity jurisdiction.

Congress next raised the amount in controversy requirement in 1958, more than tripling it to $10,000. The increase was largely in response to a surge in case filings after World War II. For over a decade, Congress had been adding judgeships but still could not keep pace and looked for other solutions. As an alternative, Congress began considering raising the amount in controversy requirement. At roughly the same time, the United States Judicial Conference commissioned a committee to study the causes of the problem and possible solutions. The Committee returned with a strong endorsement of diversity jurisdiction, but recommended that the amount in controversy requirement be raised to $7,500. The Judicial Conference endorsed the proposal, and later updated its position to support an even higher increase to $10,000.

This time, inflation played a central role in the increase. The period between 1911 and 1958 saw consumer prices roughly triple. As shown in Figure 1, an increase to over $9,000 would have been warranted just to account for inflation. Congress ultimately settled on $10,000 as a threshold that would restore the norm that diversity cases be “substantial” (on an inflation-adjusted basis) and in doing so eliminated the congestion that had been caused by the introduction of “petty” cases as inflation ate away at the impact of the previous $3,000 limit. The Report from the House Judiciary Committee, which presumably carried the day with Congress, was quite clear on this rationale:

> The present requirement of $3,000 has been on the statute books since 1911 and obviously the value of the dollar in terms of its purchasing power has undergone marked depreciation since that date. . . . It is apparent that since $3,000 was the smallest amount that was considered substantial in 1911 for problems of Federal

62. Perhaps surprisingly, Congress did not increase the amount as part of the comprehensive revision of the Judicial Code in 1948. See Baker, supra note 12, at 311–12.
67. Id. at 16, 18–20.
68. Id. at 7.
Thus, the increase to $10,000 was intended to bring the amount in controversy up to date—to restore the value-threshold status quo set in 1911—with some cushion to account for the inevitable further erosion by inflation.\textsuperscript{71}

The next increase occurred in 1988, when the amount required was raised to $50,000.\textsuperscript{72} The stated purpose of the increase was again to reduce the number of diversity cases in the federal courts and to adjust for inflation.\textsuperscript{73} In reality, it was mostly the latter. It had been 30 years since the last increase. As shown in Figure 1, it would take an increase to $40,000 just to account for inflation. The proponents of the increase understood just that, acknowledging that “the adjustment largely reflects inflation.”\textsuperscript{74} As in 1958, Congress went with a higher number to account for future inflation.\textsuperscript{75}

Just eight years later, in 1996, Congress raised the amount in controversy requirement again, this time to $75,000. It represented another effort at holding the diversity docket in check.\textsuperscript{76} Once again, the increase can be attributed in large part to inflation. By itself, the high inflation rate prevailing at that time would have warranted an increase from $50,000 to over $66,000. Indeed, the constant erosion of the amount in controversy threshold by high inflation had led to a proposal that Congress not just increase the

\textsuperscript{70} H.R. REP. NO. 85-1706, at 3.

\textsuperscript{71} Baker, supra note 12, at 315–16. In contrast, the 1958 Act also included the now familiar provision deeming a corporation to be a citizen of its state of incorporation and its principal place of business. The purpose of that reform was clearly to alter the status quo by eliminating a category of cases deemed not deserving of federal jurisdiction. See H.R. REP. NO. 85-1706, at 3 ("In adopting this legislation, the committee feels that it will bring the minimum amount in controversy up to a reasonable level by contemporary standards and that it will ease the workload of our Federal courts by reducing the number of cases involving corporations which come into Federal district courts on the fictional premise that a diversity of citizenship exists.") (emphasis added).


\textsuperscript{74} H.R. REP. NO. 100-889, at 45 (1988).

\textsuperscript{75} Id. ("[S]ince Congress is slow to act in this area and may not revisit the issue for another three decades, it is sound policy to peg the amount in controversy at this time with a reasonable inflation cushion in mind.").

\textsuperscript{76} MILLER § 3701, supra note 73.
amount in controversy requirement but index it to inflation.\textsuperscript{77} Congress declined to implement the indexing proposal, simply saying that the increase to $75,000 would “assist the Federal judiciary in reducing its increasing caseload” while also providing a federal forum for “claims with substantial amounts at issue…”\textsuperscript{78} But the change seems to assume that the prior amounts set had drawn an appropriate “substantiality” line and just needed updating. The reduction in workload would come from excising the insubstantial claims that had crept in as a result of inflation, rather than raising the bar to exclude claims that would not have qualified under the early amounts on an inflation-adjusted basis.

In summary, Congress’s approach to the amount in controversy requirement has always been grounded in a pragmatic approach to judicial federalism. Congress continues to believe in providing a federal forum for some state-law cases between parties from different states, but it has never wanted them all. Congress has always used the monetary stakes of the suit as a convenient sorting tool. In times of inflation, a monetary threshold must be increased to prevent a de facto lowering of the stakes required. Many of the increases to the diversity statute’s amount in controversy requirement—especially those made in the last 100 years—seem designed largely to maintain the federalism status quo. But Congress has also demonstrated that, when it wants to, it knows it can use the amount in controversy as a lever, up or down, to reallocate state-law cases between the federal and state courts.

II. DATA, APPROACH, AND METHODS

Given this history, future increases to the amount in controversy are all but certain. But in what amount? And with what effects? If Congress today were looking for data to formulate answers to those questions, it would find only limited guidance. The only comprehensive analysis of which we are aware was


\textsuperscript{78} S. REP. NO. 104-366, at 29 (1996).
conducted over fifty years ago in the period leading up to the 1958 increase from $3,000 to $10,000.\textsuperscript{79} A limited analysis contained in a 1988 study of the budgetary impact of possible changes to diversity jurisdiction is now also more than thirty years old.\textsuperscript{80} Those studies, while still valuable to our general understanding of the relationship between the amount in controversy requirement and diversity jurisdiction, cannot answer questions about how proposed changes would affect the size and composition of the diversity docket today.\textsuperscript{81} And they provide no guidance on a wide range of questions we had that those studies did not address.

This article fills that gap. Using a novel hand-coded set of pleadings in 2,900 cases, we examine what would happen if

\textsuperscript{79} The data appear in an attachment to the House Judiciary Committee Report accompanying the bill that led to the 1958 increase. See H.R. REP. No. 85-1706, supra note 64. The history behind the data—and how it came to be attached to the House Report—is important. In 1950, the U.S. Judicial Conference appointed a Committee on Jurisdiction and Venue to study various reform proposals that had been circulating in Congress. The committee secured data from the Division of Procedural Studies and Statistics of the Administrative Office of the U.S. Courts. The data covered cases filed during the first half of fiscal year 1951 (the “1951 data”). The Committee included that data in its Report to the Chief Justice and the Judicial Conference. That report was submitted to the House Judiciary Committee as an attachment to a statement submitted by Joseph F. Spaniol, an attorney at the Division of Procedural Studies and Statistics at the Administrative Office of the U.S. Courts. In preparing his statement, Spaniol also collected data from the second quarter of fiscal year 1957 (the “1957 data”). However, none of the actual studies that generated the data appear in the House Judiciary Committee Report or any of the attachments. The data are simply reported in tables appearing throughout these materials.

\textsuperscript{80} See ANTHONY PARTRIDGE, THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION 13–17 (Federal Judicial Center, 1988).

\textsuperscript{81} Those studies address the federal diversity docket at the point in time of their publication. The 1951 study provides detailed data, but much has changed since then. That was before the era of mass torts. It was also before the proliferation of businesses operating as LLCs or LLPs or other newfangled unincorporated entities. It is impossible to know how these developments—let alone other factors like changes in the economy and attitudes about litigation—might have altered the diversity docket in the ensuing seventy years. Moreover, the utility of the 1951 data is limited by issues of transparency and methodology. The available records indicate that the study coded cases based on amount \textit{claimed} and “for which the amount claimed is known.” H.R. REP. NO. 85-1706, at 20. As we discuss infra, however, the test is not what amount is claimed but the amount that is possible.

The 1988 study is arguably more probative since it provides a more recent snapshot and employed a more reliable methodology for estimating the amount in controversy. Specifically, the 1988 study did not rely on the amount stated in the \textit{ad damnum} clause; rather, one or both of two researchers read the complaints and removal notices (where applicable) to identify the amount that the plaintiff plausibly could claim as damages. See PARTRIDGE, supra note 80, at 13–15, 42–43. On the other hand, the 1988 study is over thirty years old and is based on a sample of just 386 cases. See \textit{id.} at 13.
Congress raised the jurisdictional amount from its current $75,000 to three different levels: $250,000, $500,000, and $1 million. At each of those levels, we examine *how many* cases likely would survive. We also dig deeper and ask *which* cases would survive. Would some types of cases and some types of litigants be affected more than others? Would some districts be affected more than others? In short, we seek to determine how various increases to the amount in controversy requirement might reshape the diversity docket, both in its size and composition.

This Part will explain our approach, our data collection strategy, and the methods used. The next Part will present our main findings.

### A. Data & Approach

Our findings are based on a time-consuming data collection effort. We began by selecting five federal districts: Minnesota, Georgia Northern, New Jersey, Texas Northern, and Utah. These five districts were not randomly selected and are not meant to be a representative sample of the nation as a whole. All of our findings must be read with this limitation in mind. We confined ourselves to five districts because of data collection limitations and encourage other researchers to test our findings in other settings. We did not collect data on a random sample of all federal diversity cases because of significant variation in state remedies laws that would have made such data-collection unreliable.\(^82\) Accordingly, our data collection prioritized accuracy over generalizability.

Nevertheless, the chosen five districts provide geographic diversity and a good mix of economic, political, and social conditions. They furnish a sufficiently solid base to cautiously make general claims that exceed any other currently available empirical evidence.

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\(^82\) See *infra* notes 93–95 and accompanying text.
Within each of these five districts we then selected a random sample of diversity jurisdiction cases based on Federal Judicial Center (“FJC”) data on cases completed in 2018. All in all we collected data on 2,229 unique cases. Because of extensive data reliability checks (described infra in section II.B) we collected data on 667 of these cases multiple times. In total, the dataset includes 2,896 cases.

