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Appendix: Statistical Analyses of Diversity Jurisdiction

APPENDIX: STATISTICAL ANALYSES OF DIVERSITY JURISDICTION

I. A Comparative Analysis of State and Federal Case Loads

The American Law Institute contends that the federal courts are interfering with state court autonomy through the exercise of diversity jurisdiction. While the nature of this interference is never specified, one possibility is that a significant interference would result if the federal

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court subsequently changes its view of the law, there is a new conflict. And as to this, "Conflict with the past is to be preferred over conflict with the future." *Id.* at 776.

114. Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 Cornell L.Q. 499, 500 (1928).

courts were deciding the bulk of cases in any given area of substantive law, thereby leaving the state courts no real role in creating state rules to govern these areas. Determining whether this situation exists is the specific purpose of this analysis. In addition, a study was made of the comparative nature of the parties in the state and federal courts. Thus, the question to be answered was, are the federal courts significantly preferred over the state courts for certain causes of action and by certain parties?

A. *Methodology.*

The material for this analysis was obtained by collecting all diversity cases reported in the Seventh Circuit since the *Erie* decision in 1938.[1] These cases were classified as to type of party involved, cause of action, and legal issue—that is, factual, statutory, or common law. (Diversity cases in which the sole issue was the jurisdiction of the federal court were omitted.)

In order to compare the federal cases with those in the states, the state reporters for the states in the Seventh Circuit—Illinois, Indiana, and Wisconsin—were studied and similarly classified.[2]

In this investigation, certain policies of classification were followed. When tabulating the parties, partnerships and unincorporated associations were classified as multi-party individuals. Cases in which both a corporation and its officers were joined were classified as mixed party cases. In classifying the causes of action, infrequent situations of intentional infliction of injury were included in the negligence categories. All cases involving both personal injury and property damage were classified only as personal injury actions. The automobile classifications include trucks and buses as well. Cases involving collisions between trains and motor vehicles were classified as railroad causes of action since in all these cases the railroad company was named as a party defendant. The tort-contract dichotomy of a warranty action was resolved in favor of an entry in the negligence categories. Classified as real estate contract causes of action were cases concerning mortgages, mineral, oil, and other

1. It may be objected that using only reported cases does not give an accurate picture of the diversity business done in the federal courts. However, for the main purposes of comparison in this study, it was felt that any discrepancies caused by failure to consider non-reported cases in the federal courts would be counteracted by the similar treatment given to state cases.

2. State reports searched were Illinois Supreme and Appellate Court reports, January 1958 to December 1958; Indiana Supreme and Appellate Court reports, May 1958 to April 1963; Wisconsin Supreme Court reports, January 1958 to June 1959. The time periods covered by the state search were chosen so that the respective state courts each decided approximately the same total number of cases involving causes of action similar to those found in federal diversity cases.

leases, mechanic's liens, and contracts for the sale of land but not broker's contracts. The classification "other contracts" includes contracts for services, negotiable instruments, real estate broker's contracts, and employment contracts. The classification "other causes of action" includes cases of fraud, deceit, libel, slander, false imprisonment, and other actions not included elsewhere. In both federal and state tabulations, a case was tabulated only upon its first appearance and not upon subsequent appearances, if it was later appealed.

B. *Results.*

The general finding of this study is that there is no area of substantive law in which the federal courts are pre-empting the law-making functions of the state courts, whether comparison is made on a numerical or percentage basis. The following graph (see page 589) shows the number of state and federal cases falling into each of the substantive categories each year. The state court reported decisions greatly outnumbered the federal decisions in every category and for each state. Moreover, the total reported state cases dealing with these causes of action outnumbered, on a yearly average, the federal diversity decisions by 458 to 58. This means that of the total reported decisions rendered in one year by both state and federal courts on questions of "state law" which arise in diversity cases, less than eleven per cent of those decisions are rendered by federal courts.

