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Controversy over the appropriate division of jurisdiction is a necessary consequence of the parallel court systems that exist in the United States. The choice of fora has led to jurisdictional friction between state and federal courts, including controversies over diversity-of-citizenship jurisdiction, habeas corpus litigation, preemption and removal formulae, and state court noncompliance with federal judicial orders.[1] The fact that state and federal courts have interpreted and enforced each other's laws ever since the United States was founded creates potential cooperation and conflict.[2] Quoting Alexander Hamilton, Chief Justice William Rehnquist stated, "National courts need not overpower or supplant the existing state courts. . . . Instead 'the national and State systems are to be regarded as *one whole.*'"[3] This premise assumes "that state and federal courts are fungible and that any departure from this premise will cast undue aspersions on the capabilities of state judges."[4] Yet, federal

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1. *See generally* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) [hereinafter A GENERAL VIEW]; CARL MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES (1969); MITCHELL WENDELL, RELATIONS BETWEEN THE FEDERAL AND STATE COURTS (1949); Kenneth C. Cole, Erie v. Tompkins *and the Relationship Between Federal and State Courts,* 36 AM. POL. SCI. REV. 885 (1942); Roger J. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief,* 51 ALB. L. REV. 151 (1987).

2. *See, e.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation,* 22 WM. & MARY L. REV. 605 (1981); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362 (1953). See JAMES D. THOMPSON, ORGANIZATIONS IN ACTION (1967) (for a discussion of the general need for coordination); Jeffrey S. Luke, *Managing Interconnectedness: The Challenge of Shared Power, in* 4 SHARED POWER 25 (John M. Bryson & Robert C. Einsweiler eds., 1991) (for the idea that friction is an effect of efforts to interconnect); and Eric Trist, *Collaboration in Work Settings: A Personal Perspective,* 13 J. OF APPLIED BEHAVIORAL SCI. 268 (1977) (for a discussion of potential for conflict).

3. William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships,* 78 VA. L. REV. 1657, 1658 (1992) (quoting THE FEDERALIST NO. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

4. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and*

review of habeas corpus petitions from prisoners convicted in state court, the parallel development of § 1983 prisoner petitions, and the very existence of diversity jurisdiction are based upon the premise that state courts cannot be fully trusted to enforce federal rights.[5] Indeed, with the Violence Against Women Act and the trend toward increasing the number of federal crimes, some would argue that the tendency is for federal courts to expand jurisdiction at the expense of state courts.[6]

Obviously, the Constitution defines broad boundaries between state and federal courts, but litigants have much room to maneuver within these boundaries. For example, in "one of the most politically divisive" areas of federal jurisdiction, habeas corpus, the issue of forum shopping does not arise.[7] Habeas corpus petitions challenge the constitutionality of a person's detention and request release. Federal courts have jurisdiction over habeas petitions from state prisoners claiming they are held in custody in violation of federal law. In this civil writ over a criminal matter, petitioners typically exhaust state court remedies first and then file in federal court. Tension between state and federal courts is exacerbated when "a single federal judge may overturn the judgment of the highest court of a State."[8] From the

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Federal Courts: Federal Jurisdiction and "The Martian Chronicles," 78 VA. L. REV. 1769, 1825 (1992).

5. *See* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1988)); VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS (1994); CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3601-30 (2d ed. 1984 & Supp. 1994) (for an authoritative discussion of diversity of citizenship jurisdiction). In his opening remarks to the conference, Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647 (1995), Professor Bourguignon showed that the distrust of state courts was evident as early as 1789.

6. *See* WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE (1994); H. Scott Wallace, *The Drive to Federalize Is a Road to Ruin,* CRIM. JUST., Fall 1993, at 8. The Violence Against Women Act, S. 11, 103d Cong., 1st Sess. (1993), introduced by Senator Joseph Biden (D-Del.) would enhance penalties for certain sex offenses and create new federal civil rights actions for violent crimes committed on the basis of gender. One commentator notes that past congressional action has federalized such offenses as carjacking and theft of animals from research facilities. *See* Christopher Zimmerman, *The New Crime Bill*, 20 ST. LEGISLATURES 27 (1994). The Violent Crime Control and Law Enforcement Act of 1994 would expand the scope of federal criminal law by "federalizing" state crimes, *e.g.*, possession of handguns by juveniles, theft of art works, and interstate domestic violence. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

7. SUBCOMM. ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES, REPORT TO FEDERAL COURTS STUDY COMM. 468 (1990). The Committee was authorized by the 100th Congress as part of the 1988 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 101-09, 102 Stat. 4642, 4644-45.

