AN EMPIRICAL STUDY OF FORUM
CHOICES IN REMOVAL CASES UNDER
DIVERSITY AND FEDERAL
QUESTION JURISDICTION*

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INTRODUCTION

The need and propriety of federal court concurrent jurisdiction with the state courts is the subject of continuing debate. For more than two hundred years, federal and state trial courts have maintained jurisdiction to hear diversity cases involving litigants from...
different states.\(^1\) For over one hundred years, concurrent jurisdiction has existed for both federal and state courts to hear cases predicated upon federal law.\(^2\)

Differing rationales are used to support federal court jurisdiction in these two types of cases. Diversity jurisdiction is generally thought to reflect a concern for out-of-state commercial litigants' fears of local-court bias, especially in cases that otherwise would have been heard in pro-debtor state courts.\(^3\) It is this economic-, class-based interpretation that gives substance to the earlier views that diversity jurisdiction is necessary to ensure justice, or the appearance of justice, in disputes between citizens of different states.\(^4\)

The rationale for federal court jurisdiction in federal question cases is more complex. Historically, federal question jurisdiction

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1. See U.S. Const. art. III, § 2 (providing that "[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ... to Controversies ... between Citizens of different States ... and ... foreign States, Citizens or Subjects")). The Judiciary Act of 1789 established the federal trial courts and gave them jurisdiction to hear diversity cases and cases involving the Federal Government. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73 (1789).


   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.


3. See Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Probs. 2, 22 (1948) (listing as motivations behind implementation of diversity jurisdiction: desire to avoid regional prejudice against commercial litigants; desire to permit commercial, manufacturing, and speculative interests to litigate controversies; and, desire to achieve more efficient administration of justice for commercial class); see also Friendly, The Historical Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483, 495-97 (1928) (citing fear of action by state legislators as being more significant than fear of local bias in courts). Of course, then legislators commonly chose and could remove judges, thereby making this distinction of lesser importance.

4. See Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) (noting need of federal courts to serve justice by addressing apprehension of litigants who would otherwise find themselves in alien state courts and subject to out-of-state bias). In essence, the Frank and Friendly articles suggest an economic reason why the framers of the Constitution cared about the interests of justice. Frank, supra note 3, at 12; Friendly, supra note 3, at 496-97. The two views are mutually reinforcing, not mutually exclusive. See Moore & Weckstein, Diversity Jurisdiction: Past, Present and Future, 43 Tex. L. Rev. 1, 21 (1964) (arguing that historically higher quality of federal justice is now "common sense" contemporary justification for diversity jurisdiction).
was left to the state courts. It was not until the 1870s that the federal trial courts gained jurisdiction to enforce litigants’ constitutional rights. Fears that courts in the Southern States would refuse to enforce federally created rights after the Civil War prompted the empowerment of the federal courts. To some extent, this fear still exists; it is, however, no longer limited to the Southern States. A second rationale for federal question jurisdiction is the need for uniform interpretation and application of federal law and its corollary, the development of a federal common law for federal legislation.

5. See supra note 2 (noting that legislative authority for federal court jurisdiction in federal question cases was not granted until 1875 by Act of Mar. 3, 1875). The Supreme Court in Clafin v. Houseman, 93 U.S. 130 (1876) held, however, that concurrent jurisdiction of the state courts with the federal courts in federal question litigation would be presumed, except where Congress explicitly denies concurrent jurisdiction, or where the exercise of such jurisdiction is incompatible with the goals that Congress has sought to achieve in enacting the legislation. Clafin, 93 U.S. at 136.

6. See supra note 2 (noting that Act of Apr. 20, 1871 established that federal court has authority to hear cases involving deprivation of constitutional rights by states).

7. See Haring v. Prosise, 402 U.S. 304, 323 (1983) (stating that central concern motivating enactment of section 1983 was “grave Congressional concern” that state courts were deficient in protecting federal rights); see also Patsy v. Board of Regents, 457 U.S. 496, 505 (1982) (noting that major factor in providing federal court jurisdiction was perceived notion that state authorities were “unwilling or unable” to protect constitutional rights of individuals or punish those who violated these rights).


With both types of jurisdiction, the historical rationale for concurrent federal and state court jurisdiction may be perceived, in part, as a concern about the quality or fairness of the state courts. This is most apparent with federal question jurisdiction and its Reconstruction-era history. The rationale for diversity jurisdiction also may be characterized as a reflection of the lesser quality of state court judges and their inability to protect against the effects of local bias.

Two centuries after the adoption of the Judiciary Act of 1789, the continuing validity of the historic concerns for federal jurisdiction may be questioned. Two relatively recent studies of federal court jurisdiction show that considerable conflict remains concerning the need for retaining diversity jurisdiction. Part I of this Article discusses these studies and the congressional response to their concerns and recommendations. Part I also examines prior research efforts that explore the continuing validity of the historic rationales for federal court concurrent jurisdiction by examining the reasons attorneys choose federal courts over state courts. Part II discusses our own research strategy on attorney choice of forum in concurrent application of the *Erie* principle was in *Ferens v. John Deere Co.* See *Ferens v. John Deere Co.*, 110 S. Ct. 1274, 1280 (1990) (holding that transferee forum required to apply law of transferor court, regardless of which party initiated transfer, and determining state conflict of laws choice is substantive, not procedural).

10. This is not to say that other rationales do not exist. At a minimum, federal trial courts were a way of "showing the [national] flag" to demonstrate to citizens the existence of a national government. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 101 (1969) [hereinafter ALI STUDY]. Among the justifications briefly discussed by the American Law Institute (ALI) is that of the increased quality of adjudication that arises by making federal courts specialists in federal question cases. Id. at 164-65 n.14. Conspicuously missing from this policy literature is any discussion of the implications of lesser state court quality as a separate issue for state and federal court policymakers.

11. See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (arguing federal courts are superior to state counterparts). Neuborne asserts that federal judges possess greater technical competence than state judges. Id. at 1121-24. Furthermore, federal judges possess a "psychological set" that renders them more likely to enforce constitutional rights vigorously. Id. at 1124-27. Finally, Neuborne states that federal judges are more insulated from majoritarian pressures, permitting them to make socially controversial decisions without fear of reprisal. Id. at 1127-30; see also H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 146 (1976) (conceding it is "very likely the federal trial courts . . . are somewhat 'better' than most state courts"). But see Fischer, *Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts*, 34 U. MIAMI L. REV. 175, 179 (1980) (concluding that sufficiently definable criterion necessary to measure empirically institutional quality of state forum, as opposed to federal forum, do not exist); Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 328 (1977) (commenting that notion concerning lack of state quality is intangible and debatable).

12. See infra notes 13-34 and accompanying text (discussing studies undertaken by the American Law Institute and the Federal Courts Study Committee). There are no visible advocates of the abolition of federal question jurisdiction in either federal or state court. At least one study found that attorneys continued to believe that state court enforcement of one type of federal civil rights law, student rights, remained less vigorous than in federal court as of the time of the research. Marvell, *The Rationales for Federal Court Jurisdiction: An Empirical Examination of Student Rights Litigation*, 5 WIS. L. REV. 1315, 1319 (1984).
jurisdiction cases, and Part III sets forth specific findings of the study. Finally, Part IV discusses the policy implications of the findings attained in our study, and recommends further areas where research is necessary.

In brief, the research found, not surprisingly, that plaintiff and defense counsel views of the two courts are quite different—the most significant of which was that plaintiff attorneys favor juries, while defense attorneys favor judges for case disposition. The research also found that perceived bias against out-of-state litigants is still frequently reported, especially in less urban areas, and federal judges are perceived to be superior to their state court counterparts. Important caveats to all these findings may also be drawn from the attorneys' responses. Further, analysis shows that in the removal case universe, the two courts serve very different constituencies: the state court filings being of individual, in-state plaintiffs, while the federal court filings being of out-of-state corporations. Hence, this study of attorney preferences does not permit conclusions about court superiority.

I. BACKGROUND: THE POLICY DEBATE CONCERNING THE JURISDICTION OF FEDERAL AND STATE COURTS

A. The American Law Institute Study

In 1969, the American Law Institute (ALI) issued a report on the appropriate allocation of jurisdiction between the federal and state courts.13 Chief Justice Warren, in an address to the American Law Institute in 1959, provided the original suggestion for the ALI study.14 The ALI premised its work on the need to limit the caseload pressures that were necessitating the continued growth of the federal judiciary.15 The report recommendations relied on an analysis based on the "basic principles of federalism" to make a "principled allocation" of jurisdiction between the two courts.16

The ALI report recommended the retention of the principal jurisdictional battleground, diversity jurisdiction in cases involving citizens of different states.17 The ALI, however, set forth the caveat

14. See id. at 1 (quoting Justice Warren's suggestion that: "[i]t 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 basic principles of federalism").
15. See id. (commenting that increase in criminal cases, habeas corpus, civil rights litigation, and securities litigation, in addition to added volume caused by growing population, were factors forcing expansion of, and increase in pressures on, federal judiciary).
16. Id. (quoting Chief Justice Warren).
17. Id. at 1-2 (stating that diversity jurisdiction continues to serve important function in federal system).
that diversity jurisdiction should be limited to cases where a noncitizen runs "a real risk of prejudice against him as a stranger" in a state court, thereby excluding in-state plaintiffs from invoking federal court diversity jurisdiction.18 The ALI recommended extending diversity jurisdiction to cases in which the risk of prejudice exists notwithstanding the fact that complete diversity of citizenship does not exist among all the parties.19 Moreover, the report also recommended permitting federal jurisdiction over cases in which not all defendants are eligible for, or agree to, removal to federal court.20

The ALI recommended the expansion of federal question jurisdiction, under which federal courts hear cases based on the federal Constitution or statutes.21 The ALI premised its conclusion on the principle that federal question jurisdiction will protect litigants from "the danger that state courts will not properly apply [federal] law, either through misunderstanding or lack of sympathy."22 The ALI recommended expanding federal question jurisdiction by abolishing the existing limitations based on the amount in controversy.23 Furthermore, it recommended extending federal court jurisdiction by permitting removal of cases based on the existence of a federal law defense to a state law claim.24

B. The Federal Courts Study Committee

Examining the same issues as the ALI, the Federal Courts Study Committee, appointed by Chief Justice Rehnquist, recently presented recommendations that intended to "improve the federal courts' capacity to resolve disputes . . . by relieving them of some functions that involve federal rights or interests only marginally if at all."25 In accordance with its views of federalism, the Study Committee would expand and diminish federal court jurisdiction.

The principal recommendation of the Study Committee was for the abolishment of diversity jurisdiction, with some limited excep-
Under its proposal, only diversity cases involving complex multi-state litigation, interpleaders, or aliens would be heard in federal court. Although the Study Committee conceded that local bias "may be a problem in some jurisdictions," it viewed the notion of local bias as a noncompelling reason for continued diversity jurisdiction. The Study Committee weighed the problem of local bias against the need to limit the demands on federal court resources, as well as the inevitable state/federal friction that accompanies a federal court's interpretation of state law. As alternative proposals, the Study Committee reiterated the ALI recommendation to limit diversity cases to out-of-state plaintiffs and to define corporations as citizens of the state or states in which they do business.

The Study Committee made no recommendations analogous to the ALI proposal to permit removal of cases from state to federal court on the basis of a federal question defense. The Study Committee did, however, propose the overruling of the Supreme Court decision in *Finley v. United States* which arguably limited the ability of federal courts to hear state law claims accompanying federal law claims. It also proposed prohibiting the removal of claims of less

26. Study Committee Report, supra note 25, at 38-43. Organized efforts to eliminate diversity jurisdiction began as early as the late 1870s, when railroads and insurance companies used diversity jurisdiction to remove personal injury lawsuits to federal court. Joiner, *Corporations As Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 Judicature 291, 294 (1987).

27. Study Committee Report, supra note 25, at 38.

28. Id. at 40; see Kramer, *Few Reasons Exist For Keeping Diversity*, Nat’l L.J., Oct. 1, 1990, at 12, col. 2 (stating in letter to editor that as Study Committee reporter responsible for preparing diversity section of report, "the evidence of such bias is weak . . . . Moreover, in cases in which bias is a factor, there is often little a federal judge can do"); see also Kramer, *Diversity Jurisdiction*, 1 B.Y.U. L. Rev. 97, 121, 123 (1990) (weighing pros and cons of diversity jurisdiction and concluding it should be abolished or at least curtailed).

29. See Study Committee Report, supra note 25, at 40-41 (noting extensive burden placed on federal courts as result of diversity jurisdiction). A study by the Federal Judicial Center estimated that adjudicating diversity cases in 1988 consumed the equivalent workload of 193 district judges and 22 courts of appeals judges. Id. The total cost to the federal system was $181 million, equal to one-tenth of the federal judicial budget. Id.

30. Id. (arguing friction between state and federal courts occurs most frequently when party commences action based on diversity that is identical to action pending in state court).

31. Id. at 42.

32. Id. at 47. Pendent or ancillary jurisdiction claims are supplementary actions to an existing federal question matter in the federal court. Pendent claims are those joined by the plaintiff at filing. Pendent claim jurisdiction permits a plaintiff to join to a federal claim a factually-related state claim notwithstanding the absence of diversity. Subcommittee to the Federal Courts Study Committee, Report to the Federal Courts Study Committee on the Role of the Federal Courts and Their Relation to the States 546 (July 1990) [hereinafter Subcommittee Report]. Ancillary jurisdiction refers to additional claims made after filing by either the plaintiff or defendant. Ancillary jurisdiction enables defendants and intervenors to add additional state law claims or to bring in new parties, for example by third party-impleader, if these claims arise out of the same transaction or occurrence as the plaintiff’s claim. Id. Additional claims made by the plaintiff may be deemed ancillary if made
than ten thousand dollars from state to federal court under the Employee Retirement Income Security Act (ERISA). Finally, the Committee proposed the repeal of 28 U.S.C. § 1441(c), a provision authorizing the removal of separate and independent claims that are joined with non-removable claims.

C. The Congressional Response to Recommendations for Jurisdictional Reform

Since the issuance of the ALI report in 1969, Congress has both supported and ignored its recommendations. In 1980, Congress expanded the federal question jurisdiction of the district courts by eliminating the ten thousand dollar amount in controversy previously required in cases based on claims involving federal law. Congress, however, took no action on proposals to permit removal of cases from state to federal court on the basis of a federal law defense or on proposals to limit diversity jurisdiction to out-of-state parties. In 1988, Congress acted to reduce the number of diversity-based cases heard in the federal district courts by increasing the amount in controversy needed for the attachment of jurisdiction. Later, in response to the Study Committee recommendation to
overrule Finley. Congress enacted legislation in 1990 that codified federal court pendent jurisdiction. In addition, Congress amended 28 U.S.C. § 1441(c) to abolish removal of “separate but independent claims” in diversity cases, and to authorize remand of federal cases dominated by state law issues.

D. The Continuing Controversy over Federal and State Court Jurisdiction

The historical rationales presented for the establishment of diversity jurisdiction fail to completely define the issues. More contemporary reasons to retain diversity jurisdiction are put forth by attorney practitioners. For example, the ALI report notes that attorneys urge the retention of diversity jurisdiction for two reasons. First, the federal courts provide superior justice to that provided by state courts. Second, the option to litigate in federal court favors the class of litigants typically represented by these attorneys.

In enacting legislation in 1980 and 1988, Congress failed to examine any empirical evidence as to the need for changes in federal trial court jurisdiction. Of course, there is little controversy surrounding the ALI’s contention that the jurisdictional amount required bears little relationship to whether federal court jurisdiction in federal question cases is itself important to maintain. Given the acceptance of federal question jurisdiction, the only argument that can be made to justify an amount in controversy requirement is to avoid excessive caseload pressures. The dollar limitation provides some measure of case significance in order to control the number of cases before the federal district courts. In addition to this argument, one could say that little study is needed to establish that state court opposition to federal law is no longer a major concern. State courts are often greater defenders of litigants’ civil rights than federal courts.

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38. See supra note 32 (discussing Finley).
41. See ALI Study, supra note 10, at 102-03.
42. Id.
43. See generally Note, Miranda and the State Constitution: State Courts Take a Stand, 39 Vand. L. Rev. 1693, 1717 (1986) (concluding that state courts interpret state constitutional provisions on self-incrimination more broadly than fifth amendment and, as result, provide more extensive protection to defendants); Newman, The “Old Federalism”: Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity, 15 Conn. L. Rev. 21, 28 (1982)
The more serious question is whether the ALI or the Study Committee was correct in their assessment of the significance of the possibility of local bias as a continuing problem in the state courts. The Study Committee report stated that local bias is no longer a major threat to litigation fairness. The Study Committee noted that this assertion was especially valid when local bias was compared to the other types of prejudice that threaten litigants. The ALI did not go that far, and it is unclear whether others join in the Study Committee's contention that the fear of local bias is an anachronism.

Thus, empirical examination of the continuing validity of the rationales for federal court concurrent jurisdiction with state courts is needed to confirm or deny the validity of these rationales. Direct study of the issue of local bias, or the notion of a higher quality of justice, is not easily accomplished because this type of direct examination would be overly expensive, even on a scale as small as a single district court. In addition, some constructs, such as the notion of a higher quality of justice, may not be susceptible to measurement because of the impossibility of defining operational measures that can record the appropriateness of case outcomes.

Research must look, therefore, to attorney surveys for proxies of direct measurement. The most common proxy is attorney reports of their reasons for filing cases in state rather than federal courts. Even with this source of information, however, interpretational problems have historically existed with matching constructs such as local bias with the wording of the research questions. The possibility also exists that responses may be affected by attorneys' interests in the outcome of the research.

To avoid this problem, the research reported in this Article began with an examination of the behavioral manifestations of attorneys' comparative views of federal and state courts. This was accomplished by asking attorneys about their reasons for filing specific cases in federal or state court when concurrent jurisdiction permitted the attorneys to file in either court.

(noting increasing role of state constitutions in protecting citizens' rights due to restriction of access to federal courts and narrowing protections of federal constitution).

44. Study Committee Report, supra note 25, at 40.
45. See Subcommittee Report, supra note 32, at 450-54 (citing Friendly, supra note 3, for its out-of-state bias analysis).
II. THE RESEARCH STRATEGY: Surveying Attorneys in Removal Cases

A. Groundwork for the Study: The Findings of Prior Research on Attorney Forum Selections

Seven previous studies have analyzed the reasons given by attorneys for forum selection where concurrent jurisdiction lies in both the federal and state courts. Of these studies, five focused on attorneys' reasons for forum selection in diversity cases,46 and one focused on federal question cases.47 A seventh study did not distinguish between the two, but merely asked about lawyers' perceptions of the superiority of federal court performance.48

A number of factors, including the limited geographic scope of some of the studies,49 the date of the studies,50 methodological fail-
poor response rates, and the narrow field of law being examined make generalizations from the previous studies difficult to formulate. Despite these limitations, prior studies indicate two major results. First, the studies indicate that the reasons given for forum selection are quite diverse. Lawyers cited as many as fifteen or twenty different factors when responding to surveys asking about forum selection choices. These factors included geographic convenience, fear of local bias, superior rules of procedure, case delay, judicial competence, litigation costs, favorable or unfavorable precedent, higher damages awards, jury pool differences, better rules of evidence, greater judicial pretrial involvement, and selection choice made by client or referring attorney.

Therefore, take into account some major changes affecting federal and state courts since the 1960s. Such developments include state court adoption of modern rules of procedure, authorization of less than twelve-member juries with non-unanimous verdicts, improvements in the quality of the state judiciary resulting from unification of state court systems, and other changes in the state courts' willingness to protect federal civil rights guarantees.

51. Taken as preliminary examinations, these studies' methodological failures are not critical. However, generalizations from their findings to a national level would not be appropriate because of their geographic scope limitations and methodological problems. For example, Perlstein's use of hypothetical questions in her survey of attorneys led Bumiller to question the ability to generalize from her findings. See Bumiller, supra note 46, at 751 (questioning evidence gathered through use of hypothetical exercises). Cameron also used a hypothetical to ask attorneys representing clients in actions such as divorce proceedings for their court preferences. See Cameron, supra note 48, at 551 (requesting attorneys to state preference "if there were no time or jurisdiction problem"). Problems of ambiguity also exist with respect to some of the surveys that fail to differentiate between bias based upon local, as opposed to out-of-state, status of the litigants and bias based upon other litigant characteristics such as business, incorporated status, or race. See Marvell, supra note 12, at 1343 n.89.

52. See Goldman & Marks, supra note 46, at 97 (basing survey results of state court practitioners on response rate of only 37%); Note, supra note 46, at 173 (surveying Virginia lawyers with response rate of only 15%); Perlstein, supra note 46, at 339 n.9 (receiving initial return of 52%, but surveys which were incomplete further reduced response rate to 38.8%).

53. See Marvell, supra note 12, at 1329, 1345 (surveying only lawyers involved in student rights litigation). Leaving aside the fact that the Marvell survey was not based upon random sampling, but a "snowball" technique to obtain referrals from each lawyer, thereby supplementing the original list obtained from published opinions, over a third of the subsample from whom background information was gathered reported that they were specialists in education law. Id. at 1344 n.91, 1348 n.107. A similarly high proportion of those interviewed reported working for non-profit organizations such as legal service agencies. Id. at 1349. Neither characteristic seems representative of attorneys as a whole. Marvell's study and some of the other studies might also be faulted for their potential contamination by researcher bias. A researcher's desire to obtain certain results can interfere with respondents' answers, and may result in the construction of ambiguous questions that favor one type of answer or in an inappropriate analysis of data. See Cameron, supra note 48, at 350 (basing study on thesis that state and federal courts are essentially equivalent and implying that neither type of judge is superior to other).

