

Winter 1976

## Diversity Jurisdiction - An Idea Whose Time Has Passed

Howard C. Bratton

*United States District Court for New Mexico*

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Courts Commons](#), and the [Judges Commons](#)

### Recommended Citation

Bratton, Howard C. (1976) "Diversity Jurisdiction - An Idea Whose Time Has Passed," *Indiana Law Journal*: Vol. 51 : Iss. 2 , Article 7.

Available at: <https://www.repository.law.indiana.edu/ilj/vol51/iss2/7>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [rvaughan@indiana.edu](mailto:rvaughan@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

## Diversity Jurisdiction—An Idea Whose Time Has Passed

JUDGE HOWARD C. BRATTON\*

The judicial Power . . . shall extend . . . to Controversies . . . between Citizens of different States.<sup>1</sup>

With these few words the Constitution sets forth the foundation for the diversity jurisdiction first conferred upon the federal courts by the Judiciary Act of 1789. These same words have provoked a controversy that has continued intermittently throughout our history, and it is once again time to reexamine diversity jurisdiction to determine whether it is justified in view of present day conditions and the workload facing the federal courts in litigation affecting federal rights.

The historical justification for federal diversity jurisdiction was the need to assure an out-of-state litigant that there was a forum to which he could resort where he need fear no bias, and where the remedies afforded would be coextensive with rights created by state law and enforceable in state courts. Much lip service has been paid to this fear of state-court bias against the outsider, although it is far from certain that this was a strong motivation for the insertion of the diversity clause in the Constitution or its implementation in the first Judiciary Act. Indeed, fear of state legislatures, and the belief that federal courts would be creditors' and businessmen's courts, significantly influenced the decision to provide for diversity jurisdiction.<sup>2</sup> The supposed fear of the hostility of state courts to litigants from other states did not play the primary role it has since been assigned.<sup>3</sup> Judicial interpretation nevertheless made the idea a part of the constitutional clause.<sup>4</sup>

Even if it were to be assumed that the fear of bias against the outsider-litigant actually existed at the time of the framing of the Constitution and at the time of enactment of the first Judiciary Act, and that this apprehension continued in the nation's early days, there would still remain the question whether such a fear is presently justified. It is conceded by some of the most ardent supporters of diversity jurisdiction that, if this fear is the only reason for its continuance, the jurisdiction

---

\* United States District Court for New Mexico.

<sup>1</sup> U.S. CONST. art. III, § 2.

<sup>2</sup> Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492-97 (1928).

<sup>3</sup> *Id.*

<sup>4</sup> See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); Friendly, *supra* note 2, at 492.

should be eliminated.<sup>5</sup> The American Law Institute has adopted this Hamiltonian thesis as its rationale for the retention of diversity jurisdiction in a curtailed form,<sup>6</sup> although the justification for its continuance has disappeared as a matter of fact.<sup>7</sup>

The possibility of bias against an out-of-stater is not the only argument advanced in support of continuing the present system. There is the argument that diversity jurisdiction serves as a cohesive force in our country,<sup>8</sup> so that its elimination would somehow retard a sense of allegiance to the nation or perhaps would impede economic growth. In a time when state ties have been weakened by the mobility of the population, leaving a strong allegiance only to the nation, and when business expansion takes place without a thought for the availability of a federal forum for possible litigation, this argument, too, fails to provide a basis for continuing diversity jurisdiction.

It has also been contended that justice is speedier in the federal courts and that there may often be procedural advantages to trying lawsuits in a federal forum rather than in state court, so that those who can file there are being well-served.<sup>9</sup> The scholarly notion that diversity jurisdiction is a vehicle for public service is supported by some important bar groups who believe that diversity should remain unchanged.<sup>10</sup> This position of the bar has been characterized as a mere love of a choice of forum,<sup>11</sup> but whatever the motive of the bar may be in opposing restriction of the present diversity jurisdiction, and despite the belief of certain scholars that diversity is a tool for public service, neither procedural differences that may make the federal courts more attractive than state courts nor the fact that cases may come to trial sooner in federal court than in state court can justify maintaining a dual court system for the vindication of rights created by state law.