8. *See* Sumner v. Mata, 449 U.S. 539, 543-44 (1981); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 263-64 (1973) (quoting Massachusetts Supreme Judicial Court Justice Paul C. Reardon on the "humiliation of review from the full bench of the highest State appellate court to

litigant's perspective, however, this is the ultimate in forum shopping, because petitioners can use state and federal courts.

Perhaps, a more basic question is: To what extent should the wishes of litigants influence the allocation of disputes between federal and state courts?[9] Some might argue that the desires of litigants should be irrelevant to the forum allocation issue because the primary responsibility of the court is to develop the law.[10] On the other hand, the free market argument is that litigants should take advantage of the options provided.[11] But what forum is chosen if litigants disagree? Further, why should a federal court alternative be available to some state law claimants and not to others?[12] This Article will explore some key factors that influence litigants' decisions to use the state or federal courts in an area of law in which choice of forum is possible—federal diversity-of-citizenship jurisdiction.

Diversity-of-citizenship jurisdiction is an interesting arena from which to observe the state-federal relationship because diversity cases require federal courts to apply state law, not federal law, in deciding cases.[13] Opponents of diversity jurisdiction contend that federal courts are not the best interpreters of state law and that federal courts time could be better used deciding federal cases.[14] The argument concludes simply that state cases belong in state courts.

The controversy over diversity jurisdiction is not new. Indeed, it has existed since diversity jurisdiction was conferred upon federal courts by the Judiciary Act of 1789.[15] Even the attempt to minimize friction between state

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a single United States District Court judge").

9. *See* Redish, *supra* note 4, at 1775.

10. *Id.* Professor Peter Nygh, in his paper *Choice of Law Rules and Forum Shopping in Australia*, 46 S.C. L. REV. 897 (1995), shows that a plaintiff's preference is not a relevant consideration in Australia.

11. In his paper, *Federal Jurisdiction in Australian Courts: Policies and Prospects*, 46 S.C. L. REV. 765 (1995), Professor Brian Opeskin asks why concurrent jurisdiction is conferred if forum shopping is to be discouraged.

12. *See* Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992); *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509 (2d Cir. 1973); *see also* Shawn R. McCarver, Note, *The "Probate Exception" to Federal Diversity Jurisdiction: Matters Related to Probate*, 48 MO. L. REV. 564 (1983); Denise Micklus-Nicotra, Note, *Federal Courts—The Continued Vitality and Questionable Validity of the Domestic Relations Exception to Diversity Jurisdiction*, 56 TEMP. L.Q. 228 (1983); Anthony B. Ullman, Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824 (1983).

13. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938); *See generally* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99-161 (1969); Howard C. Bratton, *Diversity Jurisdiction—An Idea Whose Time has Passed*, 51 IND. L.J. 347 (1976).

14. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); AMERICAN LAW INSTITUTE, *supra* note 13, at 99.

15. *See* Judiciary Act of 1789, ch. 20 § 11, 1 Stat. 73, 78; Russell Chapin, *Federal or State*

and federal courts results in complex procedural problems. One attorney observed that "[t]he law books are filled with cases involving devices by which some parties seek to create diversity of citizenship and get into the federal courts, and with the comparable efforts of others to prevent diversity and keep cases in the state courts."[16] By highlighting the primary reasons litigants and their attorneys choose to file cases in state or federal court, when a choice is available, this controversy can illuminate the general considerations involved in choice of forum.[17]

Attorneys' perceptions of the comparative quality of justice received in state and federal courts might affect forum choice regardless of the factual accuracy of their perceptions. Accordingly, the author conducted a survey to identify attorneys' attitudes toward choice of forum.[18] Of the various reasons attorneys give for choosing one forum over the other, three stood out: bias against outsiders, comparative quality of judges, and familiarity with processes and procedures of one or the other court system.

Protection for out-of-state litigants has been cited as the basic reason for retaining diversity jurisdiction in federal courts.[19] In *Erie R.R. v. Tomp-*

Court: Should Diversity Jurisdiction Be Abolished?, INTERGOVERNMENTAL PERSPECTIVE, Spring 1989, at 29 (noting that diversity jurisdiction was "tepidly supported and vigorously opposed during the debates over the ratification of the United States Constitution"). Roscoe Pound, in a speech to the American Bar Association, described diversity as "archaic" and renewed the debate over diversity jurisdiction. Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Before the American Bar Association (Aug. 26, 1906), *in* 35 F.R.D. 273, 286 (1964). *See also* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17-18 (3d ed. 1988); James W. Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future,* 43 TEX. L. REV. 1 (1964); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49 (1923).

