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David Crump

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# THE CASE FOR RESTRICTING DIVERSITY JURISDICTION: THE UNDEVELOPED ARGUMENTS, FROM THE RACE TO THE BOTTOM TO THE SUBSTITUTION EFFECT

*David Crump*

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## THE CASE FOR RESTRICTING DIVERSITY JURISDICTION: THE UNDEVELOPED ARGUMENTS, FROM THE RACE TO THE BOTTOM TO THE SUBSTITUTION EFFECT

*David Crump\**

### I. INTRODUCTION

Diversity jurisdiction is an idea whose time has come—and gone. In its present form, it serves its alleged purposes so inconsistently that its benefits are minimal, if they exist at all.<sup>1</sup> And the costs that it imposes are significant. The traditional arguments for and against diversity are well known, but the traditional arguments against it actually understate its disadvantages. Therefore, the purpose of this Article is to construct the arguments against diversity that traditional scholarship has left underdeveloped.

The first section of the Article sketches the traditional arguments, both pro and con. This section is brief, because the objective is merely to provide background for the real work of the Article. The second and third sections carry on this work by discussing the underdeveloped arguments against diversity jurisdiction. In the second section, the Article shows that diversity creates perverse incentives, which the traditional arguments do not fully explain. These phenomena include a curious kind of race to the bottom that I call the “Ice Bowl Effect,” as well as a motivation toward the joinder of unnecessary parties, that results in “Harassing the Little Guy.” Diversity also causes increases in costs which benefit what I call “Passive-Aggressive Litigants,” as well as biases that result in a “Tilted Playing Field.”<sup>2</sup>

In addition to these incentives, diversity creates distortion that the traditional scholarship has not fully explained, and these distortions are the subject of the third section. Diversity results in a large percentage of removals, which create what I call a “Twilight Zone Effect” when a case is handled by two different kinds of trial courts. Furthermore, in spite of the policy underlying the *Erie* Doctrine,<sup>3</sup> diversity still results in substitution of federal judges’ preferences for state policy, sometimes deliberately—an effect that I shall illustrate as “The Substitution of Philosophy for Law.”

A final section sets out the Author’s conclusions. These include the proposition that today, in the twenty-first century, there are more reasons than ever to authorize diversity jurisdiction more selectively. The arguments may not persuade every reader toward abolition of diversity, which arguably would be a drastic change, but perhaps they justify revision and retrenchment. Furthermore, the negative effects should be taken into account by courts whenever policy arguments properly influence decisions.

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\* John B. Neibel Professor of Law, University of Houston Law Center. A.B. Harvard College; J.D. University of Texas School of Law.

1. See DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE (5th ed. 2008).

2. See *infra* Part III.

3. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

## II. TRADITIONAL ARGUMENTS FOR AND AGAINST DIVERSITY

A. *In Favor of Diversity: The Continuing Justifications*

The reasons for the diversity provision in the Constitution are shrouded in mystery. The same is true for the initial statutory grant by the first Congress.<sup>4</sup> To fill this void, commentators have suggested several policies that diversity jurisdiction allegedly advances. Each one probably played a part in the beginning, and each presumably contributes to the retention of diversity jurisdiction today.

First and foremost, there is the theory that diversity jurisdiction serves to counteract local prejudice.<sup>5</sup> In other words, diversity is aimed at the fear that a South Carolinian who sues a Rhode Islander in a Rhode Island court will encounter that state's protectionism of its own citizens. In fact, James Madison referred to "the occlusions of the Courts of Justice" as one of the motivating factors for the Constitutional Convention.<sup>6</sup>

The question remains, however, whether diversity jurisdiction actually has much effect in serving this policy. The complete diversity requirement means that it is easy for a claimant to destroy federal jurisdiction by framing a suit strategically, and thus it results in the denial of a federal forum precisely when the policy of minimizing local prejudice would seem strongest—if indeed local prejudice is really the concern.<sup>7</sup> Furthermore, the larger question is whether protection against local prejudice is needed today in the same way in which it was when diversity was adopted. Today, communication is instantaneous, and mobility is national if not international. To put it another way, a New Yorker and a Houstonian may have more in common, and more affinity for each other, than either would have for a citizen of the same state with a different social status or lifestyle.<sup>8</sup>

Second, some scholars believe that diversity jurisdiction was designed to protect commercial interests.<sup>9</sup> The difference between states inhabited by creditors and those inhabited by debtors was one of the major divisions that had to be overcome at the Constitutional Convention.<sup>10</sup> As with the local prejudice rationale, however, one can question whether diversity jurisdiction achieves the result, or whether it is needed to do so in today's climate.

A third rationale for diversity was the expectation that the federal courts generally would furnish a superior forum. As one Congressional report puts it, the argument was that "the federal courts being better than the state, it was preferable to route as many cases into the former as possible."<sup>11</sup> But the question remains: "better" by what measure? Just as a small claims court might not be better for

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4. CRUMP ET AL., *supra* note 1, at 194-95.

5. *See id.* *See also Abolition of Diversity of Citizenship Jurisdiction*, H.R. REP. NO. 95-893 (1978), excerpted in CRUMP ET AL., *supra* note 1, at 230-31 [hereinafter *Abolition of Diversity*].

6. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 15 (1966).

7. *See supra* note 1.

8. *See* Debra Lyn Bassett, *The Hidden Bias in Diversity Litigation*, 81 WASH. U. L. Q. 119, 143-45 (2003).

9. CRUMP ET AL., *supra* note 1, at 194-95.

10. MADISON, *supra* note 6, at 15 (referring to "interferences" by some states that affected "the rights of other States, relatively Creditor").

11. Authority cited in *supra* note 5, reprinted in CRUMP ET AL., *supra* note 1, at 195.

adjudicating a multi-million dollar claim, or vice versa, federal courts might not be superior for the resolution of controversies of average size that depend purely upon state law.

A fourth rationale, more recently articulated, is that giving litigants a “choice” of forum is a desirable thing. One of the most effective opponents of abolishing diversity was the late Phoenix attorney John P. Frank, who told Congress, “The proposal to abolish the diversity jurisdiction is, from the standpoint of the bar, approximately as popular as tuberculosis in a hospital.”<sup>12</sup> Frank explained his “choice” theory as follows:

The fact of the matter is that the existence of the option is advantageous to counsel and to litigants wherever it may exist. . . .

. . . [D]uring the period of Judge Ritter’s life, lawyers in Salt Lake City tended to move toward the State side where they could [to] avoid the problems of dealing with Judge Ritter. . . .

. . . Since Senator Percy had taken over and improved merit selection in Chicago, . . . [t]he Federal district courts in Chicago have been vastly improved. The lawyers want the option, where possible, in getting before those admirable high-quality judges where they can. . . .<sup>13</sup>

But this “choice-is-good” argument is transparently lacking in merit, in spite of its widespread acceptance. The traditional arguments overlook the fact that litigants do not prefer a fair forum, or for that matter a theoretically better one. Someone gets the final choice, whether state or federal. If that litigant has a bad case and will be advantaged by an arbitrary judge, that is the direction a strong-stomached lawyer will choose. Thus, not only is the choice-of-forum argument misplaced, but, actually, its opposite is true. It furnishes an argument against diversity, one that this Article will develop below.<sup>14</sup>

Fifth, there is the argument that diversity jurisdiction brings about a cross-fertilization of the federal and state bench and bar. As Frank put it, “The educational value of having two systems in interaction” is a “great plus.”<sup>15</sup> The federal bar should not become “elitist.” But as Professor Charles Alan Wright responded, “I do not think that is any longer a problem. I think it may very well have been a problem in [the past].”<sup>16</sup>

A final argument in favor of diversity is that, allegedly, people like it. Frank pointed out that abolition of diversity was “opposed by the appropriate governing bodies” of many state bars and supported “by not one single state bar.”<sup>17</sup> He added, “The first great value of diversity is its disposition of something on the

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12. *Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. On the Judiciary*, 95th Cong. 230-46 (1978) (testimony of John P. Frank), reprinted in CRUMP ET AL., *supra* note 1, at 231 [hereinafter Frank Testimony].