The free flow of ideas for improvement between the two systems is also advanced as a value of diversity jurisdiction, a value that would

---

<sup>5</sup> *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 193-94 (1971) [hereinafter cited as *1971 Hearings*].

<sup>6</sup> STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 1, 105-08 (Official Draft 1969) [hereinafter cited as OFFICIAL DRAFT].

<sup>7</sup> COMM'N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES; RECOMMENDATIONS FOR CHANGE (1975), App. D, 176. Letter from Mr. Chief Justice Warren E. Burger to Senator Roman L. Hruska, May 29, 1975 [hereinafter cited as *Mr. Chief Justice Burger's letter*]; Currie, *The Federal Courts and the American Law Institute, Part 1*, 36 U. CHI. L. REV. 1, 4-5 (1968).

<sup>8</sup> *1971 Hearings* at 182, 199.

<sup>9</sup> *Id.* at 189, 203; Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1449 (1964).

<sup>10</sup> *1971 Hearings* at 249-306.

<sup>11</sup> See Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, WASH. & LEE L. REV. 185, 206 (1969).

be lost if it were eliminated.<sup>12</sup> It is not reasonable to assume, as this argument does, that there will become two bars—a federal bar handling federal cases and a state bar handling state cases, with no members in common and with no contact between the two groups, to the end that neither group is aware of what goes on in the other's practice before its courts. Furthermore, ideas can and do move from one system to the other, other than by way of a common bar. There are, for example, legal periodicals in which innovative ideas can be and are discussed, and there is the work of groups such as the American Law Institute which undertake to study legal institutions and, based upon that study, to recommend changes. It can be asserted that elimination or restriction of diversity jurisdiction will have a negligible impact on the flow of ideas within the entire legal community.

The fear that federal courts will become specialized courts if robbed of diversity jurisdiction<sup>13</sup> also fails to recognize the realities of the present system. Every day federal courts decide cases brought under federal question jurisdiction by looking to the law of the states, either because Congress has referred them to state law<sup>14</sup> or because there is no congressional mandate and an answer is compelled by pending litigation.<sup>15</sup> This process is not halted by abolishing diversity. Furthermore, Congress continues to enact, with increasing frequency, legislation reaching into many aspects of this nation's social and economic life.<sup>16</sup> The vast array of federal legislation and the litigation flowing therefrom must be ignored in order to conclude that the federal courts will become overly specialized. Limiting the federal courts to federal litigation should be considered, not as overspecialization, but as an efficient and productive specialization.

On the other hand, there are compelling reasons to advocate the elimination of diversity jurisdiction—given the nature of the federal system and the dramatic increase in the workload of federal courts.

Our federal system contemplated that state law would govern in the resolution of most of the controversies arising from everyday life and provided for federal competence only in those areas in which the national Constitution or statutes deprived the states of competence or provided for an overriding federal law. In the years following *Swift v.*

---

<sup>12</sup> 1971 *Hearings* at 256-57; Frank, *For Maintaining Diversity Jurisdiction*, 73 *YALE L.J.* 7, 11-12 (1963); Moore & Weckstein, *supra* note 9, at 1449-50.

<sup>13</sup> *See, e.g.*, Moore & Weckstein, *supra* note 9, at 1449.

<sup>14</sup> *E.g.*, Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2672, 2764 (1970).

<sup>15</sup> *See* Hart, *The Relations Between State and Federal Law*, 54 *COLUM. L. REV.* 489 (1954); Miskin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 *U. PA. L. REV.* 797 (1957).

<sup>16</sup> *See* Judd, *The Expanding Jurisdiction of the Federal Courts*, 60 *A.B.A.J.* 938 (1974).