16. Chapin, *supra* note 15, at 31.

17. Note that this article focuses on *litigant* choice between state and federal court, not the impact of changing jurisdictions on the caseloads of either state or federal court. For information on the latter subject, see Victor E. Flango & B. Darren Burns, *The Effect of Recent Changes in Federal Diversity Jurisdiction on the State Courts,* ST. CT. J., Spring 1989, at 4, and Victor E. Flango, *How Would the Abolition of Federal Diversity Jurisdiction Affect State Courts?*, 74 JUDICATURE 35 (1990). For some, the principal reason for eliminating or curtailing diversity jurisdiction is to reduce the federal courts' caseload. *See* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 651 (1949) (Frankfurter, J., dissenting) ("An Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts."); Charles L. Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way but Vote the Other Way with Its Feet?*, N.Y. ST. B.J., July 1989, at 20 (recognizing the problem of a heavy federal caseload but arguing that diversity jurisdiction should be retained); Douglas D. McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?*, LITIG., Fall 1980, at 38 (listing federal caseloads as the "first and foremost reason" for abolishing diversity jurisdiction).

18. The complete results of this analysis are reported in Victor E. Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41 (1991) [hereinafter *Perspectives*].

19. *See* Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall,

kins[20] the U.S. Supreme Court acknowledged that "[d]iversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."[21] A major study of federal jurisdiction undertaken by the American Law Institute at the request of Chief Justice Earl Warren concluded that diversity jurisdiction should be retained only if prejudice against out-of-state citizens continued to be a factor in litigation.[22]

Opponents of diversity jurisdiction argue that bias against out-of-state citizens is no longer important.[23] Professor Rosenberg contends that many "hard-working judges and thoughtful academics believe those fears of hometown favoritism are not really a problem today."[24]

Advocates for retaining diversity jurisdiction might agree that bias against out-of-state citizens is less of a problem, but "anyone who believes that there is no local chauvinism in the state courts is hiding his head somewhere."[25] One attorney concedes that Professor Rosenberg's assurance of no hometown favoritism could be true for metropolitan areas, but this "is not the reality for most attorneys in most parts of the country."[26] The Federal Courts Study Committee, appointed by Chief Justice Rehnquist, acknowledged that local bias "may be a problem in some jurisdictions" but not sufficiently so to be a "compelling justification" for retaining diversity jurisdiction in federal courts.[27]

Empirical evidence on the influence of fear of prejudice on lawyers' choice of forum has been mixed. One survey of 163 Virginia lawyers found that 60 percent of the respondents representing out-of-state plaintiffs cited

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C.J.) (stating that the Constitution "entertains apprehensions" that the local courts are biased in favor of local citizens); *see also* Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias."); Burgess v. Seligman, 107 U.S. 20, 34 (1883) (stating that diversity jurisdiction was established "to institute independent tribunals, which . . . would be unaffected by local prejudices"); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law,* 92 COLUM. L. REV. 249, 278 (1992) (noting that diversity jurisdiction was "created because of the fear that state courts might prefer local litigants").

20. 304 U.S. 64 (1938).

21. *Id.* at 74; *see also* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 CORNELL L.Q. 499, 521 (1928).

22. AMERICAN LAW INSTITUTE, *supra* note 13, at 105.

23. *See* A GENERAL VIEW, *supra* note 1, at 147-49.

24. Professor Maurice Rosenberg, Columbia University School of Law, *quoted in* Coyle, *Time to Kill Diversity Jurisdiction,* NAT'L L.J., Feb. 29, 1988, at 40.

25. Brieant, *supra* note 17, at 21.

26. Robert Dames, Jr., *Diversity Is for Litigants, Not Courts or Judges,* NAT'L L.J., Apr. 4, 1988, at 12.

27. SUBCOMM. ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES, *supra* note 7, at 38.

potential prejudice as a reason for their choice of federal court over state court.[28] Similarly, in another survey of seventy-four lawyers representing out-of-state clients in federal cases, 40 percent reported that fear of local bias was a consideration in their choice of forum.[29] However, only 4.3 percent of eighty-two Wisconsin lawyers cited "local bias against nonresident client" as a factor in their choice of forum.[30] Bumiller found that fear of bias against out-of-state clients influenced the decision to use federal courts in South Carolina but that it was not a significant consideration in Los Angeles and Philadelphia.[31]