13. *Id.* at 231-32.

14. *See infra* Part IIIA.

15. *See* Frank Testimony, *supra* note 12, at 231.

16. *Federal Diversity of Citizenship Jurisdiction: Hearings on S. 2094, S. 2389, and H.R. 9622 Before the Subcomm. On Improvements in Judicial Machinery*, 95th Cong. 44-63 (1978) (testimony of Professor Charles Alan Wright), reprinted in CRUMP ET AL., *supra* note 1, at 232 [hereinafter Wright Testimony].

17. *See* Frank Testimony, *supra* note 12, at 231.

order of almost 30,000 disputes a year to the general satisfaction of those who need their disposition.”<sup>18</sup> But there is a great deal of room to question whether the actions of the appropriate governing bodies were either informed or representative, just as there is room to suppose that many people—citizens and lawyers alike—dislike federal intervention into matters that they regard as subjects of state law.

### *B. Against Diversity: The Traditional Arguments*

Just as there are traditional arguments for the retention of diversity, there are traditional arguments for its abolition. The issue surfaces periodically in Congress. The best known legislative report accompanied House Bill 9622, which “would have abolished diversity jurisdiction between citizens of different states.”<sup>19</sup> The arguments, like those in favor of diversity, still resonate today.

The first argument is that abolition would preserve a federal forum for those with federal claims.<sup>20</sup> At the same time, abolition would add only negligibly to the case load of state courts. “Essentially, 32,000 cases pending before 400 Federal district judges will cause few problems when allocated among 6,000 state judges of general jurisdiction.”<sup>21</sup> The conference of state chief justices passed a resolution observing that “state courts were ‘able and willing’ to assume all or part of the Federal diversity jurisdiction.”<sup>22</sup> As Professor Wright put it, “I am concerned with people who want to take advantage of laws that Congress has passed in the last 15 years, giving rights that did not exist . . . . I want them to be able to get to trial.”<sup>23</sup> Federal courts offer no special advantages in deciding state-law cases, and “perhaps no other major class of cases has a weaker claim on federal judicial resources.”<sup>24</sup>

Second, there is the argument that diversity jurisdiction is inefficient. Federal courts have expertise in federal issues, or so the argument goes. “Thus, diversity jurisdiction forces federal courts to decide issues on which they have no special expertise at the expense of tasks they can perform significantly better than state courts.”<sup>25</sup>

Third, there is the argument that diversity jurisdiction is no longer needed because the world has changed since the United States’ founding. Thus, the report on House Bill 9622 argued:

[T]he original reasons for diversity jurisdiction have long since disappeared. At present, there is little evidence that the State courts are less qualified or, due to latent prejudice against out-of-staters, unable to render fair and impartial justice in these cases. Since Federal juries are now drawn from the same registration or voter lists as State jurors . . . , arguments that Federal juries are less biased than their State counterparts are insubstantial. . . .

Today, the United States is a more mobile society than that of the First

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18. *Id.*

19. *Abolition of Diversity*, *supra* note 5, at 230-31.

20. See, e.g., Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 100, 102-07, 119-21 (summarizing arguments for and against diversity jurisdiction).

21. *Abolition of Diversity*, *supra* note 5, at 230-31.

22. *Id.*

23. See Wright Testimony, *supra* note 16, at 232.

24. See Kramer, *supra* note 20, at 102.

25. *Id.* at 104.

Congress or even the 80th Congress. . . . [C]ommunications are made easy by telephone, telegraph and television. Technological change [and] education . . . [have reduced] the risk of prejudice against out-of-staters. . . .<sup>26</sup>

The report concluded with the observation, “The federal courts are a scarce resource and should be treated as such.”<sup>27</sup>

The argument against these first three justifications is straightforward. It is that local prejudice, allegedly, still exists. And if it does, then counteracting bias in favor of in-staters is a proper purpose of diversity jurisdiction. If this purpose is achieved, the federal courts may actually be more efficient than abolitionists recognize at achieving the Founders’ goals. Evaluation of the balance between these arguments depends upon whether one believes that local prejudice is a greater problem than the difficulties created by diversity jurisdiction. The thesis that this Article will develop is that the harm done by diversity greatly exceeds any putative benefits, and, in addition, that diversity does not really do much to counteract local prejudice anyway.

The fourth argument for abolishing diversity is based upon the enormous and complicated body of jurisdictional law that is necessary to maintain it.<sup>28</sup> Frank’s testimony was that he remembered “only one case in his own practice in which there was any serious question about whether there was diversity.”<sup>29</sup> This is an astounding statement. My own experience as a professor, for whom litigation is a sometime sideline, is that diversity has occasioned many disputes that vastly increased costs and delay.<sup>30</sup> As Professor Wright put the matter, “Litigants are making mistakes repeatedly on whether or not there is federal jurisdiction. Even when it turns out there has not been a mistake, judges are having to take the time to [decide] . . . whether diversity exists.”<sup>31</sup> Furthermore, often the matter is not one of mistakes by litigants, but instead, it is caused by gaps in the law.

The fifth traditional argument is that diversity jurisdiction is a source of friction between state and federal courts, and that efforts to minimize federal interference create complex procedural doctrines that increase the costs and delay inherent in litigating diversity cases.<sup>32</sup> Thus, the *Erie* Doctrine requires federal courts to engage in what are straightforwardly called “*Erie* educated guesses” about the meaning of state law.<sup>33</sup>

Again, the counter to these abolitionist arguments is that they are overstated and that the benefits of diversity jurisdiction outweigh them. There the matter lies, dependent upon the beholder’s eye for the weight of each side. But the point of this Article is that there are further arguments against diversity, and that they outweigh the asserted benefits.

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26. *Abolition of Diversity*, *supra* note 5, at 230.

27. *Id.*

28. Kramer, *supra* note 20, at 103-07.

29. Wright Testimony, *supra* note 16, at 232.

30. See *infra* Part IV B (discussing the Author’s experience in removed cases).

31. Wright Testimony, *supra* note 16, at 232.

32. Kramer, *supra* note 20, at 103-07.

33. CRUMP ET AL., *supra* note 1, at 266-69.

## III. BAD INCENTIVES AS NEW ARGUMENTS AGAINST DIVERSITY

I see two kinds of arguments against diversity that the traditional debate leaves underdeveloped. One is that diversity jurisdiction creates bad incentives for the litigants. This argument is the subject of the present section. A later section will feature the other type of argument: that diversity distorts the substantive litigation.

Perhaps the most powerful argument against diversity comes from recognizing the wrong-headedness of Frank's choice-of-forum argument. In most instances, only one party has a choice. And in many instances, one party or the other will benefit more from increased cost, delay, and bad judging. As I shall discuss below, the choice provided by diversity is actually a dysfunctional thing, because the choice often will be strategically dictated by a race to the bottom. This is the first of the perverse incentives that I perceive.

