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Civil Procedure:
Beyond Bias in Diversity Jurisdiction

Scott Dodson¹

Most jurists accept that the primary and traditional justification for federal diversity jurisdiction is to provide a neutral federal forum in cases presenting a risk that the state forum would be biased—or be perceived to be biased—against an out-of-state litigant.² Perennial debates about diversity jurisdiction's proper scope have centered around this bias rationale. Abolitionists seek to eliminate or minimize diversity jurisdiction on the ground that the bias rationale offers no justification today, while diversity-jurisdiction supporters contend that the bias rationale remains a forceful justification.

In my view, both sides are wrong. Supporters are wrong that the bias rationale continues to justify diversity jurisdiction today. Opponents are wrong to suppose that nothing else can justify diversity jurisdiction. I therefore aim to shift the diversity-jurisdiction debate away from its myopic focus on out-of-state bias and toward considerations that are more meaningful for modern civil litigation, such as other forms of bias and the promotion of aggregation across state lines. At the end of the day, it may be that the costs of diversity jurisdiction still outweigh its benefits in most instances. But if freed from the bias rationale, the debate might reveal creative ways to put diversity jurisdiction to better use.

Origin and Entrenchment of the Bias Rationale

What Founding Era evidence exists suggests that the Constitution's Diversity Clause was motivated by a fear of state bias against out-of-state litigants (particularly out-of-state creditors) and the resulting interstate discord.³ In 1789, Congress passed the Judiciary Act, which established the lower federal courts and granted them diversity jurisdiction “[where] the suit is between a citizen of the State where the suit is brought, and a

1. Summarized and excerpted from Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267 (2019).

2. Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 119–20 (2003).

3. For a detailed discussion of this history, see Dodson, *supra* note 1, at 270–80.

citizen of another State.”⁴ The Act’s language and quick passage support the inference that the drafters had the bias rationale in mind.⁵

Since then, the Supreme Court and prominent commentators have entrenched the bias rationale in diversity-jurisdiction lore. In the 1809 case of *United States v. Deveaux*, Chief Justice John Marshall identified both bias and the risk of bias as the targets of diversity jurisdiction.⁶ Seven years later, Justice Story wrote, in *Martin v. Hunter’s Lessee*, that diversity jurisdiction guards against state prejudices that “might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice . . . in controversies between . . . citizens of different states.”⁷ The Supreme Court and commentators have adhered to these sentiments repeatedly even into the modern era.⁸ Today, the bias rationale is the “stock rationale”⁹ and “continues to serve as a modern-day justification for diversity jurisdiction.”¹⁰

Marginalizing the Bias Rationale

In light of this history, it is unsurprising that the bias rationale has been the central feature of defenses of and attacks on diversity jurisdiction, shaping both the development of the law and academic debates about its reform.¹¹ Yet the centrality and importance of the bias rationale is overweighted. Using the bias rationale to justify diversity jurisdiction takes several analytic steps: (1) out-of-state bias or the perception of out-of-state bias exists; (2) out-of-state bias motivates parties to invoke diversity jurisdiction; (3) federal diversity courts lack out-of-state bias; (4)

4. Judiciary Act of 1789, ch. 20, §§ 11–12, 1 Stat. 73, 78–79.

5. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81 (1923).

6. 9 U.S. (5 Cranch) 61, 87 (1809).

7. 14 U.S. (1 Wheat.) 304, 347 (1816).

8. E.g., *Hertz Corp. v. Friend*, 559 U.S. 77, 89 (2010); Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487, 500 (2006).

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

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

11. Bassett, *supra* note 2, at 119.

the scope of diversity jurisdiction covers cases with a risk of out-of-state bias; and (5) diversity jurisdiction's remedial value justifies its costs. Each of these steps lacks foundation today.