This research found that 60 percent of all respondents and 72 percent of the respondents drawn from the federal sample of cases consider the resident status of their clients as a relevant factor in choice of forum.[32] Attorneys representing nonresidents overwhelmingly prefer to file in federal court (85 percent of the attorneys identified from a sample of state court cases and 96 percent of the attorneys identified from a sample of federal court cases filed in U.S. district court).[33] Conversely, if the opposing client is not a state resident, most attorneys (70 percent in the state sample and 63 percent in the federal sample) who consider resident status to be important prefer to file in state courts.[34]

Analysis of the survey revealed that local bias was not a single consideration affecting forum choice but was one of a combination of attitudes toward nonresidents of a state and attitudes toward corporations.[35] Of the attorneys selected from cases filed in state court, 63 percent considered the nonresidency of their clients to be an important factor in forum choice. Of the attorneys selected from cases filed in federal court, an even higher percentage (71 percent) considered nonresidency to be a significant factor in forum selection.

As an aside to this discussion, fear of bias might not be confined to out-of-state residents. Bumiller observed that in rural areas attorneys are more likely to "prefer federal courts to protect their clients from perceived local bias and poorer quality of judges."[36] One attorney from the Dallas sample

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28. Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178, 179-82 (1965).

29. Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 97-99 (1980).

30. Marvin R. Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 937-39 (1962).

31. Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 L. & SOC'Y REV. 749, 759-60 (1980-81).

32. *Perspectives*, *supra* note 18, at 23.

33. *Id.*

34. *Id.*

35. *Id.* at 16.

36. Bumiller, *supra* note 31, at 752.

commented, "State court judges are very biased against nonlocal attorneys and parties, particularly in the smaller, rural counties."[37] Miller's research on diversity cases and federal question cases removed from state court to federal court indicates that bias against nonlocals is perceived to be much less than bias against out-of-state residents.[38] Moreover, Miller noted a geographic component to the bias, with defense attorneys in the Northeast, industrialized Midwest, and West reporting lower levels of bias against out-of-state litigants than attorneys in the South and less industrialized Midwest.[39] Further research is needed to compare local bias between rural and urban areas within states with bias based upon state of residency.

The original intent behind diversity jurisdiction was to promote interstate commerce by ensuring commercial cases would be heard in an impartial forum to protect foreign litigants from local bias.[40] Frank lists concern over local prejudice against commercial litigants as one of the primary motivations for the creation of diversity jurisdiction.[41]

Friendly has suggested that apparent bias against out-of-state residents results from prejudices that are less related to residency than to litigant status, such as prejudice against large corporations.[42] Bumiller isolated anticorporate sentiment from local bias as separate influences on choice of forum and concluded that out-of-state plaintiffs were expressing a preference for federal court justice.[43]

In his study of cases removed from state court to federal court, Neal Miller reported that 26 percent of plaintiff attorneys and 51 percent of the defense attorneys in his sample reported bias against out-of-state litigants.[44] The comparable figures for bias against corporations were 18 percent and 45 percent, respectively.[45]

This research showed that 37 percent of the attorneys in the state sample and 41 percent of the attorneys in the federal sample considered the corporate status of their client as an important consideration in forum choice.[46] A smaller percentage (36 percent of the state sample and 29 percent of the federal sample) considered the corporate status of their opponent as a factor

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37. *Perspectives, supra* note 18, at 24.

38. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction,* 41 AM. U. L. REV. 369, 409 (1992).

39. *Id.* at 410.

40. Brieant, *supra* note 17, at 20.

41. John P. Frank, *Historical Bases of the Federal Judicial System,* 13 L. & CONTEMP. PROBS. 3, 28 (1948).

42. *See* A GENERAL VIEW, *supra* note 1, at 147-48.

43. Bumiller, *supra* note 31, at 773.

44. Miller, *supra* note 38, at 409.

45. *Id.*

46. *Perspectives, supra* note 18, at 27.

TABLE 1
RELATIVE IMPORTANCE OF RESIDENCY STATUS AND CORPORATE STATUS

	STATE SAMPLE	FEDERAL SAMPLE	FEDERAL/ STATE SAMPLE	TOTAL
Both residency status, corporate status important	31% (254)	38% (209)	30% (56)	34% (519)
Residency status important; Corporate status not important	31% (253)	33% (178)	28% (52)	31% (483)
Corporate status important; Residency status not important	5% (43)	3% (14)	6% (52)	4% (69)
Neither residency status nor corporate status important	32% (257)	27% (146)	36% (67)	31% (470)
TOTAL	807	547	187	1,541

in forum choice. Attorneys who do regard corporate status as an important consideration in forum selection tend to favor federal court if their client is a corporation and state court if their opponent is a corporation. One Texas attorney noted that "federal judges are mainly Reagan appointees very conservative and willing to violate the law to help establishment-type defendants."[47]

Table 1 compares attorney perception of the comparative importance of resident and corporate status.