Table 1 shows the relationship of each substantive category to the case loads of the respective courts.[3] It will be noted that cases arising in the state courts involving issues similar to those which were found in the diversity cases represent only a fraction of the total state case load. When it is recalled that the federal decisions accounted for less than eleven per cent of the total cases involving "diversity questions," it becomes apparent that in exercising diversity jurisdiction the federal courts are deciding an extremely small number of cases involving "state law," as compared to the decisions of the state courts.[4] One is led to inquire exactly what kind of "interference with state autonomy" is felt to be undesirable in the light of these conditions.

Even though the federal courts decide cases which could be decided by state courts, to the extent that these cases involve only factual disputes, the federal courts are not interfering greatly with the orderly creation and

3. Percentages in this breakdown do not total 100 because of the large number of "other" causes of action which did not recur frequently enough to warrant a separate category.

4. Compare in this regard the estimate of the A.L.I. that their proposals will increase state court case loads by only 1.6%, as discussed in note 20 *infra* and accompanying text.

CLASSIFICATION OF CAUSES OF ACTION ANNUALLY IN STATE AND FEDERAL COURTS

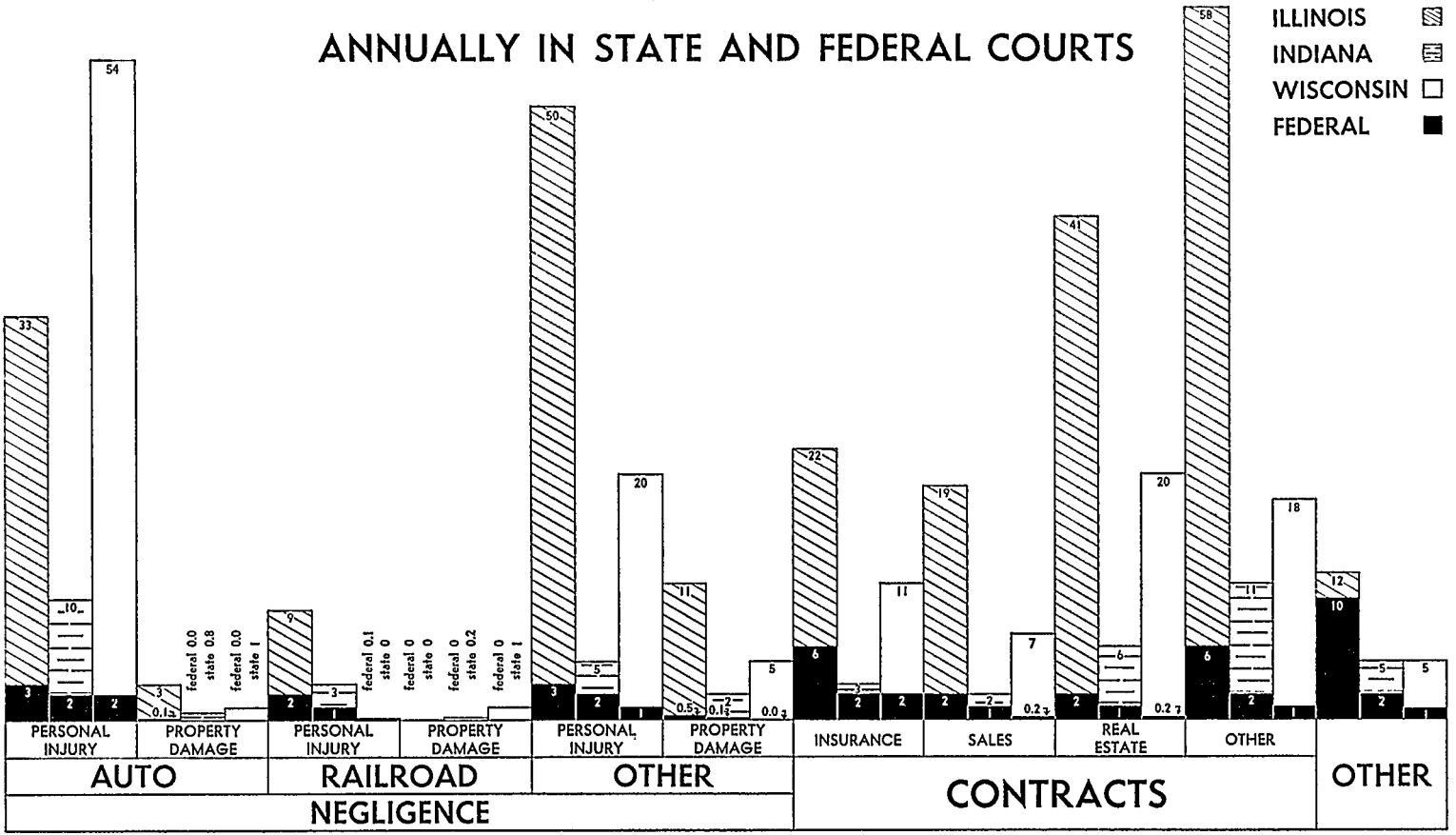

TABLE 1: Substantive Causes of Action as Percentage of Court Case Load

Court:	Cause of Action	Percent of Diversity Cases
United States Court of Appeals for the Seventh Circuit	insurance contracts	17
	"other" contracts (not insurance, sales, or real estate contracts)	16
	personal injury, auto	12
	personal injury, railroad	6
	"other" personal injury from negligence (not auto or railroad)	10
	real estate contracts (leases, sale of land contracts, mortgages, etc.)	5
	sales contracts	4
United States District Courts for the Seventh Circuit	insurance contracts	15
	"other" contracts	13
	"other" personal injury from negligence	13
	personal injury, auto	12
	sales contracts	5
	real estate contracts	5

States:	Cause of Action	Per cent of Diversity-like Cases	Per cent of Total State Cases
Illinois:	"other" personal injury from negligence	20	8
	"other" contracts	18	7
	real estate contracts	16	6
	personal injury, auto	13	5
	insurance contracts	9	3
	sales contracts	7	3
Indiana:	personal injury, auto	23	4
	"other" contracts	16	3
	real estate contracts	14	3
	"other" personal injury from negligence	12	2
