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THE FEDERAL COURTS ARE NOT BIAS FREE ZONES: AN ARGUMENT FOR ELIMINATING DIVERSITY JURISDICTION

Scott DeVito*

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

ABSTRACT

The defining purpose of the Diversity Clause of the United States Constitution is to provide a neutral federal forum for out-of-state litigants concerned that local courts and legislatures would be biased against them. That avoiding geographic bias is *the* purpose of the Diversity Clause as attested in the state ratifying conferences, the congressional record, and twenty U.S. Supreme Court opinions. In 2022, an empirical study demonstrated, using data from over one million district court actions arising under diversity jurisdiction (from 1990 to 2019), that geographic bias was no longer a concern of out-of-state litigants. As a result, diversity jurisdiction is no longer necessary and should be eliminated. Elimination of diversity jurisdiction would save billions of dollars each year, improve the application of state law, send a signal on national unity, improve the fairness of the system, and decrease friction between the federal and state courts. The central counterargument to eliminating diversity jurisdiction is that it provides a "neutral" or "bias-free" forum for litigants afraid of bias in the state courts. This counterargument fails because the empirical evidence demonstrates both that geographic bias is no longer an issue and that the federal forum is no bias-free Eden—multiple forms of pernicious bias, including racial, gender, and socioeconomic bias, are present in the federal system.

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I. LESS IS MORE

At the time of the founding of the United States, there was concern that state legislatures, judges, and juries would favor in-state litigants over out-of-state litigants.[1] In response, the Diversity Clause was incorporated into the United States Constitution to provide Congress with the power to create a geographically neutral forum for litigation between citizens of different states.[2] Historical studies, performed between sixty and thirty years ago, indicate that concern for geographic bias was still a relevant factor in deciding where to file an action or whether to remove it to federal court.[3] In my 2022 empirical study of over one million federal diversity actions (filings and removals), I found that geographic bias is no longer a factor in determining where to file or whether to remove to federal court.[4]

Because diversity jurisdiction is no longer justified by its original purpose of avoiding geographic bias, it should be eliminated. Doing so would be economically advantageous,[5] ensure that state law actions were heard by those most knowledgeable about state law,[6] send an important signal on national unity,[7] increase fairness in the justice system,[8] and avoid friction between state and federal courts.[9] The central counter-argument to eliminating diversity jurisdiction is that it provides a "neutral" or "bias-free" forum for litigants afraid of bias in the state courts.[10] This argument fails because the empirical evidence demonstrates both that geographic

[1] *See* Scott DeVito, *On the Death of Diversity Jurisdiction: An Empirical Study Establishing that Diversity Jurisdiction Is No Longer Justified*, 52 IND. L. REV. 233, 247–50 (2022) (discussing the concerns of geographic bias from delegates to the Constitutional Convention of 1787 and State Ratifying Conventions).

[2] *See infra* text accompanying notes 32–34.

[3] *See infra* text accompanying notes 35–45.

[4] *See infra* text accompanying notes 46–51.

[5] *See infra* Part IV.A.

[6] *See infra* Part IV.B.

[7] *See infra* Part IV.C.

[8] *See infra* Part IV.D.

[9] *See infra* Part IV.E.

[10] *See infra* Part IV.

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bias is no longer an issue[11] and that other forms of pernicious bias are present in the federal system.[12] In essence, federal courts are not bias-free zones.

II. THE PROBLEM OF CULTURALLY AND GEOGRAPHICALLY DIFFERENT LITIGANTS

States and Empires that are comprised of culturally diverse peoples have long worried about how to deal with geographic bias.[13] For example, three and a half millennia ago, the Hittite King Hatusil I issued an edict controlling the rights of Ura merchants in Ugarit and specified harsh penalties for Ugarit citizens who did not pay their debts to Ura merchants.[14] The fourth century B.C. Greek city-states of Oeantheia and Chalaeum formed a treaty that established procedural and substantive rules governing disputes between their citizens.[15] Ptolemaic Egypt required disputes between Egyptians and Greeks to be held before Greek courts (the chrematists) if the contract was in Greek form and before Egyptian courts (the laocrites) if in Egyptian form.[16] The Ancient Romans introduced the institution of the peregrine praetor (magistrate) to address the problem of mixed litigants—disputes between Roman citizens and subjects of Rome (peregrines).[17]

We see similar concern about geographic bias in medieval England around the first millennium with the formal development of the personal law which applied the

[11] *See* DeVito, *supra* note 1, at 261–73.

[12] *See infra* Part V.

[13] For a more comprehensive review of the history of state reactions to concerns about geographic bias see DeVito, *supra* note 1, at 238–58.

[14] *See* Reuven Yaron, *Foreign Merchants at Ugarit*, 4 ISR. L. REV. 70, 71–73 (1969) (discussing the RS tablets). This edict is found in the Ras Shamra ("RS") documents discovered at Ugarit. *Id.* at 70 n.* (explaining the meaning of the abbreviation of "RS"). While at this time, "Ugarit was a vassal kingdom of the Hittite emperor" and Ugarit's kings were the "rulers and supreme judges of their country." Ignacio Márquez Rowe, *Anatolia and the Levant: Ugarit*, *in* 1 A HISTORY OF ANCIENT NEAR EASTERN LAW 719, 719–21 (Raymond Westbrook ed., 2003) (discussing the structure of the Ugarit government).

[15] COLEMAN PHILLIPSON, 1 THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 194, 199–200 (1911) (Athens and Phaselis also made this treaty).

[16] *See, e.g.*, RAPHAEL TAUBENSCHLAG, THE LAW OF GRECO-ROMAN EGYPT IN THE LIGHT OF THE PAPYRI: 332 B.C.–640 A.D. 366–68 (1944); Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMPAR. L. 297, 300–01 (1953).

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

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law of a person's community to his or her transactions.[18] We can see the personal law in action in the 1353 Statute of the Staple, which states the jurisdiction over disputes between merchants or officials:

> [I]f both parties are foreign, it shall be tried by foreigners; and if both parties are denizens, it shall be tried by denizens, and if one party is denizen and the other alien, the one half of the inquest or proof shall be of denizens and the other half of aliens.[19]

This type of mixed jury eventually came to be called a "jury *de medietate linguae*."[20]

In the American colonies, the jury *de medietate linguae* was used in a 1674 Massachusetts trial concerning three Native Americans accused of murder.[21] In 1748, a Maryland murder trial was tried with a jury of one-half aliens and one-half citizens after the defendant claimed he was a foreigner.[22] In 1783, the Pennsylvania Court of Oyer and Terminer granted a trial *per medietatem lingua*.[23]

Given that thirty-four of the fifty-five delegates to the Constitutional Convention of 1787 were lawyers,[24] it is highly likely that they were well acquainted

[18] MARIANNE CONSTABLE, THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE 7 (1994).