54. See, e.g., Bumiller, supra note 46, at 753-58 (ranking seventeen different factors impacting upon forum selection, including local bias, anti-corporation bias, preferable procedural rules, and higher damages awards, and concluding that different criteria have varying significance depending on geographical location); Goldman, supra note 46, at 97-98 (evaluating fifteen different factors, including "superior juries," geographic convenience, "superior judges," and "superior rules of discovery," with most respondents selecting multiple (six to seven) factors as impacting on forum choice); Marvell, supra note 12, at 1352, 1354, 1360 (considering such factors as issue of law involved, case delay, and "judges' sympathies and
Second, only a small proportion of attorneys responded that the historical policy reasons for permitting attorney choice of a federal forum are important concerns. Attorney habit, convenience, and case delay are the primary factors reported as affecting attorney choice of forum in diversity cases. In diversity cases, the traditional rationale, fear of local bias against nonresident litigants, may be largely limited to specific geographic areas with less metropolitan jurisdictions. In one study examining forum selection in federal

philosophies," and concluding that addition of factors upon re-questioning suggests that lawyers will indicate those factors of relative as opposed to absolute importance).

55. See Goldman & Marks, supra note 46, at 97-100 (ranking local bias as seventh most frequent factor affecting attorneys who represent out-of-state clients in federal court diversity actions and indicating that while 40% of respondents cited this factor, its significance is further undermined by its inclusion with number of other factors); Marvell, supra note 12, at 1356 (reporting that among his unrepresentative sample of attorneys in student rights cases, dominating reason for federal court selection was judicial familiarity with legal issue involved); Summers, supra note 46, at 937-38 (finding that only seven responses out of eighty-two indicate local bias as factor in selecting federal court in diversity actions); see also infra note 59 (discussing connection between local bias and geographic location). But see Bumiller, supra note 46, at 759-61 (finding local bias key factor in federal court selection in smaller urban and rural settings); Note, supra note 46, at 182-84 (indicating that substantial number of Virginia lawyers answering survey (60%) took local bias into account when selecting forum).

56. See Bumiller, supra note 46, at 754, 770-72 (examining impact of attorney's frequency of practice in particular forum on court selection process); Marvell, supra note 12, at 1349 (reporting that 44% of attorneys surveyed in student rights cases said that decision to file in federal court "was automatic").

57. See Bumiller, supra note 46, at 770-72 (surveying impact of factors linked to attorney or client convenience upon forum selection). Convenience encompasses a number of variables, including familiarity and the feeling of comfort with the court, as well as more potentially measurable factors such as geographic convenience. Of these, the most consistently reported factors are familiarity with the judges and familiarity with rules of procedure. See id. (attributing decision to file in state court to attorney's experience with rules of procedure and judges). Geographic convenience is most relevant for federal court districts that encompass large areas where the district court may be closer to the plaintiff. In some jurisdictions, geographic convenience may be relevant as a tactical weapon against opponents for whom the federal court is not convenient. See id. at 771 (finding that attorneys in Wisconsin report geographic convenience to be major reason in selecting federal court in Milwaukee, where most of responding attorneys practice). Bumiller attributes this finding to desires to place the burden and cost of travel on the opposing party. Id. But see Goldman & Marks, supra note 46, at 98, 100 (indicating that geographical convenience has only minor impact on filing decision).

Marvell's study on the rationale behind forum selection in federal question cases is the only study to test whether location does in fact correlate with choice of forum. This study found that while only 17% of attorneys selecting state court and 4% of attorneys selecting federal court reported geographic convenience to be a factor, 52% of attorneys practicing in cities where a federal court is located filed in federal court, compared to 33% of attorneys in cities where there is no federal court. Marvell, supra note 12, at 1363.

58. See Bumiller, supra note 46, at 762-67 (finding case delay to be most important reason for forum choice in three of four sites studied and further finding perceived case delay to actually exist); Perlstein, supra note 46, at 329 (finding case delay to be only variable to have statistically significant effect on attorney forum decisions, with defendant attorneys preferring case delay); see also Marvell, supra note 12, at 1359 (noting that 33% of lawyers filing in state court and 19% in federal court cite case delay as forum choice reason).

59. See Bumiller, supra note 46, at 759-62 (finding 30% of attorneys in Milwaukee—a small metropolitan area—and 53% of attorneys in Columbia, South Carolina—a more rural area—reported fear of local bias against nonresident litigants to be important or very important factor, compared to only 19% of attorneys in Philadelphia and 15% of attorneys in Los
question cases, only 5% of the attorneys filing in federal court reported a fear of state judges' lack of willingness to enforce federal rights.\(^6\) In comparison, judicial familiarity with student rights cases was cited by 28% of the attorneys filing in federal court.\(^6\) Federal judge familiarity with federal law issues, however, has been a consequence of, and was not the reason for, the establishment of federal court jurisdiction.\(^6\)

The findings in these previous studies provide the groundwork for a more precise survey. As a whole, the prior studies identified a range of factors that attorneys reported as relevant to their decisions about forum selection. One study suggested that jurisdictional, client, and attorney legal culture\(^6\) factors may correlate with attorneys' forum choices.\(^6\) The basis of subject matter jurisdiction is also relevant in the determination of factors or considerations which impact on the attorney's choice of forum.\(^6\) Whether the attorney is a plaintiff attorney or a defense attorney also interacts with other factors, including case delay, to affect forum selection.\(^6\) Finally, a few of these studies indicated that it is possible and desirable to analyze the reasons for attorneys' selections empirically through an independent examination of the relevant jurisdiction characteristics (e.g., urban/rural, court rules).

Angeles—both larger metropolitan areas); Goldman & Marks, supra note 46, at 104 (indicating that local bias may carry greater impact in rural areas) (citing Note, supra note 46, at 178).

60. Marvell, supra note 12, at 1357. Fifty-two percent of the attorneys filing in federal court reported that judges' sympathies and philosophies were important factors in their forum choice. Id. at 1354. Of this 52%, the two primary factors accounting for forum choice are a belief that federal judges are more plaintiff-oriented than state judges or, conversely, less likely to favor a local school defendant and a belief that federal judges are more sympathetic than state judges to civil rights. Id. at 1356. These perceptions, however, are not synonymous with the implication that state judges will refuse to protect a federal right. Id.

61. Id. at 1356-57.

62. See id. at 1334 (implying that state judges' lack of familiarity with federal law is result of concurrent jurisdiction). But see id. at 1333-34, 1358 (indicating that federal court expertise in questions of federal law is traditional rationale underlying federal question jurisdiction).

63. See Bumiller, supra note 46, at 772 (discussing impact of "culture of attorneys" derived from attorney familiarity and/or partiality with particular court's rules of procedure).

64. See Goldman & Marks, supra note 46, at 99-100, 102-04 (noting that in at least one jurisdiction (Northern District of Illinois), attorney's choice to file in state court may be due to jurisdictional factors, such as federal court tendency to discourage personal injury cases through imposition of onerous procedural devices).

65. Compare Bumiller, supra note 46, at 772 (concluding that rules of procedure and case duration are important factors in forum determination in cases based on diversity jurisdiction) with Marvell, supra note 12, at 1354-55 (determining that factors related to judges are primary motivation in forum choice for cases founded on federal question jurisdiction).

66. See supra note 57 and accompanying text (indicating that attorneys may select forum based on desire to create tactical disadvantage to opposition); see also Marvell, supra note 12, at 1358-59, 1368-71 (finding different weights assigned to case delay as factor in forum selection, depending upon attorney's status).
B. A Sample Survey Approach

Prior research studies of attorney preferences in concurrent jurisdiction cases have nonrandomly surveyed selected attorneys. Nonrandom surveys of attorneys may generate biased results and, therefore, may not permit generalization from the sample to the larger attorney universe. An additional consideration in evaluating prior studies is that attorneys’ responses to the surveys were essentially based on general forum preferences rather than reasons for forum selection in a specific case. The latter approach permits the examination of cases that are contrary to attorneys’ general preferences and broadens the scope of responses received.

These two methodological considerations resulted in the need for a defined universe of court cases in this study. Existing state court information systems could not meet these needs, however, because they could not identify whether cases brought in state court involved federal question claims or whether the parties met diversity jurisdiction requirements. State courts have no use for this information. Federal courts collect this information, however, because, as limited jurisdiction courts, they must determine whether cases are properly before the federal court. While not totally satisfactory, a survey of representative attorneys filing in federal court allows for generalization of the survey results to a national population of all

67. See generally M. SLONIM, SAMPLING IN A NUTSHELL 27-28 (1960) (providing general overview of various sampling techniques and indicating that nonrandom sampling methods often result in bias favoring sample selection as opposed to being truly representative of statistical universe); D. HUFF, HOW TO LIE WITH STATISTICS 21 (1954) (discussing manipulation of statistics and indicating that only sampling technique which generates unbiased results is random sampling); Deming, On Errors in Surveys, 9 AM. SOC. REV. 359 (1944) (evaluating potential errors and biases of statistical studies, including bias arising from unrepresentative solicitation of responses); Zeisel, The Uniqueness of Survey Evidence, 45 CORNELL L.Q. 322, 327 (1960) (studying use of surveys as evidence in trials, and analogizing representativeness requirement to lottery requiring that each member of statistical universe have equal chance of sample selection).

68. See Shapiro, supra note 11, at 331 (finding diversity study based on general concerns inconclusive). Responses based upon general preferences can result in attorney failure to report factors which operate in cases that are atypical of the attorney’s most common cases. Further, questions about general preferences are really “hypotheticals” and as such are subject to criticism. See also supra note 51 and accompanying text (discussing problems associated with projecting studies results onto general population because of geographic or methodological problems).

69. Another way to articulate the distinction between the research approach used here and that of prior research is to distinguish “three basic approaches for collecting data” about the courts. See Kritzer, Studying Disputes: Learning from the CLRP Experience, 15 LAW & SOC’Y REV. 503, 504-06 (1980) (examining and delineating limitations of statistical studies using cases, differing institutions (courts), and court participants (litigants, attorneys) as sampling unit). Prior research used essentially a variant of one approach, studying a sample of participants. Our research combines case and participant study, thus attempting to avoid the limitations associated with a study oriented to one particular approach. See id. (suggesting that combining approaches may allow for more comprehensive evaluation of court processes, but admitting that analytical problems may result).
attorneys filing in federal court. The research reported in this Article, therefore, focuses on a sample of the national attorney population and on attorneys appearing in cases removed from state to federal court.

C. Removal Case Focus

Prior research on choice of forum in concurrent jurisdiction cases focused primarily on diversity cases. Only one researcher examined attorney choices in federal question cases. Both diversity and federal question cases need to be examined, however, if for no other reason than many cases exhibit both types of jurisdiction. We did not, therefore, limit ourselves by artificially distinguishing between the two types of cases in this study. Such an artificial distinction could result in ignoring similarities when they are present, or assuming similarities when they are not.

Prior research also focused primarily on plaintiff counsel because plaintiffs are responsible for the original filing decision. Yet, in an era when declaratory judgments are available, distinctions between the two types of counsel are misleading because a potential defendant has the opportunity to file a declaratory judgment action. Further, in most cases where federal jurisdiction lies, cases filed in state court may be removed from state to federal court. Hence, either through a declaratory judgment proceeding or through removal, defense attorneys can make forum selection choices almost as frequently as plaintiff attorneys.

Removal cases are the only cases in which both attorneys make explicit forum selection choices. First, plaintiffs counsel files in state court a case that could have been filed as an original matter in federal court. In most of these cases, defense counsel then decides

70. See Marvell, supra note 12 (surveying attorneys involved in student rights cases).
71. See Bumiller, supra note 46, at 753 (directing surveys to attorneys who made forum selection, including some defense attorneys utilizing removal).
73. 28 U.S.C.A. § 1441 (West Supp. 1991). The Supreme Court, however, has held that a declaratory judgment action is not removable if, but for the availability of the Act, the federal claim would have only arisen as a defense. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10-12 (1983).
74. Of course, the plaintiff attorney may try to defeat efforts by the defense attorney to select the forum through removal by adding non-diverse defendants or avoiding federal claims which may be present in the case. For example, the plaintiff might sue under a state discrimination law, although a federal discrimination law also applies. See Steinman, Removal, Remand, and Review in Pendent Claim and Pendent Party Cases, 41 Vand. L. Rev. 923, 941-42 (1988) (providing overview of problems associated with removal, including claim manipulation).
whether or not to remove\textsuperscript{75} the case to federal court.\textsuperscript{76} The major limitation on removal is that it must be accomplished within thirty days of receipt of the state court complaint.\textsuperscript{77} In diversity cases, the

\textsuperscript{75} Until 1988, a defendant had to file a verified petition for removal. In 1988, Congress altered this requirement so that the present procedure for a defendant to effectuate removal is to file a notice of removal with the federal court. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, \textsection 1016(b)(1), 102 Stat. 4642, 4669 (codified as amended at 28 U.S.C. \textsection 1446(a) (1988)). Notice of the removal filing must be given to both the plaintiff and the state court. 28 U.S.C. \textsection 1446(d) (1988). In 1988, Congress also chose to substitute Rule 11 sanctions for the requirement that a defendant post bond to pay costs should the federal court determine that removal was improper. \textit{See id.} \textsection 1446(a) (imposing requirement that notice of removal be prepared in accordance with Rule 11, which applies sanctions inclusive of attorney’s fees for failure to meet requirement that suit not be filed for any “improper purposes”).

\textsuperscript{76} 28 U.S.C.A. \textsection 1441(a) (West Supp. 1991). All defendants who are served by plaintiff must agree to removal. \textit{See} Chicago, R.I. & Pac. Ry. v. Martin, 178 U.S. 245, 248 (1900) (holding that under removal provisions of Act of Mar. 3, 1887, as corrected by Act of Aug. 13, 1888, 25 Stat. 433, which served as predecessor for 28 U.S.C. \textsection 1446, all defendants had to apply for removal, regardless of basis of jurisdiction); Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988) (stating that 28 U.S.C. \textsection 1446(a) requires that all known defendants, who have been properly joined and served, be party to petition for removal); Cornwall v. Robinson, 654 F.2d 685, 686-87 (10th Cir. 1981) (affirming remand to state court where removal petition failed to include all defendants); \textit{cf.} Bradley v. Maryland Casualty Co., 382 F.2d 415, 419 (8th Cir. 1967) (excepting defendants who are “nominal or formal or unnecessary . . . for removal purposes” from general rule of unanimity).

A few federal laws establishing causes of action permit the plaintiff to choose between federal and state court, but deny the defendant any right to remove. \textit{See} Chicago, R.I. & Pac. Ry. v. Martin, 178 U.S. 245, 248 (1900) (denying railroad right of removal for action brought in state court under Federal Employers’ Liability Act, 45 U.S.C. \textsections 51-60 (1988)). A plaintiff’s failure to object to removal in these nonremovable cases is taken as a waiver, and the case is treated as an original filing in district court. Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 705 (1972) (holding that once judgment has been entered, question is no longer whether removal was proper, but rather whether court had jurisdiction); Baggs v. Martin, 179 U.S. 206, 208-09 (1900) (stating that while jurisdiction may not be conferred by waiver, removal in and of itself does not confer jurisdiction).

There are several other types of actions where removal is authorized despite a lack of basis for original filing in federal court. \textit{See}, e.g., 28 U.S.C. \textsection 1442 (1988) (allowing removal by federal officer sued in state court for act done under color of law); 28 U.S.C. \textsection 1443 (1988) (permitting removal by defendant in state court who cannot secure civil right guaranteed by Constitution); 28 U.S.C. \textsection 1444 (1988) (granting removal to United States in suit brought against it).

Defendants cannot remove cases from state to federal court on the basis of a federal law defense, although the same types of concerns about consistency in interpretation of federal law are present regardless of who raises the federal issue. \textit{See} Arkansas v. Kansas & Tex. Coal Co., 183 U.S. 185, 188 (1901) (holding that defense rooted in federal question does not confer jurisdiction). A contrary rule, however, would permit removal of cases to federal court on the untested contention that a federal defense is present and necessary to the defense. This could lead to significant case management problems in handling plaintiff motions for remand to state court on the grounds that there is no federal issue present. Rule 11 sanctions might limit this problem, although such sanctions were not available when the rule limiting removal to plaintiff claims was first adopted. \textit{See supra} note 75 (discussing application of Rule 11 through Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, \textsection 1016(b)(1), 102 Stat. 4642, 4669 (codified as amended at 28 U.S.C. \textsection 1446(a) (1988)).

\textsuperscript{77} 28 U.S.C. \textsection 1446(b) (1988). An exception to this limitation is made for cases where removal is not authorized when the case is first filed, but subsequent events create a basis for removal. In such cases, the defendant may remove the case if done so promptly. Nicholsonstone Cos. v. ECAM Publications Inc., 742 F. Supp. 432, 433-34 (M.D. Tenn. 1990). An example of this might be a situation in which defendants include a party whose state of residence is the state where the case is filed, but where the in-state defendant is subsequently voluntarily dis-
right to remove is limited to out-of-state defendants. Defendants sued in a state court of their residence by an out-of-state plaintiff may not remove to federal court. A plaintiff may move for remand to state court based on procedural defects or lack of subject matter jurisdiction, such as no diversity of citizenship.

Using removal cases to define the statistical universe is especially interesting for two reasons. First, removal cases are initially filed in state court, where most cases are traditionally heard. This is contrary to the focus on plaintiff attorneys in prior research which implied that federal court filings are the norm. Second, removal cases are not uncommon, making them a policy-significant factor, independent of their relationship to original filings. Viewed from the perspective of the federal courts, removal cases constitute about 11-12% of all private litigant case filings each year.

D. An Initial Analysis of Removal Cases

1. Identifying the universe of removal cases

Initially, it was necessary to undertake a preliminary analysis of the universe of removal cases to determine the size of the case universe and to examine its principal characteristics. The removal case universe was established from the database created by the Administrative Office of the United States Courts (AOC) of all private party

missed by the plaintiff. *Id.* at 434. Involuntary dismissal, such as by action of the court in granting a directed verdict or summary judgment, does not create diversity. *See* Whitcomb v. Smithson, 175 U.S. 635, 637-38 (1900) (holding that when judgment is entered on merits for one defendant, other defendants cannot subsequently remove); *In re Iowa Mfg. Co.*, 747 F.2d 462, 463 (8th Cir. 1984) (indicating that when diversity occurs following summary judgment in favor of only one defendant, jurisdiction created is involuntary and therefore unremovable). Recent amendments to the removal statute limit the right of removal in diversity cases that emerge after the original filing/complaint to within one year of the plaintiff's filing or serving of summons and complaint. *Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b)(2), 102 Stat. 4642* (codified as amended at 28 U.S.C. § 1446(b) (1988)).

79. *Id.*
80. *See id.* § 1447(c) (requiring filing of plaintiff motion for remand based on procedural defects such as untimely removal, lack of subject matter jurisdiction, or failure to comply with other requirements of the Federal Rules of Civil Procedure). Remands by a district court to the state court are not generally appealable. *See* Rothner v. City of Chicago, 879 F.2d 1402, 1405-07 (7th Cir. 1989) (reviewing history of appealability of lower court remand decisions in holding that appellate court could review decision).
81. *1987 Annual Report of the Director of the Administrative Office of the United States Courts* 7, 109 (1988) [hereinafter *Annual Report*] (reporting total of 238,982 civil cases filed in United States district courts in 1987, of which 166,960 were private civil actions; 21,070 cases were removals from state courts). For 1990, a total of 217,879 civil cases were brought in district courts. Of these, 25,924 (12%) were filed as removals from state court. *1990 Annual Report of the Director of the Administrative Office of the United States Courts* 79.
cases removed to federal district court for Fiscal Year (FY) 1987.\textsuperscript{82} The database consisted of 238,982 civil cases filed in FY 1987.\textsuperscript{83} Of these, 21,070 were removal cases.\textsuperscript{84} Excluding cases involving the federal government as a party, there were 18,860 private party cases removed from state to federal court in FY 1987.\textsuperscript{85}

2. The subject matter jurisdiction of the removal cases

Analysis of the removal case universe revealed that federal questions comprised 31\% of the private party cases, while diversity jurisdiction cases made up 69\%.\textsuperscript{86} The most prevalent actions were contract, tort, and product liability cases, totaling 72\% of all private party removal actions.\textsuperscript{87} Not surprisingly, the great proportion (91\%) of these lawyers' "bread and butter" cases were diversity actions. Additionally, these actions included some federal question cases based on the Miller Act\textsuperscript{88} or the Jones Act.\textsuperscript{89}

\textsuperscript{82} The year 1987 was selected because it was the most recent year for which a computerized database was available at the time this study commenced.

\textsuperscript{83} See ANNUAL REPORT, supra note 81, at 6.

\textsuperscript{84} Id. at 109.

\textsuperscript{85} This figure is based upon a computer tape run by the Inter-university Consortium for Political and Social Research (ICPSR) which is the repository of tapes created by the Administrative Office of the United States Courts (AOC). The computer tape run utilized codes developed by the AOC and, as such, have some errors in case identifiers. See infra notes 114, 123-24 and accompanying text (discussing existence of coding errors in database).

\textsuperscript{86} Of the 18,860 private party removal cases, 5902 were federal question cases and 12,598 were diversity actions. In addition to these cases, the Federal Government removed 2000 cases to federal court. Thus, approximately 6\% of all removal cases involved federal question subject matter jurisdiction. In comparison, the ALI Study reported that federal question removal cases numbered only 165 for FY 1959 and FY 1960, with similar numbers in FY 1964. ALI STUDY, supra note 10, at 192 (referring to Annual Report of Director of the Administrative Office for 1960). This indicates that the proportion of such cases among all federal question cases has grown significantly from 0.8\% to about 6\% today. One possible reason for this growth is an increase in filing federal question cases in state court. In 1960, there were far fewer federal laws authorizing private litigant suits than there are today. See Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2000e-5 (1988) (prohibiting employment discrimination under Title VII of Civil Rights Act of 1964); see also 42 U.S.C. § 1983 (1988) (granting "civil action for deprivation of rights" ensured by Constitution). Active adjudication under section 1983 did not begin until the Supreme Court decision in Monroe v. Pape, 365 U.S. 167 (1961), overruled in part, Monell v. Department of Social Servs., 463 U.S. 137 (1983).

\textsuperscript{87} See ANNUAL REPORT, supra note 81, at 177 (reporting that out of 238,982 civil cases filed, 69,540 were contract actions, 42,947 were tort actions, and 14,145 were product liability actions).