For each of these cases, we retrieved and read the original complaints for cases originally filed in federal court and the notice of removal and attachments for removed cases. After reading them, we asked ourselves how a court in that jurisdiction would

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83. 2018 was the last year for which data was available when we began our data-collection effort.

84. MILLER § 3702.3, supra note 73 (“As a starting point in the event of a challenge, the court typically will rely upon the complaint and any materials attached to or referred to in it, which often will make it ‘facially apparent’ that the amount in controversy requirement has been met or cannot be met, thereby resolving the issue.”) (quoting Thompson v. La. Reg’l Landfill Co., 365 F. Supp. 3d 725, 729 (E.D. La. 2019)).
likely rule if there was a challenge to the jurisdictional amount requirement and Congress had set a higher amount in controversy. Instead of postulating a small increase in the jurisdictional amount, we asked about the possible effects of large increases. What would happen if Congress were to raise the amount in controversy requirement to three different levels: $250,000, $500,000, and $1 million. We choose such high numbers to sharpen our findings. A modest change in the amount in controversy (say, from $75,000 to $80,000) will likely produce an effect that is difficult to observe with confidence. We wanted to inquire if a big change in the amount in controversy produced an observable effect. In asking whether a given case could pass a much higher amount in controversy, we applied the same standard a judge would use if presented with that question: the legal certainty test.

85. We also considered basing our study on amended complaints. Some might argue that amended complaints better represent what a case is really about. We rejected this approach for various reasons. First, jurisdictional disputes tend to be based on earlier filings (though, of course, many exceptions exist). See MILLER § 3702.4, supra note 73 ("Under an easily stated, well-settled principle, reflected in numerous cases . . . drawn from throughout the federal judicial system, the existence or nonexistence of the amount in controversy required for subject matter jurisdiction purposes is determined on the basis of the facts and circumstances as of the time that an action is commenced in a federal court or arrives there from a state court by way of removal."). But cf. Rockwell Intern. Corp. v. U.S., 127 S. Ct. 1397, 1398 (2007) ("When a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."). Second, we were unable to define in a principled way the “right” amended complaint (is it the first, the last, or the average?).

86. We also considered collecting data on a continuous variable for the amount in controversy rather than breakpoints. We rejected this approach because of the imprecision inherent in many complaints. Oftentimes there is insufficient information in a complaint to determine the amount in controversy with surgical precision. Of course, sometimes the amount in controversy can be identified down to dollars and pennies (e.g., in a debt collection case where the debt is clear, and recovery of the debt is the only available remedy). But more commonly the amount in controversy is a bit fuzzy. Most pleading rules do not require a precise accounting. See, e.g., FED. R. CIV. P. 8(a)(3). Some states do not require precise accounting or do not even permit it for some types of actions. See, e.g., CAL. CIV. PROC. § 425.10(b), Nev. R. CIV. P. 8(a), Ariz. R. CIV. P. 8(b). Many complaints that we examined articulated the amount in controversy generally. For those cases we thought it was more realistic to code for whether the amount in controversy in a complaint passes a big gate (e.g., above or below $500,000) rather than seek to identify whether the amount in controversy was $650,000 or $660,000.

87. WRIGHT & MILLER § 3702, supra note 73, at 280 ("[The legal certainty] test has been repeated and applied in innumerable cases decided in every circuit.").
Under this standard, judges ask whether it could be shown to a legal certainty that the amount in controversy cannot be recovered at the various levels. Or, as some courts put it, can it be shown as a matter of law that no reasonable jury could award that amount. Courts generally accept the good faith ad damnum allegations in a plaintiff’s complaint and do not require initial evidentiary submissions.

This inquiry under the legal certainty test necessarily entails attention to state remedies law. Federal courts in diversity cases must look to forum law to determine available damages, including special and punitive damages, and limitations on damages.

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88. The vague articulation is intentional here. Plaintiffs bear the burden of establishing federal subject matter jurisdiction while the removing defendant, in the removal context, has the initial burden since it is invoking federal subject matter jurisdiction.


90. See, e.g., Schober v. Schober, 761 F. App’x 127, 129 (3d Cir. 2019) (“Under the legal certainty test, a case may be dismissed for failure to meet the amount in controversy requirement if it appears to a ‘legal certainty’ that the claim is for less than the jurisdictional amount. Such dismissal may be appropriate where the facts indicate that a plaintiff claimed certain damages merely to obtain federal court jurisdiction, or where the court determines that no reasonable jury could award that amount”) (internal citations omitted).

91. See, e.g., Onyiuke v. Cheap Tickets, Inc., 435 F. App’x 137, 139 (3d Cir. 2011) (“In determining whether the amount in controversy exceeds $75,000, the Court generally accepts the plaintiff’s good faith allegations.”); see also 28 U.S.C. § 1446(c)(2) (“If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy . . .”).

92. See Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81, 89 (2014) (“[A] defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant’s allegation.”).

93. Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352–53 (1961) (“[T]he federal courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case.”); Onyiuke v. Cheap Tickets, Inc., 435 F. App’x at 139 (“It necessarily follows that whether the claims are for less than the jurisdictional amount depends on what damages a plaintiff could conceivably recover under state law.”).

94. To be precise, federal courts must look to the forum state’s choice of law rules. See Klaxon Co. v. Stentor Electric Mfg., 313 U.S. 487, 496 (1941). The forum state’s choice of law rules might select the forum state’s damages law, or it might select the damages law of another state. See, e.g., RESTATEMENT (SECOND) CONFLICT OF LAWS § 171 (tort damages governed by the law of the state with the most significant relationship to that issue).

Because the law governing damages varies between jurisdictions and is very complex, we did not select a random sample of federal diversity cases from around the country but instead focused on five districts. We assigned different teams of RAs to different districts (and thus states and state-specific remedies law). We then trained each team on the most important and most commonly used damages rules for those jurisdictions. This approach sensitized our data-collection efforts to variation in state remedies law.

We instructed our RAs to assume that the forum state’s choice-of-law provisions would pick forum damages law. For practical reasons, it was not feasible to ask our RAs to make choice-of-law predictions. To begin, in most cases there would be no way of knowing whether a party intended to ask the forum court to apply the law of another state. And even if a request to apply non-forum law was clearly raised in the materials we asked our RAs to inspect, asking them to predict what law would ultimately be chosen would have been an impossible task. Finally, had we asked our RAs to follow the choice-of-law trail, we would have needed to educate them about, and potentially have them apply, the damages law of every state. In short, incorporating choice-of-law into our coding process would have made the enterprise unworkable. We recognize that, as a consequence, our approach could result in some cases being misclassified (e.g., they meet a postulated raised jurisdictional amount under forum damages law but fall short under foreign damages law, or vice versa). However, we estimate, without knowing, that any such situations would be infrequent and would not result in systematic bias. In the aggregate, the errors

satisfy due process.”); N.J. STAT. ANN. § 2A:15-5.14 (“No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or $350,000, whichever is greater.”).

96. Courts typically apply forum-state law unless one of the parties seeks the application of another state’s law. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 136, cmt. b. While parties must provide notice at some point that they will seek the application of non-forum law, it need not be given in the pleadings. See, e.g., Fed. R. CIV. P. 44.1 (notice of intent to seek foreign law must be provided “by a pleading or other writing.”). Thus, instructing our RAs to examine the complaint or the removal notice for an indication that non-forum law was being sought would not have captured all of the cases where choice of law was ultimately raised.
resulting from our approach are likely to flow in both directions in roughly offsetting amounts.\footnote{The factor most likely to undermine these assumptions would be if a jurisdiction imposed a hard cap on a type of damages that is common and generally indeterminate—e.g., a hard cap on pain and suffering damages in tort cases. Because none of our jurisdictions has a generally applicable fixed cap on the recovery of noneconomic damages, our data might understate the impact of raising the amount in controversy requirement if a significant number of the cases in our study would have followed the law of a jurisdiction that has a fixed cap on those or similar damages.}

In addition to determining whether a complaint would meet an elevated jurisdictional amount requirement or not, we also collected data on the number of plaintiffs and defendants in an action and various types of relief requests (economic damages, noneconomic, punitive, declaratory).\footnote{See, e.g., Bell v. Preferred Life Assur. Soc’y, 320 U.S. 238, 240 (1943) (“Where both actual and punitive damages are recoverable under a complaint[’s allegation], . . . each must be considered to the extent claimed in determining whether the jurisdictional amount is involved.”).} Most complaints do not allow for precise allocations of each type of relief. Thus, the data cannot tell us what percentage of the requested relief originates from, say, punitive damages. Instead, these are simple binary variables, indicating whether the complaint asks for any of this type of relief. The FJC dataset also contains various additional information on a given case that we will utilize in our analysis section (e.g., pro se and IFP status).\footnote{While not beyond reproach, the FJC dataset is an invaluable resource that is far beyond anything we could have collected.}

\textbf{B. Data Reliability}

Our findings are only as good as the data on which they are based. Accordingly, we built into our data-collection effort multiple types of reliability checks to gauge the quality of our data. Our first type of check was intra-RA reliability. Here, we had the same RAs code the same case multiple times (often days, weeks, or months apart). This allows us to check whether RAs are coding consistently across time. Our next type of check was an inter-RA reliability check. Since we assigned teams of RAs to different districts, we were able to assign different RAs within each team some of the same cases. Thus, some cases were coded by two or three RAs. This allows us to check whether teams of RAs code consistently. Next, the authors also coded some cases themselves, thus providing an additional reliability check.
In all of this we did not expect perfect matches. Not only is hand-coded docket research inherently imprecise, but the complaints are also often vague and allow for divergent interpretations. This is not confined to researchers evaluating complaints but judges, similarly, are confronted with the difficult task of evaluating fuzzy complaints under the legal certainty standard. Judges have significant discretion in determining the jurisdictional amount. Predictably some judges utilize this discretion more than others. This variation exists because of diametrically opposed policy goals embedded in the jurisdictional determination. Depending on the sensibilities of a given judge, she might stress some policy goals more than others and probe the amount in controversy requirement more thoroughly than other judges. Our data collection tried to mirror the task judges face and thus reproduced these competing demands and the, at times, fuzzy answers. Thus, our reliability checks seek to ascertain not whether cases were coded identically but with reasonable consistency.