Tyson,<sup>17</sup> the federal courts did not follow the original design, but, with the decision in *Erie Railroad v. Tompkins*,<sup>18</sup> the notion that state decisional law was not controlling in cases between citizens of different states was laid to rest. The federal judiciary is now obligated to follow this mandate of constitutional dimension<sup>19</sup> and to discover and apply the substantive law of the state in any diversity action before it.

*Erie* brought into sharp focus the proper role of the federal judiciary in the administration of state law. Nevertheless, *Erie* and its progeny have not relieved the burden imposed upon the federal judiciary of determining, in many cases, just what the applicable state law is, or, in the absence of any state expression on a given matter, what the state law would be determined to be if the matter had been presented to the state court. This task has not always been an easy one, and it has from time to time invited conflicts between the two systems. It 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.

A pressing problem from a practical standpoint is the workload in the federal courts. Federal political power has expanded steadily since Reconstruction days and has caused a concomitant growth in the jurisdiction of the federal courts.<sup>20</sup> This has been particularly true in recent years, and the end of this expansion is not in sight. Mr. Chief Justice Burger has said that there is likely to be so much additional jurisdiction thrust upon the federal courts over the next decade that they will do well to perform those functions alone without having also to handle diversity cases.<sup>21</sup>

In 1975, of the total of 117,230 civil cases commenced in United States District Courts, 30,631 were diversity of citizenship cases.<sup>22</sup> This amounts to approximately 26 percent of the federal trial courts' filings. In the United States Courts of Appeal 1,745 of the 13,679 appeals filed—nearly 13 percent—were diversity appeals.<sup>23</sup> These figures take

---

<sup>17</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>18</sup> 304 U.S. 64 (1938).

<sup>19</sup> See Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Miskin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1685, (1974); Friendly, *In Praise of Erie—and of The New Federal Common Law*, 39 N.Y.U.L. REV. 383, 385-98 (1964).

<sup>20</sup> Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 516, 530 (1928); Friendly, *supra* note 2, at 510.

<sup>21</sup> *Mr. Chief Justice Burger's letter.*

<sup>22</sup> ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANN. REP. OF THE DIRECTOR, App., Table C-2, at A-14.

<sup>23</sup> *Id.* Table B-8, at A-10.

on additional significance when considered together with an increase of from 242 weighted filings per U.S. District Court judgeship in 1962 to 400 such filings per judgeship in 1975.<sup>24</sup> In the circuit courts, the caseload per judgeship has grown from 82 in 1966 to 172 in 1975.<sup>25</sup> It cannot be denied that repeal of diversity jurisdiction would relieve substantially the pressure now being felt by the federal trial bench and the circuit courts, and it would undoubtedly have some impact even at the Supreme Court level.

It should also be noted that increasing the number of federal judgeships is not a complete answer to handling the workload. In 1975 there were 396 district judgeships as compared to 289 in 1961, yet the workload per judgeship is heavier now than it has ever been.<sup>26</sup> Similarly, an increase from 78 circuit judgeships in 1961 to 97 in 1975 has been accompanied by a substantial increase in the workload per judgeship.<sup>27</sup> Appointing more federal judges without limiting federal jurisdiction only attracts more cases to the federal courts.<sup>28</sup>

What are the prospects for total elimination of diversity jurisdiction? Unfortunately, they are dim at the present. Hopefully, congressional restriction may be in the offing.

Movement toward a reexamination of diversity jurisdiction began in 1959, when Mr. Chief Justice Warren, in an address to the annual meeting of the American Law Institute, said:

It is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism.<sup>29</sup>

In response to this suggestion, the Institute undertook an eight-year study to determine a rational allocation of the country's litigation between the state and federal courts. This study culminated in the publication of an Official Draft in 1969. This draft, in turn, formed the basis for the contents of the Federal Court Jurisdiction Act of 1971.<sup>30</sup> The American Law Institute Study and, subsequently, the Fed-

---

<sup>24</sup> *Id.* at XI-124. (The term "weighted filings" takes into account not only the number of cases filed but also the judicial time required by different types of cases. In calculating it, more credit is given for an antitrust action than for a routine automobile accident case.)