Among private party removal actions, the most prevalent federal question cases were labor law claims, including employment discrimination cases. Also prevalent were section 1983 cases and other civil rights' actions. A small number of the removal cases were brought under laws granting exclusive jurisdiction to the federal courts or denying removal jurisdiction for concurrent jurisdiction cases filed in state court.

3. Geographic variations among the removal cases

The study also found a geographic clustering of removal cases. Seven district courts accounted for 30% of the 18,860 private party removal cases. In order of number of filings, the seven districts with


94. See supra note 76 (discussing nonremovability of claims under Federal Employers' Liability Act). The end result is that the plaintiff's choice of forum is the only one permissible.
the largest number of removal cases in FY 1987 were: Eastern Michigan (Detroit), Central California (Los Angeles), Eastern Louisiana (New Orleans), Eastern Pennsylvania (Philadelphia), Northern California (San Francisco), Southern Texas (Houston), and South Carolina.\textsuperscript{95} Although removal cases comprised about 11.3\% of the total FY 1987 private party filings in federal district court,\textsuperscript{96} their significance in these jurisdictions with high numbers of filings varied from the national average.

High proportions of removal cases to original filings occurred in the districts of Eastern Michigan (25\%); South Carolina (28\%); and Northern California (21.5\%).\textsuperscript{97} In contrast, in Eastern Pennsylvania, removal cases made up only 7.7\% of original filings.\textsuperscript{98}

4. Characteristics of the clients in the removal cases

Eighty-two percent of the plaintiffs in the removal cases were individuals. In contrast, corporations constituted 62\% of the defendants in these cases. One surprise was that 16.6\% of all defendants were foreign nationals, including individuals, corporations, and countries. In-state plaintiffs made up 86.3\% of all plaintiffs for whom residence information was available.\textsuperscript{99} In-state defendants, however, made up only 8.7\% of all defendants for whom information was available.\textsuperscript{100} Thus, the typical removal case involved an in-state individual plaintiff suing an out-of-state corporation.

5. Other characteristics of the removal cases

Procedural advantages may exist for either party by filing in federal court. These procedural advantages include differences in class action certification\textsuperscript{101} and case transfer to a more convenient forum.

\textsuperscript{95} Of the 18,860 total removal cases, 5656 were from these seven jurisdictions: Eastern District of Michigan, 1216 cases; Central California, 1086 cases; Eastern Louisiana, 761 cases; Eastern Pennsylvania, 757 cases; Northern California, 694 cases; South Texas, 605 cases; South Carolina, 537 cases.

\textsuperscript{96} ANNUAL REPORT, supra note 81, at 177 (reporting 166,960 private party filings in federal district court).

\textsuperscript{97} Other district courts where removal cases constituted over 20\% of private party original filings were Western Louisiana (21.9\%), Southern Mississippi (28.4\%), Southern California (22\%), Southern Illinois (21.6\%), and Northern Mississippi (23.5\%).

\textsuperscript{98} Other jurisdictions with relatively low removal rates compared to total private filings were the districts for Southern New York (5.5\%), Northern Illinois (4.5\%), Northern Ohio (6\%), Eastern Virginia (5.6\%), Arizona (7\%), and Eastern Texas (6.2\%).

\textsuperscript{99} A total of 11,248 of the 13,032 plaintiffs were in-state.

\textsuperscript{100} Only 1136 of the 13,032 defendants were in-state.

\textsuperscript{101} The federal rules for class certification may be more restrictive than those used by many state courts. See Caruth v. Superior Court, 50 Cal. App. 3d 960, 974, 124 Cal. Rptr. 376, 386 (1975) (permitting alternatives to individualized notice, as long as notice is "meaningful" or has "reasonable chance of reaching a substantial percentage of the class"); Mitchem v. Melton, 277 S.E.2d 895, 898-99 (W. Va. 1981) (stating that state rules of civil procedure
The data obtained through the computer tape indicates that these differences are rarely relevant. Of the 18,860 private party removal cases, class action allegations were filed in only thirteen cases by the close of FY 1987. Furthermore, only nineteen removal cases were transferred by the close of the fiscal year from the court of filing to another federal district court.\(^{102}\)

A more common scenario is the inappropriate removal of state court cases to federal court. As of March 1991, federal courts remanded 2737 of the 18,860 removal cases (14.5\%) to state court.\(^{103}\) The remanded cases did not significantly differ from the larger universe of cases on a jurisdictional basis. Federal question cases comprised 31.3\%, while diversity cases made up 68.7\% of remanded removal cases. Only twelve of these cases involved nonremovable federal law based actions, for example, actions involving the Federal Employers' Liability Act.\(^{104}\) Hence, the bulk of the remanded cases probably involved nondiversity of parties\(^{105}\) and erroneous contentions that plaintiff had alleged a violation of federal law.\(^{106}\)

### III. The Results of the Study: Forum Selection Decisions by Attorneys

Existing empirical research does little to explain conclusively why attorneys often choose federal court forums in preference to state court forums in concurrent jurisdiction cases. We also do not know, on the basis of past systematic study, whether or not there are sound policy reasons for allowing or encouraging either the removal of state cases to federal court jurisdiction or the original filing of state law cases in federal forums under diversity jurisdiction. In fact, prior empirical research not only fails to answer important policy

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102. While we have anecdotal reports that the desire to join cases filed by different plaintiffs in both state and federal court motivated the removal, these reports do not permit statistical estimates of frequency of that occurrence.


104. See supra note 76 (discussing nonremovability of Federal Employers' Liability Act).

105. The computer tape run revealed that for the 1674 cases filed and remanded in FY 1987, 180 of the defendants were citizens of the state in which suit was brought, thus ineligible to remove in diversity matters to federal court. 28 U.S.C. § 1441(b) (1988). Of course, some of these cases, but not all, involved federal question matters, in which diversity is not required.

106. See supra note 76 (explaining that defendants cannot remove cases from state to federal court on basis of federal law defense).
questions about forum selection, it offers little guidance about future directions for research.

Fortunately, the continuing policy debate over these questions has produced some plausible hypotheses to test in substantive research. One such hypothesis, for example, is that the perceived bias in state court against out-of-state parties is distinguishable from perceived bias against parties based on their business status. A second source of testable hypotheses is our own preliminary analysis of removal cases in federal court. For example, we observed geographic variations in removal cases in federal district courts, which suggested that local legal culture is a relevant factor in attorneys' forum selection decisions. Thus, our research design has been influenced by both the policy debate and preliminary observations, as well as by prior empirical studies.

A. The Forum Selection Study Design

We designed our forum selection study to gather information through a two-phase process. First, we conducted a mail survey of attorneys appearing in a sample randomly selected from all removal cases filed in federal district courts during FY 1987. Second, we conducted telephone interviews with sixty attorneys appearing in recently decided cases in federal district court in four jurisdictions. Two of the districts chosen had a relatively high use of removal process, while two districts served as "control" districts. Results of the two study components, mail surveys and telephone interviews, are combined below for the purpose of analysis and discussion.

1. Study sample generation and survey procedures

Starting with a study universe of 18,860 removal cases filed during FY 1987 in federal district court, we randomly selected a study


108. See supra notes 95-98 and accompanying text (discussing geographic variations in removal cases).

109. The four-page survey questionnaire is reproduced in the Appendix.

110. The cases were identified from the LEXIS computer information system. We sent letters to 100 attorneys detailing the project's purposes. Later, we successfully telephoned sixty attorneys, posing open-ended questions about if and why the attorneys preferred one court over the other. We also asked for background information including whether the attorney generally represented plaintiffs or defendants, area of legal expertise, and years of practice.

111. These were the districts for Eastern Michigan and South Carolina.

112. These were the districts for Eastern Virginia and Northern Illinois, which have relatively low proportions of removal cases compared to their total private litigant docket.
sample of 600 cases. By and large, our random sample process resulted in a study sample that closely reflects the relevant characteristics of the larger universe of removal cases. For instance, all but five of ninety federal district courts in the United States and Puerto Rico are represented by cases in the sample. Federal question cases constituted 29.7% of the sample cases, compared to 31% in the study universe. Contract, tort, and product liability cases amounted to 72% of our sample cases, the same percentage as that for the universe of removal cases. Individual plaintiffs represented 86% of all plaintiffs for whom data was available, compared to 82% in the study universe. Corporations constituted 59% of the sample defendants, compared to 62% in the study universe.

We next identified the attorneys appearing in the selected cases by obtaining copies of the case face sheet from the clerks of the respective federal district courts. Face sheets are prepared for each case at the time of filing and are updated by court clerks. In addition to listing such information as docket number and date of filing, the face sheets carry the names of all the parties in the case, the attorneys' names and addresses, and usually the nature of the claim. This process of checking face sheets ultimately yielded the names and addresses of 1158 attorneys for our study sample.

The survey was then mailed to lead plaintiff and defense attorneys appearing in the case. Enclosed with the mailing was a self-addressed, postage-paid return envelope to encourage attorneys to respond to the survey. A second mailing was sent about two months after the first mailing to attorneys who had not yet responded. The intent of the second mailing was to increase the response rate to the survey. Finally, telephone calls were made to seek clarification from

113. The five districts not represented in the sample cases are the districts for the District of Columbia, Eastern North Carolina, Maine, South Dakota, and Vermont. These courts saw approximately 1% of all removal cases filed in federal district court during FY 1987 (197 out of 18,860). Four other districts with a low proportion of removal cases are included in the sample. These four districts, whose 131 removal cases are represented in the sample by seven cases, are the districts of Delaware, New Hampshire, Western Wisconsin, and Wyoming.

114. This was a smaller number of attorney names than expected from 600 sample cases. This was the result of three factors. First, we eliminated cases miscoded in the removal-case universe, for example instances where the district court reported that no such case could be found in their files, or where the face sheet showed that it was an original filing, not a removal case. Second, a few attorneys appeared in two or more sample cases, either representing the same client or suing the same defendant. Third, in a number of cases, no attorney was listed on the filing papers, nor could the district court provide an attorney name.

115. Procedures to obtain correct addresses began with the names and addresses provided on the face sheets. In most cases, these were verified and updated, as required by using legal directories and telephone listings. Where more than one attorney appeared in a case, we attempted to select the attorney most likely to have made the forum selection decision. For example, a plaintiff counsel located in a city some distance from the federal court was selected over an attorney whose office was in the city where the federal court heard the case upon removal.
a few respondents whose survey returns appeared to be inconsistent or confusing.¹¹⁶

2. Overview of mail survey contents

The mail survey itself consisted of forty-four questions, mostly requiring simple responses such as check-off responses.¹¹⁷ The survey questions were of three kinds. First, nine questions asked about case and attorney background. Second, thirty-two questions asked about the comparative importance of factors potentially relevant to forum selection decisions. Finally, two questions asked the attorneys to provide written, open-ended comments either to expand on their responses to the forum selection questions or to report the impact of removal on case outcome.

a. Questions on attorney and case background

The survey first asked nine questions about background information regarding the attorney responding, the client, the local jurisdiction, and the identity of the person making the forum selection decision.

b. Questions on reasons for selecting forum

The thirty-two structured forum selection questions first asked about the presence of local bias directed against either party in the case. Other questions asked about the relative merits of the two courts with respect to competence of the judiciary, procedural burdens, geographic convenience, or costs. The structured questions reflected the prior research showing that there are four main rationales at work in forum selection.¹¹⁸ First are several common reasons perceived to be potentially outcome determinative, including fears of state court bias or beliefs about the effect of more competent judges. Second, is the concern about the pace and cost of litigation. Third, is the infrequent intent to "jerk my opponent around," as some respondents expressed it. We may infer that such conduct is expected to affect settlement discussions or to produce tactical advantages if the opposing counsel is unfamiliar with federal

¹¹⁶ For example, a few defense attorneys responded to the structured questions that they preferred state court judges and juries, but indicated to the open-ended questions that federal judges and juries were superior to their state court counterparts.

¹¹⁷ Mail survey questions are reproduced in the Appendix.

court procedures. Neither of these "opponent inconvenience" motives, however, are directly related to trial outcome. Fourth, are the factors that relate to attorney convenience. All else being equal with respect to outcome, forum choice is likely to be based upon what is easiest for the attorney.119 Wording of the survey questions about forum selection decisions distinguished between the perceived presence of bias in a case and other forum selection reasons.

Nine questions about bias asked about the degree to which the presence of bias in the state court was expected to affect the attorney's client in the case.120 The survey also asked respondents to report the presence of any unfavorable bias affecting the opposing party.

The remaining twenty-three questions asked the extent to which each factor, such as overall competency of the judiciary, was a significant reason for the attorney's filing for removal decision. Attorneys indicated their responses on a five-point scale, showing perceived presence of the particular factor in either court, state or federal, and the extent to which either court presented a "strong" or "very strong" advantage in selection. That is, respondents selected very strong or strong state court advantage, very strong or strong federal court advantage, or indifferent. Failure to answer a question was treated in result tabulation as an "indifferent" response to ensure that a constant base (denominator) was used to compare the relative importance of each factor in forum selection choices.121

The end of the questionnaire provided respondents an opportunity to report on the effect of removal on case outcome and to explain in detail the significance of their reasons for forum-filing choices.

B. The Forum Selection Study Findings

The higher the response rate, the greater our confidence would be in the accuracy of the survey results in representing the larger universe from which the sample was drawn.122 For all but complete

119. A few of the questions labeled "outcome determinative" may also cover some "attorney convenience" elements, including judicial pretrial involvement, as distinct from burdensome pretrial requirements, and judicial familiarity with the substantive law issues. Even in cases where this is not potentially outcome determinative, judicial unfamiliarity with substantive law may require attorneys to make extra efforts and incur costs directed at educating the judge.

120. Responses used a five-point scale to distinguish between very favorable, favorable, no difference, unfavorable, or very unfavorable bias.

121. Failure to answer could mean either indifference or nonrelevance of a choice factor. For example, the question about the importance of a local arbitration rule could be responded to by saying no such rule exists (nonrelevance), or by saying it was not important.

122. See SLONIM, supra note 67 (discussing general and applied principles of statistical
censuses, comparison between the sample and the larger universe from which the sample was drawn provides information about the validity of generalizations from the sample responses to the universe.

1. Survey respondents

From the sample of 1158 attorneys, the survey was actually mailed to 1092 attorneys representing private litigants in removal actions filed during FY 1987. From the survey mailing, 553 attorneys responded for a 50.6% response rate. Of the 553 surveys returned, 71 responses were not usable. In sum, we received 482 surveys that provided useful answers for an overall effective response rate of 44.1%.

The defense attorneys’ response rate to the survey was higher than that for plaintiff attorneys. The usable survey response rate for defense counsel amounted to 52.7%, 288 respondents, compared to 35.5%, 194 respondents, for plaintiff attorneys. Respondents to the survey, by and large, represented the removal case universe, with one exception. The major difference between the sample and the removal case universe was that diversity cases were much more prominent in the sample than in the study universe. Reciprocally, federal question cases were underrepresented.

Among defense attorneys, diversity cases made up 77.1% of the

123. This lesser figure resulted from two circumstances: The United States Postal Service returned forty-two surveys as undeliverable, including six cases in which one of the parties appeared *pro se* and whose current addresses were therefore unavailable from any law directory, and twelve cases, with 24 lawyers, in which the United States was party. In most instances, the United States party was either the Federal Deposit Insurance Corporation (FDIC) or the Federal Savings and Loan Insurance Corporation (FSLIC), and had taken over a failed bank or savings and loan earlier involved in the litigation. *Cf.* 12 U.S.C. § 1819(4) (1988) (specifying that United States district courts have original jurisdiction in FDIC cases, regardless of amount in controversy); 12 U.S.C. § 1730(k)(1) (1988) (providing exception to original jurisdiction where FSLIC is receiver of state-chartered institution and where claims arise only under state law). *But see* W-V Enterprises v. North Kan. Sav. Ass’n, 628 F. Supp. 1261, 1263 (D. Kan. 1986) (remanding FSLIC removal action to state court as falling within exception to federal jurisdiction). It is also possible that there were additional cases with the United States as a party among those not responding to the survey.

124. These included: miscoding of cases as removal cases when they were in fact original filings in federal court; plaintiff attorney providing reasons for why defense attorney had removed; inability to remember case, and only background information provided; attorney saying that client confidentiality precluded cooperation in survey; or attorney deceased, retired, no longer member of firm, or no forwarding address known. The unusable responses also included 10 cases in which the structured answers were in conflict with the attorneys' written comments or had similar problems, suggesting either that the attorneys had misunderstood the survey or that the case had been an original filing in federal court, not one involving removal. An inability to verify responses in these cases through contacting the attorneys resulted in their exclusion from the survey.
cases for which responses were provided. This compares to 69% diversity cases among all removal cases, notwithstanding that the usable survey response rate for defense attorneys exceeded 50%. Among plaintiff attorneys, diversity cases were only slightly more numerous than they are in the removal case universe, 71.7% compared to 69%.

a. Characteristics of attorneys responding

The two types of counsel, plaintiff and defense attorneys, had different characteristics, as displayed in Exhibit 1. First, the plaintiff attorneys responding were more likely to practice in smaller urban and suburban areas than defense counsel, who were more likely to practice in major urban areas. Since federal courts are generally located in a state’s major urban areas, this finding is not surprising. Defense counsel is not likely to remove cases to geographically inconvenient courts. Geographic differences between plaintiff and defense attorneys are not statistically significant.

Exhibit 1
RESPONDENT CHARACTERISTICS BY TYPE OF COUNSEL

<table>
<thead>
<tr>
<th></th>
<th>Plaintiff Attorneys (n=194)</th>
<th>Defense Attorneys (n=288)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median Year of Admission</td>
<td>1975</td>
<td>1976</td>
</tr>
<tr>
<td>Litigation Practice Proportion*</td>
<td>81%</td>
<td>95%</td>
</tr>
<tr>
<td>Federal Court Litigation Proportion*</td>
<td>10%</td>
<td>44%</td>
</tr>
<tr>
<td>Major Urban Filing/Practice</td>
<td>59%</td>
<td>65%</td>
</tr>
<tr>
<td>Urban/Suburban Filing/Practice</td>
<td>24%</td>
<td>19%</td>
</tr>
<tr>
<td>Rural Filing/Practice</td>
<td>17%</td>
<td>16%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

* Differences between characteristics of plaintiff and defendant attorneys are statistically significant using Chi-square at the .01 level.

125. Respondents were asked to designate one of three geographic areas: major metropolitan area in state; urban or suburban area; or, rural area of state.

126. Statistical significance refers to the likelihood that an apparent difference in a sample or two subgroups can be generalized reliably as a real difference in the study universe. By convention, statistical significance is measured by either of two standards. The .01 level indicates that there is only one chance in one hundred that an apparent difference is not real. The .05 level means that there are five chances in one hundred that the apparent differences are not real. See Kaye, Is Proof of Statistical Significance Relevant?, 61 WASH. L. REV. 1333, 1342-15 (1986).

The Chi-square test to determine statistical significance is used in this survey for two reasons. First, it can be used to test differences where the underlying data is of a categorical, as distinguished from a continuous, variety. That is, Chi-square tests significance of data based upon groupings, for example five attorneys reported x. Other tests of significance, such as the F or t tests require continuous data, such as test scores to develop arithmetic averages for comparison. Second, the Chi-square does not make any assumptions about how the population being studied is distributed in the real world. Many other tests of significance assume population distributions such as the normal or bell-shaped curve distribution. See D. BARNES
Plaintiff and defense attorneys did not differ significantly with respect to experience, as measured by years in practice or overall litigation experience. The median year of admission to the bar was 1975 for plaintiff attorneys and 1976 for defense attorneys responding to this question. Defense attorneys claimed a higher percentage of their practice (95%) to be in litigation work than did plaintiff attorneys (81%). Defense attorneys also reported a much higher level of federal court experience than did plaintiff attorneys. Forty-four percent of defense attorneys' litigation practice was in federal court, compared to only 10% for plaintiff attorneys.

b. Characteristics of clients

The attorneys' clients had characteristics similar to those reported for the removal case universe. Exhibit 2 shows how client types are distributed with respect to the two types of counsel. Plaintiff attorneys represent individuals in 75% of the sample cases. Privately owned corporations comprised an additional 15% of plaintiff attorneys' cases, with other types of businesses making up most of the remainder. Defense attorneys primarily represent businesses, with insurance companies and publicly owned corporations each equaling 30% of the defense clients. Defense attorneys represent individual citizens in 9.4% of cases and state or local government in 3.2% of cases.

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127. See supra notes 99-100 and accompanying text (discussing characteristics of clients in removal case universe).

128. One other attribute of the respondent pool was that victorious plaintiff attorneys seemed to have been more likely to respond to the survey than were nonvictorious attorneys. Of the plaintiff respondents, 20.7% reported a plaintiff victory. Plaintiff counsel reports amounted to 62% of all reports of plaintiff victory from either type of counsel. This was a higher percentage than would be expected based on their 40.3% share of the total respondent population. Among defense attorneys, however, reports of defense victories were not as greatly overrepresented. Although 33.5% of defense counsel respondents reported a defense victory, reports of defense attorney victory by a defense counsel comprised 67% of victory reports. Defense attorneys amounted to 59.7% of all respondents.

Defense attorney successes were overrepresented, however, when compared to the study universe. Federal Judicial Center statistics for FY 1987 case filings indicate that 10% of all removal cases resulted in a victory through pre-trial ruling, such as summary judgment or dismissal for lack of jurisdiction. See supra note 105 (crediting federal case statistics to Joseph Cecil of Federal Judicial Center). Defense counsel responses to the survey question about case outcome showed 15.8% of the cases were resolved by such pre-trial rulings. In contrast, plaintiff attorneys reported pre-trial rulings in only 9% of the cases, compared to 10% in the study universe.
EXHIBIT 2
REMOVAL CASE CLIENTS BY TYPE OF COUNSEL

<table>
<thead>
<tr>
<th>Client Type</th>
<th>Plaintiff Attorneys</th>
<th>Defense Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(n= 194)</td>
<td>(n=288)</td>
</tr>
<tr>
<td>Individual</td>
<td>75.1%</td>
<td>9.4%</td>
</tr>
<tr>
<td>Foreign National Company</td>
<td>1.0%</td>
<td>5.2%</td>
</tr>
<tr>
<td>Insurance Company</td>
<td>1.6%</td>
<td>30.7%</td>
</tr>
<tr>
<td>Private Company</td>
<td>15.0%</td>
<td>17.8%</td>
</tr>
<tr>
<td>Publicly Owned Corporation</td>
<td>3.1%</td>
<td>30.3%</td>
</tr>
<tr>
<td>Other</td>
<td>4.2%</td>
<td>6.6%</td>
</tr>
</tbody>
</table>

* The differences in the distribution of client types are statistically significant using Chi-square at the .01 level.