Table 2 presents a summary of our reliability checks. Each row represents one type of reliability check. The first three columns indicate the proximity of repeatedly coded cases. In the “Identical” column are cases that received an identical amount in controversy entries in subsequent rounds. Cases in the “one off” column indicate cases where subsequent coding put them one step higher or lower than the original coding. The next column collects cases

100. See generally Scott Dodson, The Complexity of Jurisdictional Clarity, 97 V A. L. REV. 1, 3 (2011) (“Although I generally agree with the value of jurisdictional clarity as an ideal, the reality is that jurisdictional clarity is largely a chimera, done in by its own inherent complexities.”).

101. See, e.g., Foret v. S. Farm Bureau Life Ins. Co., 918 F.2d 534, 537 (5th Cir. 1990) (“The trial court is not required to follow any set procedure in determining whether the jurisdictional amount has been satisfied. The blueprint of the method of determining the length and breadth of the amount in controversy is entirely within the discretion of the trial court.”) (internal citations omitted).

102. See, e.g., Deutsch v. Hewes St. Realty Corp., 359 F.2d 96, 98-99 (2d Cir. 1966) (Waterman, J.) (“One cannot underestimate the difficulties involved in developing clear and just rules to assist the district courts in determining whether an amount in controversy in a case exceeds $10,000. The problem is especially difficult because the major considerations tug in precisely opposite directions. On the one hand, with mounting federal case loads, as Chief Judge Lumbard recently has stated, ‘it has become doubly important that the district courts take measures to discover those suits which ought never to have been brought in the federal court and to dismiss them when the court is convinced to a legal certainty that the plaintiff cannot recover an amount in excess of $10,000.’ On the other hand, we must not permit a preliminary jurisdictional determination regarding recoverable damages to deprive a plaintiff unfairly of a federal court trial of a case on its merits.”).
where subsequent entries were more than one step off. In the “NA” column we included cases where one coder felt confident enough to specify an amount in controversy, but subsequent coders indicated that they are unable to pass judgment one way or the other.103 The last column tallies the number of cases for each type of reliability check.

Table 2: Data Reliability Summary

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<th>Identical</th>
<th>One Off</th>
<th>More than One</th>
<th>NAs</th>
<th>Total #</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intra-RA</td>
<td>60 (73%)</td>
<td>7 (9%)</td>
<td>0 (0%)</td>
<td>15 (18%)</td>
<td>82</td>
</tr>
<tr>
<td>Inter-RA</td>
<td>227 (59%)</td>
<td>58 (15%)</td>
<td>15 (4%)</td>
<td>85 (22%)</td>
<td>385</td>
</tr>
<tr>
<td>Professors-RA</td>
<td>123 (62%)</td>
<td>43 (22%)</td>
<td>18 (9%)</td>
<td>16 (8%)</td>
<td>200</td>
</tr>
</tbody>
</table>

Notes: Because of rounding the percentages might not add up to 100%. Also, because of random selection of cases to check some cases are in multiple categories (e.g., RA duplicated own work on a case and also another RA checked that case).

Table 2 shows that the brunt of cases were coded identically or within one breakpoint under different check scenarios. This provides confidence in the reliability of the data collection method. That being said, we want to stress that damage allegations are squishy. We suspect that different judges would evaluate most cases similarly but disagree on some, just as our RAs and we did.

C. Methods

We primarily utilize two methods to analyze our data: modified Kaplan-Meier survival functions and Cox Proportional Hazard Regression models. Both of these methods originate in the vast literature on survival methods and estimators. Initially much of this literature was utilized to understand the temporal aspects of

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103. We allowed in the instructions to RAs that they can indicate an inability to decide whether a given case passed a given jurisdictional amount threshold. Instead of forcing them to decide when they were deeply uncertain, we believe the existing data is more reliable and informative because RAs could indicate a basic level of confidence and uncertainty. Typically, such uncertainty arose for higher jurisdictional amounts. This is a variation of what the literature on survival methods calls “right censoring” (a patient leaves the study before an event that may or may not have happened can be observed). There are no instances of “left censoring” in our data (when the event of interest has already occurred before enrollment) because all cases survive a zero-dollar jurisdictional amount.

medical treatment, comparing the survival and death rates across time for treatment and control populations. The survival estimators have been generalized to many other contexts\(^\text{105}\) beyond the survival of patients, including failure of machine parts, unemployment,\(^\text{106}\) and spoiling food. Survival estimators have also been used in a broad range of legal scholarship, ranging from the economic consequences of the Homestead Act of 1862,\(^\text{107}\) the impact of legal interventions on Guantánamo Bay detentions,\(^\text{108}\) female attrition from private law practice,\(^\text{109}\) bail jumping,\(^\text{110}\) to the speed of administrative rulemaking.\(^\text{111}\) To our knowledge, no scholarship has utilized survival methods to understand jurisdiction generally or amount in controversy specifically.

Our main methodological innovation in this Article is to substitute the temporal component in survival analysis with a measure of jurisdictional amount. Instead of asking on which day a machine fails, we ask at which jurisdictional amount a case fails. For data-collection reasons, we measure such “failure” at different breakpoints ($75,000, $250,000, $500,000, and $1 million). We estimate the points between these breakpoints.\(^\text{112}\) The guiding principle when creating these estimates is decline. Just as no dead patient can spring back to life one week after his demise, neither

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105. Different academic fields utilize different names: event history analysis (sociology), duration analysis (economics), reliability analysis (engineering).


112. Because of the paucity of breakpoints, we modified the typical Kaplan-Meier functions by estimating slopes between observed breakpoints. We report the traditional Kaplan-Meier results in the appendix. It assumes the survival function between breakpoints to be constant and, therefore, shows declining horizontal steps rather than a slope. As the number of observed breakpoints increases, the estimator would approach the true survival function for the population.
could a case that would fail one jurisdictional amount be revived at a higher amount.\textsuperscript{113}

We begin with univariate analyses that describe the potential impact of a raised jurisdictional amount in relation to a series of factors under investigation. For example, we inquire whether the pro se status of plaintiffs affect the jurisdictional amount analysis. To do this, we measure the fraction of different types of cases that satisfy increasing jurisdictional amounts.

This approach provides an intuitive and useful preliminary overview. However, it is not well suited to describe the interaction of multiple variables (e.g., pro se litigants suing in tort using complex joinder).\textsuperscript{114} For example, imagine we compare tort and contract cases and find significant differences in their sensibility to raises in the amount in controversy. It would be difficult to know whether this is due to differences in the subject matter or the fact that, let’s say, pro se litigants crowd the tort docket but are largely absent from the contract docket. Any differences in sensitivity to AIC-changes might be due to subject matter, pro se status, or both. Accordingly, univariate analyses that focus on the relationship of sensitivity to jurisdictional amounts and any one factor are inherently limited.

To overcome this limitation, we will utilize a Cox proportional hazards regression analysis in section 3.H. The Cox regression model provides a numerical survival analysis that can take into account the simultaneous effects of multiple factors and provides helpful measures of statistical reliability. In effect, the Cox model allows us to tease out, in the above example, to what extend subject matter differences are responsible for the AIC impact and to what extent pro se status factors in.

\textbf{D. Selection Effects, Limitations, and Caveats}

In many other research contexts, a counter-factual approach like ours would lead to selection effects and potentially misleading findings. Litigants are strategic actors that dynamically adjust their

\textsuperscript{113} Hypothetically, remedies law could provide otherwise but we are not aware of any such remedies laws, and they would be conceptually troublesome.

\textsuperscript{114} It is also limited to categorical factors under investigation and ill-suited for continuous variables. However, given the structure of our data and the variables of most interest to us this limitation is not significant in the context of this article.
behavior in response to altered legal environments.\footnote{115}{See, e.g., David Freeman Engstrom, *The ‘Twilight’ Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1223–24 (2013) (noting the dangers of failing to take into account dynamic litigant responses); Jonah B. Gelbach, *Note, Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2275–77 (2012) (discussing various selection effects in the context of pleading standards); Scott Dodson, *A Closer Look at New Pleading in the Litigation Marketplace*, 99 JUDICATURE 11 (2015).} For example, it could be the case that litigants would systematically adjust the relief section of their complaints in response to Congress raising the jurisdictional amount.\footnote{116}{See, e.g., William H.J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474 (2017) (presenting evidence that lawyers changed their pleading and motion practice in the wake of changed pleading standards).} If that were the case, then our comparison of the current stock of cases to the adjusted stock of future cases would be misleading. Instead of continuing to file now jurisdictionally deficient complaints into the teeth of a raised jurisdictional amount, plaintiffs would simply adjust and craft complaints to meet the new congressional guidelines. If that were the case, a raised jurisdictional amount might impact the current stock of complaints but would not present an obstacle for future complaints.

However, we think this danger is remote. Selection effects are likely not a significant factor in the amount in controversy context for numerous reasons. First, actors out there in the world are unlikely to significantly change their primary behavior in response to Congress raising the jurisdictional amount (e.g., breaching more contracts that fall below the jurisdictional amount because of the unavailability of federal courts). Many people will not adjust their behavior because they simply would not know the old or new jurisdictional amount. Many of those that are aware of the amount in controversy requirement will find that the benefits of breach outweigh the risk of litigating in state court rather than federal court.