[19] Statutes of the Staple 1353, 27 Edw. 3, § 12, https://www.british-history.ac.uk/no-series/parliament-rolls-medieval/september-1353 (last visited Oct. 20, 2023).

[20] CONSTABLE, *supra* note 18, at 112.

[21] *See* Mr. Easton of Roade Island, *A Reflacion of the Indyan Warre 1675*, *in* ORIGINAL NARRATIVES OF EARLY AMERICAN HISTORY 7–8, 8 n.3 (J. Franklin Jameson ed., 1913) (noting that "[t]he jury trying the accused consisted of four Indians and twelve whites"). Although here, the Native American jurors "were to perform only auxiliary duty, 'to be with the said jury, and to healp to consult and advice with, of, and concerning the premises.'" Yasuhide Kawashima, *The Pilgrims and the Wampanoag Indians, 1620–1691: Legal Encounter*, 23 OKLA. CITY U. L. REV. 115, 130 (1999) (quoting V RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 168 (1998) (1855)).

[22] *See* WILLIAM KILTY, A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES 152 (1811).

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

[24] Richard A. Watson, *Observations on the Missouri Nonpartisan Court Plan*, 40 SW. L.J. 1, 1 (1986).

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with both the idea of personal law and the jury *de medietate linguae*.[25] As a consequence, it is also not surprising that the U.S. Constitution, as promulgated by the Constitutional Convention of 1787, includes the Diversity Clause:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[26]

The proceedings of the Convention are silent as to why the Diversity Clause was included in the Constitution.[27] As are the records of the discussions and debates in the Committee of Detail,[28] which was given the task of working out the scope of the national judicial power.[29]

The Constitution does not itself create courts that could exercise diversity jurisdiction; instead, it grants such power to Congress.[30] Congress, through the Act

[25] We know of at least two delegates who exchanged correspondence in which the use of a jury *de medietate linguae* was discussed. *Letter from Thomas Jefferson to James Madison (July 31, 1788)*, *Founders Online*, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-13-02-0335 (last visited Oct. 16, 2021).

[26] U.S. CONST. art. III, § 2.

[27] This absence of justification for the Diversity Clause may be due, in part, to the secrecy rules adopted by the Convention. Those rules required "[t]hat no copy be taken of any entry on the journal during the sitting of the House without the leave of the House. That members only be permitted to inspect the journal. That nothing spoken in the House be printed, or otherwise published, or communicated without leave." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15 (Max Farrand ed., 1911) [hereinafter Farrand] (providing the Journal entry from Tuesday May 29, 1787).

[28] These records and notes are found primarily in the papers of James Wilson. *See* William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 204–08 (2012) (discussing the history of documents relating to the Committee of Detail).

[29] *See* Farrand, *supra* note 27, at 238 (stating Governor Randolph's observation of how difficult it was to establish the powers of the judiciary and that "once established, it will be the business of a sub-committee to detail it").

[30] *See* U.S. CONST. art. III, §§ 1–2 (creating the federal judicial power which "shall be vested in one supreme Court, and in such inferior [c]ourts as the Congress may from time to time ordain and establish" and providing that Congress could grant those courts jurisdiction over "[c]ontroversies . . . between [c]itizens of different [s]tates").

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of September 24, 1789, created diversity jurisdiction and granted circuit courts original jurisdiction over civil cases that meet a certain dollar amount:

> all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.[31]

From the mid-19th century on, Congress crafted and passed legislation demonstrating that Congress believed the purpose of diversity jurisdiction was to counter geographic bias.[32] The issue of geographic bias also arises in recent legislative reports on the federal courts.[33] Finally, the U.S. Supreme Court, in at least twenty separate opinions from 1809 through 2021, has expressed its view that the purpose of diversity jurisdiction is the prevention of geographic bias.[34]

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[31] Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73.

[32] Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552–53 (limiting the right to remove diversity actions to nonresident defendants); Act of Aug. 13, 1888, ch. 866, § 2, 25 Stat. 434 (same); Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433 (same); Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat 553 (allowing removal from state court where the parties are diverse and "when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendent [sic] may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause"); Act of June 25, 1948, ch. 646, 62 Stat. 869, 938 (forbidding removal to federal court if the defendant is a citizen of the state in which the action was brought); *see, e.g.*, Act of Mar. 2, 1867, ch. 196, 14 Stat. 559 (modifying removal jurisdiction to include any situation where the litigant reasonably believes they "will not be able to obtain justice in such State court"); *see* Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552 (restricting venue to the district where a defendant was an inhabitant, other than in diversity actions where venue was proper in the district of the residence of the plaintiff or the defendant).

[33] Federal Courts Study Act, Pub. L. No. 100-702, Title I, 102 Stat. 4644 (1988); FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (1990) (conceding that geographic bias may remain a problem but arguing that it was not "a compelling justification for retaining diversity jurisdiction."); *see, e.g.*, H.R. REP. NO. 95-893, at 1, 4 (1978) (Committee on the Judiciary submitting a report to the house of representatives proposing to eliminate diversity jurisdiction because "it is doubtful that prejudice against an individual because he is from another State is any longer a significant factor in this country's State courts").