Also, the traditional arguments against diversity fail to emphasize the fact that diversity jurisdiction often creates an incentive toward a kind of "harassment of the little guy." This phenomenon is a consequence of the rule that incomplete diversity is not diversity, so that the joinder of a local citizen defeats removal. Lawyers use this technique to manipulate jurisdiction, and they do so lawfully, but at great cost, by unnecessarily joining "little guy" locals from whom they do not, in reality, seek to recover.

The traditional arguments also fail to explain how diversity can tilt the playing field. The transition to federal court almost always raises the cost of litigation. But raising the cost is not always a neutral effect. Passive-aggressive litigants have an incentive to remove because they benefit from increased cost. Diversity thus creates a dysfunctional kind of bias that is unrelated to the kinds of bias that federal jurisdiction is supposed to create or oppose. In general, this cost effect hurts parties with the burden of proof who need remedies against opposing parties. In other words, it often hurts individual plaintiffs.

The subsections of this Article that follow will develop these arguments.

*A. The Ice Bowl Effect: A Race to the Bottom*

The negative result of Frank's choice principle can be illustrated by a famous football game played four decades ago. I call the analogy the "Ice Bowl Effect." The temperature, at that game, was minus 13 degrees. The wind chill was an amazing minus 46 degrees: too cold, it would seem, for football.<sup>34</sup> But it was under those conditions, at Lambeau Field in Green Bay, Wisconsin, that the Green Bay Packers and the Dallas Cowboys played the 1967 National Football League Championship. Green Bay won a squeaker, by the score of 21 to 17. The game was said by some to be "the greatest" ever played, and today it is known as "The Ice Bowl."<sup>35</sup>

Whatever it was, the Ice Bowl was not football. The Cowboys may have been the better team, but if so, the ice prevented the score from showing it. The field's very expensive heating system failed due to the cold (although some said that

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34. See Packers.com, Gameday: December 31, 1967, <http://www.packers.com/gameday/1967/12-31/> (last visited Oct. 18, 2009).

35. *Id.*



legendary Packers coach Vince Lombardi had turned it off).<sup>36</sup> The officials could not use whistles to stop play, because they were frozen. One fan died of exposure; the marching band canceled its performance after blood congealed on the faces of the musicians; and Packers fans several times leaned over the front row to unplug the heated benches upon which the Cowboys sat.<sup>37</sup>

Would anyone ever want to play football under these conditions? Actually, yes. The Green Bay Packers would.

Since the Ice Bowl, there have been several more frigid playoff games at Lambeau Field. Sometimes, snow whitens the grass and obscures yard markers at least temporarily (not to mention its obscuring of receivers and thrown footballs). The result is not always a Packer victory, but it is always a Packer advantage.<sup>38</sup> The forum (Lambeau Field, that is) always introduces elements of arbitrariness and distortion, but these elements favor the Packers. The Packers want a field on which the game of football is distorted, because this particular kind of distortion increases the odds that they will win.

The Packers' preference for Ice Bowl conditions is an example of the public choice phenomenon known as the "Race to the Bottom."<sup>39</sup> Sometimes, public choice creates perverse incentives toward alternatives that distort. The Ice Bowl has a lesson to teach about forum contests. It provides an analogy for one of the less attractive features of diversity jurisdiction.

To understand how the Ice Bowl resembles the effect of diversity, imagine a litigant who has the choice of litigating before Judge Goode or Judge Baad. Judge Goode sets aside his personal biases, addresses issues promptly, follows the law, and deals courteously with the litigants. Judge Baad gives free reign to his prejudices, delays decisions so as to increase expense, does not care much whether he follows the law, and is abusive of counsel. One might expect that it would be more pleasant to try a case in front of Judge Goode than Judge Baad. Therefore, John Frank's "choice" theory would predict that the parties, both of them, would exercise every available option toward the same end: to get their case out of Judge Baad's court and into Judge Goode's. But is the choice theory correct?

The obvious answer shown by the Green Bay Packer's choice of forum is, "no, the 'choice-is-good' theory is not correct." Imagine that one of the litigants has a case that is weak. It is weak factually, and it is weak legally. On a level playing field, the lawyer with the weak case is more likely to lose. An arbitrary, incendiary, lawless judge helps that party. The kinship between the Green Bay Packers and lawyers with relatively weak cases is that both benefit from the race to the bottom. Thus the lawyer with the ability to get the case in front of Judge Baad will do so, if winning the race to the bottom increases the likelihood of winning the case.

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36. *Id.*

37. *Id.*

38. The replica of the Ice Bowl played between the New York Giants and the Packers during the playoffs of 2007 resulted in a victory by the Giants, but the field conditions undoubtedly helped the Packers.

39. See Wikipedia, Race to the Bottom, [http://www.wikipedia.org/wiki/race\\_to\\_the\\_bottom](http://www.wikipedia.org/wiki/race_to_the_bottom) (last visited Oct. 18, 2009). The term refers most often when economic competition between states or nations causes undue dismantling of humanitarian standards. It fits this situation as well, however, because of its origin in game theory. *Id.*

Among other errors, the choice-is-good theory tacitly assumes that both parties get to make the decision. But the assumption is incorrect. Sometimes the plaintiff can choose the forum, and sometimes the defendant can do so. When both disagree, obviously, only one can decide. The plaintiff sometimes can craft the litigation so that it is not removable, and in that situation, the plaintiff makes the choice.<sup>40</sup> If the case cannot be structured so that it prevents removal, the defendant has the controlling choice. The choice-is-good theory builds upon a fallacy by assuming that the choice will be made in the most noble way possible. Like the Packers, lawyers want to win, even if they have losing cases; and they will race to the bottom, if their choice is the dominant one and if choosing the worst forum will help them to win.

This phenomenon, the race to the bottom, is inherent in diversity jurisdiction. The traditional arguments against diversity do not effectively answer the choice-is-good argument. They often fail to point out that the choice is one-sided. And they fail to observe that choice is a bad thing when it creates preferences analogous to those of the Packers for the Ice Bowl.

*B. Harassing the Little Guy: How Lawyers Manipulate  
Jurisdiction by Joining Unnecessary Parties*

This next point is closely related to the Ice Bowl analogy. The “race to the bottom” argument means that litigants engage in forum shopping that is not designed to find the “best” forum, but rather to win, even by distorting the playing field. The next point is that this forum shopping takes the form of tailoring the litigation so that it does, or does not, fit the diversity jurisdiction, depending upon which outcome is desired. And the main method of tailoring the litigation is to join (or refrain from joining) marginal defendants, not for the purpose of recovering from them on the merits, but solely to create or destroy diversity.<sup>41</sup> The result is a mass of wasteful add-on suits against local citizens who are not really the alleged malefactors, or as the phenomenon might be called, “harassing the little guy.”

Here is how the strategy of manipulating diversity by harassing the little guy works. Imagine a plaintiff who has been injured in a bus accident. The plaintiff, let us say, is a local citizen, but the bus company, which is the target defendant, is a citizen of another state. If the plaintiff sues only the bus company, the suit is removable to federal court (or can be filed there).<sup>42</sup> But assume that the plaintiff believes that the better strategy—the more favorable forum, with a higher likelihood of a big plaintiff’s verdict—is the state court. The plaintiff, then, casts about for someone else who can be joined, a local citizen, who can be used solely for the purpose of destroying diversity. This person may be the bus driver, for example, or a local scheduler or tour company, or someone else involved in the

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40. This is done by wasteful joinder that harasses marginal defendants. *See infra* Part III B.