	employment contracts	9	2
	insurance contracts	7	1
	personal injury, railroad	7	1
	"other" property damage from negligence	5	1
Wisconsin:	personal injury, auto	36	19
	real estate contracts	14	7
	"other" personal injury from negligence	13	7
	"other" contracts	10	5
	insurance contracts	8	4
	sales contracts	5	3

implementation of state policy. Cases in which the federal courts must interpret state statutes raise the main possibility for policy conflict between federal and state courts. The study revealed that less than one-half of the diversity cases in federal trial courts dealt with statutory issues (see Table 2). In federal appellate courts, about one-third of the diversity cases involved a statutory issue. Hence, it can be seen that federal courts are dealing mainly with the application of the common law of the state and the decision of factual issues rather than the interpretation of statutes of the state.

Turning to the results shown in Table 3 regarding the kinds of parties involved in diversity cases in the Seventh Circuit and similar cases in the state courts of that circuit, it appears that the federal court is the forum

TABLE 2: Types of Legal Issues in Federal Courts

Federal Court	Number	Percentage
Trial (F. Supp.)		
Fact	121	28
Statutory	209	49
Common Law	233	54
Total Cases	430*	
Appellate (F.2d)		
Fact	399	36
Statutory	371	34
Common Law	647	58
Total Cases	1107*	

* Some cases involved more than one legal issue.

of the individual as plaintiff[5] and the corporation as defendant. In the state courts, the plaintiff is largely an individual, while the types of defendants are varied. In every party classification, the percentage of individuals is greater in the state courts and the percentage of corporations is greater in the federal courts.[6]

TABLE 3: Percentage Classification of Parties in State and Federal Courts

	Plaintiff							Defendant						
	Single			Multi				Single			Multi			
	Private	Corporation	Government	Private	Corporation	Government	Mixed	Private	Corporation	Government	Private	Corporation	Government	Mixed
Federal Trial Courts (F. Supp.)	48	28	1	16	3	0	3	13	39	7	13	13	1	16
Federal Appellate Courts (F.2d)	53	20	1	14	2	0	3	13	53	3	14	6	0.3	11
Illinois	61	15	1	2	20	1	0	27	29	2	22	5	0	14
Indiana	70	13	0.5	1	17	0.5	0	37	28	1	25	2	0.5	6
Wisconsin	64	9	1	24	0	0	2	12	23	3	16	4	0	38*

* This unusually high figure is attributable to Wisconsin's "direct action" statute which permits direct suit against an insurer; in the typical suit the insurer is joined with the tort-feasor as a party-defendant. See WISC. STAT. § 260.11 (1963).