[34] A chronological list, from earliest to most recent, of such cases includes: Bank of United States v. Deveaux, 9 U.S. 61, 87–88 (1809) (Marshall, Ch. J.); Pease v. Peck, 59 U.S. 595, 599 (1855) (Grier, J.); Sere v. Pitot, 10 U.S. 332, 337–38 (1810) (Marshall, Ch. J.); Marshall v. Baltimore & Ohio R.R., 57 U.S. 314, 329 (1853) (Grier, J.); Dodge v. Woolsey, 59 U.S. 331, 357–58 (1855) (Wayne, J.); Ry. Co. v. Whitton, 80 U.S. 270, 271 (1871) (Field, J.); Burgess v. Seligman, 107 U.S. 20, 34 (1883) (Bradley, J); Barrow S.S. Co. v. Kane, 170 U.S. 100, 111 (1898) (Gray, J.); Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938) (Brandeis, J.); Guaranty Trust Co. of New York v. York, 362 U.S. 99, 111 (1945) (Frankfurter,

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III. EMPIRICAL EVIDENCE LEADING TO THE CONCLUSION THAT GEOGRAPHIC BIAS IS NO LONGER A PROBLEM

All of the players in the creation and implementation of diversity jurisdiction in the United States believe that diversity jurisdiction was formed to combat geographic bias. A series of surveys of lawyers from the early 1960s through the early 1990s also support the view that attorneys make forum choices to avoid geographic bias.[35] But, more recently, an empirical study of actual cases shows that geographic bias is no longer an issue in the federal courts.[36]

Historically, legal scholars sought to understand whether concerns about geographic bias played a role in forum choice by surveying attorneys about their past decision-making process. In 1962, Marvin R. Summers surveyed 111 attorneys in the Eastern and Western Districts of Wisconsin and found that geographic bias was a factor in attorney choice of forum.[37] A Virginia survey, published in 1965, also found geographic bias to be the second and third most attorney-cited factors in choice of forum.[38] In 1980, Jerry Goldman and Kenneth S. Marks found attorneys reported "local bias" as a reason for filing in federal court 40% of the time.[39] That same year,

J.); Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 622 (1949) (Rutledge, J., concurring); Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 53–54 (1954) (Frankfurter, J., concurring); McGautha v. California, 402 U.S. 183, 261 n.11 (1971) (Brennan, J., dissenting); Zahn v. Int'l Paper Co., 414 U.S. 291. 304 n.5 (1973) (Brennan, J., dissenting); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987); Finley v. United States, 490 U.S. 545, 577 n.34 (1989) (Stevens, J., dissenting); Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 n.6 (1995) (Souter, J.); Hertz Corp. v. Friend, 559 U.S. 77, 85 (2010) (Breyer, J.); Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1746 (2019) (Thomas, J.); California v. Texas, 141 S. Ct. 1469 (2021) (mem.) (Alito, J., dissenting).

[35] *See infra* text accompanying notes 37–43; *cf.* Jolanta Juszkiewicz Perlstein, *Lawyers' Strategies and Diversity Jurisdiction*, 3 L. & POL'Y Q. 321, 327 (1981) (finding no evidence of fear of geographic bias when using hypothetical problems).

[36] DeVito, *supra* note 1, at 261–73.

[37] Marvin R. Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 936–38 & tbl. (1962) (discussing survey of surveyed 111 attorneys in the Eastern and Western Districts of Wisconsin and finding "local bias against nonresident client" as the tenth out of fourteenth most important factors in deciding where to file (discussing empirical study methodology).

[38] Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178, 178–79 & tbl. I (1965) (finding the second most cited reason for preferring federal court was prejudice against an out-of-state plaintiff and the third most cited reason for preferring federal court was local prejudice against out-of-state defendant).

[39] Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J.L. STUD. 93, 95 (1980) (reporting the results of a survey of "405 attorneys . . . from the metropolitan Chicago area").

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Kristin Bumiller found evidence of geographic bias in her survey,[40] and that the concern about geographic bias was focused on "fear of favoritism to local interests."[41] In 1991, Victor E. Flango found that geographic bias was relevant to attorney choice of forum.[42] Finally, in 1992, Neal Miller reported that geographic bias was a factor in attorney choice of federal or state court.[43]

The only survey finding no significant evidence that attorneys believe state courts are biased against out-of-state litigants was published by Jolanta Juszkiewicz Perlstein.[44] Perlstein's results may be related to Perlman's use of hypothetical cases[45] as compared to all the other surveys which focused on attorney recollection of their own experience.

A 2022 study (the DeVito Study) of geographic bias using data provided by the Federal Judicial Center (FJC) found that geographic bias was not a factor in forum choice.[46] The initial FJC dataset, with over one million records spanning from 1990 to 2019,[47] was combined with data from the U.S. Census Bureau and the National Center for Health Statistics[48] to create the Study Dataset. The Study Dataset

[40] Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 L. & SOC'Y REV. 749, 753, 760 (1980) (reporting the results of her survey of "a random sample of attorneys . . . from diversity cases in four federal courts" and "a sample of attorneys in corresponding state courts").

[41] *Id.* at 761.

[42] Victor E. Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41, 46, 54, 56 (1992) (reporting the results of a survey of attorneys from "the Eastern District of Texas, the Southern District of West Virginia, and the Northern District of Ohio" and finding that 71% in the federal sample and 63% in the state sample reported geographic bias as a significant factor in forum choice).

[43] Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 393, 409–10 (1992) (describing the results of Miller's survey of "all removal cases filed in federal district courts during FY 1987").

[44] Perlstein, *supra* note 35.

[45] *Id.* at 324.

[46] DeVito, *supra* note 1, at 261–73.

[47] *See* FEDERAL JUDICIAL CENTER, *Integrated Database (IDB)*, https://www.fjc.gov/research/idb (last visited Oct. 15, 2021).

[48] CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS, NCHS URBAN-RURAL CLASSIFICATION SCHEME FOR COUNTIES, NCHSurbruralcodes.xls, https://www.cdc.gov/nchs/data/data_acces_files/NCHSURCodes2013.xlsx; *see, e.g.*, U.S. CENSUS BUREAU, COUNTY INTERCENSAL TABLES 1980–1990, https://www.census.gov/data/tables/time-series/demo/

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aggregated actions by year and county of origin, and contained, for each year and county, the: (1) total population; (2) percentage of population by race and ethnicity; (3) poverty-rate; (4) rural-urban status in a given year; (5) filing rates per 1,000 people; and (5) removal rates per 1,000 people.[49] Using the Study Dataset, I found that filing and removal rates were not impacted by a litigant's out-of-state status.[50] At the same time, factors like race, ethnicity, poverty rate, and urban/rural status tended to be statistically significant factors for filing or removal rates.[51]

There are two explanations for why the survey evidence points in the direction that geographic bias is a factor in forum choice while the most recent analysis, using actual case filings and removals, shows that it is not. It is possible that the difference is a historical artifact—attorneys used to be concerned about geographic bias, but this is no longer a concern. Alternatively, the surveys demonstrating that geographic bias is a concern of lawyers were based on attorneys' mis-recollection of their own behavior.[52] It is possible that the reporting attorneys wanted to believe that they incorporated an analysis of geographic bias in their forum choice analysis, but, in reality, did not. This view is supported by Perlstein's analysis, based on hypothetical cases not recollection, showing that geographic bias was not a concern.[53] The DeVito Study cannot prove which explanation is correct, but it does show that there is no evidence of geographic bias during a thirty-year period and covering over one million federal actions.[54]

popest/1980s-county.html (follow "1980–1989" hyperlink to download the excel file for U.S. population by race from 1980 to 1989).