41. Destruction of diversity occurs when co-citizens are ostensibly adverse, or in other words, when there is a party from the same State as another that is on the opposite side of the “v.” This is a very old rule that results from the Supreme Court’s interpretation of the diversity statute. *See, e.g.,* *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806). Whatever principles underlay this dubious interpretation of ambiguous language apparently were formed without regard to the resulting strategy of joining marginal defendants to retain litigation in state court.

42. 28 U.S.C. § 1332 (2008) dictates this result.

accident. The plaintiff then strategically joins this person as a defendant, in addition to the bus company, even though the local person has only derivative liability, if any—or is insolvent, or is unlikely to be held liable at all.<sup>43</sup> The plaintiff has succeeded, now, in destroying diversity and ensuring that the case must be heard in state court.<sup>44</sup> Unfortunately, the plaintiff also (1) has succeeded in bringing in an additional party for a reason unrelated to the merits, (2) perhaps has involved a second insurer, (3) probably has required a second defense lawyer, and (4) undoubtedly has increased the cost of litigation, all without enhancing the quality of the decision on the merits. In summary, diversity jurisdiction motivates lawyers to sue little-guy defendants against whom they have no desire to recover: defendants they otherwise would not sue.

As an aside, it ought to be added that the complete diversity requirement, which is the driving force behind this strategy, is itself inconsistent with the alleged purpose behind the diversity jurisdiction. That is to say, if diversity is designed to counteract local prejudice, the complete diversity requirement defeats the purpose. The reason is easy to illustrate with an example. Imagine that a citizen of Arkansas sues two defendants—a citizen of Arkansas and a citizen of Vermont—in an Arkansas state court. That is, the Arkansan sues a co-citizen Southerner and also joins a Northerner, from a distant state. If local prejudice is a reality, we can expect the two Arkansans to gang up on the Vermonter, even though they ostensibly are opponents. Theoretically, local prejudice should be at its most virulent in this situation, assuming local prejudice is real. The plaintiff's final argument will be, "the Vermonter did it, and I now realize that the evidence shows my fellow Arkansan to be blameless," while the Arkansan defendant, joining forces with the plaintiff, will argue, "this poor plaintiff is badly hurt and deserves huge damages, but not from me, because it's all because of the fault of that bad Vermonter." The upshot is, if local prejudice is a real phenomenon, it is a greater threat in cases of minimal diversity, not a lesser one.<sup>45</sup> The complete diversity requirement defeats the policy that supposedly justifies diversity jurisdiction. It provides strong evidence that our system does not really believe the local prejudice argument.

And our system encourages shenanigans that manipulate diversity. Imagine a well-connected attorney who helped the local federal judge get his job. Perhaps this well-connected lawyer may have persuaded the state's senior senator to recommend the federal judge and thus engineered the federal judge's appointment, ensuring the federal judge's everlasting gratitude. In the bus accident case hypothesized above, this well-connected attorney's strategy would be to sue the out-of-state bus company alone, being careful not to join any local citizens.<sup>46</sup> This strategy would allow the case to be filed in the friendly federal judge's court. But next, imagine the opposite.

Imagine another well-connected plaintiff's lawyer, who contributed an enormous amount to the state judge's re-election and served as the state judge's campaign manager, again ensuring gratitude—but this time on the part of the state

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43. See CRUMP ET AL., *supra* note 1, at 196 (explaining these tactics).

44. 28 U.S.C. § 1332 (2008).

45. See CRUMP ET AL., *supra* note 1, at 195-96 (explaining this phenomenon).

46. *Id.* at 196.

judge. This well-connected lawyer will sue the out-of-state bus company as the real target *but will also join the bus driver* as an additional defendant, because the bus driver is a local citizen. This tactic destroys diversity and prevents removal.<sup>47</sup> The factor that makes the difference is the joinder of a party who makes no difference to the expected recovery, except for destroying diversity. In other words, the race-to-the-bottom, Ice Bowl strategy motivates lawyers toward tactics that harass little guys and cause significant waste.

Sometimes, the defendant can counter this tactic with a claim of “fraudulent joinder.” That is, the defendant can remove the suit anyway and argue that the local citizen should be disregarded,<sup>48</sup> as a party “collusively made”<sup>49</sup> for the purpose of destroying diversity. But the law makes this fraudulent-joinder tactic very difficult to use, because the defendant must convince the federal court to a legal certainty that there is “no possibility” of “a cause of action against the defendant.”<sup>50</sup> Any ambiguity in the facts means that the local citizen stays in the suit and destroys diversity. In the bus accident case, for example, it usually will be impossible for the defendant to carry the burden of demonstrating to a legal certainty that the bus driver had nothing to do with the event, even if the plaintiff’s lawyer has not included the driver for any substantive purpose, but only to destroy diversity. The frequency of fraudulent joinder arguments,<sup>51</sup> however, by defendants who want to remove to federal court, is both a source of waste itself and a testament to the tactic of harassing the little guy and the Ice Bowl Effect.

### C. Raising the Cost: How Passive-Aggressive Litigants Change the Battlefield

The next point is simple. Federal court is more expensive than state court. There are many reasons why this is so. Professor Burt Neuborne, in praising the federal courts, provides a way of understanding one major reason: the multiple law clerks assigned to a federal judge.

Federal clerks . . . are chosen from among the most promising recent law school graduates for one- to two-year terms. State trial clerks, on the other hand, when available at all, tend to be either career bureaucrats or patronage employees and may lack both the ability and dedication of their federal counterparts . . . Thus, even if state and federal judges were of equal native ability, the advantages enjoyed by federal judges would probably result in a higher level of performance.<sup>52</sup>

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47. *Id.*

48. *Chicago, Burlington, & Quinay Ry. Co. v. Willard*, 220 U.S. 413 (1911). This doctrine appears to have been first recognized by the Supreme Court in this case, although the Court there found it inapplicable.

49. 28 U.S.C. § 1359 (2008). *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969), contains a widely-cited application of the collusive parties statute.

50. *E.g.*, *Henderson v. Wash. Nat’l Ins. Co.*, 454 F.3d 1278, 1283 (11th Cir. 2006) (internal quotation marks omitted).

51. A Westlaw search for the combined terms “fraudulent joinder” and “diversity” in the “All Cases” database produces more than 3000 opinions.

52. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1122-23 (1977). Neuborne asserts that the “technical competence” of federal courts is “superior,” a conclusion that this Article treats as dubious. *Id.* at 1124.

This description makes federal judges' reliance on law clerks seem an unalloyed positive. But the literature relating to law clerks is more mixed. Law clerks are not appointed by the president or confirmed by the senate, yet they exert significant and unpredictable pressure on outcomes.<sup>53</sup> In a later section of this Article, I will argue, contrary to Professor Neuborne's theory, that law clerks are likely to precipitate bad decision-making.<sup>54</sup> But for now, the point is that law clerks increase costs for litigants. One result of the multiplication of effort is that purely procedural motions get greater attention. Expensive battles over issues unrelated to the merits proliferate.