In order to obtain a rough check on the reliability of the statistics from the reported diversity cases, as compared to those which reached final judgment but were not reported, a study was made of the diversity cases filed in the Southern District of Indiana during 1962 and 1963.

5. Since only 7% of the trial court cases and 3% of the appellate court cases were removed actions, the plaintiff must have chosen the federal forum, although perhaps with the thought that if he did not so choose, he would be removed there by the corporate defendant.

6. Of course, the absolute number in each class will be far greater in the state courts than in the federal courts because of the greater case load in the states.

For comparison purposes, the docket cases used were those which required a judicial decision for final judgment.[7] The docket study results shown in Table 4 indicate that, numerically, many more cases are filed and proceed to final judgment than are reported in the reporters. However, in terms of percentage comparisons there is not such a great disparity between filed and reported cases.

TABLE 4: Study of Docket of Southern District Indiana

Southern District Indiana	Parties															Cause of Action									
	Single						Multi									Negligence						Contract		Other	
Numerical																									
Reporters																									
F.2d	65	27	0	23	61	3	15	2	0	5	13	4	1	9		18	0	7	0	14	3	15	4	5	18	25
F. Supp.	22	4	0	6	12	2	3	0	0	0	1	4	0	4		2	0	0	0	7	0	2	1	0	4	10
Docket																									
Total	109	104	0	59	72	0	20	2	0	3	61	13	0	33		65	5	3	1	35	2	14	9	65	28	9
Final Judgments	16	12	0	9	8	0	2	0	0	1	7	1	0	5		11	0	2	1	4	0	3	1	4	4	0
Percentages																									
Reporters																									
F.2d	57	24	0	20	54	3	13	2	0	4	11	4	1	8		16	0	6	0	12	3	13	4	4	16	22
F. Supp.	76	14	0	21	41	7	10	0	0	0	3	14	0	14		7	0	0	0	24	0	7	3	0	14	34
Docket																									
Final I/C	52	39	0	29	26	0	6	0	0	3	23	3	0	16		35	0	3	0	13	0	10	3	13	13	0

II. An Analysis of the Effect of the American Law Institute Proposals on the Federal District Court for the Southern District of Indiana

The purpose of the present study[8] is to determine the practical effect the American Law Institute's proposals would have upon the workload of a federal court in regard not only to the number of actions which would be excluded but also to the subject matter and nature of the actions involved. The question is raised whether the Institute's method of controlling the types of parties is the most fruitful approach to setting standards for diversity jurisdiction.

The Institute's proposals are a continuation of the present statutory scheme in the sense that they aim at controlling the types of parties al-

7. Cases which were settled, dismissed by stipulation, or terminated by a consent or default judgment were omitted from this comparison. It is hard to say that these cases represent an "interference with state autonomy" since no action at all is taken by the federal courts; conceivably a different situation is present where final termination requires a decision by the judge.

8. The Indiana Law Journal wishes to thank the Indianapolis Division of the United States District Court for the Southern District of Indiana and especially the Clerk of the Court, Mr. Robert Newbold, and his staff for their cooperation in making available their records so that the information necessary for this study could be obtained.

lowed access to the federal courts. The two most far-reaching proposals are the elimination of all cases originated by residents of the state in which the suit is brought, regardless of the citizenship of the defendant,[9] and the barring of suits brought or removed by a foreign corporation which has business connections in a state extensive enough to be deemed to have a "local establishment" there.[10]

A. *Methodology.*

A study was made of the civil docket of the Indianapolis Division of the District Court for the Southern District of Indiana for the fiscal years 1962 and 1963. The actions included were those instituted during these two years without regard to the date of final termination.[11] The results are presented according to both the number of actions involved (Tables 5 through 8) and the subject matter of the actions (Tables 9 and 10) so as to point out the lack of correlation between the two. The tables show a classification of cases entitled "Non-Resident Corporation—Doing Business in State." This classification is used as the equivalent of the number of foreign corporation litigants maintaining a "local estab-

9. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 2, 1964) (hereafter cited as A.L.I.), § 1302(a), 11: "No person can invoke that jurisdiction [diversity], either originally or on removal in any district in a state of which he is a citizen." Of course under existing statutes, an in-state defendant cannot remove an action by an out-of-state citizen. See 28 U.S.C. § 1441(b).