About one-third of the attorneys surveyed consider residency status and corporate status when selecting a forum for litigation, another one-third say neither is important, and the remainder consider residency more important than corporate status in choosing a forum. In other words, twice as many attorneys feared bias based upon out-of-state residency status as feared bias based upon the corporate status of their clients. The majority of those who consider state residency status and corporate status important prefer federal court, as do approximately two-thirds of the attorneys who considered state residency, but not corporate status, to be an important consideration in forum selection.

The rules for determining state citizenship are complex. In general, an individual is a citizen of the state of domicile, and a corporation is a citizen of any state in which it is incorporated or has its principal place of business.[48] Insurance companies are citizens of the state of domicile of the

47. Victor E. Flango, *Why Do Attorneys Prefer State Courts or Federal Courts?*, ST. CT. J., Fall 1991, at 16, 17.

48. *See* 28 U.S.C. § 1332(c)(1) (1988).

person insured.[49] A plaintiff can invoke diversity jurisdiction if the suit is between citizens of different states and the amount-in-controversy exceeds $50,000. Under the same circumstances, an out-of-state defendant, but not an in-state defendant, can remove the case from state to federal court.[50] Diversity must be complete, *i.e.*, diversity jurisdiction is not available if any one defendant and any one plaintiff are citizens of the same state.[51] A plaintiff may therefore prevent a case from going to federal district court by including as a party a defendant from his own state. Indeed, lawyers also have ways of creating diversity jurisdiction if necessary.[52]

Using 1987 data provided by the Administrative Office of the United States Courts, the author found that the proportion of in-state individual plaintiffs filing in federal court against out-of-state residents was unexpectedly large.[53] Expectations of favorable treatment should lead in-state plaintiffs to file in state court, and fear of local bias should lead out-of-state plaintiffs to file in federal court. Theoretically, the classic situation in which local bias works together with anticorporate bias is when an in-state plaintiff sues an out-of state corporation. In the words of one attorney, "[W]hen representing a local individual against [an] out-of-state corporation, the judge presiding who is an elected official has a natural, inherent bias for the local voter."[54] Contrary to those expectations, many in-state plaintiffs chose to file suit against out-of-state corporations in federal court, not in state court in which they presumably would have an advantage. The data further showed that in-state plaintiffs remove to federal court as often as out-of-state defendants do.[55]

Using data for the fiscal year ending September 1993,[56] Table 2 shows that half of the 51,445 diversity cases filed in U.S. District Courts involved in-state individual plaintiffs and another 10 percent involved in-state corporations. Most suits (82 percent) by out-of-state corporations in federal courts involved in-state individuals or corporations. Few involved foreign citizens or nations. One-third of the suits involved a conflict between an in-state individual plaintiff and an out-of-state business. But Table 2 provides only

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49. *Id.*

50. 28 U.S.C. § 1441(b) (1988).

51. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (establishing rule of complete diversity).

52. David A. Skidmore, Jr., *Making a Federal Case Out of It: Creating Diversity Jurisdiction*, 40 FED. B. NEWS & J. 390 (1993).

53. Victor E. Flango & Craig Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads,* 15 U. DAYTON L. REV. 405, 446 (1990).

54. Flango, *supra* note 47, at 17.

55. Flango & Boersema, *Changes in Federal Diversity Jurisdiction*, *supra* note 53, at 446.

56. The author is grateful to Dr. William. T. Rule, Economist in the Long Range Planning Office of the Administrative Office of the United States Courts, for providing this data.

TABLE 2: TOTAL DIVERSITY FILINGS IN U.S. DISTRICT COURT FY 1993 BY PLAINTIFF AND DEFENDANT

	Defendants						
Plaintiffs	In-State Indiv.	Out-of-State Indiv.	Foreign Indiv.	In-State Business	Out-of-State Business	Foreign Nation	Total
In-State Individual	117*	5,634	1,675	933	17,504	179	26,042
Out-of-State Individual	3,607	760	230	2,055	6,377	31	13,060
Foreign Individual	523	151	50	361	178	4	1,267
In-State Business	271	980	284	82*	3,730	61	5,408
Out-of-State Business	2,766	251	48	2,189	773	25	6,052
Foreign Nation	30	3	1	53	14	3	104
TOTAL	7,314	7,779	2,288	5,673	28,576	303	51,933

*If both parties are state residents, diversity jurisdiction cannot be invoked. These cases may have been miscoded.