Also, plaintiffs are unlikely to change how they write complaints in response to a raised jurisdictional amount. Plaintiffs who desire to be in federal court typically already claim as much as they can.\footnote{117}{See generally William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693 (2016) (arguing that even in a world without pleading standards plaintiffs would typically “file factually detailed, plausible complaints or [] not file at all.”).} Put simply, those plaintiffs have many reasons to

\begin{itemize}
\item \footnote{116}{See, e.g., William H.J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474 (2017) (presenting evidence that lawyers changed their pleading and motion practice in the wake of changed pleading standards).}
\item \footnote{117}{See generally William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693 (2016) (arguing that even in a world without pleading standards plaintiffs would typically “file factually detailed, plausible complaints or [] not file at all.”).}
\end{itemize}
demand all available relief and few reasons to exclude.\textsuperscript{118} Plaintiffs who filed in state court and wish to stay there often plead vaguely; instead of specifying damages down to dollars and cents they often plead generally (e.g., “slip-and-fall resulted in a broken arm”). For these plaintiffs, raising the jurisdictional amount is not likely to change their pleading practices because vagueness and generality remain good strategies for keeping their cases in state court. Thus, for both plaintiffs that want to litigate in federal court and those that want to remain in state court, a raised jurisdictional amount would likely not affect their pleading approaches. Insofar as this claim is true for most plaintiffs, our approach allows for inferences from the current stock of cases to a hypothetical future stock of cases that plead under a raised jurisdictional amount. Insofar as the above claim is not true, our inferences are not reliable.

Perhaps the highest danger of selection effects originates with removing defendants. Defendants can also make their own amount in controversy assertions in the removal notice.\textsuperscript{119} Defendants who do so may feel conflicted. On the one hand, they have an incentive to assert a high number in order to achieve the ultimate goal of establishing that removal is proper. On the other hand, some defendants may feel that placing a high value on the case is against their ultimate interests as the party that might have to pay a judgment. Thus, it is possible that defendants moderate their amount in controversy assertions in their removal notices, trying to strike a balance between signaling that the case exceeds the amount threshold without acknowledging their full potential damages exposure. If this is true, then there may be some cases in our population in which the defendant asserted a value only high enough to clear the current $75,000 threshold but could and would have asserted a higher value had the threshold been higher. Should Congress increase the amount in controversy requirement, these defendants might be expected to ratchet up the values they assert in their removal notices to clear the higher threshold. All of our findings must be read with these caveats in mind.

\textsuperscript{118} See FED. R. CIV. P. 8(a)(3) (“A pleading that states a claim for relief must contain . . . a demand for the relief sought, which may include relief in the alternative or different types of relief.”).

III. MAIN FINDINGS

Our overarching finding is that jurisdictional amounts are not neutral throttles. They do not modulate all cases evenhandedly. Instead, different areas of law, different parts of the country, and different litigants are more affected by changes in the jurisdictional amount than others. Thus, setting the amount in controversy at any level entails normative choices about which cases to bless and curse with a federal forum and which to shun. While our research is focused on what would happen if Congress raised the jurisdictional amount, lowering the jurisdictional amount would also lead to differentiation. Alas, even a $0 amount in controversy requirement entails a choice with differential impact.

The initial section of this Part looks at the effect of various increases on the overall size of the diversity docket. The sections that follow then aim to tease out the different ways in which the jurisdictional amount impacts various parts of the federal docket. We begin by examining how the various increases would affect the five districts in our study. We then examine how the various increases would affect cases based on their subject matter (tort cases versus contract cases). Next, we examine the effect of the various increases based on whether a case was originally filed in federal court or removed. We then examine how the various increases affect cases based on whether either of the parties is a resident of the forum state. Next, we examine how the various increases affect cases in which one of the parties (typically the plaintiff) was proceeding pro se. Finally, we examine how the various increases affect cases that eventually became part of an MDL.120

We want to stress three specific findings. First, increasing the amount in controversy could create a significant but non-linear decrease in the overall size of the diversity docket. Second, a change in the required amount in controversy would have a disparate impact across the country, with some districts being affected roughly twice as much as others. And third, increasing the amount in controversy would disproportionately impact removed cases,

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120. We also examined party complexity and types of relief requested on an individual basis. These figures did not strike us as suggesting sufficiently novel or interesting findings to warrant separate treatment. To avoid clutter, we do not present these figures here but included these variables in the Cox Model in section 3H.

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cases that eventually transfer to MDL proceedings, and cases with pro se litigants.

The final section of this Part presents a Cox Proportional Hazard Regression model that combines all of these variables and provides for coefficient comparisons and measures of statistical significance.

A. All Diversity Cases

We begin with an account of how raising the jurisdictional amount would impact all diversity cases. Figure 3 presents a modified Kaplan-Meier survival function where the horizontal axis indicates progressively higher jurisdictional amounts, and the vertical axis represents the percent of all diversity cases that would survive such an amount.\footnote{The left vertical axis shows percentages relative to all cases. The right vertical axis shows percentages relative to only those cases that meet the current amount in controversy requirement of $75,000. As such, the left vertical axis can be used to approximate the percentage of cases that survive at a given AIC point. The right vertical axis can be used to approximate how much an increase from the current AIC would reduce the current diversity docket.} An unmodified Kaplan-Meier survival function with confidence intervals is provided in Appendix A.

As explained above in section II.A, each black dot indicates one breakpoint that we measured (at $75,000, $250,000, $500,000, and $1 million). The black line indicates our best estimate between these breakpoints.
Figure 3 shows a significant but non-linear decline in the overall size of the federal diversity docket. More than tripling the

122. The 1988 study found a similar impact. It estimated that an increase from $10,000 to $50,000 would eliminate 10.6% of the cases while 59.3% would clearly survive (with the fate of the remaining 30.1% of the cases unclear). See Partridge, supra note 80, at 14. Comparatively, increasing the amount from $10,000 to $100,000 would eliminate 14.5% of the cases while 47.7% would clearly survive (with the fate of the remaining 37.8% of the cases unclear). Id. at 17. Thus, the 1988 study also found that higher increases yielded diminishing reductions. The 1951 study yields conflicting findings. It estimates that increasing the
amount in controversy to $250,000 could reduce the diversity docket by roughly 20% overall. Increasing the amount in controversy to $1 million (a thirteen-fold increase) would still leave more than half of the diversity docket intact. Most of the decline occurs early on and then levels off. This suggests that Congress could affect a significant decline in the federal diversity docket with a modest increase in the jurisdictional amount. A greater increase in the jurisdictional amount would have declining marginal effects. However, these effects are not evenly distributed across all types of cases. In the following sections we will analyze the federal docket one facet at a time.

B. By District

We begin our facetted analysis by differentiating the overall jurisdictional amount pass rates by district. Figure 4 replicates the information of Figure 3 in the shape of the black line that indicates the overall average pass rates. The grey lines indicate district-by-district pass rates. Again, Figure 4 is a modified Kaplan-Meier survival function and Appendix B provides an unmodified version.

amount from $3,000 to $7,500 would eliminate 20% of the cases, raising it to $10,000 would eliminate 24%, and raising it to $15,000 would eliminate 40%. See H.R. REP. NO. 85-1706, supra note 64, at 24 (1958). Thus, the marginal reduction appears to slow between $7,500 and $10,000 and then speed up between $10,000 and $15,000. This result may be an artifact of the study’s methodology, which valued cases according to the amount claimed by the plaintiff rather than an estimate of the possible damages.
Notes: The dots represent measured breakpoints; the lines represent estimated rates. The grey line represents the complete dataset while each black line represents a different district. Texas Northern is labeled mid-figure to avoid clutter (its endpoint very closely matches the average line).

As Figure 4 makes clear, some districts are far more sensitive to changes in the jurisdictional amount than others, with some districts being affected roughly twice as much as others.\textsuperscript{123} Thus, in

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure4.png}
\caption{AIC Modification Pass Rates Across Districts}
\end{figure}

\textsuperscript{123} The 1951 study also found that different districts would be affected differently. Across all eighty-six districts, it estimated that increasing the amount in controversy from
some states a raised jurisdictional amount would not significantly affect the federal dockets while others might suddenly find much of their diversity docket vanished. For some districts, that might provide a welcome reduction to overcrowded dockets. For other districts, it might leave judges with too little to do.124

These differential effects are likely the result of different economic conditions, different dockets, and, perhaps, variation in state damages law. This is a reminder that the federal civil docket is not uniform across the country.125 Some districts simply have more or less of some types of cases than other districts. It is also a reminder that the federal diversity docket is shaped not only by Congress (through, for example, setting various jurisdictional amounts) and courts (through doctrines like the legal certainty test) but also by the states (through their damages law).

C. By Subject

The next faceted analysis examines the impact of different amount increases based on subject matter.126 Perhaps suits with different underlying subject matters are more vulnerable to raises in the jurisdictional amount than others. This could be the case for various reasons. First, it is possible that some types of suits tend to be more serious than others. Perhaps the average tort case, for example, involves more serious misconduct with more serious

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124. Judges with light caseloads can add to them in different ways. Judges can serve as visiting judges in overburdened districts. See 28 U.S.C. § 292(b) (assignment to different district within the same circuit); 28 U.S.C. § 292(d) (assignment to a district in another circuit). Judges can substantially add to their dockets without leaving their own courthouses by agreeing to serve as an MDL transferee judge. See 28 U.S.C. § 1407(b) (district judge must agree to accept transferee judge assignment). Because most MDL cases are diversity cases, and because MDL cases are less affected by amount in controversy increases, accepting more MDL assignments might have the ironic effect of raising the district’s diversity numbers back up to the point where it was no longer a laggard.

125. See David L. Shapiro, Federal Diversity Jurisdiction: A Survey and a Proposal, 91 HARV. L. REV. 317, 319 (1977) (proposing a “local option” plan, under which each federal district would have limited freedom to retain, curtail, or virtually eliminate diversity jurisdiction within its borders.”).

126. The main subject matter of each case is identified in the FJC data. Alas, modern joinder allows for suits that involve multiple subject matters. Thus, the FJC data is not a fine-tuned instrument. That being said, many of the diversity suits in our data set involved relatively unified subject matters.
consequences than the average contract case. Second, different types of damages are available in different types of cases. For example, punitive damages and damages for pain and suffering are far more likely to be available in tort cases than in contract cases. Thus, even if the seriousness of the misconduct is held constant, it is possible that higher amount thresholds might affect tort damages differently than contract damages. Third, the amount in controversy determination is more difficult in some types of suits than others. Finally, numerous states have subject-specific damages laws that, typically, limit the available amount in controversy for some types of suits. For example, many states have implemented individualized damages caps for medical malpractice suits. Such variation in damages law might affect the diversity docket if Congress were to raise the jurisdictional amount because complaints in those subject matters would fail under the legal certainty test.