10. A.L.I., § 1302(b), 11:

> No corporation incorporated or having its principal place of business in the United States which has and for a period of more than two years has maintained a local establishment in a State can invoke that jurisdiction, either originally or on removal, in any district in that State in any action related to the activities of that establishment.
>
> The term "local establishment," as used in this section, means a fixed place of business where, as a regular part of such business: (1) services are rendered or accommodations furnished to persons within the State; (2) sales, delivery or distribution of goods are made to persons within the State by one maintaining a stock of goods (including a regularly maintained showroom for the display of samples) within the State; (3) sales of insurance, securities, or other intangibles are made to persons within the State; or (4) production or processing takes place. Dealings carried on through a bona fide and independently responsible commission agent, broker, or custodian do not give rise to a local establishment. A subsidiary corporation, or a local establishment thereof, does not of itself constitute a local establishment of its parent corporation.

This section does not apply to partnerships, associations or unincorporated business entities; the Institute reasons that these loose organizations would cause difficulties in applying the "local establishment" rule.

11. Not all of the diversity actions instituted during 1962 and 1963 are included. Several actions were still pending and the files for many of these were in use and not readily available. As the necessary information was immediately available for a very high percentage of the actions, it was felt that this was sufficient without further interfering with the court administration.

lishment" in Indiana.[12] The classifications entitled "Resident Executor, Administrator, etc." and "Non-Resident Executor, Administrator, etc." include all actions brought by a representative for a decedent or a third person.

B. *Results.*

In Table 5 the original actions are classified according to the type of plaintiff instituting the action. The removal actions are classified in Table 6 according to the type of defendant removing from a state court. These tables show that the exclusionary effect of the A.L.I. changes would be almost exclusively on resident plaintiffs and non-resident corporations doing business in state, in their status as either plaintiff or defendant.[13]

TABLE 5: Original Diversity Actions

Plaintiff	Total Original Actions	Excluded by Institute's Proposals	Per Cent of Actions Excluded
Resident Individual	43	43	100.0
Non-Resident Individual	57	—	—
Resident Corporation	6	6	100.0
Non-Resident Corp.—Doing Business in State	33	33	100.0
Non-Resident Corp.—Not Doing Business in State	59	—	—
Resident Executor, Administrator, etc.	10	10	100.0
Non-Resident Executor, Administrator, etc.	6	1	16.7
Totals	214	93	43.5

TABLE 6: Removed Diversity Actions

Removed By	Total Removed Actions	Excluded by Institute's Proposals	Per Cent of Actions Excluded
Non-Resident Individual	11	—	—
Non-Resident Corp.—Doing Business in State	18	18	100.0
Non-Resident Corp.—Not Doing Business in State	6	—	—
Totals	35	18	51.4

12. Both the Indianapolis court and the Administrative Office records, which were used by the Instiute as the basis for their study, show a category of "Non-Resident Corp.—Doing Business in State." The Institute used this category as an approximation of the number of corporations maintaining a "local establishment." To save time this was also done in the present analysis. As pointed out by the Institute, some of these corporations would not meet the more rigorous test of being "locally established." A.L.I., App. B at 166. This approximation also assumes that the activities involved are related to a "local establishment." The effect is to enlarge somewhat the number of actions excluded by this proposal. However, the Institute points out that general statistics and an Eastern District of Pennsylvania study show that the approximation is correct in a very large proportion of the cases. A.L.I. at 167 n.1.

13. The Institute's study estimates that nationally 8,824 out of a total of 15,584, or 56.6% of the original actions and 2,091 out of 3,406 or 61.4%, of the removal actions would be excluded.