TABLE 3: ORIGINAL DIVERSITY FILINGS IN U.S. DISTRICT COURT FY 1993 BY PLAINTIFF AND DEFENDANT

	Defendants						
Plaintiffs	In-State Indiv.	Out-of-State Indiv.	Foreign Indiv.	In-State Business	Out-of-State Business	Foreign Nation	Total
In-State Individual	77	3,285	1,107	603	7,832	99	13,003
Out-of-State Individual	3,140	506	164	1,684	2,152	14	7,660
Foreign Individual	463	121	29	311	119	4	1,047
In-State Business	230	739	209	52	2,197	43	3,470
Out-of-State Business	2,467	186	35	1,912	503	18	5,121
Foreign Nation	30	1	1	50	14	2	989
TOTAL	6,407	4,838	1,545	4,612	12,817	180	30,399

part of the story. Without knowing how these cases got to federal court, it is not possible to draw any firm conclusions.

Of the total diversity caseload, 28 percent (14,470 cases) were originally filed in state court then removed to federal court. Not surprisingly, out-of-state businesses accounted for 73 percent (10,608) of the removals (of cases involving 8,439 in-state individuals and 1,324 in-state businesses.) More surprising was the distribution of 30,399 cases originally filed in U.S. District Court (Table 3). Of these, 43 percent were filed by *in-state* individuals and 11 percent by *in-state* businesses. In other words, more cases were filed in federal court by in-state residents (16,473) than by out-of-state residents (12,781). Moreover, in most of the cases filed by in-state residents, the defendant was an out-of-state corporation.

The large number of filings by in-state individual plaintiffs filed in federal court was unexpected, given the supposed advantages of confronting an out-of-

state defendant and an out-of-state corporate defendant in the local, "friendly" state court.

Concern about the quality of justice in state courts might be another aspect of the concern over local bias. Miller notes that the rationale for diversity jurisdiction might be a "reflection of the lesser quality of state court judges and their inability to protect against the effects of local bias."[57] Whether or not an aspect of bias, one reason for concurrent federal and state court jurisdiction is a concern about the quality of justice received in state courts.[58] One West Virginia attorney who expressed a preference for federal courts in cases involving complex legal issues commented, "In state court, there was little chance of getting a judge capable of understanding the issue or willing to work hard enough to do so. The federal judges are simply brighter and more conscientious."[59] A Texas lawyer noted that "federal judges do not receive campaign contributions from lawyers who practice in front of [them]."[60] Bumiller found that preference for the perceived higher quality of federal judges was an important factor in choice of forum in each district but especially in the two more rural districts.[61]

Others argue that state courts have been improving to the point where "it is not clear that on a nationwide basis, federal courts are consistently superior to, or more current than, state courts."[62] Moreover, state courts vary among themselves in terms of quality of justice, so it is naive to compare federal courts to state courts as if there were only two court systems instead of fifty-two.

Nearly half of all respondents to the survey reported no difference between state and federal judges in terms of sympathy to local litigants.[63] The survey found that 55 percent of the attorneys from the state sample and

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57. Miller, *supra* note 38, at 374.

58. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 144 (1985) (arguing that the quality of justice is better in federal courts because they have more qualified judges, less congestion, and better rules of procedure); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (asserting that federal judges are more technically competent than state judges and are more insulated from public pressure, permitting them to make more controversial decisions); *see also* John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 410 (1979); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 328-29 (1977); Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 870 (1931).

59. *Perspectives*, *supra* note 18, at 29.

60. Flango, *supra* note 47.

61. Bumiller, *supra* note 31, at 768-69.

62. Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, 61 N.Y. ST. B.J., July 1989, at 14, 18; *see also* Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983) (exploring the issue of the institutional competence of state trial courts).

63. *Perspectives*, *supra* note 18, at 29.

79 percent of the attorneys from the federal sample regarded overall competence of the judiciary and quality of judges as reasons for choosing federal court.[64]

Bumiller found that familiarity with judges and with rules of procedure were relevant to forum selection.[65] Many plaintiffs' attorneys in Miller's study did not find federal courts "user friendly."[66] This research found that most attorneys did not choose the forum based upon geographical convenience, but 60 percent of the attorneys in the state sample gave familiarity with court operations as a reason for choosing state courts. An attorney from Sacramento summarized that "State courts are more 'caring' (closer to litigants and attorneys); federal courts tend to be more aloof, distant."[67] When asked to evaluate factors most important to forum selection other than jurisdictional requirements, attorneys who tended to practice in state courts listed familiarity with court operations, convenience, lower filing fees, and availability of arbitration. These lawyers considered state courts "attorney friendly" and state judges more accessible.