2. Reasons given for selection of forum

As Exhibit 3 illustrates, the outcome-determinative factors relating to judicial qualities and local bias were the strongest forces in defense attorneys' forum selection decisions. Among plaintiff attorneys, by contrast, most important were attorney convenience and the pace and cost of litigation, factors that are not outcome determinative. For plaintiff attorneys, jury-related issues were the most important outcome-related factors for case filing.

EXHIBIT 3
IMPORTANCE OF FORUM SELECTION FACTORS BY TYPE OF COUNSEL**

<table>
<thead>
<tr>
<th></th>
<th>Plaintiff Attorneys</th>
<th>Defense Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Reporting</td>
<td>Reporting</td>
</tr>
<tr>
<td></td>
<td>State Court Advantage</td>
<td>Federal Court Advantage</td>
</tr>
<tr>
<td>Bias*</td>
<td>44.9%</td>
<td>77.4%</td>
</tr>
<tr>
<td>Outcome Determinative Factors</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judge Qualities*</td>
<td>26.3%</td>
<td>85.4%</td>
</tr>
<tr>
<td>Jury Impact*</td>
<td>47.4%</td>
<td>57.6%</td>
</tr>
<tr>
<td>Law Rulings*</td>
<td>25.3%</td>
<td>53.5%</td>
</tr>
<tr>
<td>Court Rules*</td>
<td>24.7%</td>
<td>60.4%</td>
</tr>
<tr>
<td>Cost and Convenience Factors</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney Convenience</td>
<td>64.4%</td>
<td>61.5%</td>
</tr>
<tr>
<td>Opposition Inconvenience</td>
<td>14.9%</td>
<td>17.9%</td>
</tr>
<tr>
<td>Pace/Cost</td>
<td>58.2%</td>
<td>58.7%</td>
</tr>
</tbody>
</table>

* The differences between plaintiff and defense counsel citing bias as a forum selection factor are statistically significant using Chi-square at the .01 level.

** The percentages detailed in this table combine respondent answers reporting either a "strong" or "very strong" court advantage to at least one question under each factor to generate the overall court-favoring score of that factor.

The survey findings represent responses from about 44% of the attorneys surveyed. Separate results are presented for each attorney type so as to identify the factors associated with each type's fo-
rum choice. Responses indicating that a factor presented either a “strong” or “very strong” court advantage for the client are typically combined to present a single measure of court preference, although, in a few instances, separate reporting is made of the “very strong” court advantage measure. Included with the statistical results are presentations of the findings from over 300 anecdotal or written comments offered by respondents. As appropriate, we have noted the results of statistical significance tests to show whether apparent sample differences are large enough to warrant a conclusion that there are true differences in the study universe.129

Examining the strength of the forum selection factors by examining only responses citing “very strong” court advantage does not greatly change the overall analysis of the relative importance of these choice factors to each type of attorney. Comparisons across types of attorneys, however, do show two differences. First, 35.1% of the plaintiff attorneys cited attorney convenience as a “very strong” selection factor, reflecting primary importance for these attorneys. In contrast, only 21.9% of the defense attorneys said attorney convenience was a “very strong” selection factor. The two types of attorneys have nearly the same combined score, however, of “strong” plus “very strong” responses (64.4% combined score for plaintiff counsel and 61.5% for defense counsel). This difference between plaintiff and defense attorneys’ citing of “very strong” attorney convenience is now statistically significant.

Looking at a second forum-selection factor, concerning jury-related issues, and again examining only “very strong” responses, leads to a different analytical outcome. Jury-related issues as a selection factor are important (i.e., “strong” and “very strong” combined) for 47.4% of plaintiff attorneys and 57.6% of defense attorneys; this difference across types of attorney is statistically significant. If we differentiate between levels of strength, however, and consider only respondents specifying “very strong,” then the difference between plaintiff attorneys (17.5% “very strong”) and defense attorneys (21.5% “very strong”) is not statistically significant.

a. Cost and convenience factors

i. Attorney convenience

“Attorney convenience” refers to the common tendency to choose that action with which one is most familiar, or which is the least troublesome. In cases where forum differences have no impact

129. See supra note 126 (discussing statistical techniques used in study to determine significance).
upon case outcome, attorney convenience is likely to dominate as a forum selection factor.\textsuperscript{130} Plaintiff attorneys reported attorney convenience as the most important reason to choose state court. Almost two-thirds (64.4\%) of the 194 plaintiff attorneys responding cited either state court geographic convenience, familiarity with the state court, or the relative absence in the state courts of burdensome pretrial requirements as factors in their forum selection.\textsuperscript{131} Moreover, 35.1\% of plaintiff attorneys cited at least one of these attorney-convenience reasons as providing a "very strong" court advantage. Attorney convenience was by far the most important of all the forum selection factors using this measure of factor strengths.

For defense counsel, in contrast, attorney convenience was not as important a reason for removal as other factors, although nearly as many defense counsel cited court convenience as a factor in forum selection (61.5\%) as did plaintiff attorneys (64.4\%). The difference between the two attorney types was most notable when attorneys indicated the strength of importance. Only 21.9\% of defense attorneys cited attorney convenience as providing a "very strong" court advantage, compared to 35.1\% of plaintiff attorneys.

The background information that attorneys supplied about themselves on the mail survey supports the finding that attorneys select the court with which they are most familiar (Exhibit 1). Plaintiff attorneys are less likely to be litigators (81\%, compared to 95\% for defense counsel), and state court is perhaps expected to be less inhospitable to less-experienced litigators. Plaintiff attorneys are also less likely to practice in federal court (10\%, compared to 44\% federal court litigation practice for defense attorneys). Thus, defense attorneys are more likely than plaintiff attorneys to be both litigators and experienced in federal court.

The defense attorneys reporting higher levels of federal court experience also reported higher levels of comfort in removing to federal court. For those defense attorneys with less than 20\% of their practice in federal court, only 40.1\% said familiarity with federal practice was a factor in removal decisions. But among those defense attorneys whose federal practice comprised over 50\% of their prac-

\textsuperscript{130} Attorney convenience was directly represented on the survey in questions asking about the attorney's greater familiarity with either type of court, and the geographic convenience of either court for the attorney or the client. A third question asked whether pretrial requirements, such as frequent status calls, affected the attorney's choice of forum.

\textsuperscript{131} All three of these reasons for forum selection showed statistically significant differences between the plaintiff and defense attorneys using Chi-square at the .01 level.
practice, 77% said familiarity with federal court was a factor in removing cases from state to federal court.

Among the several survey questions exploring this choice factor, geographic convenience of the court was most relevant for defense attorneys appearing in cases filed in a rural state court. Of the forty-six defense attorneys reporting a rural state court forum, 41% said that geographic convenience was a significant reason for their removal decisions. In comparison, of the other 221 defense counsel who answered this question, only 19% cited this factor as affecting their removal decisions. Written comments by the respondents amplify these generalized findings. A few plaintiff attorneys reported that they favored state court because the judges are easier to work with and do not have the "arrogance" of federal judges. In another instance, defense counsel removed three cases to permit merger of the cases into other, ongoing litigation in federal court involving the same defendant. In two other cases, the federal court transferred the case to a more convenient venue for the defendant. The responses from the telephone interviews were of a similar nature, with several attorneys reporting an uneasiness with treatment of counsel by federal judges.

ii. Opponent inconvenience

"Opponent inconvenience" is a tactic used to influence settlement prospects, although it has no relation to the strength of the substantive case. In essence, this tactic is used to erode the opposing party's willingness to continue litigation. As shown in Exhibit 3, plaintiff and defense attorneys did not differ materially in weighing the effect of opponent inconvenience on forum-selection decisions: 17.9% of defense counsel and 14.9% of plaintiff counsel cited this as a factor.

Looking at the two components making up the opponent inconvenience factor, geographic inconvenience and higher litigation costs...
costs, both types of attorneys agreed that federal court litigation is more expensive to undertake. Geographic inconvenience of state court, however, may also result in increased state court costs for the defense. Still, 57% of the plaintiff attorneys expressing an opinion on opponent costs agreed with defense counsel that federal court imposes higher litigation costs upon the opposing party. The written comments largely mirror these views. Twenty-nine attorneys said costs were increased by removal, while ten said they were reduced. Nine of the ten, however, referred to summary judgment availability as the reason for reduced costs. One attorney observed in the written comments that higher cost for the opponent was the primary reason for removal.

The written comments also suggest that there are other components to opponent inconvenience, beyond the obvious geographic and cost issues. For example, three defense attorneys reported removing in the hope that their less-experienced opposing counsel would be unfamiliar with the federal rule requiring a written demand for jury trial.135 Four other defense attorneys reported that they removed simply to annoy opposing counsel or because filing in federal court would remove whatever advantage plaintiff counsel thought would come from filing in state court. Finally, one plaintiff attorney reported that the defendant used removal to gain time to become judgment proof.136

iii. Pace and cost of litigation

As with opponent inconvenience, the client's cost and the pace of case processing can be major factors in both the decision to sue and in the client's willingness to enter into settlement negotiations independent of the merits of the case itself.137 Overall, plaintiff and

137. Attorneys were asked if they preferred a faster or slower case process, when such choice was available. In the same vein, attorneys were asked which court promised lesser litigation costs. Litigation costs decrease a plaintiffs' net recovery, while they increase the net amount of damages paid by a defendant. See D. Trubek, J. Grossman, W. Felstiner, H. Kritzer & A. Sarat, Civil Litigation Project: Final Report 553-67 (1988) (comparing plaintiff success, as measured by amount of recovery minus attorney fees and original recovery estimates, to defendant success as measured by attorney fees and reduction in damages paid from damages claimed). In only a few types of cases may the losing party be required to pay the litigation costs of the prevailing party. In 42 U.S.C. § 1988 (1988), the last sentence provides:
defendant attorneys show almost identical concern for pace and cost of litigation (Exhibit 3). However, differences do appear in examining the specific components included in this factor. Defense attorneys are more concerned about the pace of litigation than are plaintiff attorneys. Nearly half of defense counsel (45.4%) chose to remove to federal court because a faster court process was available there. But only one-third (31.4%) of plaintiff counsel chose state court because a faster process was available in that court.\textsuperscript{138} Some attorneys reported that a slower court process was a factor in their forum selection decision (9.3\% of plaintiff attorneys, compared to 9\% of defense attorneys).\textsuperscript{139}

While defense attorneys are more concerned with pace, plaintiff attorneys are more concerned about the costs of litigation. Plaintiff attorneys cited lower costs of state court as a factor in 36.7\% of their cases, while defense counsel cited lower costs in federal court as a factor in only 16.7\% of their cases.\textsuperscript{140} Indeed, one-third of all defense counsel citing costs as a factor said that state court costs are lower than those in federal court. The greater concern among plaintiff attorneys for litigation costs is perhaps explained by client differences. As Exhibit 2 shows, plaintiff counsel typically represent individuals, and defense counsel typically represent commercial interests. Individual litigants are less able to pay for the costs of litigation.

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In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of the then title, title IX of Public Law 92-318 or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. See generally Dobbs, Awarding Attorney Fees Against Adversaries: Introducing the Problem, 1986 DUKE L.J. 435 (reviewing bases for fee shifting in civil rights and common law cases, entitlement to awards, and calculation of fees).

For much the same reason, questions about the existence of mandatory arbitration were also included as pace- or cost-related. An arbitration requirement can affect both speed of resolution and cost of reaching settlement but is less likely to affect case outcome as such. These two questions, going to pace and cost and to outcome determination respectively, were not successful in eliciting attorney responses. Only 8.3\% of all respondents reported that arbitration requirements, or their absence in one court but not the other, affected the filing decision. According to our telephone interview respondents, one reason for this low level of response is that arbitration is more akin to mediation than a parallel resolution mechanism. The telephone interview respondents said that trial de novo was typically available to an adverse arbitration award. In one jurisdiction, this entailed a refiling of the case and required payment of a new filing fee. In the other three jurisdictions, this disincentive to appeal an arbitration award did not exist.

138. The difference between plaintiff and defense attorneys in forum preference based upon faster process is statistically significant using Chi-square at the .01 level.

139. Responses to the telephone interviews in the Eastern District of Virginia indicate that too rapid a court pace can have adverse affects on solo practitioners who must allocate their limited resources among several pending cases. Hence, these attorneys may prefer the slower pace available in state court, without necessarily seeking delay as a tactical weapon.

140. The difference between counsel on the importance of costs to filing decisions was statistically significant using Chi-square at the .01 level.
The written comments indicate that expectations of defense attorneys about quicker federal court processing often refer to non-trial outcomes. Of the 113 attorneys who commented that removal hastened case conclusion, sixty-four said this was due to faster settlement and twenty-seven said it was due to judicial rulings on motions for summary judgment. Only twenty-two said speedy case conclusion was due to a faster trial. Indeed, twenty-four attorneys commented that removal delayed the case, including one instance in which an appeal was taken from a district court order remanding the case to state court. An additional twelve cases concluded by voluntary dismissal, prompted by the more timely case preparation requirements in federal court. The written comments also indicate that among the sixty-four attorneys who said that removal hastened case settlement, twenty-eight attorneys said this was due to lowered verdict expectations and four other attorneys said that this was due to the greater possibility of summary judgment ruling.

The telephone interviews showed that in one of the four districts examined, the pace of litigation was the primary reason for selecting that forum. In the Eastern District of Virginia, speedy trial is the norm, so much so that the federal court there is said to have a "rocket docket." In that district, 71% of the attorneys said that a faster court process in the federal court affected their decisions to file. Some attorneys filed in federal court to take advantage of the "rocket docket," while others filed in state court to avoid the preparation burden created by the "rocket docket."

In the District of South Carolina, concern for pace and cost may be inferred from attorney reports about poor judicial case management. Poor management is reportedly related to the judicial rotation scheme used in the state courts. Attorneys observed that the rotation results in little judicial supervision of discovery and typically creates few pre-trial pressures or incentives for attorneys to manage properly their cases or settle before trial. All of these

141. The 30% of plaintiff attorneys who reported that the process is faster in state court than in federal court predominantly referred to the time until trial could be scheduled, rather than settlement or summary judgment.

142. Although very few plaintiff attorneys responding to the mail survey said that litigation costs were lower in federal court than in state court, several plaintiff attorneys in the telephone interviews said that they were, and described how this happens. Some federal court requirements, such as those relating to routine status calls and written briefs to support motions, necessitate better case management by the attorneys. Better case management results in less wasted effort and, therefore, lower costs.

143. Forty-three percent of respondents with cases in the Eastern District of Virginia also said that federal judges are more competent than state judges. A different but overlapping 43% of respondents in that forum said that they prefer the pre-trial involvement by federal judges to enforce the court's speedy trial approach.

144. These latter attorney reports are confirmed by Grossman, Kritzer, Bumiller, Sarat,
problems can create unnecessary, or at least higher, litigation costs.

b. Outcome determinative factors

"Outcome determinative" reasons refer to the extent to which the state and federal courts provide equal forums for deciding cases on their merits. The survey questions concerning outcome determinative reasons are grouped into two types of policy factors: (1) questions about local bias; and, (2) questions about various aspects of the comparative forum characteristics, such as judicial competence. Each of these categories can be expected to directly affect perceptions of case strength and case outcome.

Outcome determinative factors are much more important for defense counsel than they are for plaintiff attorneys in forum selection. Virtually all defense attorneys (93.4%) selected at least one outcome determinative factor, compared to 66.5% of plaintiff attorneys. Looking at the individual components of the forum selection factor, as shown in Exhibit 3, we see that more than 85% of defense attorneys reported that judicial quality was important in their filing decisions. Among plaintiff counsel, jury impact, i.e., its role and rules, is the most cited outcome-determinative factor (47.4% "strong" and "very strong" combined). Considering only "very strong" outcome-determinative factors, however, we found that defense attorneys identified judicial qualities as highly important three times more often (52% "very strong") than plaintiff attorneys identified jury impact as highly important (17.5% "very strong").

i. Perceived bias in forum

For purposes of this study, the most significant aspects of perceived bias in state courts concern out-of-state litigants, nonlocal litigants, and businesses. Two types of bias were explored in the survey. First, we asked whether bias relating to the attorney's own client was expected to affect the outcome of the case. Second, we asked about unfavorable bias affecting the opposing client. Perceived bias for or against each party, plaintiff or defendant, was thus examined across both types of counsel. The survey questions

McDougal & Miller, Dimensions of Institutional Participation: Who Uses the Courts, and How? 44 J. Pol. 86, 106 (1982) (finding that "frequency of trials in... state court of South Carolina is so much higher than in the other courts. . ."). See Bumiller, supra note 46 (discussing responses to survey among South Carolina attorneys).

145. See infra notes 146, 162-64 and accompanying text (discussing outcome determinative factors including local bias, judicial competence, differing law rulings, differing jury rules and composition, and differing procedural rules).

146. Other types of bias that may be expected to appear against a client include those relating to a client's sex, race, nationality, or socioeconomic status.
probed several particular bases of possible client-related bias: against out-of-state litigants; against the type of business, such as insurance, conducted by litigants; against corporate litigants; against foreign nationals; against individuals because of race, gender, or socioeconomic status; and against nonlocals, as distinguished from out-of-state litigants. Of these several bases for state court bias, low response rates to some questions and seeming respondent confusion resulted in our decision to focus the research on out-of-state bias, locality-based bias, and business bias.

Plaintiff attorneys reported that favorable bias, as seen in Exhibit 3, with respect to their clients in state court is relatively common (44.9%). As providing a "very strong" court advantage, however, only 15.4% of plaintiff attorneys cited pro-client bias. This forum selection factor was nearly as important as jury impact, cited as a "very strong" advantage by 17.5% of plaintiff attorneys, and may parallel it. Pro-client bias, however, was less important than attorney convenience, which was cited by 35.1% of plaintiff attorneys. In any case, pro-client bias was much less significant to plaintiff attorneys than anti-client bias was to defense attorneys.

Plaintiff attorneys reported specific forms of state court bias to favor plaintiffs, including bias due to the locality of plaintiff's residence (27.3%) and bias due to the plaintiff's gender, race, or socioeconomic status (20.6%). We interpret these two bases of favorable bias as the converse, respectively, of unfavorable bias with respect to out-of-state and business defendants.

Anti-defendant-related bias was reported to be an important case presence by 77.4% of defense counsel (Exhibit 4). Defense counsel reports of state court bias against their clients are corroborated by plaintiff attorneys, over half of whom (53.9%) said that the opponent client faced unfavorable bias (Exhibit 4). The bases of client-related bias that defense counsel reported to be most common were

147. Plaintiff attorneys' responses reporting favorable bias based on client gender was 5.7% and based on client race was 7.2%. Defense counsel reports of anti-client bias were 3.5% for gender and 0.3% for race. Individuals made up only 9.4% of defendant clients.

148. Defense counsel reports of socioeconomic bias were three times higher (34.7%) than the percentage of individuals among their clients (9.4%), suggesting that they often took this term to include business status. Similarly, defense counsel reports of bias based on foreign nationality were higher (26%) than the percentage of foreign national defendants (5.2%), again suggesting confusion between foreign nationality and out-of-state bias. Rather than confusion, it may also be that the reports of bias against foreign nationals represented the presence of a foreign national as co-defendant in the case. Since we cannot know which explanation is correct, these responses are omitted from the research discussion in the text.

149. Interestingly, 22.4% of defense attorneys said that plaintiff clients faced some sort of bias in state court, most commonly that from socioeconomic status (10.1%), and out-of-state status (9.6%). Anti-client bias in state court was reported by 10.3% of plaintiff attorneys.
PREVALENCE OF BIAS AGAINST DEFENSE CLIENTS IN STATE COURTS

<table>
<thead>
<tr>
<th>Type of Bias</th>
<th>Plaintiff Attorneys Reporting Bias Against Opposing Client (n=194)*</th>
<th>Defense Attorneys Reporting Bias Against Defendant (n=288)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Against Out-of-Staters</td>
<td>26.3%</td>
<td>50.7%</td>
</tr>
<tr>
<td>Against Type of Business</td>
<td>18.0%</td>
<td>44.8%</td>
</tr>
<tr>
<td>Against Corporations</td>
<td>17.6%</td>
<td>45.1%</td>
</tr>
<tr>
<td>Against Non-locals</td>
<td>10.9%</td>
<td>20.0%</td>
</tr>
<tr>
<td>Combined Bias Reports**</td>
<td>53.9%</td>
<td>77.4%</td>
</tr>
</tbody>
</table>

* These figures represent responses by plaintiff attorneys to survey question asking about bias facing the opposing client (e.g., defense client). By contrast, Exhibit 3 shows reports by plaintiff attorneys of favorable bias toward plaintiff client in state court.

** This figure represents the proportion of attorneys citing one or more bias factors as relevant to the filing decision. It excludes reports of bias against defense clients based upon sex, race, socioeconomic, or foreign national status, because these statistics were not reliable enough for separate presentation. The inclusion of all other types of bias increases the plaintiff reports of opposing client bias to 69.6%. Statistical significance testing is not appropriate here, because plaintiff and defense attorneys responded to different questions.

out-of-state status (50.7%) and business/corporation status (44.8%).

Again, plaintiff attorneys corroborated defense attorneys’ perceptions of bias. Over half of plaintiff counsel (53.9%) said that bias handicapped defense clients. In contrast, only 22.6% of defense counsel said that plaintiffs faced some type of bias in state court. Among the plaintiff attorney reports of bias against defendants, out-of-state bias was the most common (26.3%), followed by type of business (18%) and incorporated status (17.6%).