In such circumstances, one can foresee that the result may not be "a higher level of performance," as Professor Neuborne concludes. A party wishing to resort to the courts at reasonable expense, in a suit that is not a first-impression landmark, might consider the resulting unpredictability, delay, and expense to be a negative rather than a positive attribute of the federal forum. Such a party may prefer to have the suit handled by the "career bureaucrat" that Professor Neuborne so disdains: a person who has seen these issues before, knows how they have been resolved in the past, and can channel the litigation to resolve them efficiently. Professor Neuborne's arguments center upon what he calls "constitutional cases," which may indeed contain a larger set of cases needing expensive handling. But the darker side of this greater expense in the federal courts obviously can be a problem even for the constitutional litigant, and in addition, it is a severe problem for many litigants in the vast majority of federal cases that do not pose constitutional questions but that still are forced to be treated by all the trappings of the expensive federal forum.

Part of the problem, furthermore, is that the disadvantages imposed by expense and delay are not suffered by all litigants equally. The party with the burden of proof, or the party who depends upon the court to provide relief, is likely to be more disadvantaged. Thus, a plaintiff who simply wants to present a claim for personal injuries may be faced with delays and expense created by the defendant's standard-form Motion for More Definite Statement, which occasions little cost to the defendant but great cost to the plaintiff. The law clerk may be delighted to work on that leading procedurally-oriented case in which the Supreme Court required plausibility in pleadings,<sup>55</sup> an opinion that provides a field day for ambiguous arguments since it provides little guidance and since it arguably conflicts with the Federal Rules.<sup>56</sup> The law clerk can justify a wide range of rulings about the specificity of pleadings in either simple or complex cases, so that the defendant can inexpensively create an issue that sparks a creative (meaning unpredictable and

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53. David Crump, *Law Clerks: Their Roles and Relationships with Their Judges*, 69 JUDICATURE 236, 236-37 (1986); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1171 (1994) (containing an appellate judge's conclusion that "the tendency has been for more and more of the opinion-drafting responsibility to be delegated to law clerks") (quoting RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 104 (1985)).

54. See *infra* Part IV. B.

55. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

56. It provides little guidance because "plausibility" exists even if the pleadings are very general (perhaps more so), and thus the standard does not say how much specificity is required. It conflicts with the Federal Rules of Civil Procedure because Rule 84 provides that the annexed Federal Forms are examples of sufficiency, and the forms do not exhibit the kind of specificity that the Supreme Court demanded in *Bell v. Twombly*.

puzzling) decision spurred by the law clerk's intellectual curiosity, producing a result that is very expensive for the plaintiff to navigate. And when this specificity-of-the-pleadings exercise is over with no advancement of the merits, the war of attrition will continue, because the defendant will seek *Daubert-Kumho* hearings<sup>57</sup> about every one of the plaintiff's expert witnesses, in addition to a plethora of other kinds of procedural relief. The circumstances can, of course, be reversed, so that the defendant is the one to be run around the maypole with procedural issues to which there are only judgment-call answers. The point is that diversity jurisdiction permits the passive-aggressive party, the one that opposes decision by driving up costs and delay, to obtain an advantage.

#### *D. Bias: Why Certain Parties Want a Federal Forum*

The unevenness of the impact due to the expense of federal litigation is related to yet a fourth underdeveloped argument against diversity: bias for and against categories of litigants that is unrelated to the purpose of preventing local prejudice. Professor Debra Lyn Bassett has shown that diversity has a negative impact upon rural parties, in a way that is unrelated to state-based prejudice; the federal courts give the advantage, in her view, to the urban litigant.<sup>58</sup> And there are other ways in which the playing field tilts, upon removal, that are unrelated to the avoidance of in-state bias. In one of the Supreme Court's recent removal decisions, *Caterpillar Inc. v. Lewis*,<sup>59</sup> the parties engaged in a lengthy battle over precisely such an issue. The injured plaintiff wanted the case in state court because of a belief that the federal courts were more hostile to plaintiffs and more hospitable to defendants, irrespective of which state the respective litigants called home.<sup>60</sup> Some defense lawyers in personal injury cases make it a policy routinely to remove virtually every lawsuit they can to the federal forum.

So do defendants in employment law cases. These litigants believe that, completely aside from any alleged issues of local prejudice, the federal forum is inherently more pro-defendant. One newsletter that serves defense lawyers explains the underlying reasoning with startling clarity:

Chant with us the following mantra: Federal court good; state court bad. With the rarest of exceptions, you are always better off in federal court. Going there is not unlike visiting a cathedral. The rules of evidence and procedure are more evenhanded; unlike their state court colleagues, federal judges have two law clerks to help analyze and deal with lawsuits; and the rules on setting aside a jury verdict are more favorable.<sup>61</sup>

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57. See David Crump, *The Trouble with Daubert-Kumho: Reconsidering the Supreme Court's Philosophy of Science*, 68 MO. L. REV. 1 (2003) (asserting that the decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), "was intended to liberalize the admittance of evidence, but instead it has produced a minefield clogged with 'Daubert hearings' that are more lengthy, technical, and diffuse than anything that preceded them").

58. Bassett, *supra* note 8, at 143-44.

59. 519 U.S. 61 (1996).

60. *Id.* at 75 n.14.

61. *Fort Worth Federal Court Sends Federal Wage Claim to, Gasp, State Court*, TEX. EMP. L. LETTER, June 1998, at 1.

Undoubtedly, the ability to impose higher costs upon plaintiffs serves defendants who prefer to litigate employment cases in expensive “cathedrals.” The degree to which federal courts tilt the playing field in favor of institutional defendants and against individuals, as compared to the state courts, even affects the constitutional cases that concern Professor Neuborne, because civil rights plaintiffs have increased their filings under Section 1983 in state courts,<sup>62</sup> where they prefer both the efficiency and the differently leveled playing field to the atmosphere in the federal courts.

#### IV. CONFUSION AND DISTORTION AS NEW ARGUMENTS AGAINST DIVERSITY

The preceding section has discussed bad incentives that diversity creates. The present section will explore a different kind of argument against diversity: that it distorts the merits of the suit in ways unrelated to its purposes. One reason is that the Twilight Zone nature of removal from state to federal courts has effects that distort. Another is that in spite of the policy underlying the *Erie* Doctrine, diversity frustrates state law.

##### A. The Twilight Zone Effect of Removal

The process of removal creates powerful arguments against diversity. Removal is a controlled accident, waiting to see the results it produces. The transition of a case from one court with a history in the litigation and with one set of procedures, to another court with a decidedly different set of procedures and with no history, is a recipe for unpredictable kinds of miscarriages. The traditional arguments against diversity jurisdiction include the complexity of jurisdictional law itself. But those traditional arguments understate the peculiar problems occasioned by the Twilight Zone effect of removal, which transcend mere complexity and affect substantive results.

The Twilight Zone analogy is particularly apt given the possibility of overlapping simultaneous jurisdiction. The removal law imposes a number of successive requirements for removal, but it leaves unclear the status of jurisdiction when some, but not all, steps have been completed. The authorities are in conflict. In *First National Bank in Little Rock v. Johnson & Johnson*,<sup>63</sup> the court held that removal was effected, and power transferred, with the first step, but in *Beleos v. Life & Casualty Insurance Co. of Tennessee*,<sup>64</sup> the court decided that power remained in the state court. The Twilight Zone effect is compounded by holdings that a plaintiff may waive defective removal<sup>65</sup> and that a defendant can later cure

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62. For example, a recent Westlaw search of state-court cases in Texas yielded seventeen appellate cases in the first six months of 2008 construing the civil rights remedial statute, 42 U.S.C. § 1983 (2008). Since these were all appellate cases, there must be many multiples of this number that were resolved in trial courts, or in other words, hundreds annually. Presumably, plaintiffs in constitutional cases avoid federal courts for some of the same reasons they do so in employment cases, as is shown above.