The research also lends some support to Bumiller's stratification of attorneys into a "state" and a "federal" bar.[68] There are indeed differences between lawyers who usually litigate in state courts, and lawyers who usually litigate in federal courts. Solo practitioners and attorneys from smaller law firms more often prefer state courts.

What considerations lead litigants and their attorneys to choose state court or federal court when a choice is available? Based upon responses from a survey of attorneys who litigate in state and federal courts, this author concluded that quality of judges, residence and status of litigant, and familiarity with local or federal courts were the three primary reasons attorneys gave for choosing federal or state courts. More specifically, attorneys prefer to file in state courts if their opponent is not a state resident and if they are accustomed to working with state courts and their less onerous pretrial requirements. Lower costs to litigants and voir dire procedures also favor use of state courts.

Attorneys who usually practice before federal courts tend to be from larger law firms and tend to view federal judges as better trained, better supported with resources, and more impartial because they are not elected. They believe complex litigation belongs in federal court. Specifically, attorneys prefer federal courts if their client is from out of state and if they believe that the competence of the judiciary in general and the quality of judge

64. *Id.*

65. Bumiller, *supra* note 31, at 755-58.

66. Miller, *supra* note 38, at 446.

67. *Perspectives, supra* note 18, at 38.

68. Bumiller, *supra* note 31, at 772.

is important to their case. Attorneys who prefer greater judicial pretrial involvement also favor federal court.

The quality of state courts and judges varies from state to state and within each state over time. Indeed, case processing time and the influence of litigation costs were important to the choice of forum in some places but not in others. Overall, however, federal judges might be perceived as more qualified because:

- There are fewer federal judges, so they have more prestige and status. For this reason, the Judicial Conference of the United States, while eschewing caps, has taken a position "that judicial growth should be carefully controlled."[69]

- Federal judges have life tenure, one of the key components of judicial independence.

- Federal judges are less subject to local political pressures since they are appointed rather than elected.

- Federal judges have the more traditional trial role because they do not have the high-volume caseloads of state courts, nor do they handle domestic matters. Magistrate judges handle habeas corpus petitions and other high-volume matters.

- Federal judges have smaller, more homogeneous caseloads with more time to contemplate and much larger support staffs and facilities including libraries.

As currently written, diversity jurisdiction permits litigants some flexibility in choice of forum. Indeed, it may be that some individuals favor retention of diversity jurisdiction merely to preserve the choice of state court or federal court. In his testimony before the House Judiciary Committee, John Frank noted:

> I am not here preaching the cult of the superman, arguing that all federal judges are abler than all state judges, or even that most of them are. I say only that many thousands of Americans believed that they would be better off in federal court than in the state court. . . . The point is that for more than two centuries, those people and their ancestors before them have been entitled to make that choice. They should not be deprived of that option now.[70]

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69. Henry J. Reske, *Keeping a Trim Federal Judiciary*, A.B.A. J., Dec. 1993, at 26.

70. *Revising Federal Jurisdictional Rules: Hearings on H.R. 4357 Before the Subcomm. on*

Kastenmeier and Remington summarized more succinctly, "Basically, the bar likes forum shopping."[71]

If attorneys and their clients prefer federal courts, there are ways of "creating" diversity jurisdiction.[72] To counter the expansion of federal diversity jurisdiction, Congress is considering several proposals to restrict choice of forum. A Federal Courts Study Committee, appointed by Chief Justice William Rehnquist to prepare a long-range plan for the federal judiciary, recommended that "Congress should limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation, interpleader, and suits involving aliens."[73] The Study Committee further recommended that if Congress decided not to eliminate diversity jurisdiction, it should:

- prohibit plaintiffs from invoking diversity jurisdiction in their home states. 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.

- deem corporations to be citizens of every state in which they are licensed to do business. The same reason that justifies barring diversity jurisdiction to in-state plaintiffs justifies prohibiting diversity jurisdiction for corporations in places where they are licensed to do business.

- specify that the jurisdictional floor does not include noneconomic damages, such as pain and suffering, punitive damages, mental anguish, and attorneys' fees, which litigants use to skirt the jurisdictional minimum.

- raise the jurisdictional minimum from $50,000 to $75,000 and index the new floor amount.[74]

Obviously, the elimination of diversity jurisdiction, except for interpleader, multi-state litigation, and suits involving aliens, would have the most impact on litigant choice.

Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 103d Cong., 2d Sess. (1994) (statement of John P. Frank, appearing for the Arizona state bar).

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

72. Skidmore, *supra* note 52, at 390.

73. SUBCOMM. ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES, *supra* note 7, at 38.

74. *Id.* at 42.