Reports of actual out-of-state bias are rare and isolated. Available empirical evidence at best supports only marginal, sporadic, and geographically isolated bias.¹² Even that evidence is questionable because of the difficulty distinguishing out-of-state bias from other kinds of bias fears. As the 1990 Federal Courts Study Committee concluded, "a greater tension than between residents and nonresidents is that between urban residents and rural residents of the same state or between poor and rich, or between individuals and corporations or other institutions, in the same state."¹³

Fear of out-of-state bias, to the extent it exists, only weakly motivates parties to invoke diversity jurisdiction. In one survey, less than 15% of plaintiff attorneys and less than 10% of defense attorneys cited fear of out-of-state bias as a "very strong" motivating factor in forum selection. A host of other factors influence forum selection more strongly, including the perceived quality of the court, favorable procedures, convenience and familiarity, bias against corporations, and the like.¹⁴ Indeed, around half of the diversity cases are brought in federal court by *in-state* plaintiffs who ought to be the beneficiaries of local bias in state court.¹⁵

For those state-court cases presenting a risk of out-of-state bias, it is not clear that federal court actually alleviates that bias. Federal judges come from the same circles as state judges and have the same local concerns; to the extent bias against out-of-staters exists, that bias might be equally held by local federal judges. To the extent the fear of bias is directed at state *laws* that are biased against out-of-state parties, *Erie* and the Rules of Decision Act demand that those state laws apply with the same force in federal court.¹⁶ Nor are federal juries predictably less biased

12. E.g., Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 410 (1992).

13. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 15 (1990).

14. Miller, *supra* note 12.

15. Victor E. Flango, *How Would Proposed Changes in Federal Diversity Jurisdiction Affect State Courts?*, NAT'L CTR. FOR ST. CTS. 76-78 (Apr. 30, 1989).

16. 28 U.S.C. § 1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

against out-of-state litigants than federal juries,¹⁷ and, in any event, jury trials are astonishingly rare.¹⁸ In short, there is little reason to presume that federal diversity jurisdiction really offers any meaningful bulwark against out-of-state bias.

Even were diversity jurisdiction a reliable solution for marginal perceptions of out-of-state bias, the scope of diversity jurisdiction is ill-matched for that purpose. The scope of diversity jurisdiction is overinclusive in that it, for example, allows in-state parties to invoke federal diversity jurisdiction against out-of-state parties. The scope is also underinclusive because it prohibits, say, a partnership doing business primarily in Texas, organized under the laws of Texas, and made up of fifty Texas partners and one California partner from invoking diversity jurisdiction when sued by a California citizen in California state court. The bias rationale cannot justify diversity jurisdiction's scope.

Finally, the costs of diversity jurisdiction as a whole overwhelm any limited benefits. Although diversity-eligible cases amount to only about 1% of state dockets,¹⁹ they make up more than 30% of the federal docket.²⁰ This diversity-jurisdiction burden on federal courts has meaningful adverse effects on the efficient and effective resolution of disputes. Diversity cases demand interpretation and application of state substantive law by federal judges less familiar with state law than their state-court counterparts. Federal judges presented with an unsettled question of state law must choose between making a frequently difficult *Erie* guess and delaying the case by seeking certification from the state courts. When federal courts do decide questions of state law, those decisions are not precedential and thus deprive the state courts of the opportunity to build state-law precedent. Diversity jurisdiction itself raises litigable and often contentious disputes about citizenship, the amount in controversy, alignment of parties, joinder, removal, and supplemental jurisdiction. And these features mean that diversity jurisdiction is a major distraction of federal-court attention away from civil (and criminal) cases arising under federal law. Evidence suggests that these complexities make diversity

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

18. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Brian J. Ostrum et al., *Examining Trial Trends in State Courts 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004).

19. Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 110-17.

20. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS.

cases in federal district court more demanding and time-consuming—by as much as 22%—than federal-question cases.²¹ For all these reasons, supporters are wrong that the bias rationale justifies diversity jurisdiction.

Refocusing the Debate

But abolitionists are wrong, too. Diversity jurisdiction has much to commend it for reasons other than the mitigation of out-of-state bias—reasons that are often given short shrift when the focus is on out-of-state bias. Debates about diversity jurisdiction should move beyond the bias rationale to consider the full gamut of virtues and vices of diversity jurisdiction, including the facilitation of interstate aggregation and remediation of other biases.