63. 455 F. Supp. 361 (E.D. Ark. 1978).

64. 161 F. Supp. 627 (E.D. S.C. 1956).

65. In fact, this is the effect of the thirty-day limit on plaintiff's motion to remand for procedural defects. See CRUMP ET AL., *supra* note 1, at 225 n.3.

improper procedures.<sup>66</sup> These doctrines are not subject to any time limit, meaning that the Twilight Zone theoretically can last indefinitely.<sup>67</sup> The most significant problems arise when the state court concludes that it still has responsibility and therefore enters an order whose legality no one can predict. At least one court has held that both state and federal courts have jurisdiction at the same time in the Twilight Zone,<sup>68</sup> notwithstanding the likelihood of conflict.

My own experience, limited as it is for a professor who participates in actual litigation only occasionally, has included a number of cases in which the presence of the litigation in two different courts was a bigger problem than the complexity of the governing law. (This is one reason for my surprise at John Frank's assertion mentioned above, that there had been only one case in his career that involved a serious jurisdictional question.) One of my cases involved a post-trial removal. How many people have ever seen a case removed *after* a jury trial? Well, I have. In one of my cases, which never resulted in a written opinion, the plaintiff acceded to the manufacturer-defendant's wishes on the eve of trial and nonsuited the local-citizen distributor defendants, whose presence in the case, after all, had been only a strategy for retaining the case in state court and preventing removal. The case proceeded to trial in the state court, and it produced a disastrous result for the defendant: a plaintiff's verdict in the high multi-millions of dollars. The state judge granted judgment on the verdict. Then, because the trial had consumed only twenty-eight days—less than the thirty-day window from the time of the dismissal of the local citizens in which the statutes authorized removal—the defendant concluded that it could lawfully remove the case after judgment, and for whatever reason (perhaps even to benefit from the inevitable confusion), it did so.

If such a removal was lawful, it meant that the federal district judge would need to apply the Federal Rules of Civil Procedure in handling the post-trial motions to determine the outcome of a trial held under the Texas Rules of Civil Procedure, and the federal appellate court would face similar issues in applying the Federal Rules of Appellate Procedure to decide about a trial held under state rules. But there was nothing in the statutes that seemed to preclude the removal. This issue required a large volume of briefing unattached to any controlling authorities, together with tricky efforts by the plaintiff's lawyer to avoid inadvertent waiver of a possibly improper removal (and efforts by the defense to precipitate precisely such a waiver). Ultimately the federal judge decided that the defendant's participation in the trial of the case was itself a waiver, of the right to remove—a decision supported by little authority, but opposed by less—and he remanded the case to state court. Meanwhile, the passage of time under the applicable state rules meant that the state trial judge had lost jurisdiction of the case, and appeal was precluded under the terms of the rules. The defendant appealed out of time anyway, and to protect itself, the defendant also sought an injunction from the federal judge to prevent the state courts from refusing to hear its appeal. The federal trial judge granted the injunction for the stated purpose of protecting his jurisdiction,

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66. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 76-77 (1996) (holding that even a substantively defective removal can be cured if jurisdiction exists at the time of judgment).

67. *Id.*

68. *Berberian v. Gibney*, 514 F.2d 790 (1st Cir. 1975).



prompting an appeal by the plaintiff's lawyer in the federal court of appeals premised on the anti-injunction act; and meanwhile, the plaintiff opposed the defendant's appeal in the state courts of the remanded case as untimely. Ultimately, these never-never land conditions produced a trans-substantive result: the parties' settlement of the case, prompted in part by the inability of either side to predict anything.

My cases also have included one that was a dispute between two subcontractors that manufactured spacecraft parts, controlled entirely by state law, but that the defendant removed on the theory that there was a generalized "federal interest" in space exploration that created federal jurisdiction. The result was expensive disclosures and discovery, including hearings to determine a myriad of questions about deposition issues, until the federal district judge decided that state-law contract claims were not federal questions and remanded the case to the state court, meaning that much of the discovery had to be re-done.

Then, I had a case involving a multiple-death explosion in Malaysia in which the defendants removed by claiming fraudulent joinder. Before the judge rejected the fraudulent joinder argument and remanded the case, again, there was extensive and expensive duplication of discovery. And in yet another of my cases, one party to a commercial dispute subject to settlement negotiations learned that the other was contemplating suit, and so it rushed to the state courthouse with its own suit framed to prevent removal, in the hope of establishing dominant jurisdiction. The other party succeeded in persuading a federal judge that the first suit had been filed in bad faith and successfully exercised dominant jurisdiction in the federal court instead.

The abolition of diversity would not solve all of the problems associated with removal, of course. Federal question cases can be and frequently are filed in state courts, and the law permits defendants to remove these cases, as it should. But the volume of disasters occasioned by removal would be considerably reduced by the abolition of diversity, particularly since diversity provides more motivation for strategic joinder than federal question jurisdiction does.

*B. The Substitution Effect: Why Frustration of State Policy Is Worse  
Than the Traditional Arguments Recognize*

My final argument against diversity is based on *Erie Railroad Co. v. Tompkins*,<sup>69</sup> but I have a variation on the traditional reasoning. One of the existing problems that prompted the *Erie* decision was federal interference with state substantive policy. The *Erie* Court discussed *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,<sup>70</sup> which it said had provoked widespread criticism for the doctrine that federal judges were "free to exercise an independent judgment as to what the common law of the State is—or should be."<sup>71</sup> In the underlying case, Brown & Yellow Taxicab had an agreement with a railroad that gave it a monopoly; but the common law of Kentucky prohibited monopolies, and a suit in the Kentucky courts to enforce the monopoly would not have

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69. 304 U.S. 64.

70. 276 U.S. 518 (1928).

71. *Erie Railroad Co.*, 304 U.S. at 71.

succeeded.<sup>72</sup> Therefore, Brown & Yellow reincorporated under the law of Tennessee to create diversity, so that it could sue in federal court,<sup>73</sup> and it obtained an injunction that prevented Black & White from competing.<sup>74</sup> It thus perpetuated its monopoly and defeated the clearly expressed state policy of Kentucky.<sup>75</sup>

The *Erie* Doctrine was intended to prevent this kind of haphazard federal interference with state substantive laws, and undoubtedly it has reduced it, but unfortunately, idiosyncratic federal decisions that counteract state policy remain a significant problem—and they provide an underdeveloped argument against diversity jurisdiction. The traditional arguments against diversity include a perception that following state law is difficult, chancy, and imperfect for federal judges, but the traditional arguments assume that federal judges try to follow state law. This argument against diversity is underdeveloped, however, because sometimes federal judges do not try to follow state law when they are required to. Instead, they sometimes substitute their own preferences. Federal judges hearing state law claims are supposed to act like ventriloquist's dummies and parrot the words that a state judge would utter, exactly as the state judge would utter them. But federal judges do so imperfectly, and at times wander off the reservation completely, to do what they want to do, instead of trying to follow state law. Instead of acting as ventriloquist's dummies, they become body snatchers. And the result is that diversity still motivates the evil to which the *Erie* decision was directed. The *Brown & Yellow Taxicab* result still happens.