[49] To account for population growth or decline in a county, which can itself alter the filing or removal rate, we track filings and removals as filing or removal per 1,000 people in that county that year. DeVito, *supra* note 1, at 261–73.

[50] *Id.*

[51] *See id.*

[52] *The Choice Between State and Federal Court in Diversity Cases in Virginia*, *supra* note 38, at 178–79; Goldman & Marks, *supra* note 39, at 96; Bumiller, *supra* note 40, at 753; Flango, *supra* note 42, at 46; Miller, *supra* note 43, at 385–86; *see* Summers, *supra* note 37, at 937–38.

[53] *See* Perlstein, *supra* note 35, at 324.

[54] *See generally* DeVito, *supra* note 1, at 261–73.

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IV. ARGUMENTS IN FAVOR OF ELIMINATING DIVERSITY JURISDICTION

The evidence demonstrates that diversity jurisdiction is no longer needed to serve its intended purpose. This is, in itself, strong evidence that diversity jurisdiction should be eliminated as a law that no longer serves its purpose is an opportunity for mischief. In addition, the elimination of diversity jurisdiction would save billions of dollars, place cases in front of judges more familiar with state law, promote national unity, promote fairness, and decrease friction between the federal and state courts.

A. The Economic Argument for Eliminating Diversity Jurisdiction

It has long been established that abolishing diversity jurisdiction would reduce costs for the federal courts.[55] Nonetheless, it is worthwhile to approximate how much money would be saved by eliminating federal diversity jurisdiction for non-aggregated (simple) actions.

We can estimate the cost of diversity actions to the federal courts by combining data on the cost of the federal judiciary, the percent of all cases in the federal courts that are civil, and the percent of all civil actions that are diversity actions. When we do so, we see that the elimination of diversity jurisdiction for simple actions would, on average, save the federal courts $2.7 billion per year.

To arrive at this figure, we begin by examining the percentage of all actions in the district court that are civil actions. As Table 1 shows, civil filings in U.S. District courts represent about 80.1% of all federal filings.

[55] *See, e.g.*, Howard C. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347, 352 (1976); George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 364–65 (1933–1934).

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Table 1: Portion of Filings in the U.S. District Courts That Are Civil Filings[56]

Period	Total Filings (All)	Total Civil Filings	Percentage Civil Filings
03/21 – 03/22	380,213[57]	309,102[58]	81.3%
03/20 – 03/21	526,477[59]	461,478[60]	87.7%
03/19 – 03/20	425,945[61]	332,732[62]	78.1%
03/18 – 03/19	376,762[63]	286,289[64]	76.0%
03/17 – 03/18	358,563[65]	277,010[66]	77.3%
Average			**80.1%**

We then calculate the percentage of all civil filings in the U.S. District Courts that are diversity actions. As Table 2 shows, diversity actions represent approximately 42% of all civil filings in U.S. District Court.

[56] The data from Table 1 comes from the U.S. Courts, Federal Judicial Caseload statistics.

[57] *See* Admin. Off. of the U.S., FED. JUD. CASELOAD STAT. 2022, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 (last visited Apr. 14, 2023).

[58] *Id.*

[59] *See* Admin. Off. of the U.S., FED. JUD. CASELOAD STAT. 2021, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021 (last visited Apr. 14, 2023).

[60] *Id.*

[61] *See* Admin. Off. of the U.S., FED. JUD. CASELOAD STAT. 2020, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 (last visited Apr. 14, 2023).

[62] *Id.*

[63] *See* Admin. Off. of the U.S., FED. JUD. CASELOAD STAT. 2019, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 (last visited Apr. 14, 2023).

[64] *Id.*

[65] *See* Admin. Off. of the U.S., FED. JUD. CASELOAD STAT. 2018, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 (last visited Apr. 14, 2023).

[66] *Id.*

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Table 2: % of Civil Actions in U.S. District Court That Are Diversity Actions[67]

Period	# Civil	# Diversity	Percent Diversity Actions
03/21 – 03/22	309,102[68]	141,125[69]	45.7%
03/20 – 03/21	461,478[70]	275,453[71]	59.7%
03/19 – 03/20	332,732[72]	140,812[73]	42.3%
03/18 – 03/19	286,289[74]	94,206[75]	32.9%
03/17 – 03/18	277,010[76]	85,316[77]	30.8%
Average			**42.3%**

If we combine Tables 1 and 2, we find that, on average, approximately 34% of civil actions in the federal courts arise under diversity jurisdiction. Table 3 shows that, on average, the federal government pays nearly $8 billion for the federal courts.

[67] The data from Table 2 comes from the U.S. Courts, Federal Judicial Caseload statistics.

[68] *See* U.S. Courts, TABLE C-2-U.S. DIST. CTS.-CIV. FED. JUD. CASELOAD STAT. [hereinafter FJC STATISTICS] (Mar. 31, 2022), https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2022/03/31.

[69] *Id.*

[70] FJC STATISTICS (Mar. 31, 2021), https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2021/03/31.

[71] *Id.*

[72] FJC STATISTICS (Mar. 31, 2020), https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2020/03/31.

[73] *Id.*

[74] FJC STATISTICS (Mar. 31, 2019), https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2019/03/31.

[75] *Id.*

[76] FJC STATISTICS (Mar. 31, 2018), https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2018/03/31.

[77] *Id.*

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Table 3: Judiciary Funding FY 2020 – FY 2023[78]

Period	Funding for Courts of Appeals, District Courts, and Other Judicial Services
FY 2023	$8,783,508,000[79]
FY 2022	$8,282,748,000[80]
FY 2021	$7,974,273,000[81]
FY 2020	$7,742,523,000[82]
FY 2019	$7,355,330,000[83]
Average	**$8,027,676,400**

If we assume that eliminating simple diversity actions would reduce the cost of the judiciary by the same amount as the reduction in caseload, then its elimination would produce approximately $2.7 billion in savings each year.[84]

One potential counterargument to the economic savings argument made above, is that eliminating non-multidistrict litigation ("MDL") diversity actions will not

[78] The data for Table 3 comes from the Administrative Office of the U.S. Courts.