(a) Against out-of-state litigants

As seen in Exhibit 4, 50.7% of the responding defense attorneys said that bias against out-of-state litigants was present in their cases. Exhibit 4 also shows that a number of plaintiff counsel agreed that there is bias against out-of-state defendants. Interestingly, this perception of bias is one of the few factors which correlates closely with plaintiff counsel’s legal experience, measured by year of bar admission. Among plaintiff counsel with less experience (bottom 25%), only 12% reported bias against defendant. Among the most experienced (top 25%), 32% reported bias. This difference in perception between experienced and less-experienced plaintiff attorneys was statistically significant at the .01 level.

Statistical analysis of the interrelationships among jurisdictional basis, perceived bias, and geographic distribution largely confirmed the conventional wisdom. We expected diversity cases to show higher levels of out-of-state litigant bias reports, since bias is the
historic reason for diversity jurisdiction and because there is a legal requirement in diversity cases, not present in federal question cases, that prohibits removal by in-state defendants. Not surprisingly, then, reports by defense counsel of bias against out-of-state litigants are more prominent in diversity cases (56.3%) than in federal question cases (31.8%). This difference is statistically significant at the .01 level. Plaintiff attorney reports of favorable bias toward their clients were more prominent in diversity cases, but not by much. Thirteen percent of plaintiff attorneys reported favorable bias in diversity cases compared to 9.3% of similar plaintiff reports in federal question cases.

Reports of out-of-state bias as a forum selection factor show a definite geographic imbalance. Generally, defense attorneys in the Northeast, the industrialized Midwest, and the Far West reported low levels of bias against out-of-state litigants compared to attorneys elsewhere. By contrast, attorneys in most Southern States and the less industrialized Midwest reported such bias as affecting their forum filing decisions in high proportions. The only area where attorneys did not demonstrate a clear pattern was the Rocky Mountain States. The industrialization distinction that

150. It is instructive to compare these results with those of a survey of federal judges asking for their views on retention or abolition of diversity jurisdiction. Shapiro found that proponents of retaining diversity jurisdiction were predominant in the South and Midwest, while abolitionists were proportionally stronger in the Northeast and Far West. See Shapiro, supra note 11, at 335-36.

151. These included the federal districts for Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, and Northern West Virginia, which is at least partially affected by its close proximity to Washington, D.C. Of the 46 responding attorneys in these states, only 16 (31%) reported bias against out-of-state litigants.

152. These included the federal districts in Michigan, Northern Ohio, Northern Illinois, Eastern Wisconsin, Minnesota, and Northern Indiana. Of the 36 responding attorneys in these six states, only 11 (31%) reported bias.

153. These included the federal districts in Arizona, California, Nevada, Oregon, and Western Washington. Of the 35 responding attorneys in these five states only 12 (34%) reported out-of-state bias.

154. These geographic clusters are based on a combination of traditional state groupings and an ad hoc distinction based on the level of industrialization and urbanization. For example, the State of Illinois is traditionally considered to be a Midwestern State. Yet, northern Illinois is highly industrialized, while southern Illinois is highly agricultural, with important elements in common with Southern or Border States.

155. These states include Arkansas, Virginia, South Carolina, Southern West Virginia, Louisiana, Mississippi, Tennessee, Georgia, Texas, except the Southern District, and Alabama. Of 82 attorneys surveyed in these 10 states, 58 (71%) reported state court bias. Inclusion of the Florida, North Carolina, Kentucky, and Southern Texas districts reduced this to 63% (71 of 112 attorneys).

156. These states include Nebraska, Kansas, North Dakota, Southern Illinois, Southern Ohio, and Southern Indiana. There were no responses from South Dakota or Central Illinois. Of the 17 attorneys surveyed in these six states, 16 (94%) reported local bias concerns. Inclusion of attorney responses from Arkansas, Oklahoma, Kentucky, Western Missouri, and Iowa reduced this to 74%.

157. These states include Idaho, Utah, Wyoming, Eastern Washington, Colorado, and
both explains and generates the Midwest groupings is supported, for example, by noting that in the lower Midwest where bias against out-of-state litigants is generally reported to exist, none of the seven attorneys in the federal Eastern District of Missouri in St. Louis reported out-of-state bias against litigants. However one interprets the findings, it is clear that research of attorney reports of local bias may be affected by selection of the jurisdiction to be studied.

(b) Against nonlocal residents

Out-of-state litigants may face bias in a local state court based on nonlocal residence, rather than out-of-state residence. That is, "courts" in some areas may discriminate against all outsiders, regardless of whether they reside in-state or out-of-state. To examine this, the survey directed respondents to report the presence of bias based on locality of residence, other than state of residence. Both defense and plaintiff counsel reported such bias to exist. Twenty percent of defense counsel reported locality-based bias. These reports were confirmed by 10.9% of plaintiff counsel (Exhibit 4). When asked about favorable client bias based on locality of residence, 27.3% of plaintiff counsel reported such favorable bias. Overlap between out-of-state and locality-based bias is suggested by fifty-five defense attorneys who reported both types of bias in the same case. These fifty-five attorneys equalled 38% of the defense attorneys reporting bias against out-of-state litigants, and 81% of those defense attorneys reporting bias based on locality of residence.

The parallelism of locality-based bias with out-of-state litigant bias is further suggested by a geographic analysis of responses citing

Montana. Of the 10 attorneys in these states, five reported that bias against out-of-state litigants was a concern. This finding included the reports of two attorneys from Colorado, where Denver is an international trade center. If the attorneys from Colorado are excluded, the proportion of bias reports rises to 62%. The small numbers involved, however, do not allow for even an intuitive certainty in the finding.

158. In other states with more than one federal district, attorneys in the less urban districts reported out-of-state bias at higher levels than the more urban district lawyers. The less urban districts included Western New York, Southern California, Eastern California, Southern Ohio, Southern Illinois, Western Iowa, Western Wisconsin, and Southern West Virginia. Texas is yet another, albeit more complicated example. Attorneys in the Northern District of Texas reported bias more often than attorneys in Southern Texas. While both districts have metropolitan areas, Houston in the south has more of a tradition of international trade, with its seaport and oil industry background, than does Dallas in the north.

159. When using either the geographic or the industrialization explanations as a framework, anomalies in reporting of bias were seen. Attorneys in Massachusetts, Hawaii, and Maryland reported bias concerns contrary to the regional or trade explanations, while only one of three attorneys in Southern Georgia reported low bias. It may well be that these reports are simply the result of the small sample sizes, or, if real, are reflective of some unique jurisdictional features.
locality-based bias. Again, respondents in the Southern States were much more likely to report this type of bias than respondents elsewhere. Indeed, nearly half the defense attorneys citing locality-based bias were from the ten Southern States.  

A few respondents provided written comments describing how local bias operates. Thus, nine attorneys cited potential judicial conflicts as a factor in their removal decisions. These included cases where the state judge formerly represented the plaintiff, where the judge had been a law partner of the plaintiff attorney, where plaintiff attorney was a political supporter of the judge, and where plaintiff attorney was a politically important local figure.

The telephone interviews provided the greatest support for the hypothesis that locality-based bias is a large part of the bias against out-of-state litigants. In the District of South Carolina, over half the attorneys (53%) reported that local bias was the major factor affecting forum selection. The rural nature of much of the state was cited as explaining locality-based bias among jurors. The fear of such bias affecting the judges was also said to be the reason why a system of rotating judges across the state every six months was adopted. This policy, however, limits the ability of the judges to lessen the effects of juror biases, as discussed below.

(c) Against businesses

Bias against business status was a significant factor (Exhibit 4). Among defense attorneys, the reported level of bias against businesses (44.8%) and corporations (45.1%) was almost as high as that reported for bias against out-of-state litigants (50.7%). Nearly 19% of the defense counsel reporting business-related bias did not report any other type of bias.

Further analysis also confirmed that there is a high correlation between defendant's status as a business, for example an insurance company, and perceptions of anti-client bias. Approximately two-thirds (66.4%) of the defense counsel reporting out-of-state bias also reported bias against the incorporated status of the client and nearly as many defense attorneys reported bias based on the type of business conducted (61.6%). Combining the reports of incorporated status, business-related bias, and anti-client bias.

160. See supra note 155 (identifying states). Out of a total of 57 reports of locality-based bias, 28 were in these Southern States. Defense attorneys in these states numbered 112 (39%) of the 288 defense attorneys in the total sample.

161. Locality-based bias in small, rural counties was explained in two ways by the telephone respondents. First, local litigants are themselves well-known to the jurors. Second, local counsel representing plaintiffs are prestigious individuals in their own right and are typically members of locally powerful law firms that often include another firm member who is the magistrate hearing traffic cases and who presides in small claims court.
FORUM CHOICES IN REMOVAL CASES

rated status and type-of-business bias, 80% of those reporting out-of-state bias also reported bias based on business status. Attorneys representing insurance company defendants were most likely (59.1%) to report out-of-state bias. Attorneys representing other types of businesses reported in only 52.9% of these cases that out-of-state bias was present. There was no evidence from a geographic distribution analysis that business-based bias parallels out-of-state bias.

The telephone interviews confirmed that bias against businesses is distinct from other types of bias. Attorneys in the two large urban districts, Chicago and Detroit, reported that jury composition in the state courts favored plaintiffs, who typically are individuals suing businesses. In these areas, litigant status was more important than locality of residence.

ii. Perceived forum characteristics

The survey questions about perceptions of comparative forum characteristics began with a subset of questions about the role of the judge in providing a fair forum. This subset asked attorneys to compare the overall competency of the judges.\textsuperscript{162} Survey questions were then posed concerning the importance of legal rulings and precedents on filing decisions.

Expectations about court rulings on questions of law are another type of outcome determinative factor. Law rulings may be given by both the trial court and the appeals court.\textsuperscript{163} By and large, institutional differences between federal and state courts are not as great as they once were. Most states have adopted procedural and evidentiary rules akin to those found in the federal courts. More significant are the differences in interpretation and enforcement of those rules.\textsuperscript{164}

\textsuperscript{162} These questions dealt with the overall competence of the judiciary and the familiarity of the judges with the substantive law at issue. It also included the involvement of the judiciary in pretrial proceedings, as, for example, forceful judicial encouragement of settlement discussions.

Two survey questions asked whether knowing the identity of the judge expected to hear the case influenced the attorney's filing decision. These questions did not provide very useful information. As noted by our telephone interview respondents, different judges are often characterized as favoring either the plaintiff or defendant. In the District of South Carolina, one federal judge is said to favor the plaintiff side, while a second judge is said to favor the defense. Since judges often rotate to different locations, case venue may determine whether or not a state court case is removed to federal court.

\textsuperscript{163} Two survey questions asked about whether the influence of higher court precedents on substantive law rulings by the trial judge in the case affects filing, and whether in the absence of direct precedent, either the federal or state appellate courts are expected to provide a favorable ruling.

\textsuperscript{164} Two questions asked about the effect on filing of differences in the courts' rules or
Finally, the survey asked questions concerning jury impact. The role of the jury is parallel to the judge characteristics affecting forum fairness. When local bias is not present, jury sympathies, emanating from jurors' economic status and sophistication, and jury rules can affect both verdict outcome and size of damages awards. These factors can also affect settlement negotiations based upon verdict expectations.\(^{165}\)

(a) Judicial competence and role

The importance of perceived judicial qualities was much greater for defense counsels' forum filing decisions than for plaintiff attorneys. Defense counsel almost uniformly favored federal court judges (85.6%). In contrast, plaintiff attorneys only slightly favored state court judges. Thus, while 16% of plaintiff attorneys said state court judges are more competent than their federal court counterparts, another 15% said federal judges are more competent. One variation from this split between plaintiff and defense counsel was found among plaintiff counsel in suburban courts, where 25% favored state court judges compared to only 9.1% favoring federal judges. Examining the questions making up this factor, plaintiff counsel said that state judges are more familiar with the substantive law issues in their cases (13.9%). The margin was not great however, with only 11.3% saying that federal judges are better versed in the substantive law issues.\(^{166}\) Finally, 21.1% of plaintiff attorneys reported a state court advantage in judicial pretrial involvement. This may mean that, taken as a group, plaintiff attorneys prefer less judicial involvement, not that state court judges are perceived as better at such involvements.\(^{167}\)

In examining the questions comprising the judicial qualities factor (Exhibit 5), judicial competency was by far the most important reason cited for defense attorneys' forum selection (78.8%). Also, both judicial familiarity with substantive law (57.3%), and greater pretrial involvement (53.5%), gained support from over half the defense counsel. Over half of the defense counsel (52%) said that at enforcement for discovery and evidence rules. A third question asked about the filing effect of differences in the courts' rules relating to summary judgment rulings.\(^{165}\) One jury impact question asked whether the attorney's case filing choices were affected by court rules establishing size of jury and rules requiring jury unanimity. Two other questions asked whether the attorney's filing was affected by expectations regarding jury verdicts or settlement amounts. See infra text accompanying note 185 (discussing how and where jury sympathies differ from local bias).\(^{166}\) These attorneys were typically referring to diversity cases involving state law matters, rather than federal question matters.\(^{167}\) This inference is based upon the written comments by defense counsel and their telephone interview responses.
EXHIBIT 5

PERCENTAGE OF RESPONDENTS REPORTING PERCEIVED QUALITY OF FORUM AS REASON FOR FORUM SELECTION BY TYPE OF COUNSEL

<table>
<thead>
<tr>
<th>Reason for Selection</th>
<th>Plaintiff Counsel</th>
<th>Defense Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Court</td>
<td>(n=194)</td>
<td>(n=288)</td>
</tr>
<tr>
<td>Judicial Competency*</td>
<td>16.0%</td>
<td>78.8%</td>
</tr>
<tr>
<td>Substantive Law Familiarity*</td>
<td>13.9%</td>
<td>57.3%</td>
</tr>
<tr>
<td>Judicial Pretrial Role*</td>
<td>21.1%</td>
<td>53.5%</td>
</tr>
<tr>
<td>Total**</td>
<td>26.3%</td>
<td>85.4%</td>
</tr>
</tbody>
</table>

* Differences between plaintiff and defense counsel are statistically significant using Chi-square at the .01 level.

** Respondents who selected one or more of the three judge-related reasons for forum filing.

least one of these was a "very strong" reason, including 44.1% who said judicial competency was a "very strong" reason for removal to federal court.

Overall, judicial competency dominated the judicial qualities factor. Only 8% of the defense attorneys who cited the perceived quality of the forum as a factor in their forum selection did not cite judicial competency. For these attorneys, judicial familiarity with the substantive law of the case is seen as a subset of judicial competence. If it is not a question of competence, state judges in diversity matters should be more familiar with the state law issues than federal judges. Yet, of the 222 defense counsel in diversity matters, 122 (55%) said federal judges are more familiar with the substantive law issues in these cases. In federal question cases, almost two-thirds (65.2%) of the defense counsel said federal judges are more familiar with the substantive law issues.

The ability of the judge to counteract perceived jury inadequacies or biases was an important concern for defense attorneys. For example, competency of the judiciary as a factor in defense counsels' forum filing decisions correlated closely with perceptions of the likelihood of local bias affecting the case. Among the 146 defense attorneys reporting local bias against out-of-state litigants, 84% reported that judicial competency was a reason for selecting a federal forum. This was a significantly higher reporting of concern for judicial competency than the 73% of the 142 attorneys who did not report out-of-state litigant bias.

Similarly, judicial pretrial involvement was cited as a forum selection factor by 61% of defense attorneys re-

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168. Only one attorney stated in the written comments that federal judge unfamiliarity with state law issues aided the plaintiff. No telephone interview respondent made such a comment.
169. The difference between attorneys reporting and not reporting out-of-state bias for
porting bias against out-of-state litigants. Only 46% of defense attorneys not citing this bias reported judicial pretrial involvement to be important.

Given this interrelationship between judicial qualities and local bias, it is not surprising that defense attorneys' federal court experience is a significant predictor of their reports of superiority of federal judges. Among the defense attorneys with less federal court experience, totaling less than one-fifth of their litigation practice, 71% cited one of the three measures of judicial qualities measures as favoring the federal bench. Among the more experienced federal court practitioners, with federal practice constituting over one-half of their litigation practice, 88.7% cited one of these same measures as favoring the federal bench.

The telephone interviews with the South Carolina and Eastern Virginia attorneys gave a more detailed picture of the interaction between judicial competence, the judge's pretrial role, and other factors in the choice of forum. In South Carolina, the semiannual rotation of judges across the state's trial courts results in a reluctance of judges to take pretrial actions that will limit the discretion of the trial judge. Therefore, rulings on pretrial motions, ranging from discovery objections to summary judgments, are difficult to obtain. In Eastern Virginia, however, judicial qualities are related to case-processing speed. In contrast, in the Northern District of Illinois, relative judicial competence is said to be an important factor in its own right, with 43% of the attorneys citing this factor as favoring the federal court. Several of these same attorneys, how-

superior judicial competency in federal court was statistically significant using Chi-square at the .02 level.

170. Among defense attorneys reporting that local bias was a very strong presence, judicial pretrial involvement was an even stronger reason for removal, with 64.5% reporting that it was a factor in forum filing.

171. For those defense attorneys who reported a federal court advantage from judicial pretrial involvement, the difference between those reporting and not reporting out-of-state bias was statistically significant at the .01 level. This may be explained by noting that insofar as removal minimizes local bias and provides greater judicial oversight against such bias, settlement is prompted. Among defense counsel citing out-of-state litigant bias in state court, half (50%) also cited better settlement prospects in federal court. Among those defense attorneys not reporting local bias, only 32% cited likelihood of better settlement in federal court. This difference is also statistically significant at the .01 level.

172. The differences between the reports of experienced and less-experienced defense attorneys for judicial competency, superiority, and substantive law familiarity, are statistically significant using Chi-square at the .01 level. Differences in their reporting of judicial pretrial involvement as a filing factor are not statistically significant.

173. Cf. Neubauer, Snyder & Nolan, Judges Compare Courts, Litigation, Spring 1985, at 10, 11 (reporting comments of Judges Costantino and Aspen who noted absence in federal court of concerns they had as state judges for other judges' rulings on motions).

ever, said the state judges sitting in the equity division were at least as able as the federal judges, and would typically act on motions for injunctive relief more speedily than the federal court.

(b) Legal rulings and precedents

Defense attorneys were far more concerned about potential legal rulings than were plaintiff counsel (Exhibit 6). A more favorable appellate decision was relevant to 46.9% of defense counsel in their forum selection choice, compared to 22.7% of plaintiff counsel. One-third of defense counsel concerned about potential appellate rulings (15.6% of all defense counsel) considered this to be a "very strong" reason for forum selection.

Prior precedents guiding trial court law rulings were also thought to favor defendants in federal court over plaintiffs in state court. Over one-fourth of defense counsel (25.9%) said federal precedents favored their side, compared to 11.9% of plaintiff counsel viewing state precedents as more favorable.\textsuperscript{175}

Overall, 53.5% of defense counsel cited the likelihood of a more favorable federal court legal ruling. Among plaintiff attorneys, 25.3% cited expectations about favorable state court legal rulings. Legal rulings were cited by 20.8% of defense counsel as a "very strong" court advantage factor in forum filing, compared to 9.3% of plaintiff counsel.

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\textsuperscript{175} Our telephone interviews found several plaintiff attorneys in the districts for Northern Illinois and Eastern Michigan who reported that federal precedent on state law issues in diversity cases do not necessarily follow state court rulings per the \textit{Erie} doctrine. \textit{See supra} note 9 (discussing \textit{Erie} doctrine). This occurs where a federal court rules that a line of state trial court and intermediate appellate court rulings do not represent what the likely outcome would be were the state's highest court to rule. One plaintiff attorney said that his state's high court had used its certiorari authority to refuse to review one line of lower court rulings for an extended period of years, despite federal court rulings refusing to follow the state intermediate appeals courts.
(c) Court rules

Defense counsel cited court procedural rules as important nearly two and one-half times (60.4%) as often as plaintiff attorneys (24.7%) (Exhibit 3). A closer examination reveals that most of this difference is attributable to defense attorney preference for federal court summary judgment rules and practices. The written comments also noted some additional procedural rule differences of importance in specific cases.

(1) Summary judgment

Defense attorneys reported that the availability of summary judgment rulings was an important factor in forum selection in 47.9% of the cases (Exhibit 7). Indeed, 20.1% of defense counsel said that summary judgment availability was a "very strong" reason for the removal decision. Only comparative judicial competence and substantive law familiarity were cited more often. In contrast to the high level of defense counsel concern about summary judgment availability, only 12.4% of plaintiff counsel reported that more favorable state court summary judgment rules affected their filing decisions. Among all plaintiff attorneys, those appearing in cases filed in major metropolitan areas were most likely (19.4%) to favor state court rules and practices in summary judgments. Two interpretations of these comparative findings exist. First, the small number of plaintiff attorneys citing this factor suggests that fear of a federal summary judgment ruling is not a major factor in decisions to file in state court. At the same time, it is possible that summary judgment rulings may be more easily gained by plaintiffs in some

176. This is statistically significant at the .01 level.
state courts than in federal court. 177

Exhibit 7 evidences the direct correlation between reports of federal court summary judgment rule superiority and attorney experience with federal court practice. 178 Among those defense attorneys who reported less than 20% of their practice in federal court, only 33% cited the federal rule as a factor in forum filing; 13.4% cited this as a "very strong" reason for removal. Among those defense attorneys who reported over 50% of their practice in federal court, two-thirds (66.6%) said that federal summary judgment rules were a factor in forum selection, and 32.8% cited it as a "very strong" reason for removal.

The written comments provided by the respondents support the statistical indications of the importance that defense counsel give to the greater availability of federal court summary judgment rulings. Twenty-seven attorneys commented that a summary judgment ruling was, in fact, the outcome of removal. After quicker settlement, this was the most significant result of removal. The two factors are not unrelated; four settlements reportedly resulted from the threat of summary judgment. The telephone interviews further confirmed the significance of summary judgment availability. In the two districts where jury verdicts were feared, South Carolina and Eastern Michigan, one-fourth of the attorneys cited this factor. In the two other districts where fear of a jury verdict was not cited often, references to summary judgment availability was minimal. 179

(2) Discovery and evidence

A substantially greater proportion of defense attorneys than plaintiff attorneys reported differences between the evidentiary rules of the two courts as important. Thus, while 27.4% of defense counsel said that the Federal Rules of Evidence favored their side, only 9.3% of plaintiff attorneys thought state court evidence rules favored the plaintiffs’ side. 180 Similarly, defense counsel said that

177. Defense attorneys in New York, Texas, and California were much less likely than other defense attorneys to cite federal court superiority for summary judgment rules. This finding is consistent with prior writings on this topic. See Pierce, Summary Judgment: A Favored Means of Summarily Resolving Disputes, 53 BROOKLYN L. REV. 279, 280 (1987) (stating that misperception that summary judgments are overturned frequently keeps attorneys from making motions for them).