A particularly flagrant example is the litigation in *Factors Etc., Inc. v. Pro Arts, Inc.*<sup>76</sup> Just for fun, *Factors* might be called “The Case of the Rawls Substitution,” because the federal court deliberately substituted the egalitarian views of the utopian philosopher John Rawls for the state law it was supposed to follow.<sup>77</sup> The *Factors* case is all the more interesting because it featured not only John Rawls, but also Elvis Presley. During his lifetime, Elvis formed a Tennessee corporation and assigned to it the right to the commercial use of his name and likeness.<sup>78</sup> This bundle of rights is often referred to as “the right of publicity.”<sup>79</sup> After Elvis's death, the defendant, Pro Arts, published and commercially sold Elvis posters.<sup>80</sup> Elvis's assigned corporation, Factors Etc., sued for an injunction against Pro Arts in federal court in New York.<sup>81</sup> In defense, the alleged infringer, Pro Arts, argued that the right of publicity did not survive the death of the subject.<sup>82</sup> The federal district judge granted the injunction, but Pro Arts appealed to the Second Circuit.<sup>83</sup> That court concluded that Tennessee law was controlling, but it

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72. *Black & White Taxicab*, 276 U.S. at 522-23.

73. *Id.* at 521.

74. *Id.* at 524.

75. *Id.*

76. 652 F.2d 278 (2d Cir. 1981).

77. *Id.* at 281 (quoting *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 958-59 (6th Cir. 1980)).

78. *Id.* at 279.

79. *Id.* at 279 n.1.

80. *Id.* at 279.

81. *Id.*

82. *Factors Etc.*, 652 F.2d 278, 280 (2d Cir. 1981).

83. *Id.*

asserted—dubiously—that there was no helpful authority in Tennessee: “Tennessee statutory and decisional law affords no answer to the question.”<sup>84</sup> However, the Sixth Circuit had previously concluded that Tennessee would *not* recognize a post-mortem right of publicity.<sup>85</sup> Since the Sixth Circuit included Tennessee, the Second Circuit followed the Sixth Circuit’s decision instead of doing the harder work of looking for Tennessee law.<sup>86</sup>

The trouble was, the Sixth Circuit had invented its rationale for decision in complete disregard of Tennessee law. Judge Mansfield dissented from the Second Circuit’s decision on the ground that the Sixth Circuit had violated the *Erie* Doctrine and that the Second Circuit was perpetuating federal interference with Tennessee policy.<sup>87</sup> Judge Mansfield quoted the Sixth Circuit’s sophistry:

Since the case is one of first impression, we are left to review the question in light of practical and policy considerations . . . the relative weight of the conflicting interests of the parties, and certain moral presuppositions concerning death, privacy, inheritability, and economic opportunity.<sup>88</sup>

The Sixth Circuit law clerk who wrote these startling words—and it must have been a law clerk, if not an intern—went on to cite several inappropriate sources, including John Rawls’s utopian manifesto, *A Theory of Justice*.<sup>89</sup> By his time, obviously, any thought of Tennessee common law was a distant speck in the law clerk’s rear view mirror.

Several comments should be made about this reasoning. First, when the law of a state is unclear, the federal court is required to estimate state law. It is supposed to look to the decisions of the highest court of the state to find analogous decisions from which to draw its principles, not to John Rawls; and if there is nothing helpful even by analogy, the federal court is supposed to look to lower state court decisions. Informally, we say that the federal court makes an “*Erie* educated guess,” although the guess usually can be grounded somewhat in reality.<sup>90</sup> The law clerk who wrote the Sixth Circuit’s decision did not even try, and neither did the Second Circuit. The next point is that Judge Mansfield’s dissent did engage in some legal reasoning, unlike the majority’s mishmash. The majority’s result, he said, was “inconsistent with . . . nearly every other case which has considered the issue.”<sup>91</sup> Third, Judge Mansfield confidently predicted that Tennessee would uphold the right of publicity after death (and disagree with the Rawls

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84. *Id.* at 281.

85. *Memphis Dev. Found.*, 616 F.2d 956.

86. *Factors Etc.*, 652 F.2d at 281.

87. *Id.* at 286.

88. *Id.* at 285.

89. *Id.* at 285-86. Rawls’s philosophy, which is derived by positing an “original position” characterized both by “perfect knowledge” and a “veil of ignorance,” organizes the ideal society by two principles that feature equality as the superior value. Freedom, progress, economic soundness, art, learning, scholarship, self-fulfillment, and other values are subordinate. Rawls’s philosophy, if followed faithfully, would outlaw the efforts of the Federal Reserve Board to oppose inflation, and they would make a minimum wage law immoral. DAVID CRUMP, *HOW TO REASON ABOUT THE LAW: AN INTERDISCIPLINARY APPROACH TO THE FOUNDATIONS OF PUBLIC POLICY* 224-27 (2001).

90. CRUMP ET AL., *supra* note 1, at 266-69.

91. 652 F.2d at 284.

substitution).<sup>92</sup> Fourth, Judge Mansfield was right, and Tennessee promptly did as he predicted.<sup>93</sup>

His prediction came true in the next chapter in the fight over poor Elvis's right of publicity. The decision issued from a lowly state trial court: the Chancery Court of Davidson County. *Commerce Union Bank v. Coors*<sup>94</sup> was a suit by the estate of bluegrass giant Lester Flatt against Coors's use of his likeness in two advertisements. One can be sure that the Davidson County Chancellor did not command the three-law-clerk army of each Second Circuit Judge in the *Factors* case, but contrary to the conclusions of Professor Neuborne,<sup>95</sup> the absence of this lawless posse of supernumeraries was actually an advantage. In the Davidson County Chancery, nobody substituted John Rawls or the philosophy of *A Theory of Justice*. Instead, the Chancellor read the parties' briefs and considered some actual Tennessee law. "The Tennessee Supreme Court has recognized that the exclusive right to use a trade name can survive the termination of business by a business entity which used it," he wrote.<sup>96</sup> Also, "The Tennessee Court of Appeals held that the exclusive right to use the name of a Memphis drugstore passed from the sole proprietor to his widow who continued to operate the business."<sup>97</sup> It could have been a pretty clear step from these analogous authorities to an *Erie* educated guess that would recognize a post-mortem right of publicity, if the Sixth and Second Circuits had bothered, but they did not. The chancellor excoriated the *Factors* decision and agreed with Judge Mansfield's dissent:

Judge Mansfield makes a pointedly perceptive comment when he said "it would be rational for Tennessee courts to adopt a policy enhancing the continued growth of Nashville and Memphis as centers for the lives and activities of music industry personalities." . . . This Court agrees with Judge Mansfield. It would be unreasonable not to protect the efforts and energies of so many Tennessee artists.<sup>98</sup>

Highly-educated federal law clerks, enamored with Rawls's controversial philosophy, did not produce a higher level of performance in this instance. Instead, they undoubtedly were a hindrance.

So what finally happened in *Factors*? The Living Elvis case was still pending. It had been remanded to the federal district judge, the one who had originally granted the injunction, and he gained new conviction in the rightness of that result from reading *Commerce Union Bank v. Coors*. Having received the order of his appellate court, he had no authority to re-grant the injunction, but he took the unusual step of staying his decision to allow the Second Circuit to recall its mandate.<sup>99</sup> The Second Circuit reconsidered—and amazingly, came out with the same decision: no post-mortem right of publicity.<sup>100</sup> Without trying to follow the

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92. *Id.* at 288.

93. *Commerce Union Bank v. Coors of the Cumberland, Inc.*, 7 MEDIA L. RPTR. 2204 (Chan. Ct. Davidson Cty. Tenn. 1981).