[79] *See* THE ADMIN. OFF. OF THE U.S. CTS., The Judiciary Fiscal Year 2023 Congressional Budget 13, https://www.uscourts.gov/sites/default/files/FY%202023%20Congressional%20Budget%20Summary.pdf#:~:text=The%20Judiciary's%20fiscal%20year%20(FY,%24767.1%20million%20in%20mandatory%20appropriations.

[80] *See* THE ADMIN. OFF. OF THE U.S. CTS., The Judiciary Fiscal Year 2022 Congressional Budget 11, https://www.uscourts.gov/sites/default/files/fy_2022_congressional_budget_summary_fy_2022.pdf.

[81] THE ADMIN. OFF. OF THE U.S. CTS., The Judiciary Fiscal Year 2021 Congressional Budget 11, https://www.uscourts.gov/sites/default/files/fy_2021_congressional_budget_summary_0.pdf.

[82] THE ADMIN. OFF. OF THE U.S. CTS., The Judiciary Fiscal Year 2020 Congressional Budget 11, https://www.uscourts.gov/sites/default/files/fy_2020_congressional_budget_summary_0.pdf.

[83] THE ADMIN. OFF. OF THE U.S. CTS., The Judiciary Fiscal Year 2019 Congressional Budget 9, https://www.uscourts.gov/sites/default/files/fy_2019_congressional_budget_summary_final_0.pdf.

[84] This should be understood as an upper limit on the savings as we have not been able to calculate the percent of civil appeals that are individual actions arising under diversity jurisdiction nor have we been able to calculate the savings relating to "other judicial services."

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eliminate the underlying cases—they will instead move to the state courts. This could place an undue and unaffordable economic burden on the states.

We reject this argument.[85] When we look at the empirical data, we see that the impact of shifting the cases from federal courts to the state courts is *de minimis* for the state courts because of the vast difference in caseloads at the federal and state levels. In 2020, there were 140,812 actions filed under diversity jurisdiction in the federal courts[86] and approximately 11.7 million civil filings in state court.[87] This is a ratio of roughly eighty-three state court filings for each federal diversity action. Elimination of federal diversity jurisdiction would increase state court caseloads by a mere 1.01%—a *de minimis* increase.

B. The Unfamiliarity Argument for Eliminating Diversity Jurisdiction

State court judges are also likely to be more familiar with state law than federal judges. As George W. Ball argued, the types of cases that enter the federal court "are not those which the federal courts are peculiarly fit[] to handle."[88] Ball added that "abolition of the diversity provision would leave the federal courts free for the decision of questions for which those courts are peculiarly well designed."[89] We can strengthen Ball's argument by looking at the empirical data.

In 2020 there were, on average 2,607, simple actions arising under diversity jurisdiction per state, including the District of Columbia, the District of Guam, the District of the Northern Mariana Islands, and the District of Puerto Rico.[90] That same

[85] We are not alone in rejecting this conclusion. *See, e.g.*, IAN ANDERSON, ARTHUR AUFSES, SCOTT M. BERMAN & ANDREW J. MELNICK, REPORT OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION COMMITTEE ON THE FEDERAL COURTS ON THE RECOMMENDATION OF THE FEDERAL COURTS STUDY COMMITTEE TO ABOLISH DIVERSITY JURISDICTION, 158 F.R.D. 185, 192–93 (1995).

[86] These numbers were derived using data made publicly available by the Federal Judicial Center ("FJC"). *See* ADMIN. OFF. OF THE U.S., FED. JUD. CASELOAD STAT. 2020, https://www.uscourts.gov/ statistics-reports/federal-judicial-caseload-statistics-2020 (last visited Oct. 20, 2023).

[87] These calculations were based on a combination of state and federal data. The state data was collected by the Court Statistics Project. *CSP STAT Civil*, CT. STAT. PROJECT, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil (last visited Apr. 14, 2023).

[88] Ball, *supra* note 55, at 366.

[89] *Id.*

[90] These numbers were derived using the FJC data. *See Integrated Database*, *supra* note 47.

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year, there were, on average, 364,742 civil actions filed per state.[91] Thus, in 2020, for every action arising under diversity jurisdiction, there were roughly 140 civil actions in state court. That same year, there were, on average, 14,937 torts, 80,357 commercial actions, and 6,609 real property actions per state.[92] The related federal courts, on the other hand, saw only, on average per state, 686 torts, 351 commercial actions, and fifteen real property diversity actions.[93] That means that in 2020, federal courts, sitting in diversity and therefore applying state law, see just 4.63% of the torts their state court counterparts see, 0.44% of the commercial actions, and 0.23% of the real property actions.

Because state courts see vastly more actions relating to state law than the federal courts, it is highly likely that state court judges will have greater experience, knowledge, and facility with state law than related federal courts.

C. The National Unity Argument for Eliminating Diversity Jurisdiction

As Abraham Lincoln noted "[a] house divided against itself cannot stand."[94] One argument in favor of eliminating diversity jurisdiction for simple actions is that doing so would send a message on national unity—one which shows we are no longer divided by geographic boundaries. Given the current divisiveness of American society,[95] any movement showing national unity could be of value.

Because diversity jurisdiction was created in response to geographic bias in the state courts,[96] it furthers the idea that the American people are divided against each

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[91] Ct. Stat. Project, *State Court Caseload Statistics*, TOTAL CIV. CASELOADS, https://www.courtstatistics.org/__data/assets/file/0019/23905/total_civil_caseloads.xlsx (last visited Apr. 14, 2023).

[92] *Id.*

[93] These numbers were derived using the FJC data. *See Integrated Database*, *supra* note 47.

[94] Abraham Lincoln, House Divided Speech (June 16, 1858), https://www.nps.gov/liho/learn/historyculture/housedivided.htm.