<sup>25</sup> *Id.* at XI-15. (Cases are normally handled by a panel of three judgeships, so the per-judgeship figures must be multiplied by three to show the true burden on individual judges.)

<sup>26</sup> See note 24 *supra* & text accompanying. (The figures quoted above do not include territorial courts.)

<sup>27</sup> See note 25 *supra* & text accompanying.

<sup>28</sup> 1971 *Hearings* at 129.

<sup>29</sup> OFFICIAL DRAFT at 1.

<sup>30</sup> S. 1876, 92d Cong., 1st Sess. (1971).

eral Court Jurisdiction Act, undertook a thorough revision of all aspects of federal jurisdiction.<sup>31</sup>

The most important restriction on diversity jurisdiction which has been proposed denies an in-state plaintiff the right to invoke the diversity jurisdiction of the federal court sitting in that state because his adversary is an out-of-state citizen.<sup>32</sup> If diversity jurisdiction must be retained in some form, this change is highly desirable. It would reduce the number of diversity of citizenship cases filed in federal court by approximately 50 percent.<sup>33</sup> At the same time, it would add less than one percent to the caseload of the state courts.<sup>34</sup> Furthermore, it would eliminate what has long been considered an unfair advantage of the in-state plaintiff over the in-state defendant.<sup>35</sup> It should be added that it would also rid diversity jurisdiction of what, when viewed against the historical justification for such jurisdiction, is one of its most irrational aspects.

Other significant changes which would reduce diversity jurisdiction involve (1) treating a foreign corporation with a permanent establishment in a state as if it were a local citizen with regard to its local activities, thus denying it diversity jurisdiction originally or on removal;<sup>36</sup> (2) denying a commuter or other person whose principal place of business or employment is in a state in which he is not a citizen the right to invoke diversity jurisdiction in the state where he works;<sup>37</sup> and (3) treating an executor or other personal representative as a citizen of the same state as the decedent or other person represented, thus eliminating the possibility of creating or destroying diversity by any such appointment.<sup>38</sup>

The provision relating to foreign corporations would also apply to an unincorporated association,<sup>39</sup> which is made a citizen of the state

---

<sup>31</sup> The changes proposed in federal question jurisdiction, admiralty and maritime jurisdiction, and other changes are not within the scope of this article and will not be discussed. See, e.g., 1971 *Hearings*, pt. 2; OFFICIAL DRAFT at 24-93, 162-422; H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973); Currie, *The Federal Courts and the American Law Institute, Part II, Federal Question Jurisdiction*, 36 U. CHI. L. REV. 286 (1969); Field, *Jurisdiction of Federal Courts*, 46 F.R.D. 141 (1969).

<sup>32</sup> 1971 *Hearings* at 10; OFFICIAL DRAFT at 12.

<sup>33</sup> 1971 *Hearings* at 128; Letter from Norbert A. Halloran, Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, to U.S. District Judge Howard Bratton, Oct. 15, 1975.

<sup>34</sup> 1971 *Hearings* at 128.

<sup>35</sup> *Lumberman's Casualty Co. v. Elbert*, 348 U.S. 48, 53 (Frankfurter, J., concurring); Frankfurter, *supra* note 20, at 524.

<sup>36</sup> 1971 *Hearings* at 10; OFFICIAL DRAFT at 13.

<sup>37</sup> 1971 *Hearings* at 11; OFFICIAL DRAFT at 13.

<sup>38</sup> 1971 *Hearings* at 11; OFFICIAL DRAFT at 13.