Congress recently raised the dollar limits on diversity jurisdiction so that a case in controversy must be worth more than $50,000 before it can be heard in federal court.[75] Raising the amount-in-controversy requirement further would have the least effect on litigant choice, because the dollar amounts demanded are often arbitrary and can be increased to meet jurisdictional requirements.[76] A suit can be dismissed if there is evidence that an attorney increased the amount of a plaintiff's claim simply to get the suit into federal court.[77] Even raising the jurisdictional limit to $100,000 would eliminate only about 8 percent of the diversity cases from federal court.[78]

The proposals to bar plaintiffs from invoking diversity jurisdiction in their home states or to deem corporations citizens of every state in which they are licensed to do business obviously would deny a choice to those types of litigants. Another proposal receiving attention is the one to bar in-state individuals or corporations from claiming diversity jurisdiction. Pending bills in the House of Representatives would, in the words of Judge Stanley Marcus (S.D. Fla.), chairman of the Judicial Conference Committee on Federal-State Jurisdiction, "correct a long-standing anomaly in the jurisdiction of the federal courts."[79] Judge Marcus argued that in 1789 Congress had a reason for providing access to federal courts by in-state plaintiffs but not in-state defendants because of the perceived state court prejudice against creditors.[80] In brief, state courts were seen as favoring two distinct classes of litigants: home-state citizens and anyone resisting the payment of debt. Judge Marcus notes that no one is arguing that state courts are systematically biased in favor of defendants in the adjudication of state law claims or that state courts are under-enforcing state-created rights.[81]

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75. 28 U.S.C. § 1332 (1988); *see also* 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 (1984).

76. Anthony Partridge, THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION 14 (1988); David P. Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. CHI. L. REV. 268, 295 (1969).

77. *See* Arnold v. Troccoli, 344 F.2d 842, 844 (2d Cir. 1965).

78. Flango & Boersema, *supra* note 53, at 434.

79. *Revising Federal Jurisdictional Rules: Hearings on H.R. 4446 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994) (statement of Stanley Marcus, Chairman, Judicial Conference Comm. on Federal-State Jurisdiction). H.R. 4446, 103d Cong., 2d Sess. (1994), would amend 28 U.S.C. § 1332. Proposed new subsection (e) would preclude plaintiffs from invoking diversity jurisdiction if all plaintiffs in the suit were citizens of the state in which the suit was filed. H.R. 4357, 103d Cong., 2d Sess. (1994) would go further by stating that diversity jurisdiction would not be allowed if *any* plaintiff were a citizen of that state. The Judicial Conference supports H.R. 4357. *Subcomm. on Intellectual Property and Judicial Administration, supra.*

80. *Id.* Judge Marcus noted the special concern with "impairment of credit markets by parochial state courts reluctant to enforce instruments of debt." *Id.*

81. *Id.*

The recent Federal Courts Study Committee recommendation cited above echoes the conclusions of the American Law Institute study that "[t]he in-stater can hardly be heard to ask the federal government to spare him from litigation in the courts of his own state."[82] Yet this research has shown that more diversity cases are filed originally in federal courts by in-state plaintiffs than by out-of-state residents. Accepting these recommendations would mean that plaintiffs would be precluded from invoking diversity jurisdiction in their home state, in the state of their principal place of business, or in any state in which they are registered to do business.[83]

A variation in the proposal to bar suits by in-state plaintiffs is to consider corporations to be citizens of every state in which they are licensed to do business. Under present law, a corporation is treated as a citizen of any state in which it is incorporated as well as the state in which it has its principal place of business.[84] This gives multistate corporations a choice of forum that local businesses do not have.[85]

In whichever manner jurisdiction between state and federal courts is divided, the process is one of experimentation and incremental change moreso than a division based upon strict logic. This pragmatic process is marked by "complexity and fuzziness" that might even be "desirable in giving room for flexibility, fine-tuning, recognition of difference, and accommodation of unforeseen developments."[86]

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82. AMERICAN LAW INSTITUTE, *supra* note 13, at 124.

83. Charles W. Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction,* 70 JUDICATURE 291, 291-92 (1987).

84. 28 U.S.C. § 1332(c)(1) (1988); *see also* David W. Jackson, Note, *Federal Court Diversity Jurisdiction and the Corporation,* 8 TULSA L.J. 120 (1972).

85. Joiner, *supra* note 83, at 291.

86. David L. Shapiro, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to* "Reassessing the Allocation of Judicial Business Between State and Federal Courts," 78 VA. L. REV. 1839, 1841 (1992).