[95] *See, e.g.*, *Divided America*, ASSOCIATED PRESS, https://www.ap.org/explore/divided-america/; Ian Bremmer, *The U.S. Capitol Riot Was Years in the Making. Here's Why America Is So Divided*, TIME, https://time.com/5929978/the-u-s-capitol-riot-was-years-in-the-making-heres-why-america-is-so-divided/; Laura Silver, Janell Fetterolf & Aidan Connaughton, *Diversity and Division in Advanced Economies*, PEW RSCH. CTR., https://www.pewresearch.org/global/2021/10/13/diversity-and-division-in-advanced-economies/.

[96] DeVito, *supra* note 1, at 244–58 (discussing the legislative and Federal common law history of the Diversity Clause).

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other based on state citizenship.[97] Given that geographic bias has been shown to not exist,[98] keeping diversity jurisdiction furthers a harmful myth of division.

The Roman empire faced a similar issue. Initially, the Roman law (*jus civile*) only applied to disputes between Romans.[99] Conquered people (peregrines) were required to use "their own customary law or the law of their former (conquered) state."[100] Because conquered people and Roman citizens interacted commercially, a third kind of law, the *ius gentium*, was created through the auspices of the peregrine praetor (magistrate) to resolve commercial disputes between them.[101] This unified law was so effective that Rome made it applicable to all members of the empire (Romans and peregrines) thereby fostering the idea of a common Roman citizenship.[102]

It is the suggestion of this Author that we similarly eliminate diversity jurisdiction and thereby create one place where state law complaints are heard—the states. Doing so will demonstrate the reality that America is no longer divided by the geographic boundaries of the states.

D. The Fairness Argument

George W. Ball has argued that diversity jurisdiction is problematic because it creates "two conflicting rules of law existing simultaneously in a single jurisdiction."[103] Wealthier or more sophisticated parties can manipulate the system to their advantage through "devious employment of innumerable fictions to avoid or obtain the jurisdiction of the federal courts" thereby harming poorer or less sophisticated parties.[104] Eliminating diversity jurisdiction for simple actions would

[97] *See generally id.*

[98] *Id.* at 261–73.

[99] Trnavci, *supra* note 17 (discussing the *ius gentium*).

[100] *Id.*

[101] *Id.*

[102] *See* Rena van den Bergh, *The Influence of Free and Foreign Trade on the Development of Roman Law*, 65 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG [THRHR] 373, 382–83 (2002) (S. Afr.); ERNEST BARKER, CHURCH, STATE AND EDUCATION 23 (1957); C. DELISLE BURNS, POLITICAL IDEALS: AN ESSAY 57 (1921).

[103] Ball, *supra* note 55, at 362.

[104] *Id.* at 363.

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remove this disparate power and place rich and poor, sophisticated and unsophisticated litigants on equal footing.

E. The Friction Argument

By allowing the federal courts to address state law, we create unnecessary and harmful friction between the two judicial systems.[105] When a federal court sitting in diversity hears a state law case, the federal judge is required to understand the law of the state.[106] While sometimes the law is well settled, sometimes it is not.[107] When the law is not settled by the state Supreme Court, the federal district courts are expected to give great weight to the opinions of the intermediate appellate state court, but may disregard them if the federal court believes, in so doing, it would be applying the law in the manner the state Supreme Court would.[108] Confusing this issue is that federal decisions on state law are not binding on the state trial courts, intermediate appellate courts, or Supreme Court.[109] This can bring the federal and state courts into conflict that can be easily avoided by eliminating diversity jurisdiction for simple actions. As Howard C. Bratton notes, doing so "is in keeping with the principles of federalism to do away with what amounts to an intrusion into the ambit of the state courts, and to restrict the federal courts to their proper function of dealing with federal litigation."[110]

V. FEDERAL COURTS ARE NOT BIAS-FREE ZONES

A final argument in favor of keeping diversity jurisdiction is that the federal courts, in some sense, provide a superior forum to state courts.[111] This is a position well attested to among attorneys.[112] Yet, there is no empirical evidence

[105] Bratton, *supra* note 55, at 350.

[106] *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 78, 80 (1938).

[107] *See, e.g.*, Jim White Agency Co. v. Nissan Motor Corp., 126 F.3d 832, 835 (6th Cir. 1997); Austin v. Kroger Tex. L.P., 746 F.3d 191, 199–204 (5th Cir. 2014); Stahle v. CTS Corp., 817 F.3d 96, 113–14 (4th Cir. 2016).

[108] *See, e.g.*, Allstate Ins. Co. v. Menards, Inc., 285 F.3d 630, 637 (7th Cir. 2002).

[109] Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., 941 P.2d 1321, 1343 (Kan. 1997); Lilley v. Johns-Manville Corp., 596 A.2d 203, 210 (Pa. Super. Ct. 1991).

[110] Bratton, *supra* note 55, at 350.

[111] John J. Parker, *The Federal Jurisdiction and Recent Attacks upon It*, 18 A.B.A. J. 433, 439 (1932).

[112] *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 142–44 (1985); Miller, *supra* note 43, at 414–17.

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demonstrating this supposed superiority.[113] In addition, when we look at the particular ways that the federal courts are deemed better than the state courts, we find the federal courts subject to precisely the problems they are deemed to be free of.

For example, one argument for the superiority of federal courts is that they provide a fair and objective forum while state courts are subject to bias and influence.[114] The principal version of this argument is that federal courts provide a forum free of geographic bias while state courts do not.[115] As we have seen, this is not true—litigants have no concern that state courts will be biased against them based on their out-of-state status.[116]

A second version of this argument is that even if geographic bias is not a problem, the state courts are subject to other forms of bias, while the federal courts are not.[117] Once again, a close look at the evidence demonstrates that this view also fails. For example, the federal courts are not free from racial and ethnic bias. First, the makeup of the court itself implicates systemic racism.[118] White Americans are overrepresented at both the federal trial and circuit courts, while Black Americans, Hispanic Americans, and American Indians are underrepresented at both the trial and appellate courts, and Asians are underrepresented only in the district courts.[119] (See Table 4 and 5).

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[113] Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 256–61 (1988) (arguing that the question of whether the federal judges are better than state court judges may be impossible to resolve).

[114] John W. Reed, The War on Diversity, Address Before the Annual International Society of Barristers Convention (Mar. 24, 1983), *in* INT'L SOC'Y BARRISTERS Q., 1983, at 297, 298–99.

[115] Robert C. Brown, *Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179, 180–82 (1929) (discussing the purpose of diversity jurisdiction); Parker, *supra* note 111, at 437.

[116] DeVito, *supra* note 1, at 261–73.