<sup>39</sup> 1971 *Hearings* at 10; OFFICIAL DRAFT at 13.

in which it has its principal place of business by another proposed change,<sup>40</sup> so that neither can invoke diversity jurisdiction in a state in which it has a local establishment. This procedure, as well as the commuter provision, has been attacked as an unworkable rule that will breed threshold litigation,<sup>41</sup> and it has been suggested that the impossibility of defining corporate citizenship is one more reason why diversity jurisdiction should be repealed entirely.<sup>42</sup> Of the three, only the proposed personal representative rule has not been criticized and, in fact, has been regarded as an improvement over the existing rule.<sup>43</sup>

On the whole, the above proposals for restricting diversity jurisdiction are inadequate. Moreover, some proposed amendments<sup>44</sup> would *enlarge* the jurisdiction in some measure. Some proposed restrictions would be cumbersome, and one might be tempted to discount the whole set of proposals relating to diversity on this ground. However, that would only leave us with the present system, which is even less attractive.<sup>45</sup>

The American Law Institute proposals embodied in S. 1876<sup>46</sup> represent the only effort that has so far been made to remove from the federal courts business that belongs in the state courts. Even a partial measure is better than none at all. The overall effect of its adoption would be to substantially reduce the number of diversity of citizenship cases filed each year in federal courts. In 1971, S. 1876's prospects for adoption were not promising, particularly in regard to the diversity provisions.<sup>47</sup> It is unlikely that the climate of opinion has changed

<sup>40</sup> 1971 *Hearings* at 8; OFFICIAL DRAFT at 10.

<sup>41</sup> 1971 *Hearings* at 247; Fraser, *Proposed Revision of the Jurisdiction of the Federal District Courts*, 8 VALPARAISO L. REV. 189, 193-95 (1974).

<sup>42</sup> Currie, *supra* note 7, at 36-45.

<sup>43</sup> *Id.* at 15-16.

<sup>44</sup> See 1971 *Hearings* at 13, 58-68, 131, 147, 308-11; OFFICIAL DRAFT at 16-17, 67-76.

<sup>45</sup> See Wright, *supra* note 11, at 186-92. Professor Wright grades the present allocation of jurisdiction between the state and federal courts in terms of rationality, clarity, efficiency, and the promotion of harmony between the two systems. He finds it irrational—jurisdiction is allocated on the basis that it has been done that way in the past. He believes that the present rules do not adequately apprise a lawyer of reasonable intelligence where he should bring his lawsuit and lead to extensive preliminary litigation to decide where the case should be heard or require wasteful duplication of proceedings. Finally while he believes that the present rules do fairly well in avoiding unnecessary friction between the two court systems, he points out that they could be better. With regard to diversity jurisdiction, he thinks that the A.L.I. proposal permitting removal at the outset of a case by a single defendant even though other defendants are of such citizenship that they cannot remove is an improvement, as is the A.L.I. proposal that the state court may complete the trial when the case becomes removable during the trial, so that, if the case is remanded, judgment can be entered. See OFFICIAL DRAFT at 357-60.

<sup>46</sup> The Judicial Conference of the United States has taken the position that the proposals contained in S. 1876 were "well conceived, workable and based upon acceptable compromise" of the differing views of the bench and bar.

<sup>47</sup> 1971 *Hearings*, pt. 2, at 761.

dramatically enough to permit complete abolition of diversity jurisdiction, but it is to be hoped that at least the American Law Institute proposal will soon be enacted into law.

If the preceding pages have served no other purpose, it is hoped they have shown that times and circumstances change and that what may have been responsive to the needs of the past is not likely to meet the needs of the present. Ultimately, there should be a fair and rational allocation of the nation's litigation based upon the principle that, since state courts are the authoritative expositors of state law under our system, they should be the courts where such issues are tried, and upon the principle that federal courts should be limited to their proper role as national courts dealing with litigation affecting federal rights. Until that time, the American Law Institute diversity jurisdiction proposals represent a step in the right direction.