178. Total years of law practice, however, was not found to be related to attorney reports of summary judgment superiority. Of those attorneys admitted to practice before 1964, only 31.6% favored federal court summary judgment rules. Of those admitted after 1978, 44.4% favored federal summary judgment rules. Among those admitted between these two dates, 55.7% favored federal summary judgment rules.

179. The few attorneys who did cite Cook County juries in the Northern District of Illinois did, however, also cite summary judgment rulings.

180. This is statistically significant using Chi-square at the .01 level.
federal court discovery rules favored their side (28.1%). This was twice as often as plaintiff counsel preferred state court discovery rules (13.9%).\footnote{181 One way in which the federal rules favor defendants is suggested by written comments from five attorneys who said that federal judge control over discovery shortened the time to case resolution.}

(3) Other procedural rules

In the written comments, attorneys also noted other procedural differences between federal and state courts. Important differences cited by the attorneys included the availability in federal, but not state, courts of court orders for medical examination and out-of-state discovery, the use of special verdict forms, and the ability to implead third-party defendants. One attorney reported that the threat of Rule 11 sanctions prompted a voluntary dismissal. Also, one attorney filed in state court for its lower filing fee, despite an expectation of removal.

(d) Jury impact: Jury composition and its effects

(1) Jury rules and composition

This factor is made up of two components. The first component is composed of the different jury rules affecting case outcome. Consider, for example, the number of jurors comprising a petit jury or the rules governing jury verdicts, such as requirements for unanimous or non-unanimous verdicts. The second component arises from the inference that jury composition\footnote{182 This inference is very strong from plaintiff reports, where the role of the judge in state court is seen as much more limited than it is in federal court. Among defense attorneys, however, the relationship between jury composition and size of verdict is complicated by the perceived greater likelihood that a federal judge will grant a summary judgment motion, or otherwise exercise control over the size of jury verdicts. In any case, as the telephone interviews showed, a general expectation that state juries will favor plaintiffs more than federal juries does not hold true for all types of cases. For example, several attorneys reported that in more complex commercial cases, or in major medical malpractice cases, federal juries will typically return higher verdicts than will state juries. See S. STEINGASS, SECTION 1983 LITIGATION IN STATE COURTS § 7.3(a)(1), at 7-8 (1988) (noting that although federal juries are less likely to impose liability, federal juries are more inclined to render large verdicts when liability is established).} differences, which affect jury sympathies, are the basis of attorney reports that either the federal or state court is expected to provide a more favorable verdict, settlement amount, or damage recovery.\footnote{183 Using this definition, the two types of counsel show moderate differences in their consid-
eration of expected jury impact as a factor in forum filing. Defense attorneys cite the jury impact factor (Exhibit 8) in 57.6% of their

### Exhibit 8
**Importance of Jury Impact in Filing Decision by Type of Counsel**

<table>
<thead>
<tr>
<th>Type of Counsel</th>
<th>Total Jury Impact*</th>
<th>Damages*</th>
<th>Settlement*</th>
<th>Jury Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defense (n=288)</td>
<td>57.6%</td>
<td>18.8%**</td>
<td>41.0%</td>
<td>23.3%</td>
</tr>
<tr>
<td>Plaintiff (n=194)</td>
<td>47.4%</td>
<td>31.4%</td>
<td>24.2%</td>
<td>21.1%</td>
</tr>
</tbody>
</table>

* Difference between plaintiff and defense attorneys is statistically significant using Chi-square at the .01 level.

** An equal number of defense attorneys cited the likelihood of higher verdicts in federal court. While this might be due in part to a misreading of the question, it may also reflect differences in the underlying cases in which the attorneys appeared. The telephone interview respondents reported that for lesser value claims, state court juries provide higher awards; for higher value claims, federal juries provide higher awards.

responses, compared to 47.4% of plaintiff attorneys.184

In essence, both types of attorneys agree that there are jury differences associated with each court, differences that relate primarily to expectations about the direction and size of jury verdicts, as well as the secondary effects on settlement levels. Put simply, plaintiff lawyers tend to favor state court juries, and defense attorneys tend to favor federal court juries in removal cases.185 The telephone interviews also made clear that locality-based bias is different than jury composition effects, or sympathies. The attorneys who practice in large urban areas, for example Chicago and Detroit, reported that juries in these districts favored individual plaintiffs, regardless of residence. This, of course, translates into anti-business bias.186

Although not statistically measurable, substantive differences between federal and state court jury rules were reported in specific cases. For example, several defense attorneys in their written comments cited jury rules relating to the content of the jury charge and the requirement of unanimity of verdict. Attorneys also commented on jury composition and its effect on case outcome, including two attorneys who cited juror sophistication in malpractice cases.

Court jury rules, such as size of jury or unanimity/non-unanimity requirement for a verdict, are almost equally relevant for both types

184. This is statistically significant using Chi-square at the .01 level.

185. Cf. Coddington & Hicks, *The Arena: Defendant's Choice of Forum*, 46 J. Air L. & Com. 941, 945 (1981) ("Federal jury panels are felt to be more defense oriented since, as a rule, they are more heterogeneous, come from a wider geographical area, have a higher percentage of male jurors and come from a higher socio-economic status.").

186. See *supra* Part III(B)(2)(b)(i)(c) Perceived bias in forum—Against businesses (discussing high number of defense attorneys reporting anti-business bias).
of attorneys. As Exhibit 8 shows, 21.1% of plaintiff attorneys said favorable state court rules affected their filing decisions, while 23.3% of defense counsel said that the federal rules favored their side.

(2) Damages and settlement expectations

The dominating elements making up attorney interest in jury impact are attorney expectations of higher awards or settlements. While both types of attorneys often cited these two factors, differences appeared in their expectations for a trial verdict or case settlement. As Exhibit 9 shows, plaintiff attorneys (31.4%) placed greater emphasis on trial verdicts than did defense counsel (18.8%). In contrast, defense attorneys (41%) cited more advantageous settlements as a reason to select federal court more often than plaintiff attorneys did (24.2%). The greater emphasis that defense attorneys placed on settlements in federal court, rather than reduced verdicts, can be understood in light of the telephone interviews. Comments indicate that settlement is more common in federal court than it is in state court because the interview respondents consider state court cases more likely to go to trial. Plaintiff expectations about higher verdicts in state court result in a reduced willingness to settle for the lower amounts offered by defendants.

EXHIBIT 9
IMPORTANCE OF EXPECTATIONS ABOUT JURY VERDICTS AND SETTLEMENT LEVELS BY TYPE OF COUNSEL

<table>
<thead>
<tr>
<th>Type of Counsel</th>
<th>Awards/Verdict* Advantage</th>
<th>Settlement Level* Advantage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defense (n=288)</td>
<td>18.8%</td>
<td>41.4%</td>
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<td>Plaintiff (n=194)</td>
<td>31.4%</td>
<td>24.2%</td>
</tr>
</tbody>
</table>

* Differences between plaintiff and defense counsel are statistically significant using Chi-square at the .01 level.

187. Cf. D. TRUBEK, supra note 137, at S-66 (suggesting that defense attorneys have greater success in achieving reduced awards or settlements in federal rather than state court).

188. Questions arise as to why defendants are unwilling to meet the higher settlement demands of plaintiffs in state court. One possibility is that plaintiff settlement demands are close to their expectations about a jury award. If a settlement offer is based upon the common method of discounting, amount desired multiplied by likelihood of success, plaintiff counsel must have high expectations of state court success in these cases. If so, removal has had a major impact on case outcome. Alternatively, removal availability may itself reduce defendant's willingness to settle, due to beliefs about its effect on case success. Obviously, attorney experience is an important predictor of the validity of attorney's success expectations.
(3) Interaction with attorney experience

Interactions between the multiple factors affecting forum choice are illustrated at several points above. A final example of interaction relates to the earlier finding that federal court experience correlates with the likelihood of defense attorneys to remove to federal court because of more favorable summary judgment rules. Analysis of the responses relating to jury impact shows that less-experienced defense attorneys are more likely to remove on the basis that jury awards will be lower in federal court. Thus, 27.5% of defense attorneys who spend less than one-fifth of their litigation practice in federal court believed that federal court jury awards are lower than those in state court. In comparison, only 11.9% of the more-experienced federal court attorneys, spending over one-half their litigation time in federal court, removed because they believed federal court verdicts are lower. These differences between less- and more-experienced defense attorneys' views about verdict levels are statistically significant.189

IV. POLICY IMPLICATIONS

Discussion of the policies underlying concurrent federal and state court jurisdiction is largely limited to the issue of retaining or abolishing diversity jurisdiction. Within this context, the empirical question on which the prior literature focuses is whether bias against out-of-state litigants continues to be a significant national concern with implications for the quality of justice and commerce.190

The implications of concurrent jurisdiction for court improvement efforts are virtually unexplored in the policy research literature. Indeed, the literature assumes that little need exists for federal court reform and that the improvement of state courts is irrelevant to federal policymakers. Similarly, the separate interests of state court policymakers are ignored.

The research design employed in this study encompassed both

189. The analysis of less-, as opposed to more-experienced attorneys' views about settlement are more ambiguous. Thus, 50.7% of the less-experienced defense attorneys said settlements in federal court are lower, compared to 36.2% of the more-experienced attorneys. These differences are not statistically significant, leading to the hypothesis that there is a continuum of case outcomes distinguishing less- and more-experienced defense attorneys, at opposite ends of which are complete defense victory and favorable jury verdict. This hypothesis suggests that reduced settlements are the midpoint of the continuum.

190. See supra notes 3-11 and accompanying text (providing historic overview of reasons for diversity and federal question jurisdiction); Frank, supra note 3, at 24 (presenting strong demonstration that local bias existed or was real fear in 1789, and that bias extended to both jury and judge actions). The local bias discussed by Frank even included state legislative action shaping venue requirements to further the power of local courts, whose bias worked to negate the claims of British nonresidents of the colony of Virginia. Id. at 24.
federal question and diversity jurisdiction. The broad scope of questions permitted an examination of policy implications of local bias, judicial parity, and court reforms. The discussion of the policy implications from the research survey begins with a brief overview of the key findings. The analysis then focuses on the core issue underlying the diversity jurisdiction argument—local bias against out-of-state litigants. Next, the analysis looks at the most important aspects of the federal and state courts affecting forum filing—judicial competencies and jury sympathies. It then turns to a discussion of some other procedural differences between the two courts, especially that of the availability of summary judgment. The importance of attorney experience as a policy issue is examined next. Finally, recommendations for changes in the law and court operations are presented.

A. Overview of the Research Findings’ Relevance for Policy Analysis

Consistent with economic views of litigation decisionmaking, 191 84.4% of plaintiff and defense attorneys reported that forum choice is based, at least in part, on a concern for its impact on case outcome. 192 However, forum convenience and the cost of litigation are the most relevant reasons, especially among plaintiff lawyers, for forum selection—the latter factor reflecting the lesser economic status of plaintiffs compared to defendants.

Defense attorneys’ forum preference for federal court is based on expectations of lesser hostility there toward business litigants (80% to 85% of defendants are businesses). 193 This expectation is influenced by two primary factors: fear of anti-client bias in some local state courts, and federal judges’ greater judicial capabilities and willingness to act as a check upon jury bias and sympathies. In some jurisdictions, a third related factor was that of differences in the jury


192. See supra Exhibit 3 and accompanying text (examining factors affecting forum selection by type of outcome); see also note 145 and accompanying text (indicating concern that forum selection has impact on case outcome is greater for defense attorneys). If the responses are weighted to reflect the differing response rates of the two attorney types, 80% of the attorneys chose an outcome determinative response. The major caveat to these findings is that they reflect the views of removal case attorneys appearing predominantly in diversity matters, rather than federal question cases. Hence, drawing quantitative inferences from this survey about attorneys appearing in original filing federal court cases or cases not removed to federal court that could be removed would be less valid than qualitative inferences.

193. See supra Exhibit 2 (noting defense respondents included: foreign nationals or companies, 5.2%; insurance companies, 30.7%; private companies, 17.8%; and, publicly owned corporations, 30.3%).
pool, for example the jurors’ level of financial sophistication, and decisional rules that affect the expected verdicts and settlements. Finally, attorney convenience and the pace and cost of litigation were often cited as factors affecting the defense attorneys’ forum filing decision. 194

Indeed, among plaintiff attorneys, familiarity with state court 195 was the single most frequently cited reason for filing decisions, closely followed by the cost of litigation. Among outcome determinative reasons, more sympathetic or favorable juries was the most important factor. Thus, plaintiff attorneys pointed to the expectation of a higher verdict or settlement in state court. Almost as important to plaintiff attorneys was the combination of (1) local bias against defendants’ out-of-state or business status, and (2) favorable bias toward local, individual plaintiffs.

For a small number of both types of attorneys, forum filing was seen as a tactical weapon used to inconvenience their opponents, independent of any effect the choice might have on a case trial outcome. 196 Presumably, inconvenience affects litigants’ willingness to accept a lower level for settlement. These findings lead to several major policy conclusions.

- Fear of bias against out-of-state litigants continues to be an important reason for federal court removal in concurrent jurisdiction cases. Related biases based on litigants’ business status or locality, irrespective of state of residence, reinforce the significance of local bias as a significant policy factor.
- The perception of greater competency of federal judges, while sometimes an independent reason for federal court removal, is primarily of policy importance in forum selection only as it interacts with local bias fears and other jury impact issues.
- The reported greater availability to defendants in federal court of favorable judicial rulings, including summary judgment, implicates issues of both court reform and federalism.
- Attorney familiarity with federal court is related to the specific reasons given for forum selection. Court changes that reduce attorney familiarity may have unexpected negative effects that need to be considered.

One important caveat in drawing conclusions from the study is

194. See supra Exhibit 3 (showing outcome determinative factors more important to defense counsel, although similar percentage of plaintiff and defense counsel are concerned with nonoutcome determinative factors).
195. See supra part III(B)(2)(a)(i) (reviewing factors cited by plaintiff attorneys as part of attorney convenience).
196. See supra text accompanying notes 135-36 (noting that written comments on surveys indicated wide variety of reasons why removal would inconvenience opponent).
the unclear relationship between attorney reports of differences between the two courts and the reality of such differences. Policy conclusions may or may not be contingent on a real congruence between the two. For example, the perception of bias against out-of-state litigants is, of course, a reality in its own right, requiring action to preserve the appearance of justice. But policy conclusions based on reported differences in judicial competencies, or the availability of summary judgment, should be dependent, in large part, upon some external reality that corroborates attorney reports.

B. Importance of Local Bias

1. The policy positions

Fear of bias directed at out-of-state litigants is customarily linked to the diversity jurisdiction of the federal courts. Most recently, the Federal Court Study Committee rejected the importance of local bias for diversity jurisdiction on two grounds. First, the Study Committee disputed the existence of any widespread bias effect. Reports of bias were characterized as inconsistent, reflecting only attorney fears, rather than an empirical reality. Other types of bias were said to be more significant, especially bias against corporate litigants.

The Study Committee noted that while "there may be cases in which prejudice against an out-of-stater plays a role, the class of such cases is probably small." Second, the ability of the federal courts to alleviate the problem was doubted. Jury pool differences are not great because federal and state juries "are usually drawn from the same lists." The

197. Cf. Chemerinsky, supra note 8, at 269 (stating that opinion surveys will not be viewed as proving either superiority or parity of two different court systems).

198. See infra note 206 and accompanying text (stating for proponents, perception of bias alone is sufficient to justify diversity jurisdiction).

199. Policy recommendations may appropriately look at educational practices that teach attorneys what "reality" is without knowing what that reality actually is.

200. STUDY COMMITTEE REPORT, supra note 25, at 40 (concluding without providing any detail that out-of-state bias is not "a compelling justification for retaining diversity jurisdiction"). The Subcommittee Report provides a detailed examination of this issue. SUBCOMMITTEE REPORT, supra note 32, at 450-54. Its analysis may be taken as indicative of the reasoning of the full Committee. The Study Committee report virtually denies the existence of out-of-state bias at all, commenting that "[bias] does not fall along state boundary lines." STUDY COMMITTEE REPORT, supra note 25, at 15.

201. STUDY COMMITTEE REPORT, supra note 25, at 15.


203. SUBCOMMITTEE REPORT, supra note 32, at 453. The Subcommittee makes reference to the fact that the federal district covers a wider area than state courts from which it draws its jury pool, but dismisses this distinction on the assumption that if bias exists in a state, it is equally distributed across urban and rural areas. Cf. infra text accompanying note 210 (arguing bias is local rather than state-based). The Subcommittee Report also states that "the argument must therefore be that the federal judge will more freely exercise the powers that he
Study Committee also wrote that the power of the federal judge to
direct or set aside verdicts is not great.\textsuperscript{204}

Advocates of retaining diversity jurisdiction argue that bias
against litigants is widespread.\textsuperscript{205} They argue that federal juries are
less prone to influence by such bias, and that federal judges use a
variety of means to limit the importance of any such bias in their
courts. In any case, the perception of possible bias by litigants is
viewed as a valid reason for diversity jurisdiction independent of the
actual existence of bias.\textsuperscript{206}

The principal empirical issue in this debate is whether a distinc-
tion can be made between bias against out-of-state litigants, and
bias directed at businesses or non-local residents, regardless of the
state of residence. Those advocating such a distinction contend that
there is a great overlap between these biases. Accordingly, author-
izing federal jurisdiction for some, but not all, essentially equally-
situated litigants solely on the basis of residence is not appro-
priate.\textsuperscript{207} Proponents of diversity either oppose the empirical validity
of denying such distinctions or reject its policy validity.\textsuperscript{208}

\textsuperscript{204} SUBCOMMITTEE REPORT, supra note 32, at 453. Although not credited, both this point
and the previous point are taken almost verbatim from Friendly, who cited no empirical data
to support this opinion. See H. Friendly, supra note 202, at 148 (discussing similarities be-
tween state and federal courts).

\textsuperscript{205} See Frank, The Case for Diversity Jurisdiction, 16 HARV. J. ON LEGIS. 403, 410 (1979)
(presenting several arguments including, without apology, availability of federal forum to es-
cape other forms of bias than that against out-of-state litigants); McFarland, supra note 48, at
38 (citing proposition that diversity jurisdiction is still necessary to promote free flow of capi-
tal among states, without, however, explaining why this is so); Marsh, Diversity Jurisdicti-
on: Scarecrowt of Overcrowded Federal Courts, 48 BROOKLYN L. REV. 197, 209-10 (1982) (suggest-
ing that abolition of diversity jurisdiction could “chill entrepreneurial investment interstate” inso-
far as diversity jurisdiction provides for “need of the commercial community for stability”).

\textsuperscript{206} See Betz, For the Retention of Diversity Jurisdiction, N.Y. ST. B.J., July 1984, at 35, 36
(1809)). Chief Justice Marshall stated that “the Constitution itself either entertains apprehen-
sions on this subject, or views with such indulgence the possible fears and apprehensions of
suitors [that it has provided for diversity jurisdiction].” Deveaux, 9 U.S. (5 Cranch) at 87.
Given the historical antecedents and the general legal tradition of concern for the appearance
of justice, the discussion of bias in the text uses these concepts, perception of bias and exist-
ence of bias, interchangeably.

\textsuperscript{207} SUBCOMMITTEE REPORT, supra note 32, at 448 (discussing effect of abolishing diver-
sity jurisdiction on state courts). The Report states:

\begin{quote}
what is unfair is that existing law gives some litigants the benefit of a federal forum
that is denied to their neighbors solely because these litigants have the good fortune
to face an adversary from another state. . . . [T]here is nothing unfair about placing
all parties with state law claims on an equal footing. Abolishing diversity jurisdiction
does nothing more than take a windfall benefit away from a class of litigants with no
claim to special treatment.
\end{quote}

\textit{Id.} at 448.

\textsuperscript{208} See supra note 205 (listing articles discussing these issues).
2. *The research findings*

Contrary to the Study Committee views, the continuing presence of fear of bias against out-of-state litigants is clear from our research. Over half the defense counsel (50.7%) responding to the mail survey cited this form of local bias as present in their cases. Plaintiff attorneys supported these reports at about half the level (26.3%) of defense attorneys. The telephone interviews identified one state where out-of-state litigant bias is a significant phenomenon in rural areas. The geographic analysis of bias reports from the mail survey similarly found that reports of bias directed at out-of-state litigants are most prevalent in the more rural areas of the country, including the Southern and lower Midwest States.

Our findings also refute the contention that bias against out-of-state litigants is identical to bias against businesses. Although local bias against litigants based on business status is a separate concern for litigants, and was cited at almost as high a level of concern, the distribution of reports of business-based bias differed significantly from that of bias against out-of-state litigants. Thus, while out-of-state bias was geographically concentrated in primarily rural areas, reports of bias against business litigants showed no similar distribution pattern. Further, the results of our telephone interviews support this interpretation of the data. Attorneys in the telephone interviews who reported local bias would specify either out-of-state or business-directed bias, but not both.

The mail and telephone interview reports do, however, support the view that bias reports may simply represent a local phenomenon. That is, local juries may be biased against litigants who are not from the immediate area, regardless of whether they are out-of-state litigants or from a metropolitan area within the state. Thus, the telephone interview respondents described how locality-based bias operates, for example, through the medium of politically powerful and respected local attorneys influencing local juries.