[117] *See* John P. Frank, *Diversity Jurisdiction: Let's Keep It*, 3 ADELPHIA L.J. 75, 83 (1984).

[118] Systemic bias is defined as a system or set of "institutions that produce racially disparate outcomes, regardless of the intentions of the people who work within them." Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof*, WASH. POST, June 10, 2020, https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/.

[119] *See infra* Tables 4 and 5.

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Table 4: Number of Active Federal Judges By Race and Court[120]

	White	Black	Hispanic	Asian	American Indian	Total
District Court	420	78	58	24	3	583
Court of Appeals	115	25	14	14	0	168

Table 5: Percent of Active Federal Judges By Race and Court

	White	Black	Hispanic	Asian	American Indian
District Court ("D.C.")	72.04%	13.38%	9.95%	4.12%	0.51%
D.C. difference from U.S. Population	12.74%	-.22%	-8.95%	-1.98%	-0.79%
Court of Appeals ("C.A.")	68.45%	14.88%	8.33%	8.33%	0.00%
C.A. difference from U.S. Population	9.15%	1.28%	-10.57%	2.23%	-1.30%
U.S. Population[121]	59.3%	13.6%	18.9%	6.1%	1.3%

In addition, a number of empirical studies have found that the federal courts treat people differently depending on their race or ethnicity. Levinson, Bennett, and Hioki found that federal district courts and federal magistrate judges[122] "displayed

[120] Biographical Directory of Article III Federal Judges, 1789–present, Advanced Search Criteria, FED. JUD. CTR., fjc.gov/history/judges/search/advanced-search (click on "Court," then on "U.S. District Courts" or "U.S. Courts of Appeals" and select all; to search using race or ethnicity, click "Personal Characteristics and Background," then click on "Race or Ethnicity," and mark the relevant check box; for all searches also click on "Limit to Standing Judges," then mark the box next to "Active Judges"). This data was as of October 2023.

[121] *QuickFacts: United States*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/US/PST045221 (last updated July 1, 2022).

[122] *See* Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 97 (2017) (describing the participants of the study as one hundred district court judges, eighty magistrate judges, and "[f]ifty-nine state judges from eight states").

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strong to moderate implicit bias against Asians (relative to Caucasians)."[123] Asian Americans were associated with "negative moral stereotypes (e.g., greedy, dishonest, scheming)" while White Americans were associated with "positive moral stereotypes (e.g., trustworthy, honest, generous)."[124] Similarly, all judges "displayed strong to moderate implicit bias against Jews (relative to Christians)."[125]

Another study found that female judges believed that minority lawyers were less well-treated by their White counterparts.[126] In addition, nearly half of minority male attorneys reported the belief that minority attorneys confront a disadvantage in the Second Circuit,[127] and a majority of minority attorneys reported that they had been subject to racial/ethnic bias.[128] Finally, the majority of lawyers reported observing witnesses being subjected to racially/ethnically biased treatment.[129]

Empirical studies have also shown, relative to employment law in the federal courts, that White plaintiffs who allege racial discrimination are more likely to prevail than plaintiffs from Black, Indigenous, and People of Color ("BIPOC") communities.[130] This disparity becomes sharper when the judge is White.[131]

Judge Mark W. Bennett has noted that implicit bias harmfully impacts both jury selection and *Batson* challenges.[132] Victor D. Quintanilla argued that because

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[123] *Id.* at 104.

[124] *Id.*

[125] *Id.*

[126] Carroll Seron et al., *A Report of the Perceptions and Experiences of Lawyers, Judges, and Court Employees Concerning Gender, Racial and Ethnic Fairness in the Federal Courts of the Second Circuit of the United States*, 1997 ANN. SURV. AM. L. 415, 421 (1997).

[127] *See id.* at 425, 446.

[128] *Id.*

[129] *Id.* at 428.

[130] Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 346 (2012) ("When we take into account pro se status . . . white judges tend to dismiss [employment discrimination] cases involving minority plaintiffs at a much higher rate than cases involving white plaintiffs.").

[131] *Id.* (finding that, holding other relevant factors constant, "[W]hite judges tend to dismiss [employment discrimination] cases involving minority plaintiffs at a much higher rate than cases involving [W]hite plaintiffs").

[132] *See* Mark W. Bennet, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 158–65 (2010).

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Ashcroft v. Iqbal[133] "requires judges to draw on their 'judicial experience and common sense'" and judges have systemic biases, federal judges may have difficulty "at the inception of litigation, with deciding whether stereotyped-group members have pleaded plausible claims of discrimination."[134]

The empirical evidence demonstrates that the federal courts do not provide a forum free from racial and ethnic bias. Similarly, they do not provide a forum free of gender bias. As with race and ethnicity, the makeup of the courts implicates gender bias with males being overrepresented in the courts of appeals by 11.7% and males being overrepresented in the district courts by 12.9%. (See Table 6)

Table 6: Number and Percentage of Federal Judges Who Are Female[135]

	#/ Female	% Female	% different from U.S. Population
District Court	227	37.58%	-12.92%
Court of Appeals	66	38.82%	-11.68%

In addition, there is clear systematic bias for persons who do not identify as either "male" or "female" because there are no persons whose gender is listed as "other," "nonbinary," or "transgender."[136] As about 5% of young American adults identify as nonbinary or transgender,[137] we would expect there to be out of the approximately thirty (out of the 604) district court judges who identify as nonbinary

[133] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[134] Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 195 (2013).

[135] *Biographical Directory of Article III Federal Judges, 1789-present*, FED. JUD. CTR., fjc.gov/history/judges/search/advanced-search (last visited Feb. 16, 2023) (click on "Court," then on "U.S. District Courts" or "U.S. Courts of Appeals" and "Select All"; to search using gender, click "Personal Characteristics and Background," then under "Gender" select the relevant gender; for all searches also click on "Limit to Sitting Judges," then select the radio button for "Active Judges"); *QuickFacts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045221 (last modified July 1, 2022) (estimating that 50.5% of the U.S. population is female). This data was as of October 2023.

[136] *Id.*

[137] Anna Brown, *About 5% of Young Adults in the U.S. Say Their Gender is Different from Their Sex Assigned at Birth*, PEW RSCH. CTR. (June 7, 2022), https://www.pewresearch.org/fact-tank/2022/06/07/about-5-of-young-adults-in-the-u-s-say-their-gender-is-different-from-their-sex-assigned-at-birth/.