Facilitating aggregation is an important justification for diversity jurisdiction. The law favors aggregation of claims, parties, and cases because of its efficiency and fairness benefits to the parties and the system.²² In general, it is far more efficient and fair to litigate a thousand similar claims together, before a single decisionmaker, than independently and perhaps scattered across the country. State borders, however, impede interstate aggregation in state court.²³ Diversity jurisdiction can enable salutary aggregation in federal court that might be forbidden in state court and without dependence upon worries of out-of-state bias: the Federal Interpleader Act,²⁴ the Multidistrict Litigation Act,²⁵ the Multiparty, Multiforum Trial Jurisdiction Act of 2002,²⁶ the Class Action Fairness Act of 2005,²⁷ and even the supplemental-jurisdiction statute²⁸ all use diversity jurisdiction to promote aggregation—to significant systemic benefit—even when the bias rationale is not seriously implicated.

Freeing the debate from the tethers of the bias rationale also sets other considerations in a new light. For example, diversity jurisdiction can help

21. STEVEN FLANDERS, *THE 1979 FEDERAL DISTRICT COURT TIME STUDY 15* (1980).

22. Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 *NW. U. L. REV.* 1, 7–16 (2018); Scott Dodson & Philip A. Pucillo, *Joint and Several Jurisdiction*, 65 *DUKE L.J.* 1323, 1325 (2016).

23. *Id.* at 37–38.

24. 28 U.S.C. § 1335.

25. *Id.* § 1407.

26. *Id.* § 1369.

27. *Id.* § 1332(d).

28. *Id.* § 1367.

avoid other state-court biases that are not inherently tied to out-of-state citizenship. Corporations have long valued diversity jurisdiction because of a belief that federal courts are more business-friendly than state courts.²⁹ Some litigants think certain state courts favor plaintiffs or class actions more than their corresponding federal courts do.³⁰ Others see antirural or antiurban biases in state courts.³¹ Still others have suggested that diversity jurisdiction can help overcome racial bias in state courts.³² Political or social preferences may differ in state and federal court,³³ such as when a litigation raises sensitive or highly charged issues like abortion or religion. Quite aside from biases, diversity jurisdiction offers certain efficiencies, including interstate procedural uniformity and familiarity and the ability to transfer across state lines to more convenient locations.

I do not defend these benefits here or suggest that they should carry the day. My point instead is that minimizing the out-of-state bias rationale allows these factors to be confronted and debated more clearly on their own terms rather than be overshadowed by the lens of out-of-state bias. Courts interpreting diversity-jurisdiction statutes and developing diversity-jurisdiction doctrines should therefore marginalize the bias rationale and instead focus on other benefits (and, of course, costs) of diversity jurisdiction.

A key area ripe for consideration is the test for determining citizenship. Historically, citizenship determinations have been complex and unpredictable. The test for an individual U.S. citizen's state citizenship for purposes of diversity jurisdiction depends upon the individual's subjective intent to permanently reside in a particular state, which can lead to self-serving testimony and disruptive preliminary hearings involving significant evidentiary proof. Citizenship of artificial entities suffer from similar complexities and uncertainties. Most artificial entities—partnerships, real estate trusts, unions, associations, and the like—take on

29. William Howard Taft, *Criticisms of the Federal Judiciary*, 29 AM. L. REV. 641, 650–51 (1895).

30. THOMAS E. WILLGING & SHANNON R. WHEATMAN, ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION 8 (Fed. Jud. Ctr. 2004).

31. Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273 (2003).

32. Benjamin V. Madison, III, *Color-Blind: Procedure's Quiet but Crucial Role in Achieving Racial Justice*, 78 UMKC L. REV. 617, 618–19 (2010).

33. Letter from GBA Strategies to Nat'l Ctr. for State Courts (Dec. 4, 2014).

the citizenships of each member.³⁴ Such derivative citizenship causes its own headaches. The development of citizenship doctrines untethered from the bias rationale might encourage alternative formulations that expand or restrict federal jurisdiction for other justifiable reasons or lead to the development of tests that focus on virtues of clarity and predictability.³⁵ For example, the test for unincorporated entities could be simplified to be determined solely by the state whose law creates the entity, or perhaps both that state and the state of the entity's principal place of business, like the test for corporations. Or perhaps the test for a natural person's citizenship could be based on objective factors rather than subjective intent. These possibilities may or may not prove sensible, but their sensibility ought to depend primarily on factors other than the impact of out-of-state bias.

Conclusion

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

34. *Americold Realty Trust v. ConAgra Foods, Inc.*, 136 S. Ct. 1012, 1014 (2016).

35. *E.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 89 (2010).