Further analysis of the mail survey responses supports this inter-

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210. *Cf. Study Committee Report, supra* note 25, at 15 (stating there is "greater tension . . . between urban residents and rural residents of the same state. . . .").
211. It is this description that explains how local bias differs from jury sympathies. From the defense perspective, jury sympathies refers to the jury’s tendency to favor plaintiff verdicts or to grant larger damages awards. By and large, the telephone interviews suggest that the largest awards are found in large urban areas, such as Detroit and Chicago. Removal to federal courts in the more urban states reduces the jury sympathies factor by drawing potential jurors from both urban and rural areas, with a few exceptions such as the Southern District of New York. Local bias, however, is concentrated in the less urban states, and operates as detailed in the text.
pretation of overlap between out-of-state and locality-based bias. First, over one-third (38%) of the defense attorneys reporting out-of-state bias also reported locality-based bias, while 81% of those citing locality-based bias also cited out-of-state litigant bias.\textsuperscript{212} Second, analysis of the geographic distribution of the defense attorneys who cited locality-based bias supports the locality-based bias interpretation, since these reports were largely clustered among respondents in the Southern States. Third, 27.3% of plaintiff attorneys reported favorable bias based on local residence. These locality-based bias reports, however, are merely indicative, not conclusive, evidence of a congruence between the two types of geographic bias.\textsuperscript{213} Therefore, the case for locality-based bias, as distinct from that directed at out-of-state litigants, is still more inferential than proven.

The research findings also suggest that attorneys are less concerned with fear of bias issues than with other factors affecting case outcome. For example, only 10% of defense attorneys said that bias was a “very strong” reason for removal from the state court. In contrast, 44% of defense counsel said judicial competency was a “very important” reason for removal of cases.\textsuperscript{214} These findings suggest that local bias and judicial competency are mutually reinforcing reasons for defense attorneys’ case removal decisions. Therefore, attorneys citing out-of-state bias are more likely than attorneys not citing this factor to report that federal judges are more competent than state judges. Both the telephone interview responses and inferential logic indicate that this interaction between bias and competency is due to expectations that federal judges will control any local bias directed at out-of-state litigants.\textsuperscript{215}

\textsuperscript{212} It may well have been that a higher proportion of defense counsel would have cited locality-based bias if they had been explicitly asked to choose between out-of-state and locality bias. The great majority of counsel in these cases represented out-of-state clients, and, therefore, would be less likely to distinguish between the two types of bias, than would counsel representing in-state litigants. Since out-of-state bias is of historical notice, attorneys are probably primed to respond to this question, rather than to questions about locality bias.

\textsuperscript{213} More conclusive results could be obtained only by direct questioning of attorneys on this point. While 38% of attorneys citing bias against out-of-state litigants also reported locality-based bias, the failure of the remaining 62% to similarly cite both is open to two interpretations. It may be that the latter attorneys perceived a real difference between the two biases. Alternatively, these attorneys may simply have failed to think about the differences in these biases, and may merely have reported according to their understandings of the policy argument about the continued existence of bias against out-of-state litigants.

\textsuperscript{214} It might also be inferred that out-of-state bias is receding in those areas of the country experiencing considerable population growth due to population shifts away from the Northeast and upper Midwest. Two districts in Florida and Texas, where there has been considerable population growth from migration within the United States, showed lesser levels of bias against out-of-state litigants than that reported by all attorneys in either state.

\textsuperscript{215} Plaintiff counsel split in ascribing greater competency to either federal or state court judges. This suggests that judicial competency is not a factor in forum filing unless it interacts
The research also examined other types of perceived litigant-directed bias that have not been the subject of much policy discussion. For example, respondents to the mail survey reported parallel bias against out-of-state litigants in federal question cases, but this has not been the subject of any literature focusing on policy issues. Similarly, the research demonstrated some, albeit relatively little, perceived bias against litigants based upon their race or sex. This type of bias has not been the subject of much policy discussion either, although the cases that revolve around the question of representative juries might be read to suggest otherwise.

3. Policy implications

On balance, these findings support the arguments of the advocates for the retention of diversity jurisdiction. First, although proponents of the abolition of diversity jurisdiction contend that potential fear of bias against out-of-state litigants is not a major national concern, it is important in the less industrialized, more rural regions of the country. Second, while bias against businesses often parallels that against out-of-state litigants, the match between them is only an approximate one. In some cases both may be present. In other cases only one or the other is found. Third, it may be that out-of-state bias is a subset of locality-based bias. Absent more direct research, however, such a view can only be tentatively in-

with other factors. Further, the telephone interview responses indicate that some counsel perceive federal judges as more likely to have a pro-defense bias. If true, this type of bias must be distinguished from judicial competency.

216. Much of this litigation involves criminal law cases. See Duren v. Missouri, 439 U.S. 357, 360-61 (1979) (finding that automatic jury venire exemptions for women, resulting in venires averaging less than 15% women, violated Constitution's fair cross-section requirement); Batson v. Kentucky, 476 U.S. 79, 92-93 (1986) (overruling Swain v. Alabama, 380 U.S. 202 (1965) and holding that Constitution allows inquiries into prosecutor's reasons for exercising peremptory challenges against black jurors in criminal case). The principles of these cases apply to civil proceedings as well. See Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2086-87 (1991) (holding that peremptory challenges are subject to scrutiny in both criminal and civil cases); Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) (stating that in both criminal and civil cases, prospective jurors cannot be selected with the "systematic and intentional exclusion of any ... economic, social, religious, racial, political, [or] geographical groups of the community"); Fludd v. Dykes, 863 F.2d 822, 828 (11th Cir. 1989) (holding that Batson applies in civil cases).

217. Bias may be intentional or unintentional, resulting from the exclusion of minority group members. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII of Civil Rights Act of 1964 proscribes both de jure and de facto discrimination). In the jury context, unintentional exclusion of minority group jurors can result in an absence of jurors with specific life experiences relevant to the legal issues of a case. Minority group members may also serve to limit the operation of intentional bias among other juror members.

218. See Study Committee Report, supra note 25, at 40 (conceding existence of some bias in some jurisdictions, but denying bias as compelling reason for retaining diversity jurisdiction).

219. See supra notes 150-56 and accompanying text (discussing reports of lesser out-of-state bias levels in urban areas).
ferred. Nevertheless, none of the abolitionists' arguments refute the finding that over half the defense attorneys reported some level of state court bias against out-of-state litigants.220

Two final points can be made. First, assuming that either business-directed or locality-based bias is congruent with out-of-state bias, the question remains whether this distinction matters. It could be argued that such a distinction is irrelevant to the commercial purposes of diversity jurisdiction.221 A modern commercial interest may still exist in ensuring the availability of a federal forum to out-of-state litigants, regardless of the basis for local bias. For example, national businesses, such as insurance companies or lending institutions, might make some types of commercial decisions contingent upon the availability of a federal court forum that is unaffected by local bias.222 While there is no direct evidence supporting this hypothesis, its validity would explain a report that counsel for major United States corporations are supporters of diversity jurisdiction.223

Finally, it must be noted that focusing the argument solely on bias in diversity jurisdiction cases misses several other important issues. Comparative judicial qualities, such as competency concerns, are much more significant to attorneys' forum selection than concerns about bias. Furthermore, these concerns interact with bias concerns. How federal courts reduce local litigant bias, and why state courts are said to be less able to reduce such bias, are areas that need to be validated, investigated, and analyzed. Conversely, to the extent that federal courts actually reduce the impact of local litigant bias, they may also introduce other types of institutional litigant favoritism that affect case outcomes.224

220. See supra Exhibit 4.
221. See Frank, supra note 3 (citing fear of bias against commercial litigants as original justification for diversity jurisdiction); see also R. Neely, THE PRODUCT LIABILITY MESS 15, 61-63, 71 (1988) (asserting that in product liability cases, where most defendants are out-of-state corporations and most plaintiffs are local individuals, defendant corporations pursue federal forum out of fear that state courts will favor local plaintiff). But see Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 LAW & CONTEMP. PROBS. 216, 235-36 (1948) (contending that diversity jurisdiction is no longer justified by fear of bias against out-of-state litigants because protection against such bias can be found in state appellate process).
222. The one area of commerce where this is most likely to occur is in the insurance industry. What the absolute level of corporate response might be, even in the field of insurance, is not, however, the topic of this study.
223. See Frank, supra note 205, at 404 n.3 (citing various corporate counsel opposed to abolishing diversity jurisdiction); see also Marsh, supra note 205, at 209 (noting that convenience and cost have led large corporations to rely on integrated judicial system).
224. See supra note 221 (suggesting that diversity jurisdiction may be institutionalizing favoritism toward commercial litigants).
C. Importance of Relative Judicial Competencies

1. The policy positions

While there is an implicit belief among many, but not all, commentators in the superiority of the federal courts, its significance for abolition or retention of diversity jurisdiction is hotly disputed. For example, the Study Committee contended that the differences that do exist are irrelevant to retention or abolition of diversity jurisdiction.

Absent, however, is any suggestion that federal court superiority, if real, necessarily implies a federal concern for state court "reform." As recently as 1969, the American Law Institute stated "it may be seriously questioned whether it is a function of federalism to try to prod the states into improving their judicial systems." Advocates of diversity jurisdiction, however, argue that if the state courts are in fact inferior to the federal courts, abolition will make the condition of the state courts worse. In recognition of the

225. See Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1106 (1977) (contending that lack of parity between federal and state court systems is due to historical patterns and institutional factors). Neuborne cites greater technical competence of federal judges as one reason for the disparity. Id. at 1121-24; Marvell, supra note 12, at 1333-35 (discussing greater judge competency as rationale for federal question jurisdiction). But see Fischer, Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts, 84 U. MIAMI L. REV. 175, 180-81 (1980) (contending that judicial competency cannot be measured empirically). Fischer states that "[e]ven the proponents of the use of competency criteria for forum allocation decisions acknowledge that their judgments to date are based largely upon speculation." Id. The belief that parity cannot be empirically measured is also supported by Chemerinsky. See Chemerinsky, supra note 8, at 256-61 (contending that parity cannot be empirically verified in context of constitutional litigation). Chemerinsky states that parity cannot be measured because there is no agreement on what are preferred case outcomes. Id. at 257. Therefore, valid data could not be compiled to determine whether either court is more or less likely to reach the "right" outcomes. Id. at 257. He further argues that, even if such data were available, the internal variations between the federal and state courts would minimize the value of cross-court comparison. Id. at 259. To this writer, Chemerinsky's argument seems more plausible than the contrary opinion of Solimine & Walker. See Solimine & Walker, supra note 8, at 214-15 (measuring parity empirically by analyzing written judicial opinions of state and federal court judges).

226. See Study Committee Report, supra note 25, at 38-43 (failing to recognize judicial competence as factor in discussion of diversity jurisdiction); see also Subcommittee Report, supra note 32, at 449 (denying relevance of federal court superiority to diversity jurisdiction issue); H. FRIENDLY, supra note 202, at 146 (arguing that while it is very likely that federal courts are "better" than most state courts, state courts have not proven to be "incapable of dispatching ordinary civil litigation").

227. ALI Study, supra note 10, at 459 (rebuiting rationale for diversity jurisdiction that federal courts have reforming influence on state courts).

228. See Frank, supra note 205, at 412-13 (contending that alleviating caseload pressures on federal court system is not valid justification for abolishing diversity jurisdiction because doing so necessarily involves increasing caseload pressures on state court system); see also Study Committee Report, supra note 25, at 41 (justifying virtual elimination of diversity jurisdiction despite excess burden placed on state court system). The Report states, "what is a heavy burden to the federal court system would represent an insignificant addition to the work of most state courts because the state court system is so much larger in the aggregate than the federal system." Id. Interestingly, though, in the very same text, the Report recog-
caseload issues that might affect state courts if diversity jurisdiction was abolished, the Study Committee did note that Congress could provide for transitional funding to alleviate any caseload problems that might adversely affect the state court system.\textsuperscript{229} No writer has proposed federal efforts to upgrade state courts as a preliminary action preceding the abolition of diversity jurisdiction.\textsuperscript{230}

The primary empirical question is whether attorneys still perceive that federal judges are superior to state court judges.\textsuperscript{231} The logical follow-up to this question is to infer from the attorney reports what behavioral consequences are likely to occur with "improved" state judicial capabilities.

2. The research findings

The research findings clearly support the view that federal judges are perceived as superior to state court judges. Virtually all of the defense attorneys and a large proportion of the plaintiff attorneys said that federal judges are more competent.\textsuperscript{232} Almost as many att-
torneys said that federal judges are more familiar with the substantive law issues of the case in question, even though most of the cases involved state law issues brought under diversity jurisdiction. Adjusting for the smaller number of plaintiff attorney responses, about two-thirds to three-fourths of all attorneys reported that the federal bench is generally more capable than the state judiciary. The large number of plaintiff attorneys reporting federal judge superiority also counters any interpretation of the data to mean that favorably acting judges are defined as superior judges.

The importance of judicial competency depends upon the assigned tasks that counsel expect judges to perform. Defense counsel seem to expect judges to limit jury discretion, including limiting the effects of local juror bias. Not only did the telephone interviews provide explicit reports of this expectation, but the mail survey measure of jury impacts from "expected verdict size" supports this interpretation. As noted, defense counsel reports of judicial competence are highly correlated with those citing local bias. Plaintiff counsel corroborated these reports of local bias. The fact that plaintiff counsel generally seemed to prefer that judges not exercise control over jury discretion, explains why judicial competency was not as significant a forum selection factor for plaintiff counsel as it was for defense counsel.

3. Policy implications

Improving the quality of the state judiciary essentially is independent of issues relating to either forum choice or even diversity jurisdiction. Nonetheless, even in this context, both federal and state governments have reason to improve state court judicial capabilities.

233. Only one attorney reported that removal in a diversity case was because the primary substantive law issue in the case involved a federal law defense.

234. This finding also refutes any possible objection that the use of removal cases to identify lawyers for the survey affects the reporting of judicial superiority. That is, the large numbers of plaintiff attorneys reporting federal judge superiority undercuts the likelihood of a different result from surveying attorneys in concurrent jurisdiction cases that remain in state court.

235. See supra note 169 and accompanying text (stating that 84% of defense attorneys reporting that local bias exists, also said federal judges display overall, superior competency, while 73% of those not reporting local bias had same report).

236. See supra note 169 and accompanying text (discussing correlation between local bias and judicial competence).

237. See supra Exhibit 3.
a. Federal government interests

Several justifications exist for federal concern regarding state court quality. First, the perception of the quality of the state judiciary has a direct effect upon federal court filing. Although the Study Committee argues otherwise, the respondents in this study seem to believe that because of their higher quality, federal judges can directly control jury bias by controlling courtroom demeanor or by limiting jury instructions which ultimately direct deliberation. Indirect control can also exist through the power of the judge to order a new trial. Another possibility lies in the power of the judge to take a case from the jury by granting motions for summary judgment, directed verdict, or judgment notwithstanding the verdict. All of these actions are affected by the quality of the judge's legal acumen and by the willingness of the judge to control jury bias. Improvements in state court judicial quality could reduce the reliance on the federal courts as a means of limiting local bias in diversity cases.

Second, improved state court quality could lessen the federal court docket of federal question cases. Attorney fear of local bias was reported to be a forum selection factor in federal question cases, although it was not at as high a level as in diversity cases. Reduction of this fear can be expected to increase the use of state courts in both types of cases.

Finally, irrespective of any impact on federal court caseloads, the view that the federal government has no interest in the quality of the state courts has long been rejected by Congress. There may even be constitutional reasons for this interest. An argument can be made that there is a constitutional right to civil "justice" in the state courts, a right that parallels the Supreme Court holding in criminal matters of a "no evidence" rule.

238. See Subcommittee Report, supra note 32, at 453 (arguing that power of federal judges to protect out-of-state litigants from bias is not great).
239. This is not to say that state judges cannot or do not also use such mechanisms for controlling juries. The point is to refute the Study Committee's assertion that there is no means for better judge quality to have an effect on jury behavior. Whether or not differences exist in a federal judge's comparative use of these measures would be the subject of another study.
240. See supra text accompanying note 150 (discussing attorney reports of out-of-state bias in diversity and federal question cases).
b. State government concerns

It is axiomatic that the quality of the state courts is of major concern to the state courts themselves. The retention or abolition of diversity jurisdiction is irrelevant to state concern for improvement of its courts, except as increased caseloads may decrease court quality. Hence, improvement of the state judicial system is an absolute, not relative, goal of the state courts.

More concrete reasons for state concern about court improvement also exist in the context of concurrent jurisdiction. Presently, the availability of removal to federal court of diversity cases can result in inefficiencies in the use of state court resources. Indeed, any use of state court resources in cases ultimately decided by a federal court is inefficient. "Better" state courts could help keep these cases in the state courts, thereby reducing such inefficiencies.

State courts also have reason to be concerned about inaccurate perceptions of their lesser competence. Such perceptions may decrease bar or public support for future efforts to improve the courts. Thus, state courts must explicitly consider how they differ from the federal courts and how those differences affect litigants.

D. Other Procedural and Substantive Law Court Differences

1. The policy positions

Policy discussion of the interchangeability or parity between the federal and state courts is almost always limited to examining judicial qualities and rulings. Consistent with this emphasis are fifty years of Supreme Court decisions limiting differences in diversity case outcomes due to choice of forum — at least insofar as such differences result from judicial rulings on the applicable law.
Similarly, state court judges are required to follow federal law precedents in federal question cases.\textsuperscript{247} This literature assumes that these mandates are appropriately followed, with little systematic evasion.

While court parity writings rarely focus on differences in jury decisionmaking, a considerable amount of literature exists on how jury composition affects case outcome.\textsuperscript{248} In essence, differences between federal and state court juries are assumed in policy discussions. These differences may generate tactical maneuvering by attorneys, but they cannot be made subject to policy changes.

It is, therefore, hardly surprising that little has been written about either the empirical or policy issues implicit in the interrelationship between judicial and jury decisionmaking. Even legal doctrine ignores these issues, perhaps under the fiction that the mechanisms by which judges limit juries are procedural, not substantive.\textsuperscript{249} This is an unfortunate omission because different court systems may respond differently to the tension between the underlying constitutional values, prompting some courts to stress judicial decisionmaking\textsuperscript{250} while others stress deference to jury verdicts.

2. \textit{The research findings}

The research findings indicate that some areas of state law are not consistently followed by federal court rulings.\textsuperscript{251} Over one-half the

\footnotesize{\begin{itemize}
\item courts to state high court decisions on state law matters in diversity cases); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535 (1958) (reaffirming holding in \textit{Erie} requiring federal courts to adhere to "definition[s] of state-created rights and obligations by the state courts").
\item 249. \textit{But see} Galloway v. United States, 319 U.S. 372, 396-411 (1943) (Black, J., dissenting) (arguing that allowing federal judges to grant directed verdicts through Rule 50 violates accused’s right to jury trial). \textit{See generally} Fed. R. Civ. P. 50 (giving federal judges authority to grant directed verdicts).
\item 251. Of course, some variation in appellate court rulings is inherent in the existence of multiple courts, which often must choose from among several legal doctrines for the legal principle most relevant to the facts of the instant case. Thus, variations among the several federal courts of appeals on a legal issue is among the most important reasons for the United States Supreme Court to review a lower court decision. \textit{See} Sup. Ct. R. 17(1)(a) (providing

This literature assumes that these mandates are appropriately followed, with little systematic evasion.
defense attorneys (53.5%) said that the likelihood of more favorable appellate rulings in federal court was a factor in case removal, despite the high level of diversity cases in the sample. Both the written comments and the telephone interview responses support this finding. The comments and responses identified specific types of cases in which federal courts of appeals were expected to provide rulings in diversity cases diverging from those of the state courts.

Perhaps the most surprising finding from the survey is the importance attached to the availability of summary judgment in federal court by defense attorneys. After the several judicial quality questions, defense attorneys most often cited summary judgment availability as their reason for removal from state to federal court. By and large, the telephone interviews indicate that defense attorneys' reports on availability of summary judgment relate to a perceived greater willingness of the federal judiciary to grant summary judgment motions, thereby eliminating any jury involvement. Of course, the telephone interviews also show that there are organizational impediments limiting the ability of the state court judges to issue summary judgment rulings.

3. Policy implications

Different case outcomes are an inescapable corollary of concurrent jurisdiction. For example, trying the same case before different juries or judges, even in the same court, may result in different verdicts. Extra-legal influences, such as jury bias against a class of litigants, are even more likely to produce differing case outcomes. In the absence of such influences, however, a systematic difference in outcomes is not expected.

The research results suggest that notwithstanding Erie and like decisions, two types of systematic differences between state and federal courts affect case outcomes: (1) the availability of summary judgment rulings; and, (2) federal court adherence to state law precedents. The question remains whether these differences are justified.

252. See supra text accompanying note 176 (reporting that 47.9% of defense attorneys see availability of summary judgment rulings as important factor in selecting forum, while 20.1% saw it as "very strong" reason).

253. For example, the rotation of judges in South Carolina every six months impedes the willingness of judges to issue rulings that will limit the discretion of judges who later try the case (in the event of a partial summary judgment).
attorney perception that federal judges are more liberal in granting motions for summary judgment rulings predate the expansion of this authority by the Supreme Court in 1986. This perception is consistent with our other data indicating that federal judges are more likely to control jury discretion, while state judges are less likely to interfere with jury decisions. These inferences are supported by both the written comments to the mail survey in which twenty-seven attorneys reported that their cases ended with summary judgment, and by the telephone interview comments.

The propriety of the differences in summary judgment practice is then dependent on the value placed on the right to a jury trial compared to the judge’s obligation to safeguard justice. The more one values the right to jury trial, the less one values the availability of summary judgment.

The key policy implication is not that state courts should adopt federal court policies about summary judgment, but that the policy

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The only empirical study to contrast federal and state court motion practices found that, in four of the five districts examined, federal courts are more likely to terminate cases by motion rulings than are state court judges. See Grossman, supra note 144, at 106 (analyzing how courts of general jurisdiction acquire and process their cases). No research has been done on why judicial practices differ, although prior to 1986, there was very little difference in the formal rules governing summary judgment motions between most state courts and the federal rule. See, e.g., W. Va. R. Civ. P. 56; Tenn. R. Civ. P. 56; Tex. R. Civ. P. 166(a); N.C.R. Civ. P. 56; Miss. R. Civ. P. 56. Obviously, judicial philosophies on the proper role of the judiciary vis-a-vis the jury is an important factor. This factor may be influenced by the need of many state judges to run for election. Other factors may also be present, however, such as the impact of a common federal court local rule requiring extensive written briefs to support summary judgment motions.