94. *Id.*

95. Neuborne, *supra* note 52, at 1122.

96. *Commerce Union Bank*, 7 MEDIA L. RPTR. at 2206.

97. *Id.*

98. *Id.* at 2208.

99. *Factors Etc., Inc. v. Pro Arts, Inc.*, 541 F. Supp. 231 (S.D.N.Y. 1982) (*on remand*).

100. *Factors Etc., Inc. v. Pro Arts, Inc.*, 701 F.2d 11, 12 (2d Cir. 1983).

Supreme Court and appellate decisions that the Davidson chancellor had found, the court sidestepped the question whether *Commerce Union* had “sufficient authoritativeness” and declared again that the authorities conflicted.<sup>101</sup> Again, Judge Mansfield dissented.<sup>102</sup> Today, of course, it is well established that the right of publicity survives death in Tennessee.<sup>103</sup> Elvis lives, and he will live forever.

How prevalent is this pattern of lawlessness? It would take a study far beyond the scope of this Article to answer that question. It is not too much to assert, however, that diversity jurisdiction contributes to the frustration of state policy. It does so still, in spite of the *Erie* Doctrine and its explicit disapproval of federal judges who decide what state law “should be.” The traditional arguments against diversity make a valid point in criticizing the waste, confusion, and delay created by federal decisions of state law. The point here is that the reality is even worse than the traditional arguments recognize, because it includes not just complexity, but outlandish nullification of the law. The *Brown & Yellow Taxicab* case is still with us, in the form of decisions such as those in the Case of the Living Elvis.

#### V. CONCLUSION

Diversity jurisdiction cannot do much to achieve its alleged purposes. As the traditional arguments indicate, the judge is a local citizen, and so are the jurors. The assumption that these local citizens will be differently biased, merely because the courthouse in which they sit is a few blocks from the state courthouse, has little to commend it. Second, the law of diversity defeats its own purposes, because it does not allow for a federal forum when diversity is incomplete. Thus, the federal courthouse closes whenever a local plaintiff joins any local citizen as one of multiple defendants, even if a diverse defendant is the real target. In that situation, if local prejudice really were a valid concern, one would expect that the diverse defendant would need a federal forum even more than in cases with complete diversity, because, by hypothesis, the judge and jury would be infected by xenophobia, and the two local citizens would collaborate strategically to direct all biases at the foreigner. Third, the plaintiff can usually destroy diversity by the simple device of adding superfluous defendants who happen to be local citizens: a strategy that creates its own pathologies. And fourth, communications and mobility today are vastly different than they were at the time of the nation’s founding, or even a few years ago; and as a result, an inhabitant of Los Angeles is likely to have more in common with a Bostonian of similar characteristics than either would have with a co-citizen of different social status or lifestyle.

The traditional arguments against diversity also feature the complexity inherent in the jurisprudence of diversity, which involves expenditures of private and judicial resources that do not advance dispute resolution on the merits. Then too, the traditional arguments emphasize the friction between state and federal laws

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101. *Id.*

102. *Id.* at 13.

103. *Tenn. ex rel Elvis Presley Int’l Mem’l Found. v. Crowell*, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987) (rejecting the Second Circuit’s interpretation). This decision has even been followed by the errant Sixth Circuit, which so boldly had ignored Tennessee law. *See Dominion Trust Co. of Tenn. v. United States*, 7 F.3d 233 (6th Cir. 1993).

that diversity creates. Furthermore, there is the argument that diversity contributes to delay and crowding in the federal courts, so that litigants with true federal claims cannot have their suits heard promptly.

These arguments have merit, but this Article has sought to demonstrate that the traditional debate has left other arguments undeveloped. It has failed adequately to examine the dysfunctional incentives that diversity jurisdiction brings about. For example, there is the Race to the Bottom that results when a litigant with a weak case deliberately selects the more arbitrary forum precisely because arbitrariness is an advantage for the party that anticipates a loss on the merits. This Article calls this phenomenon the Ice Bowl Effect. Then, too, diversity jurisdiction creates a motivation for plaintiffs to add superfluous defendants: parties against which these plaintiffs really have no desire of recovery, but which they add merely to destroy diversity. This Article refers to this result as Harassing the Little Guy. Also, the increased cost of federal litigation gives an edge to obstructionists. This advantage goes to the kind of party that this Article calls the Passive-Aggressive Litigant. And finally, the transition to federal court induces new kinds of bias, so that many lawyers for institutional parties in personal injury or employment litigation routinely remove these cases, believing that the result will be what this Article labels a Tilted Playing Field against individual plaintiffs.

In addition, the traditional debate understates how much diversity jurisdiction distorts the substantive law. It increases the number of removals, and removals are inherently prone to distortion. They create what this article refers to as the Twilight Zone Effect, which arises when two different kinds of trial courts handle the same litigation. And in spite of the *Erie* Doctrine, diversity jurisdiction results in frustrating state policy. This Article illustrates the result by what it calls the Case of the Living Elvis.

The abolition of general diversity jurisdiction of the kind featured in Section 1332 would not mean the abolition of all jurisdiction founded on diversity. There are reasons other than local prejudice that can support the grant of power to federal courts.<sup>104</sup> There are at least three types of cases in which diversity may be justified on grounds unrelated to the local prejudice rationale. First, there are cases in which large numbers of very similar claims would otherwise be dispersed throughout many States, producing wastefully duplicative litigation. An example is litigation relating to a transportation disaster, such as the crash of an intercity aircraft. The Multiparty, Multiforum Jurisdiction Act addresses this issue, but it is narrowly limited in its effect.<sup>105</sup> Abolition of general diversity jurisdiction would allow for expansion of the Act so that it would better achieve its purposes. Second, types of litigation that are subject to perceived abuses in peculiar venues might be treated advantageously by diversity jurisdiction. The removal provisions of the Class Action Fairness Act are an example.<sup>106</sup> Third, the federal courts might be an

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104. Cf. Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: The Silver Lining*, 66 A.B.A. J. 177, 180 (1980) (making a related argument about potential positives in the abolition of diversity jurisdiction).

105. 28 U.S.C. § 1369 (2006). The Act applies only to multistate disasters that result in the deaths of at least seventy-five individuals; deaths of seventy-four people or fewer would result in duplicative litigation if the claims were dispersed.

106. 28 U.S.C. § 1453 (2006).

appropriate forum for particularly complex cases in which the “amount in controversy” is very large. Today, a suit in the multiple hundreds of thousands of dollars would not fit this description; indeed, a suit for a \$1 million might not be better handled by a more expensive and more complicated court. An increase in the required amount in controversy for diversity jurisdiction to, say, \$10 million, would achieve this result.<sup>107</sup> In such a situation, the greater expense of litigating in a federal forum, one in which the judge has two law clerks and perhaps even an army of interns, might be justified by the returns to scale.

In suits of average or even modestly large size, however, the dysfunctional incentives and distortions brought about by diversity jurisdiction significantly outweigh any conceivable benefits. The newer arguments developed in this Article show that federal power should be confined to cases in which its exercise serves purposes other than those attributed in the distant past to diversity jurisdiction, and it should be authorized only in situations in which it causes fewer disadvantages. Today, more than ever, there are persuasive arguments for the abolition or retrenchment of the general diversity statute.

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107. Increases in “amount in controversy” are a traditional means of confining the adverse effects of diversity jurisdiction. The original statute required no threshold. Later, more than \$3,000 was required, then \$10,000, then \$50,000. Today, the “amount in controversy” requirement is \$75,000.