Figure 5 again includes a grey line that indicates the overall, non-differentiated pass rates. It adds two black lines: one for tort cases and one for contract cases. Of course, contract and tort cases are not the only types of diversity cases, but they currently constitute the brunt of the federal docket.

127. See, e.g., 14AA Fed. Prac. & Proc. Juris. § 3707 (4th ed.) (“The application of the legal certainty test to a tort claim lodged in a federal court on the basis of diversity of citizenship in which the plaintiff alleges a small amount of actual damages, such as medical expenses, and a large amount of unliquidated damages, usually involving pain and suffering and a loss of future earnings, presents particularly difficult measurement problems.”); H.R. Rep. No. 85-1706, supra note 64, at 1–30 (1958) (“[I]n tort cases the amount claimed oftentimes bears little relation to the actual recovery.”).

128. Tort cases in the FJC data include torts to land, tort product liability, airplane personal and product liability, assault, libel, slander, motor vehicle personal and product liability, other personal injury, medical malpractice, personal injury and product liability, health care and pharmacy related torts, as well as asbestos cases.

129. Contract cases in the FJC data include general contract cases, insurance cases, contract product liability, and franchise cases.
Figure 5: AIC Modification Pass Rates Comparing Tort Cases to Contract Cases

Notes: The dots represent measured breakpoints; the lines represent estimated rates. The grey line represents the complete dataset. A word of caution about interpreting these results: as indicated above, these figures act on a single variable and do not take into account simultaneous effects of multiple factors, and they do not indicate overall statistical reliability. Section III.H will provide a better measure of statistical reliability.

Figure 5 suggests a significant variation between the vulnerability of tort and contract cases. Raising the jurisdictional amount would lead to a sharp drop-off in contract cases but a much
milder reduction in tort cases. This suggests that a raise in the jurisdictional amount would significantly reshuffle the mix of subject matter before federal courts.

The fact that tort and contract cases would fare differently under higher amount thresholds is not inherently problematic. Congress is free to give tort cases privileged access to federal court compared to contract cases. If Congress wishes to use the amount in controversy threshold to achieve that goal indirectly, it certainly may do so. Our purpose is only to point out that higher increases will favor tort cases over contract cases, leaving it to Congress to decide what to do with that information.

130. Our findings align with two earlier studies estimating the expected impact of increases to the amount in controversy requirement. See Partridge, supra note 80, at 15–16 (finding that an increase from $10,000 to $100,000 would eliminate 43.9% of contract cases but only 4.3% of tort cases); H.R. REP. No. 85-1706, supra note 64, at 20 (finding that an increase from $5,000 to $10,000 would eliminate 39% of contract cases but only 13% of tort cases).

131. Another layer of potential concern is, of course, the composition of the re-shuffled tort and contract dockets. As discussed later (see infra section 3.G), surviving tort cases are dominated by MDL cases at the higher breakpoints, suggesting that no longer viable tort cases are of the more quotidian variety. Though beyond our data, we suspect that the re-shuffled contract docket would include fewer suits by and against individuals, leaving mostly inter-business suits.

132. The Multiparty, Multiforum Trial Jurisdiction Act, for example, provides a special pathway into the federal courts for lawsuits based on accidents in which 75 or more persons died. 28 U.S.C. § 1369(a).

133. While federal procedure generally (but not always) follows what is known as the “trans-substantivity” norm, in which the same rules apply to all cases regardless of subject matter, we do not think that norm is implicated in these circumstances. See generally David Marcus, The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure, 59 DePaul L. Rev. 371, 372 (2010) (“The trans-substantivity principle reduces complexity for a straightforward reason. It requires that the procedural treatment that the Federal Rules prescribe for simple contracts disputes mirrors exactly what applies in complicated employment discrimination litigation.”). First, an across-the-board increase to the amount threshold would follow that norm, not deviate from it. Second, even if Congress were to enact different jurisdictional standards for tort and contract cases, we do not think that would transgress the trans-substantivity norm as it is commonly understood. The concept of procedural trans-substantivity is typically associated with court rulemaking. One of the main arguments for having a single set of rules applicable to all cases is that creating different rules for different types of cases is a matter of substance and politics that should be left to Congress. See Steven S. Gensler, Judicial Case Management: Caught in the Crossfire, 60 DUKE L.J. 669, 704 (2010). While it is true that trans-substantivity has other benefits—for example, lessons learned in one type of case can be applied in others, see id., the primary justification for it is not violated when it is in fact Congress that picks the substantive winners and losers.
D. By Origin

Our next univariate comparison is focused on the origin of a case: was it originally filed in federal court or removed from state court? In many ways, filing plaintiffs and removing defendants are similarly situated when they invoke federal subject matter jurisdiction. But an important tension lingers between the norm that plaintiffs are masters of their own suits and that defendants can also invoke the protection of federal courts. In recent years, endless litigation and significant statute-drafting has centered on the interplay of these norms. Figure 6 explores how originally filed actions and removed actions would fare if Congress were to raise the jurisdictional amount.

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134. See, e.g., Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81, 88 (2014) (arguing that it would be “anomalous to treat commencing plaintiffs and removing defendants differently with regard to the amount in controversy”); McPhail v. Deere & Co., 529 F.3d 947, 953 (10th Cir. 2008) (requiring proof by defendant but not by plaintiff “bears no evident logical relationship either to the purpose of diversity jurisdiction, or to the principle that those who seek to invoke federal jurisdiction must establish its prerequisites”).

The gap between these lines is striking (and, as we will see in section 3.H, highly statistically significant). A modest increase in the jurisdictional amount would affect cases filed originally in federal court almost as much as it would affect removed cases. However, at higher levels, their fates would depart. At the extreme $1$ million level, more than 60% of the current stock of federal diversity cases originally filed in federal court would still be there. In contrast, only one in four removed cases would still remain on the federal docket.

What explains this surprising finding? Perhaps plaintiffs are preemptively filing their removal-eligible big cases in federal court,
anticipating that removal would be inevitable, to be able to select their preferred federal forum.\footnote{136} Perhaps plaintiffs do more in their larger cases to structurally block removal (for example, by joining a non-diverse co-party or by suing in the defendant’s home state) than they do in their smaller cases.\footnote{137} Conversely, perhaps plaintiffs are deliberately structuring their larger cases (for example, by excluding potential non-diverse co-parties) to secure access to federal court. Our data show only that there are comparatively more “big” cases in the original jurisdiction bucket than there are in the removal bucket. But they do not explain why that might be so.

Another possibility is that the materials we used to code the cases do not accurately signal the full potential value of the cases in the removal bucket. As discussed above,\footnote{138} while plaintiffs filing originally in federal court have no incentive to downplay their damage claims (and would seem to have every incentive to maximize them), plaintiffs who file in state court have an incentive to conceal their true damages to potentially thwart removal. Thus, in the removed cases in our dataset, the state-court complaints might understate the damages potentially in controversy. To counteract that, removing defendants are permitted to include their own assertions about the amount in controversy in their removal notices.\footnote{139} Removing defendants have every incentive to show that the amount in controversy exceeds the current $75,000 threshold. But removing defendants currently have no incentive to show that the amount in controversy exceeds any of the higher breakpoints in our study. Indeed, some removing defendants might deliberately

\footnote{136} A plaintiff from State A, for example, might prefer State Court A to State Court B, but prefer the federal courts in State B to either State Court B or federal courts in State A. If the plaintiff files in State Court A and the case is removed, it would be removed to federal court in State A and the plaintiff would need to successfully move to transfer to get to the case to federal court in State B. If the plaintiff files in State B (home of the defendant), the case would remain there because the forum defendant rule would bar an attempt at removal. See \textit{Strawbridge v. Curtiss}, 7 U.S. 267 (1806). Even if complete diversity exists, the plaintiff can block removal via the “forum defendant rule” by suing in the defendant’s home state. See 28 U.S.C. § 1441(b)(2). Thus, if the plaintiff perceives removal to be likely, the plaintiff might rationally file in federal court in State B to ensure getting its second favorite forum and avoid the risk of the case ending up in one of its two disfavored forums (State Court B or federal court in State A).

\footnote{137}Joining a non-diverse co-party prevents removal by destroying complete diversity. See \textit{Strawbridge v. Curtiss}, 7 U.S. 267 (1806). Even if complete diversity exists, the plaintiff can block removal via the “forum defendant rule” by suing in the defendant’s home state. See 28 U.S.C. § 1441(b)(2).

\footnote{138} See \textit{supra} notes 107–08 and accompanying text.

\footnote{139} See 28 U.S.C. § 1446(c)(2).
temper their pricing to avoid suggesting that a case approaches the $1 million mark (which, alas, is against the defendant’s ultimate interests).

To mirror what federal judges do in practice, we instructed our RAs to consider both the plaintiff’s state-court complaint and the defendant’s removal notice.\textsuperscript{140} We recognize, however, that the unique setting of removal gives neither the plaintiff nor the defendant an incentive to be fully candid about the entire range and measure of damages potentially in controversy above the current $75,000 threshold. To the extent this occurred in our study sample of cases,\textsuperscript{141} our data underestimates the number of removed cases likely to have passed at the higher breakpoints. Thus, if Congress were to enact those higher breakpoints, giving removing defendants the full incentive to make assertions to meet them, those pass rates might increase, reducing the disparity captured in our data.

With that caveat in mind, our data suggest that a modest change in the jurisdictional amount would do little to affect the mix of direct filed and removed federal diversity cases. However, raising the jurisdictional amount dramatically might significantly reduce the number of removed cases compared to originally filed cases. We leave it to Congress to decide whether that result would be normatively desirable or not. Alternatively, if Congress wanted to keep a consistent mix of federal diversity cases and raise the jurisdictional amount significantly, then this would require concurrent adjustments to federal removal statutes and doctrines.