255. For example, on an anecdotal level, three attorneys who, after hearing a brief recitation of this research’s preliminary findings, which included mention of summary judgment availability, reported that these findings were exactly right on all points.

256. The trial judge has several means of controlling jury errors, including ordering a new trial. See Galloway v. United States, 319 U.S. 372, 411 (1943) (Black, J., dissenting) (noting that if court thinks that jury verdict has been reached without sufficient evidentiary support, new trial should be granted instead of directing verdict). Similarly, judicial abuse of power in substituting the judge’s views for those of the jury may be subject to varying types of appellate review.
adopted should consider the impact that a different policy might have on forum selection. Further, particular classes of litigants are affected differently by these opposing policies. Conversely, the inference that many case outcomes differ because of summary judgment policies indicates that the substantive/procedural law distinction drawn by the Supreme Court is inherently flawed, and not a convenient fiction.

b. Federal court adherence to state law precedents

The reported failure of the federal courts to rule consistent with state courts in diversity cases cannot be defended as based on weighing different constitutional values. Such debate was thought to have been foreclosed by *Erie* and its progeny. The telephone interview respondents indicated, however, that federal courts follow the technical *Erie* mandate of predicting what the state high court's decision would be, ignoring the intermediate appellate court rulings. This is particularly true in several states where the high court has only certiorari jurisdiction, and may choose to avoid deciding cases by refusing certiorari. According to the survey respondents, numerous intermediate appellate court decisions issued over a span of up to ten years have not been accepted as controlling by the federal courts.

The responses indicate that an unrecognized gap may exist in the *Erie* doctrine as it is now interpreted. This research does not provide any guidance for inferences about the pervasiveness of the problem. However, the large proportion of attorneys in the study who anticipated different rulings of law in state court points to the need for more definitive study. This research does not permit any determination of whether, or how, to respond to this gap in the *Erie* doctrine. It does suggest, however, that the federal and state appellate courts should examine the validity of the attorney reports within their own jurisdictions.

E. Attorney Experience as a Policy Issue

1. The policy positions

The implications of attorney experience are not commonly thought to be a policy issue for purposes of analyzing the allocation of jurisdiction between federal and state courts. Neither the ALI nor the Federal Courts Study Committee report makes any reference to how attorney expertise affects filing decisions, nor how such issues
experience might be manipulated to reduce problems associated with concurrent jurisdiction. Of course, other policy proposals such as those establishing competency requirements for admission to the federal bar, have been set forth. One commentator has suggested that there is a link between proposals for the elimination of diversity jurisdiction and competency proposals.258

2. The research findings

Attorney experience and familiarity with the court was found to be an important forum choice factor. Its importance was especially significant for plaintiff attorneys, where it was the most cited reason for forum selection (64.4%). Further, the importance of this factor for defense attorneys may well be underestimated, because this study omitted defense attorneys who chose not to remove cases where it was authorized.259

Attorney experience is also related to several other factors affecting choice of forum. For example, defense attorneys with greater federal court experience are more likely to seek removal to obtain summary judgment rulings, while less-experienced attorneys remove to gain an advantage in settlement negotiations.260 Similarly, more-experienced defense attorneys were most likely to report federal judicial superiority. Interestingly enough, plaintiff attorneys with litigation experience were more likely to report the presence of bias against the opposing party than were plaintiff attorneys with less experience, a finding suggesting that experienced plaintiff attorneys are less likely to select state courts for convenience reasons than for its effect upon case outcome.261

3. Policy implications

A logical inference from the data is that abolition of diversity jurisdiction would affect the use of federal question jurisdiction. Abolition of diversity jurisdiction would necessarily reduce attorney familiarity with federal courts, most importantly among plaintiff at-

258. See Frank, supra note 205, at 414 (suggesting that, if diversity jurisdiction was abolished, additional federal bar examination may emerge, creating "superqualified federal barrister class").
260. See supra Exhibit 7 and accompanying text (discussing how removal decisions based on summary judgment availability are function of attorney experience in federal courts).
261. This is not to say that convenience and case outcome are mutually exclusive reasons. Defense attorneys with higher levels of federal court experience were also those most likely to cite court familiarity as contributing to the removal decision. This is not surprising, since experience and familiarity represent different facets of the same phenomenon.
torneys representing individual clients.\textsuperscript{262} Insofar as court familiarity is an important factor in attorney forum selection, any reduction in familiarity with the federal courts would also reduce the likelihood that an attorney would select a federal forum in a federal question case.\textsuperscript{263} Such cases would either be filed in state courts or referred to attorneys who specialize in federal court cases, leading to the development of a specialized federal bar. This probably would result in an increase in the fees charged by the federal court specialists, resulting again in abandonment of claims.\textsuperscript{264}

\section*{F. Some Miscellaneous Court Differences}

\subsection*{1. The policy positions}

By and large, policy discussions of concurrent jurisdiction note that several procedural advantages are available in federal court. These include superior procedural rules, rules of evidence, and several institutional-based advantages such as the 100-mile rule for summonses.\textsuperscript{265} In addition, the availability of a federal forum for multi-state litigation has also been noted with approval.\textsuperscript{266}

\subsection*{2. The research findings}

Survey respondents cited several procedural differences between state and federal courts in their written comments and telephone interviews. The most commonly reported difference was the greater willingness of federal judges to enforce rules relating to discovery. This tendency was demonstrated either by requiring recalcitrant attorneys to provide requested information or by requiring strict adherence to discovery time limits.\textsuperscript{267} The greater scope of the federal

\textsuperscript{262} Plaintiff attorneys representing individual clients in diversity cases are more likely to occasionally represent such clients in federal question matters. Defense attorneys in diversity cases, however, represent commercial clients, whose cases in federal court are less likely to involve federal question matters.


\textsuperscript{264} The specialized bar might, over time, create secondary barriers to non-specialist attorneys' representation in these cases. See Galanter, \textit{Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change}, 9 Law & Soc'y Rev. 95, 114, 118, 123 n.72 (1974) (suggesting that attorneys who continually litigate in particular forum have strategic advantages over those who do not, including greater influence over judicial decisionmaking and rulemaking).

\textsuperscript{265} See Fed. R. Civ. P. 4(f), 45(e) (stating that subpoena mandating appearance by witness can be served any place outside of court's district that is within 100 miles of place of hearing or trial).

\textsuperscript{266} See Study Committee Report, \textit{supra} note 25, at 40 (noting that federal forum should be available in complex cases involving multi-state litigants); ALI Study, \textit{supra} note 10, at 377-78 (noting that availability of federal forum is sound way of alleviating state courts of complexities involved in multi-state litigant diversity cases).

\textsuperscript{267} Attorneys reported differences in enforcement of procedural rules as a reason for
discovery rules was also important to several attorneys. Only one attorney, however, cited the federal interpleader rule for third-party defendants as a factor in the decision to remove to federal court. Finally, two defense attorneys reported removal in anticipation of plaintiff attorneys’ failure to meet the federal requirement for written demand for a jury trial.

Conversely, many plaintiff attorneys prefer state courts because of the lesser emphasis on burdensome procedural rules. Typical of this view were the attorneys who reported that state courts did not require motions practice. Further, written briefs to support motions are not required in several state courts and state judges may not readily entertain motion filings. Finally, a few plaintiff attorneys also noted that federal judges were more “arrogant” than state judges.

3. Policy implications

The procedural observations of the attorneys are of two types. First are those noting an inability of the state courts to provide specific procedural elements needed to resolve cases on the merits. These include, for example, the geographic scope of discovery. Little needs to be said about this issue except that state rules should be amended, where needed, to deal with the deficiencies in the rules. Identification of specific changes, however, must be done on a state-by-state basis.

The second observation is more complex. It involves direct judicial monitoring of case processing. For example, while judicial enforcement of procedural norms, such as time limits on discovery, may be theoretically attractive, one should be hesitant to recommend greater enforcement of these rules without first knowing why judges sometimes fail to enforce them. Is it local bias, caseload pressure, judicial rotation, or simply an effort to force attorneys to resolve matters before judicial control is absolutely needed? Simi-
larly, one should be hesitant to recommend a state rule paralleling the common federal local rules and practices for case-status calls without knowing how this would affect state courts—especially in light of the significantly greater number of cases in state courts. More directed research is needed before such recommendations can be implemented.

G. Future Policy and Research Recommendations

Because the structure of a research report must follow the behavior being studied, various observations and recommendations appear throughout the report. This section attempts to synthesize the prior discussion and add a few related points that would be out of place elsewhere.

1. Diversity Jurisdiction

Diversity jurisdiction of the federal courts is reported to continue to serve contemporary litigant needs for an impartial forum. Proposals to abolish or drastically curtail diversity jurisdiction are unsupported by this and other research. Future research attempting to clarify the utility of diversity jurisdiction must examine the probable actions of commercial litigants in response to a curtailing of diversity jurisdiction. If it is found that the historically favored beneficiaries of diversity jurisdiction would be relatively unaffected by its abolishment, it might be argued that bias against out-of-state litigants is a less important concern despite its continued presence.

These conclusions about the possible commercial importance of diversity jurisdiction have little application to the derivative question of whether in-state plaintiffs should be allowed to invoke diversity jurisdiction. Insofar as judicial competency is found to be a question of "whose ox is being gored," there are neither principled nor utilitarian reasons for this jurisdictional duplication. Finally, further research on bias against out-of-state litigants should explicitly examine the relationship of locality-based bias to this issue.

271. One should not be surprised to find that enforcement of a status call rule may require other changes in case processing, including use of an individual calendar system.

272. This contention has been put forth by litigants in the Supreme Court as recently as 1989. See Brief for Respondents at 32, Carden v. Arkoma Assocs., 110 S. Ct. 1015 (1990) (No. 88-1476) (citing avoidance of local bias against out-of-state litigants as justification for diversity jurisdiction). The Court's decision in this case did not respond to this policy argument. See Carden v. Arkoma Assocs., 110 S. Ct. 1015, 1017 (1990) (holding that limited partnership could not be considered "citizen" of state that created it for purposes of determining diversity jurisdiction).
2. Removal recommendations

In general, removal jurisdiction is justified as a parallel to federal court jurisdiction to hear originally filed cases. Indeed, the prohibition against removal of diversity cases involving in-state defendants supports the adoption of a similar rule against originally filed cases.

Whether removal should be expanded to include cases involving federal defenses or counterclaims is a more complicated question. The research data clearly indicates that fear of local court bias against out-of-state litigants is present in federal question cases. Hence, as a theoretical matter, expanded removal jurisdiction is justified on two grounds: bias concerns and greater familiarity with federal law. On the other hand, docket concerns caution that such expansion may result in defendants creating federal law claims to escape "unfriendly" state courts for reasons unrelated to the aforementioned justifications for expanded authority. One possible solution to this potential problem would be to permit removal in federal question cases where the removing party asserting a federal defense is from out-of-state, but where diversity jurisdiction does not exist because either one defendant or plaintiff has residence in the other party's state of residence.

3. State court actions

Many attorneys responding to the survey perceive that state courts are less competent than federal courts. Some of the greater satisfaction with federal courts may be attributed to superior resources, for example, the availability of law clerks for each judge. Further, perceptions about judicial parity do not necessarily reflect actual improvements that have occurred in the state courts since the attorneys' perceptions were probably formed during law school or during the attorneys' first years of practice. Nonetheless, the level of judicial competency is an issue in many state courts. Thus, the research results support current efforts to improve the state courts, especially in the area of recruitment of the judiciary. The research also supports court efforts to better inform the public and attorneys of the actions taken to improve court and judicial performance.

A less abstract recommendation lies in the study's finding of the importance of summary judgment rulings in removal decisions. Summary judgments are an important tool for achieving judicial and litigant economy. Cases that are decided quickly on the basis of applicable law are less costly to litigate than those cases that perpetuate only to produce an identical result in the end. On the other hand, judicial resolution of cases without the benefit of a jury could
offend the public's perceptions about how the judicial process should operate. Additionally, judges are able to rectify jury errors using directed verdicts and other procedural mechanisms. As noted previously, these conflicting values must be faced squarely by state courts.

Finally, court structures that impede the availability of summary judgment and other pretrial rulings cannot be justified on jurisprudential grounds. State courts should use the research findings as a stimulus to review their policies on summary judgment and identify structural roadblocks to the availability of such rulings.

4. Federal court actions

The research data indicates that for many plaintiff attorneys, the federal courts are not "user friendly." This is due, in part, to a lack of familiarity with the federal courts, and also to a perception that federal judges are more aloof and arrogant than their state court counterparts. In addition, federal court paperwork requirements are thought to make cases more expensive to litigate than in state court, and therefore favor the major law firm practitioner over the solo or small firm practitioner. These are not new observations, but their importance has rarely been so documented at a statistical level.

Actions to resolve these problems are not always immediately obvious and may even be inconsistent with other efforts to transfer whole classes of cases to the state courts. Nonetheless, the fact remains that attorneys who are unfamiliar with federal court will be forced to litigate in the federal courts. Clients will face disadvantages due to their attorneys' lack of experience, including the possibility of paying higher fees to cover the costs of attorney on-the-job training. Although federal courts are unlikely to establish a clerk position to assist attorneys who are unfamiliar with federal practice, at a minimum, the federal courts should sensitize the clerical staff to the problems of inexperienced attorneys.

A more serious problem suggested by the research is the reported circumvention of the *Erie* doctrine by federal courts. If attorney reports are representative of the larger litigation issue, the spirit of *Erie* is often being compromised by indirect and sometimes direct evasion of its rule.273 Again, additional research is needed to confirm these reports.

273. *See supra* Part IV(D)(3)(b) (discussing reported lack of adherence by federal courts to *Erie* ruling).
This report may provoke debate among those who either disagree with its findings, or are uncomfortable with the bluntness with which the findings are presented. The policy significance of the research may be inferred from several letters from attorneys who wrote at length to describe their views as an addendum to their survey responses. Some attorneys even provided us with newspaper clippings describing the background of their survey cases. On the other hand, other attorneys telephoned to gain assurances that their responses would be held confidential or to assure themselves that there was no hidden sponsor of the research, for example an insurance industry.

Probably the most controversial aspect of this report is its findings on attorney perceptions about judicial parity. Because this topic seems to provoke response, it is necessary to remind ourselves of the limits of the findings. First, these are reports of attorney perceptions, not of an independent reality. Second, attorney perceptions may be colored by hearsay reports and other external influences as much as by direct experience. For example, from the emphasis in many law schools upon federal procedure, some attorneys may infer that federal courts are better than state courts. Third, the survey's lack of precision in defining parity is a critical weakness in inferring from the attorneys' perceptions to the existence of an underlying reality. If the most important criteria for evaluating courts is their ability to render justice in a way that justice is perceived by litigants, then the greater emphasis of state courts on jury verdicts makes assumptions about relative judicial competency and court performance even more questionable.

Legal education may also be a factor in forum selection. For example, the research suggests that some proportion of attorney actions in forum selection is based upon local beliefs about federal and state court practices. As attorneys become more experienced, forum selection decisions begin to mirror real differences between the two courts. This suggests that continuing legal education has a role in the allocation of cases between the two courts. That is, continuing legal education acts as a substitute for attorney experience in ensuring that forum choices are reality-based. Further, courts could initiate steps to assist attorneys, and even pro se litigants, who are unfamiliar with court rules and procedures. Consider, for example, the use of video tape programs that could be accessed in the clerk's office to introduce naive litigants to the local court's procedural requirements and processes.
In addition, several methodological lessons may be derived from the study. First, the study’s use of a national sample of attorneys demonstrates the limits of research that focuses on local court samples. The national sample permitted examination of regional differences of bias reports that would be unseen with local studies. At a minimum, the research shows the need to qualify any effort to make generalizations from local studies, however useful they may be to understanding the local court.

Second, the focus of the research on attorney decisions in specified cases, rather than general preferences or hypothetical situations, gives us greater confidence in the validity of the attorney reports. This approach may also have encouraged attorneys to respond to our survey insofar as it appeals to attorneys’ preferences for concreteness.

Third, the use of removal as the focus of the study illustrates how research findings are affected by methodology. This sample is, of course, biased since it excludes attorneys appearing in cases filed and not removed from state court although they could have been removed. This bias may, therefore, mean that the study findings exaggerate defense counsel preference for federal court, and understate attorney satisfaction with state court.

Fourth, the study findings should not be interpreted to imply that differences between federal and state courts are not legitimate. The Constitution authorized a dual court system for sound reasons, which this research found to be still relevant. Variations in outcome are an inescapable corollary of the dual structure. Systematic differences in the outcome of whole classes of cases, however, is less defensible. The results of the study suggest that this issue needs further examination, especially with respect to the continuing vitality of the *Erie* doctrine and its progeny.

The final words look forward to how our research findings may be used in the future by policymakers and researchers. This research has many lessons for both. The most important lesson is, perhaps, that the controversial issues examined are not as simple as researchers and policymakers alike have often believed. But, to the extent that policymakers must act on available information, inferences drawn from this research provide such guidance.
APPENDIX

CHOICE OF FEDERAL VERSUS STATE COURT FORUM: ATTORNEY VIEWS

Attorney Name: ____________________________

I. ATTORNEY BACKGROUND

1. Year of admission to bar: _____

2. What percentage of your legal practice is composed of litigation matters? _____ %

3. What percentage of your litigation practice is composed of federal court practice? _____ %

4. Type of practice: (Check most applicable)
   a. Private law practice (including solo practice) a. _____
   b. Corporate counsel office b. _____
   c. Government counsel office c. _____
   d. Legal Services/non-profit office d. _____
   e. Other (e.g., part-time, academic position) e. _____
   f. Number of lawyers in firm or office f. _____

II. CASE BACKGROUND FACTORS

5. How would you characterize the predominate environment of the jurisdiction served by the state court in which this case was initially filed?
   Major city in state _____ Other Urban/Suburban _____ Rural _____

6. Were state law actions included with the removal action under pendant jurisdiction because they were related to federal question jurisdiction? Yes ____ No _____

7. What is the status of this case in federal district court, subsequent actions on remand? (Check all applicable)?
   a. Joined with other litigation in federal court a. _____
   b. Pending/awaiting trial b. _____
   c. Interlocutory order in effect c. _____
   d. Summary judgment for defendant (in whole or part) d. _____
   e. Dismissal for lack of jurisdiction e. _____
   f. Summary judgment for plaintiff (in whole or part) f. _____
   g. Trial verdict for plaintiff g. _____
h. Trial verdict for defendant
i. Mixed verdicts for both parties (e.g., cross claims)
j. Settlement
k. Voluntary dismissal
l. Remanded to state court (in toto)
m. Partial remand (state law issues) to state court
n. Removal not completed: state court retained jurisdiction

8. The Client Identifier that best describes this case's real client in interest is: (Check most applicable)
a. An individual client
b. Foreign national/corporation (or nation)
c. Insurance carrier
d. Privately owned business or corporation
e. Publicly owned corporation
f. Government body or authority
g. Non-profit organization
h. Other

9. Whose decision guided the case forum choice (of filing or removal) for your side? (Check most applicable)
a. Mine, as attorney, or attorney/client joint decision
b. Client corporation (inside) counsel's direction
c. Prior or referring (or outside) attorney in case
d. Counsel for co-party (e.g., attorney for co-defendant)

III. FORUM SELECTION REASONS

A. Local bias relating to special characteristics of litigants is the historical justification for concurrent jurisdiction. This bias may act to favor or disfavor your client. Please indicate the degree to which local state court bias was expected to affect your client in this case.

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<th>Very Favorable</th>
<th>Favorable</th>
<th>Neutral</th>
<th>Unfavorable</th>
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<tbody>
<tr>
<td>10. Non-resident-of-state status of client</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
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<td>11. Locality of residence (other than state of residence)</td>
<td>1</td>
<td>2</td>
<td>3</td>
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<td>5</td>
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<tr>
<td>12. Sex of client</td>
<td>1</td>
<td>2</td>
<td>3</td>
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<tr>
<td>13. Race of client</td>
<td>1</td>
<td>2</td>
<td>3</td>
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</tr>
<tr>
<td>14. Socioeconomic status of client</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
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</tr>
<tr>
<td>15. Foreign national/company status of client</td>
<td>1</td>
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### FORUM CHOICES IN REMOVAL CASES

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<th>Very Unfavorable</th>
</tr>
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</table>

16. Incorporated status of client business

17. Type of business conducted by client

18. Other client attribute ______________________

19. Were any of the foregoing biases anticipated to operate against your opponent? Please check all applicable.

- a. Non-resident status
- b. Locality of residence
- c. Sex
- d. Race
- e. Socioeconomic status
- f. Foreign national/company status
- g. Incorporated status
- h. Type of business

20. My familiarity with court operations

21. Geographic convenience for self or client

22. Geographic inconvenience of opponent

23. Onerous pretrial requirements (e.g. from status calls)

24. Greater judicial pretrial involvement processing

25. The overall competency of the judiciary

26. Judge familiarity with the case's substantive law

27. Lesser litigation costs for client

28. Higher litigation costs for opponent

29. Higher damage award likelihood in this case

30. Court jury rules (size, non-unanimity) favor client

31. Court precedents in this case favor client

32. Court evidentiary rules favor client

33. Judge expected to hear this case was preferred

34. Judge assigned to case was disfavored

35. Better out-of-court settlement is more likely
36. A more favorable appellate decision (if necessary) is more likely

37. A faster court process was preferred and available

38. A slower pace to decision was preferred and available

39. Court discovery rules favor client more

40. Court rules for summary dismissal favor client

41. Court rule requiring parties participate in arbitration or mediation

42. Absence of court rule requiring participation in arbitration or mediation

43. Please list any factors not noted above that affected your filing/removal decision.

44. What were the most significant effects of removal upon this case's outcome, procedural progress, costs, etc.?

Thank you for your cooperation. Please return this survey to Institute for Economic and Policy Studies P.O. Box 572 Alexandria, VA 22313 703/549-7686