As pointed out in Table 7, in many of the original actions excluded the defendant would still be eligible to remove if the action were commenced against him in a state court. By combining both original and removal actions in Table 8, the effect of the Institute's proposals on the total diversity actions is shown. Assuming that all original actions excluded would be removed when the defendant was eligible to do so, 28.9 per cent of the actions would be totally barred from the federal courts. This is considerably less than the nationwide figure estimated by the Institute's study. By assuming that every original action excluded would have been removed, they predict that nationwide 45 per cent of all diversity actions would be barred from federal courts.[14]

TABLE 7: Original Actions Excluded—Removal If Action Had Been Brought in State Court

Plaintiff	Total Actions Excluded	Actions That Could Be Removed	Per Cent of Actions Removable	Actions That Could Not Be Removed	Per Cent of Actions Not Removable
Resident Individual	43	26	60.5	17	39.5
Resident Corporation	6	3	50.0	3	50.0
Non-Resident Corp.—Doing Business in State	33	2	6.1	31	93.9
Resident Executor, Administrator, etc.	10	8	80.0	2	20.0
Non-Resident Executor, Administrator, etc.	1	0	—	1	100.0
Totals	93	39	41.9	54	58.1

TABLE 8: Effect of The Institute's Proposals on Total Diversity Actions (Original and Removal)

Jurisdiction Invoked By	Total Diversity Actions	Diversity Actions Excluded	Actions Removable	Actions Not Removable	Per Cent of Total Diversity Actions Not-Removable
Resident Individual	43	43	26	17	39.5
Non-Resident Individual	68	—	—	—	—
Resident Corporation	6	6	3	3	50.0
Non-Resident Corp.—Doing Business in State	51	51	2	49	96.1
Non-Resident Corp.—Not Doing Business in State	65	—	—	—	—
Resident Executor, Admistrator, etc.	10	10	8	2	20.0
Non-Resident Executor, Administrator, etc.	6	1*	0	1	16.7
Totals	249	111	39	72	28.9

* In this case the executrix, a Michigan resident, brought a wrongful death action against an Indiana resident on behalf of the Indiana decedent. The executrix was decedent's mother. Obviously diversity was not "created" here, but the action would be excluded by the A.L.I. proposals. See A.L.I., § 1301(b)(3), 8.9.

14. See, A.L.I., App. B at 167.

Table 9 shows the original actions classified according to the type of action involved. Table 10 shows the same for removal actions. It can be seen that there is no correlation between the actions excluded and any particular subject matter. For example, 52 per cent of the tort actions would be excluded and 32 per cent of the mortgage foreclosure actions would be excluded.

TABLE 9: Type of Action—Original

Plaintiff	Tort		Mortgage Foreclosure	Other Contract	Insurance Contract	Patent, Trademark, Copyright Infringement	Interpleader	Misc.	Total
	Personal Injury	Other							
Resident Individual*	34	2	—	5	2	—	—	—	43
Non-Resident Individual	39	—	8**	7	1	1	—	1	57
Resident Corporation*	1	—	—	3	2	—	—	—	6
Non-Resident Corp.—Doing Business in State*	—	2	20	2	3	2	3	1	33
Non-Resident Corp.—Not Doing Business in State	1	1	35	13	2	3	—	4	59
Resident Executor, Administrator, etc.*	10	—	—	—	—	—	—	—	10
Non-Resident Executor, Administrator, etc.†	6	—	—	—	—	—	—	—	6
Totals	91	5	63	30	10	6	3	6	214

* These actions would be initially excluded by the Institute's proposals, except for the Interpleader Actions.
** All plaintiffs were Non-corporation Business Entities.
† Table 5 shows that one of the actions instituted by a Non-Resident Executor, Administrator, etc., would be excluded.