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or transgender, and between eight to nine courts of appeals judges. Either there are no federal district court and circuit court judges that identify as nonbinary, transgender, or other, or the courts simply do not report that information. In either case, that is evidence of systematic bias against nonbinary and transgender persons.

Studies have also found issues with gender bias at the federal courts. For example, a survey of the U.S. Second Circuit Court of Appeals found that female judges believe that female lawyers are not treated as well as male lawyers by White male lawyers.[138] In addition, a significant portion of White female attorneys (40% of government attorneys and 49% of private attorneys) report that they had been subject to sex-based bias.[139] Furthermore, lawyers generally reported seeing gender-based bias toward female witnesses.[140]

As more evidence of federal court gender bias, the federal courts were initially reluctant to investigate gender bias at all.[141] In 1988, Congress passed the Judicial Improvements and Access to Justice Act, which created a Federal Courts Study Committee to look into the future of the Federal Judiciary.[142] In 1990, that Committee published its report and, while it acknowledged that the state courts had found issues of gender bias, it deemed the study of the federal courts unnecessary because "the quality of the federal bench and the nature of federal law keep such problems to a minimum" and instead concluded that "education is the best means of sensitizing judges and supporting personnel to their own possible inappropriate conduct and to the importance of curbing such bias when shown by attorneys, parties, and witnesses."[143]

However, Brooke D. Coleman's review of some of the Gender Bias Task Force Studies in the federal courts found serious gender-bias problems.[144] Coleman noted that the federal task force found that women were severely underrepresented in the

[138] Seron et al., *supra* note 126, at 421.

[139] *Id.* at 425.

[140] *Id.* at 427.

[141] *See* Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2196–97 (1993).

[142] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 102(a), 102 Stat. 4642, 4644 (1988).

[143] U.S. FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990).

[144] *See* Brooke D. Coleman, *A Legal Fempire?: Women In Complex Civil Litigation*, 93 IND. L.J. 617, 626–27 (2018) (discussing gender bias taskforce studies).

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federal judiciary.[145] Women were treated differently than men, and that such treatment was often offensive and intimidating.[146] For example, the Third Circuit Task Force on Equal Treatment in the Courts found that "[b]oth men and women attorneys reported references by judges to female attorneys as . . . 'young lady' or 'the lady lawyer.'"[147] In the Eighth Circuit, female attorneys reported that they "were addressed by such terms as 'honey,' 'hon,' 'dear,' 'doll,' 'sweetie,' 'little lady,' 'missy,' and 'little girl.'"[148] In the D.C. Circuit, female attorneys reported being interrupted more often than men and being listened to or recognized as an attorney less often than men.[149]

Thus far the empirical evidence indicates that the federal courts are not free from racial, ethnic, or gender bias. The federal courts are also not free from socio-economic bias. As Judge Kozinski of the Ninth Circuit Court of Appeals noted "[n]o truly poor people are appointed as federal judges."[150] Michele Benedetto Neitz notes that judges exist in a higher economic strata than those litigants who typically appear before them and, as a result, that different status "may result in socioeconomic bias."[151] An example of the economic status difference in action occurred in *Sanchez v. County of San Diego*.[152] *Sanchez* is a Fourth Amendment case centered on the constitutionality of welfare recipients being required to allow warrantless home visits from an inspector (to check for fraud) in order to receive benefits.[153] During oral argument, Judge Andrew Kleinfeld noted,

[145] *See id.* at 627–28.

[146] *See id.* at 629.

[147] Comm'n on Gender and Comm'n on Race & Ethnicity, *Report of the Third Circuit Task Force on Equal Treatment in the Courts*, 42 VILL. L. REV. 1355, 1408 (1997).

[148] Eighth Cir. Gender Fairness Task Force, *Final Report & Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 CREIGHTON L. REV. 9, 134 (1997).

[149] Special Committee on Gender, *Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L.J. 1657, 1707, 1709–11 (1996).

[150] United States v. Pineda-Moreno, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissenting).

[151] Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 142–43 (2013).

[152] Sanchez v. County of San Diego, 464 F.3d 916, 920–21 (2006).

[153] *Id.*

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> I mean, you walk in and you see the $5000 widescreen TV, and the person says, "oh, I have all this trouble supporting my children 'cause I don't have a man to help me in the house," and there's obviously a man to help her in the house—and that's seeing if the charity is going where it's supposed to go. . . . And you open a closet and you see four suits . . . and the golf clubs of the person that doesn't live there, supposedly—same thing, isn't it?[154]

Judge Kleinfeld's statement indicating that welfare recipients use their government checks for greens fees, business attire, and in-home theater systems is, without question, a blatant example of implicit socioeconomic bias.[155] This bias is also evident from Judge Kleinfeld's equating welfare benefits with charity, something inconsistent with Supreme Court precedent.[156]

VI. ELIMINATING DIVERSITY JURISDICTION

As we have seen, there is no basis for concluding that federal courts provide a necessary forum for standard state law actions.[157] The empirical evidence shows that geographic bias is no longer a factor in forum choice. Moreover, the federal courts do not provide some ideal, objective, bias-free forum as they remain susceptible to racial/ethnic, gender, and socioeconomic bias. Eliminating diversity jurisdiction for these types of actions would save billions of dollars, ensure those most familiar with state law decide state law-based cases, strengthen the idea of national unity, limit one way in which rich and sophisticated litigants game the system to the detriment of the poor or unsophisticated litigants, and would reduce friction between state and federal courts. Diversity jurisdiction should therefore be eliminated.

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[154] Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 INDIANA L.J. 355, 403 (2010) (quoting from Audio file: Oral Argument, *Sanchez*, 464 F.3d 916 (No. 04-05122) (remarks of Kleinfeld, J., at 6:06–6:47) (on file with the *Indiana Law Journal*)).

[155] *Id.*

[156] Neitz, *supra* note 151, at 157; *see also* Goldberg v. Kelly, 397 U.S. 254, 265 (1970) ("Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'").

[157] Scott Dodson makes an interesting argument that discussions of diversity jurisdiction should focus on the value of aggregating cases and that, if we do so, we will see that diversity jurisdiction has value outside of avoiding geographic bias. *See* Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 301–03 (2019); *see also* Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 6–7 (2018). This argument is quite interesting and will be discussed in a future paper.

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