E. By Residency

We next turn to examine the likely effects of a raised jurisdictional amount on forum residents and non-residents. The reason for this focus is the raison d’être of diversity jurisdiction,

\textsuperscript{140} The amount in controversy can be satisfied by either the sum demanded in good faith in the plaintiff’s complaint or an amount asserted in the defendant’s removal notice. \textit{Id.}

\textsuperscript{141} We have no way of knowing whether this phenomenon exists, how widespread it might be, or how much it might lead defendants to understate amounts potentially in controversy. While our impression of the removal notices we read leads us to think that defendants are generally not pulling their punches on how much might be at stake—for example, we saw no evidence that defendants were describing wrongful death suits as mere “$100,000” cases—we acknowledge the possibility that defendants might be reluctant to affirmatively describe cases as “$1 million” cases, or might fail to mention potential damages that could tip a case from a $200,000 to a $300,000 case.
traditionally explained as protecting out-of-state litigants from local prejudice. While local prejudice is difficult to define or study, we wanted to contribute to this debate by probing how a raised jurisdictional amount would re-shuffle resident and non-resident litigants in the federal diversity docket. Figure 7 distinguishes between suits where only the plaintiff is from the forum, where only the defendant is from the forum, and where neither party is from the forum.


143. See, e.g., Debra Lyn Bassett, The Hidden Bias in Diversity Jurisdiction, 81 Wash. U. L.Q. 119, 137 (2003) (“The term ‘local bias’ is used in the legal literature regularly without definition, thereby assuming that readers understand its meaning.”).

144. See, e.g., Jerry Goldman & Kenneth S. Marks, Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry, 9 J. Legal Stud. 93, 94 (1980) (“The actual existence of local prejudice is difficult to uncover, and thus survey research must be content with an examination of the perception of such prejudice by attorneys.”).

145. This categorization reflects, in part, the concerns embedded in the removal statute. See 28 U.S.C. § 1441(b)(2) (“A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”). Others might want to further sub-divide non-forum litigants into domestic and foreign categories. See generally Kevin M. Clermont & Theodore Eisenberg, Xenophilia in American Courts, 109 Harv. L. Rev. (1996).
Notes: To avoid confusion, we suppressed from this figure a few cases where the data indicated that both litigants were at home in the district. Presumably, cases in this category would fail based on a lack of complete diversity of citizenship at any jurisdictional amount. Also, please note that the FJC data from which resident information is derived relies here on party submissions that might reflect their views and aspirations more than reality.

Figure 7 suggests that raising the jurisdictional amount would most reduce cases where the plaintiff is litigating in her home state. It will have less of an impact on cases where the defendant is litigating at home and least where neither party is at home. Please note, however, that these differences, once we control for additional
variables, are not statistically significant. To the extent higher amount requirements suppress diversity cases in which the plaintiff files in federal court in its home state, many would see that as a normatively positive side effect. Diversity jurisdiction reformers have long called for Congress to eliminate so-called “in-state plaintiff” diversity jurisdiction. First, the standard “outsider bias” justification for diversity jurisdiction does not apply when a plaintiff is the one to invoke federal jurisdiction in its home state. Second, permitting plaintiffs to file diversity cases in their homes states places plaintiffs in a privileged position compared to defendants, who are barred by the forum-defendant rule from removing cases from their own home states on the grounds that they are not at risk of local prejudice. While Congress could level the playing field by eliminating the forum-defendant rule, most reformers have proposed that Congress extend the “no risk of local prejudice” concept to plaintiffs and bar plaintiffs from invoking diversity jurisdiction in their home states.

146. See infra section III.H.
148. See ALI 1968 STUDY, supra note 147, at 124 (“The right of an in-state plaintiff to institute a diversity action against an out-of-state defendant . . . is not responsive to any acceptable justification for diversity jurisdiction. The in-stater can hardly be heard to ask the federal government to spare him from litigation in the courts of his own state. Any prejudice which he may fear is not of the kind against which diversity jurisdiction was intended to protect.”); FCSC REPORT, supra note 55, at 42 (“The only colorable argument supporting diversity jurisdiction—fear of state court bias against out-of-state litigants—has no force when in-state plaintiffs invoke it.”).
149. See 16 MOORE’S FEDERAL PRACTICE § 107.55[1], at 107-08 (2020) (“The justification for the forum defendant rule is simple. The purpose of diversity jurisdiction is to provide litigants with an unbiased forum by protecting out-of-state litigants from local prejudice. Therefore, it makes no sense to allow an in-state defendant to take advantage of removal on the basis of diversity jurisdiction.”).
150. See Dodson, supra note 24, at 315.
F. By Pro Se

One important consideration when contemplating a raise of the jurisdictional amount is the impact of such a move on vulnerable litigants. The protection and advantages of federal courts should be open to all types of litigants, from the most well-resourced and experienced institution to the most destitute one-time litigant.151 Beyond even-handedness, there are also institutional reasons to insist on a diverse pool of litigants. Courts and legal developments are shaped by the character and arguments of litigants. If vulnerable and poor litigants are systematically shut out of federal courts, then it will predictably be more difficult for federal judges to gain experience with their plight.

Vulnerability is a difficult concept to measure and operationalize. Here we use the crude proxy of pro se status.152 An alternative or additional proxy could be in forma pauperis status (“IFP”) but there are too few instances in our dataset to make reasonably reliable claims based on IFP status.

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151. Of course, not all pro se litigants desire to be in federal court.
152. Defined here as cases with at least one pro se litigant. Often that is the plaintiff, sometimes a defendant, and, very rarely, both. Not all pro se litigants are poor, of course. But they are likely poorer than litigants who hire attorneys.
As Figure 8 shows, an increase in the amount in controversy would affect pro se cases far more than non-pro se cases. Thus, an increase in the jurisdictional amount would reduce the percentage of the overall federal docket that contains pro se litigants. Insofar as these litigants present judges with different arguments, perspectives, and challenges, this would limit the exposure of federal courts in diversity cases to a diverse set of views.

Our data set does not allow us to explain why pro se cases drop off so sharply at the higher amount in controversy breakpoints. Many pro se cases are brought by prisoners. We suspect, however, that most prisoner suits are brought under federal question jurisdiction. To the
extent prisoners are filing pro se diversity actions,\textsuperscript{153} it seems reasonable to assume that prisoners engage in fewer activities that might lead to high-value diversity suits (e.g., large commercial transactions or serious car accidents).\textsuperscript{154} For non-prisoner pro se litigants, the most likely explanation is probably brute economics. Litigants generally willing to take the “do it yourself” route in their small value cases might feel the need for expert assistance in their highest value cases. And as the value of a case increases, so too does the incentive for an attorney to take it. Thus, the drop-off in high-value pro se cases may simply reflect the reality that it is easier to find a lawyer to take on a high-value weak case than a low-value one.

G. By Multi-District Litigation (“MDL”)

The next type of case we examine is multi-district litigation (“MDL”): cases transferred under 28 U.S.C. § 1407 for coordinated or consolidated pretrial proceedings. As is by now well-known, multi-district litigation takes up a sizable chunk of the federal docket in general and the federal diversity docket specifically. Not only are these types of cases numerous, but they also include many high-profile proceedings\textsuperscript{155} like the national opiate litigation.\textsuperscript{156} MDL proceedings also stand out because they frequently utilize “unorthodox procedures” not typically found in other cases.\textsuperscript{157} Most of the academic work that documents the departures of MDL procedures from those utilized in non-MDL cases has focused on the manner of litigation during and post-transfer. We observed in our dataset another type of departure: loose and irregular pleading. Numerous complaints in cases predictably destined for MDL-proceedings that were already ongoing (so called “tag-along”

\textsuperscript{153} Generally, a prisoner does not acquire a new domicile upon incarceration. See generally 15A MOORE’S FEDERAL PRACTICE § 102.37[8] (2019 ed.).

\textsuperscript{154} While prisoners sometimes suffer significant personal injuries while incarcerated, those claims are typically brought as civil rights claims under federal question jurisdiction. See generally 42 U.S.C. § 1983.

\textsuperscript{155} Alas, not all MDL cases are high-profile or far-reaching. See generally Zachary D. Clopton, MDL as Category, 105 CORNELL L. REV. 1297 (2020).


cases) did not utilize traditional complaints but used stream-lined short-forms instead.\textsuperscript{158} We were curious if all of these differences between MDL and non-MDL cases mattered in the context of establishing diversity jurisdiction.

\textsuperscript{158} When short-form complaints are used, the details of the plaintiff’s individual circumstances are often provided by having the plaintiffs fill out “fact sheets” using protocols developed by the parties and the court. See MARGARET S. WILLIAMS, JASON. CANTONE & EMERY G. LEE, FEDERAL JUDICIAL CENTER, PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES (2019) (“Pocket Guide” co-developed by the Federal Judicial Center and the Judicial Panel on Multidistrict Litigation).
Figure 9: AIC Modification Pass Rates in MDL Cases

Figure 9 shows the significant gap between the vulnerability of non-MDL cases and MDL cases. Initially small, the gap continues to widen dramatically after the quarter-million-dollar mark. While raising the jurisdictional amount past that point would barely affect MDL cases, non-MDL cases continue to drop off sharply. Figure 9 suggests that raising the jurisdictional amount modestly would increase the percentage of MDL cases on the federal docket modestly while a significant increase in the jurisdictional amount would drastically accelerate the conquest of the federal docket by MDL proceedings. Since MDL proceedings are handled by a single
judge and can contain hundreds or thousands of cases, a large increase in the jurisdictional amount would mean many non-MDL judges would see their diversity docket sharply reduced.

What explains why MDLs initially drop off at the $250,000 breakpoint but then mostly hold steady through increases at $500,000 and $1 million? One possible explanation is that our data might be sorting MDL plaintiffs with manifested injuries from those who were exposed but remain largely asymptomatic. Many MDLs are mass product liability actions against drug companies or the makers of medical products. Some MDL plaintiffs are alleged to have suffered severe injuries or even died from exposure to the product in question. Those plaintiffs will easily clear any amount threshold up through $1 million. That insight likely explains why MDL cases are comparatively immune to amount in controversy increases; the types of product liability cases that often become aggregated via MDL are, as a category, high-value cases because they often involve severe or long-term injuries triggering the possibility of significant economic and noneconomic damages. But other MDL plaintiffs exposed to the product may have yet to manifest any of the severe injuries alleged to potentially result from exposure to the product. The drop-off between $75,000 and $250,000 may reflect our coders’ conclusion that plaintiffs who have yet to suffer from those severe injuries have claims large enough to get into federal court but not warranting present significant damages.