TABLE 10: Type of Action—Removal

Removed By	Tort		Insurance Contract	Misc.	Total
	Personal Injury	Other			
Non-Resident Individual	9	—	1	1	11
Non-Resident Corp.—Doing Business in State	13	3	2	—	18
Non-Resident Corp.—Not Doing Business in State	—	4	1	1	6
Totals	22	7	4	2	35

These two examples raise the question of whether the Institute's proposal represents the most efficient means of accomplishing the dual objectives of increasing "state autonomy" and at the same time stream-

lining the diversity jurisdiction of the federal courts. One possible alternative to be considered would be adjustment of standards along subject matter lines.[15] From the standpoint of state autonomy, it could be argued that there is a much stronger state interest in having certain subject matters within its jurisdiction than in having certain parties within that jurisdiction. One commentator has pointed out that personal injury actions are probably the most "local" in nature and have the least national or interstate impact of all disputes being handled on diversity grounds.[16] If it is objected that these are the kinds of actions subject to the influence of local prejudice, it can be pointed out that data collected in a recent study from the two federal judicial districts in Wisconsin indicate that fear of local bias is seldom the determining factor in an attorney's choice of forum in diversity cases.[17] If there is anything purely "local" in character in which the state has a nearly exclusive interest, it is the status of land titles. It seems most haphazard to leave some of the mortgage foreclosure cases in the federal court while others are returned to the state courts.

From an administrative standpoint certain questions arise. In the first place, the exclusion of personal injury actions alone would have reduced the workload of the Indianapolis court nearly 33 per cent more than the Institute's proposals.[18] Furthermore, the fact that 63 per cent of the removal actions were personal injury suits suggests that under the Institute's proposals a high percentage of cases excluded and eligible for removal would have been removed back into the federal court. Thus, the Institute's proposal might not accomplish much except to add an additional procedural step to the litigation—removal by the defendant.

The mortgage foreclosure actions also raise doubts about the efficiency of the Institute's approach. The elimination of the 43 remaining foreclosures would have meant nearly a 20 per cent decrease in the court's current case load. Since all of these cases were settled either by stipula-

15. Such an approach has been suggested by Professor Meador of the University of Virginia. Meador, *A New Approach to Limiting Diversity Jurisdiction,* 46 A.B.A.J. 383 (1960).

16. *Id.* at 3.

17. Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases,* 47 IOWA L. REV. 933 (1962). And compare similar opinions by federal judges: Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 CORNELL L.Q. 499, 521 (1928); "Fears of local hostilities had only a speculative existence in 1789, and are still less real today." Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 HARV. L. REV. 483, 510 (1928). This same reasoning would apply to most property damage suits.

18. From Tables 9 and 10 it can be seen that 113 of the 249 actions, or 45.5%, would have been excluded. Compare this to the 28.9% which would be excluded permanently under the Institute's proposals.

tion or by default, no conceivable prejudice could have harmed the parties by remitting them to the state courts.[19]

The Institute study points out that in many federal districts and in many state courts there is today no real congestion problem. The longest delays occur mostly in both federal and state courts in large metropolitan areas. Thus any relief given to the federal courts would mean an increased burden on the state courts, which are already crowded. But the Institute goes on to maintain that the added burden on the state courts would not be serious. They show figures which estimate that if 69 per cent of the diversity cases *tried* in the United States District Court for Massachusetts during the fiscal year 1960 were returned to the Massachusetts Superior Court, the state court of general jurisdiction, it would increase the number of Superior Court trials by only 1.6 per cent.[20] How much interference with state autonomy actually exists when the reference is to cases comprising only 1.6 per cent of the state court caseload? If an undesirable interference does exist it would seem that it must come from a particular subject matter that tends to find its way into the federal system. There might be certain subjects which could more properly be left in the federal courts than others, but this would never be shown under the Institute's approach of simply controlling the types of parties allowed access to the federal courts. It seems that before any legislative changes are adopted to alter diversity jurisdiction, control of the subject matter and nature of the action should be further considered as a possible approach to limiting diversity jurisdiction.

19. The eight actions classified as being brought by a "non-resident individual" were brought by unincorporated business entities and therefore were not excluded by the A.L.I. proposals. See note 10 *supra*. However, they were all financial institutions doing business in the state. There seems to be little justice in treating the same types of institutions differently on the basis of this difference in form.

20. A.L.I., App. B at 174.