The use of short-form complaints may also play a role. A typical short-form MDL complaint provides plaintiffs with a list of claims that might be asserted and injuries that might have been sustained, with the plaintiff then checking the applicable boxes. Plaintiffs are not asked to describe their individual damages in detail and little space is provided for someone to do so. Those details will come later, often via a fact sheet. The net result is that short-form complaints provide a very thin basis on which to ascertain the amount potentially recoverable. In some cases, the thin record does not matter, for example when the short-form complaint shows that the MDL plaintiff died or had a heart attack. In other cases, such as when a plaintiff checks a box next to a term like “long-term kidney disease,” the lack of further information about what that actually means may have driven our coders—dutifully following the legal certainty test—to code those cases higher than what they might
have done had the plaintiffs been required to provide the particulars of their claimed injuries.

Figure 9 also contains another lesson: while a raise in the jurisdictional amount would take some cases out of MDL proceedings, many nation-wide MDLs based on state-law causes of action would continue to be viable.159 The JPML can only transfer cases under § 1407 that are already in federal court; it does not have the power to transfer state-court actions. Only cases filed in federal court or removed to federal court can be transferred under § 1407. Insofar as MDL coordination is desirable, Figure 9 shows that there is only a small risk that a raise in the jurisdictional amount would have the unintended effect of depriving MDL proceedings of the currently deep reach into state courts.

H. Cox Model

Each of the previous sections explored one variable in turn. This section summarizes and extends this discussion by examining the simultaneous effects of multiple variables at the same time and by measuring statistical significance. Given how under-theorized and under-tested this area of inquiry is, we utilized a broad range of variables of interest to construct a broad specification. Future studies might want to isolate specific areas of inquiry and consider the information value of each variable in isolation and in combination with other groups of variables to construct more focused models.

Table 3 presents our initial set of Cox model specifications.160 We report hazard ratios (“HR”) rather than Cox coefficients for ease of interpretation.161 A hazard ratio of 1 represents the baseline.162 Hazard ratios below 1 signify a lower risk of dismissal. For example, a hazard ratio of 0.6 for MDL membership indicates that cases that were transferred under 28 USC § 1407 are associated with

159. See generally Dodson, supra note 24, at 267 (emphasizing the role of diversity jurisdiction in facilitating multistate aggregation); FCSC REPORT, supra note 55, at 38 (“Congress should limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation, interpleader, and suits involving aliens.”).

160. We satisfactorily tested key aspects of the full model: proportional hazard assumptions, nonlinearity in the relationship between the log hazard and covariates, and testing for outliers that are unduly influential and drive the model.

161. Given a Cox regression parameter \( \beta \), the hazard ratio is: \( HR = e^{\beta} \).

162. For \( \beta = 0 \), \( e^{\beta} = 1 \).
a 40 percent lower risk of dismissal at any given moment as compared to similar cases that are not part of an MDL proceeding. Conversely, hazard ratios above 1 signify a higher risk of dismissal. For example, a hazard ratio of 1.23 for pro se cases indicates that cases with at least one pro se litigant are associated with a 23 percent higher risk of dismissal at any given moment as compared to similar cases that did not include a pro se litigant.

Table 3: Cox Proportional Hazard Regression Models (Reporting Hazard Ratios)

<table>
<thead>
<tr>
<th></th>
<th>(1) Baseline</th>
<th>(2) Districts</th>
<th>(3) Remedies</th>
<th>(4) Complexity</th>
<th>(5) All Controls</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case Removed</td>
<td>1.81***</td>
<td>1.78***</td>
<td>0.62***</td>
<td>1.36***</td>
<td>1.38***</td>
</tr>
<tr>
<td></td>
<td>(10.68)</td>
<td>(10.21)</td>
<td>(11.19)</td>
<td>(5.17)</td>
<td>(4.84)</td>
</tr>
<tr>
<td>Subject Matter: Torts</td>
<td>0.80**</td>
<td>0.82**</td>
<td>0.83.</td>
<td>1.16.</td>
<td>1.11</td>
</tr>
<tr>
<td></td>
<td>(-2.94)</td>
<td>(-2.63)</td>
<td>(-1.84)</td>
<td>(1.84)</td>
<td>(1.06)</td>
</tr>
<tr>
<td>Subject Matter: Contract</td>
<td>1.31***</td>
<td>1.38***</td>
<td>1.15.</td>
<td>1.24**</td>
<td>1.17.</td>
</tr>
<tr>
<td></td>
<td>(3.49)</td>
<td>(3.55)</td>
<td>(1.654)</td>
<td>(2.751)</td>
<td>(1.85)</td>
</tr>
<tr>
<td>District:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Georgia N. (baseline)</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Minnesota</td>
<td>0.77</td>
<td>0.66***</td>
<td>(-4.75)</td>
<td>(-6.05)</td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>0.90.</td>
<td>0.92</td>
<td>(-1.77)</td>
<td>(-1.34)</td>
<td></td>
</tr>
<tr>
<td>Texas N.</td>
<td>0.83*</td>
<td>0.79**</td>
<td>(-2.00)</td>
<td>(-2.63)</td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>0.86.</td>
<td>0.67***</td>
<td>(-1.95)</td>
<td>(-4.57)</td>
<td></td>
</tr>
</tbody>
</table>

Relief Requested:

| Economic Damages        | 0.81.        | 0.93          |
|                        | (-1.77)      | (-0.37)      |
| Noneconomic             | 0.78**       | 0.88          |
|                        | (-2.81)      | (-1.44)      |
| Punitive                | 0.81***      | 0.68***       |
|                        | (-4.697)     | (-6.95)      |
| Injunctive              | 0.89         | 0.89          |
|                        | (-1.35)      | (-1.42)      |
Table 3 helps to identify variables that are statistically significant and those that are not. Notably, the identity of the district, whether a case was removed to or originally filed in federal court, party complexity, some types of relief requested, pro se status, and whether the case was part of an MDL are all statistically significant. Once we control for those items, however, other variables like residency and corporate status are not statistically significant. Most notably, forum residency is not statistically significant in Model 5 with all controls. This is surprising given the centrality of forum residency to the diversity jurisdiction status, case law, and academic debates. Similarly, the subject matter of the suit, while statistically significant in the initial model, is not statistically significant once we can control for additional factors, most notably MDL status. Importantly, the lion’s share of MDL

163. Pro se status is only of mild statistical significance, likely due to the low number of cases. We suspect, without knowing, that even a moderately larger sample size that captured more pro se cases would show a drastic substantive effect on the statistical significance.
cases in our study are tort cases. Thus, the controlled analysis suggests that the reason contract cases drop off more sharply than tort cases at the higher breakpoints is because the MDL component of the diversity tort docket is comparatively immune to amount increases (at least up to the $1 million mark). Conversely, geographic factors are initially not statistically significant (Model 2) but once we control for additional variables geographic measures become more fine-tuned and statistically significant.

Turning to substantive significance, the variables that show the biggest substantive sensitivity to modifications of the jurisdictional amount are removal, MDL status, and request of punitive damages (holding all other covariates constant). If Congress were to raise the jurisdictional amount, this is where we would expect to see the biggest changes in the federal docket. Far more of the cases currently removed, outside of MDL proceedings, and without punitive damages requests would stay in state courts. Similarly, pro se litigants would become rarer on the diversity docket. Modifications of the diversity docket would also be unevenly distributed around the country, with some districts seeing a much greater diminution of their diversity dockets than others.

Figure 10 graphically reproduces these statistical and substantive significance findings.
Figure 10:

Notes: As in Table 3, Georgia N. serves as the baseline district.
Each variable is represented by a black square. The horizontal scale represents hazard ratios. The further variables are removed from the baseline of 1 (the dotted vertical line) the more substantive effect they have. Variables to the right of the dotted line (i.e., those greater than 1) indicate an increased risk of dismissal. Variables to the left of the dotted line (i.e., those smaller than 1) indicate a reduced risk of dismissal. The whiskers extending from the black squares indicate confidence levels. Variables whose confidence levels include or cross the baseline are not statistically significant.

IV. IMPLICATIONS FOR LEGISLATIVE REFORM

Whether to raise the amount in controversy threshold, leave it in place, or even lower it is a matter for Congress. What insights or lessons do our data provide to assist Congress in that endeavor? We first recap our major findings. We then discuss several implications for legislative reform.

A. Recap of Major Findings

Increasing the amount in controversy inevitably reduces the number of cases eligible for diversity jurisdiction. But by how much? Our data show that the reduction would be neither extreme nor linear. Increasing the amount in controversy to $250,000 (3.3 times its current amount) would likely eliminate about 20% of the diversity docket. Increasing it to $500,000 (6.6 times its current amount) would only eliminate about 33% of the diversity docket. And increasing it to $1 million (over 13 times its current amount), would likely eliminate only about 40% of the current diversity docket.

Two lessons for Congress seem clear. The first is that Congress can make a dent in the size of the diversity docket by increasing the amount in controversy. A 20% reduction is nothing to sneeze at. Second, further increases yield diminishing reductions. Bigger dents require increasingly bigger swings. And even increasing the

164. Comparison is streamlined because we utilize only indicator independent variables instead of continuous variables (except for party complexity which is divided into multiple buckets of complexity).

165. In other words, we cannot reject the hypothesis that the Cox regression parameter is 0 (as a regression parameter of 0 would produce a hazard ratio of 1).
amount in controversy over thirteen-fold to $1 million would still leave over half of the diversity docket intact. By that measure, we already have a million-dollar diversity docket.

Our data also show that increasing the amount threshold is not a neutral throttle. We expected this intuitively, and prior studies had indicated differential effects on contract cases compared to tort cases. Our data confirm those subject-matter effects. Tort cases would fare better at all amount thresholds, with the advantage reaching roughly two-to-one at the $1 million mark. Our study also provides new data on other differential effects. Some districts are more affected than others. The MDL docket would fare comparatively well. Pro se litigants would not. Comparatively fewer cases would be removed or be filed originally in federal court by plaintiffs in their home states. So, as the diversity docket shrinks, its profile also changes. The million-dollar diversity docket is necessarily a subset of the current one, but it is not a representative one.

B. Inflation Adjustment

Inflation has taken a big bite out of the $75,000 amount threshold in the twenty-five years since 1996. In 1996 dollars, diversity jurisdiction is now available for cases worth about $45,000 today—roughly a 40% discount.

As a result, the diversity docket is assuredly different today than it was in 1996. It is logically inescapable that there is some set of cases that are worth $75,000 in today’s dollars that would not have been worth $75,000 in 1996. We have every reason to believe that the profile of cases in this amount in controversy band is different than is found at higher amount thresholds (though we are reluctant to speculate on what those specific differences might be). The main point is that thanks to inflation, today’s diversity docket is certainly bigger and very likely contains a different mix of cases than the 1996 diversity docket.

Whether to extend diversity jurisdiction to this set of cases is a matter of jurisdictional policy for Congress. If Congress were to debate the impacts of inflation since 1996 and decide that it liked having these additional lower-stakes cases in federal court, it could certainly do that. But Congress has not had that discussion.

166. See supra note 130 and accompanying text.
This new cohort of cases is eligible for diversity jurisdiction only because Congress has not given the matter any thought. It is a result of inaction, not choice.

To be sure, inflation adjustment is itself a policy choice. When Congress adjusts the amount in controversy to keep up with inflation, it ratifies the policy judgment that went into setting those earlier stakes. But when Congress doesn’t adjust for inflation, it allows the judicial federalism balance to change by default. Thus, the reality is that Congress effectively makes jurisdictional policy whether it accounts for inflation or not. Our view is that inattention should not be the mechanism for altering the allocation of state-law cases between the state and federal courts. For that reason, we think that periodic adjustments are Congress’s responsibility unless and until Congress elects to revisit the question of what that balance should be.

From that position, we think the argument for an increase to $125,000 or $150,000 to adjust for inflation is strong. To restore the relative value of the 1996 $75,000 threshold, and to restore the mix of cases associated with that value, Congress would need to increase the amount in controversy to about $125,000. When Congress has made earlier inflation adjustments, it has sometimes added some cushion to account for expected future inflation. If Congress wanted to follow that approach again, a doubling of the amount in controversy to $150,000 would be warranted.

C. Indexing

If one believes that Congress has a duty to make periodic inflation adjustments, the question then becomes when and how Congress should do it. Congress could discharge its duty by affirmatively revisiting the need for an inflation adjustment at regular intervals. For example, in 1996 it made an inflation adjustment only eight years after the 1988 increase. But the average interval has been twenty-eight years, and the current interval is at twenty-five years and counting. We are not optimistic that Congress will stay on top of the matter through the normal ebb and flow of jurisdictional legislation.

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167. See supra note 71 and accompanying text.
168. See supra Table 1, and accompanying text.
One rather obvious solution would be for Congress to pass legislation that provided for automatic increases indexed to the inflation rate. The Judicial Conference has supported indexing since 1990, when it adopted an indexing recommendation made by the Federal Courts Study Committee. The closest that recommendation has come to being implemented was in 2009, when an indexing proposal was included in the original House bill of what became the Federal Courts Jurisdiction and Venue Clarification Act of 2010. That proposal called for indexing to occur every five years (starting on January 1, 2011) with the amount to be adjusted to the nearest $5,000. The proposal did not make it into the version of the bill Congress eventually passed.

While we support the concept of indexing, we don’t think that the effects of inflation warrant indexing on an annual or even a five-year basis. The point of indexing is to create a mechanism that prevents long-term Congressional inaction from effectively altering diversity policy. The goal is not to ensure that the amount threshold is always tuned to perfection but to avoid the large effects when the gaps between updating extend into decades. We also are wary of small increment adjustments because they are unlikely to make any discernable difference. Given the uncertainty of the valuation process, we suspect that a $5,000 increase would do little more than create work for those of us who write (and update) books on federal procedure.

169. See FCSC REPORT, supra note 55, at 42 (proposing indexing); JCUS-SEP 90, supra note 77, at 60 (adopting recommendation).
171. Id.
172. The provision drew opposition because, under this particular proposal, the Director of the Administrative Office of the U.S. Courts would have published upcoming increases in the Federal Register, but they would not then appear in the text of the section 1332. Critics complained that it would be confusing for litigants and attorneys to have to consult a secondary source to determine the details of a statutory requirement.
173. One academic proposal calls for the amount to be updated every year. See Nina Mohebbi, Craig Reiser & Samuel Greenburg, A Dynamic Formula for the Amount in Controversy, 7 FED. CTS. L. REV. 1, 10–13 (2014) (proposing that the amount in controversy requirement be indexed annually based on a formula that incorporates inflation and judicial workloads).
We tentatively suggest that indexing would work better as a decennial exercise with increases made in increments of no less than $25,000. Doing so should avoid extreme erosion of the amount threshold without yielding changes that come across as meaningless tinkering. In that sense, the role we imagine for indexing is to serve as a backstop. Congress is free to pay closer and more frequent attention. But if it doesn’t, decennial indexing should keep the scheme from getting too far out of kilter.

D. “Real Stakes” Increases

Our findings also have important implications for possible increases beyond what is needed to account for inflation. Our data show that the reductions to the diversity docket diminish as the increases grow larger. At the same time, the larger increases have worrisome side-effects in the form of escalating disparate impacts on different subject matters, districts, and pro se litigants. If one views the case reduction as the benefit and the differential impact as a cost, then increases to the higher amounts impose escalating costs for diminishing returns.

Would any real stakes increases be in order? Using the amount in controversy to shrink the size of the diversity docket would not be unprecedented. Most notably, Congress did it in 1888 to reduce the burden on overworked federal judges and give them more time and resources for the new and growing federal question docket. Our study does not address whether any similar circumstances exist today.

Our data, however, are helpful in that they provide Congress with an estimate of the impact of any amount in controversy increases so that Congress can make an informed decision as it considers various policy goals. Our data show that, compared to “big swing” increases, more modest increases yield more “bang for the buck”—proportionally greater reduction—with less dramatic side effects. Thus, Congress arguably could view a change to $250,000 as triggering only the question of whether a reduction in the size of the diversity docket is warranted, without having to tackle what we think would be the much messier questions associated with dramatically altering the types of cases within it.
E. Strategic Increases

So far, we have contemplated that Congress could use our data reactively to assess the size and composition impacts of a proposed change. For any proposed increase to the amount in controversy threshold, would the expected decrease in the size of the diversity docket strike Congress as too small, too large, or just right? Would the expected changes to the mix of cases and litigants strike Congress as too high a price to pay, an acceptable side effect, or possibly even a bonus?

But Congress could come at these questions from the other direction. Congress could decide on a diversity profile and then use the amount in controversy as a sculpting tool. For example, if Congress decided it wanted to focus diversity jurisdiction on mass torts, it could steer the diversity docket in that direction by making escalating increases to the amount in controversy threshold. To be sure, Congress could achieve that type of goal much more directly and effectively by amending the diversity statute to include or exclude particular categories of cases. But the point remains that as Congress gains more information about the relationship between the amount in controversy and the composition of the diversity docket, it then becomes possible for Congress to use the amount threshold as a proxy for changing the profile of cases in the diversity docket. Our data suggests it would only be a loose proxy. But it is not implausible that jurisdictional politics might lead Congress in the direction of a loose proxy over an overt reform. And further research might provide more refined data.

CONCLUSION

Increasing the amount in controversy in the diversity statute will likely have complicated and multifaceted effects on the federal litigation landscape. Setting any jurisdictional amount entails a choice with differential impact on different types of cases, different litigants, and different parts of the country. But choose we must. The hope of this article is that such a choice is better made against the backdrop of empirically informed doctrinal and normative arguments.
While this article has focused on federal diversity jurisdiction, it is important to point out that most litigation occurs in state courts. Many states, similarly, distribute cases to different state courts, or to different tracks within those courts, based on amount in controversy determinations. These states use jurisdictional amounts to prioritize some litigants and some types of cases over others. Some are afforded ample procedural opportunities and well-funded courts; others receive summary adjudications, few procedural protections, and courts that handle crushing caseloads.

We hope future researchers will build on the approach pioneered in this article with iterative and improved work, not only at the federal level, but also with an eye toward adjudications in state and tribal courts.


176. See, e.g., CAL. CODE OF CIV. PROC., Art. 2, § 116.221 (“[T]he small claims court has jurisdiction in an action brought by a natural person, if the amount of the demand does not exceed ten thousand dollars ($10,000).”); TEX. GOV’T CODE § 27.031 (“[T]he justice court has original jurisdiction of [] civil matters in which exclusive jurisdiction is not in the district or county court and in which the amount in controversy is not more than $20,000 . . . .”); S.B. 6417, 2019 Leg., (N.Y. 1999) (Increasing small claims jurisdiction in New York City Civil Court from $5,000 to $10,000. The jurisdictional limit for small claims would remain $5,000 for City Courts outside of New York City, and $3,000 for Town and Village Courts.).

177. See, e.g., COLO. R. CIV. P. 16.1 (providing “[s]implified [p]rocedure [for] civil actions other than [] civil actions in which any one party seeks monetary judgment from any other party of more than $100,000.”).

178. See, e.g., PAWNEE TRIBE OF OKLA., L. & ORD. CODE, Ch. 16, § 1601 (“The following suits may be brought under the small claims procedure: [] Actions for the recovery of money based on contract or tort, including subrogation claims, but excluding libel or slander, where the amount sought to be recovered . . . does not exceed Two Thousand Dollars ($2,000.00).”); L. OF THE CONFEDERATED SALISH & KOOTENAI TRIBES CODIFIED, Title IV, Ch. 4, § 4-4-102 (“[T]he Tribal Court sit[s] as the Small Claims Division of the Tribal Court in all actions for money damages . . . when the amount claimed is not less than $50, nor more than $3000.”).