ALTERED STAKES: REIMAGINING THE AMOUNT-IN-CONTROVERSY REQUIREMENT

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Which state-law cases should Congress allow into federal court? Congress's answer has always been "only the big ones." This article revisits the choice to limit diversity jurisdiction to higher-value cases and critically examines how Congress has approached setting the amount threshold. It surveys alternate ways Congress could use case value to sort which cases make it into the diversity docket. We explore lotteries, auctioning access to the highest bidder, setting an amount in controversy maximum rather than the current minimum, pegging the jurisdictional amount to the minimum wage or the cost of a hamburger, employing relative measures that use multiples (or fractions) of a litigant's income, and other devious proposals.

Some of these proposals are too radical to ever happen. Others, like changing which damages count toward the limit, are mainstream enough to have been endorsed by the federal judiciary. Our goal is to jolt. Few items in Congress's jurisdictional toolkit are so consequential yet so taken for granted, so little examined, or so poorly understood. By reimagining the amount-in-controversy requirement, we aim to ignite renewed attention and appreciation to its impact on the diversity docket. More broadly, we offer this article as a new entry point to revisit the conceptual and doctrinal underpinnings of the federal diversity docket, and access to federal court generally.

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INTRODUCTION

Federal courts differ in innumerable ways from state courts. Federal courts are well-funded, staffed by the most elite judges[1] and clerks,[2] have manageable dockets, and provide professional assistance to a reasonable number of pro se litigants. State courts, in contrast, are notoriously underfunded, overworked, and overrun with pro se litigants who receive little assistance. Though hard to quantify, ethnographically the two court systems are often worlds apart. Spend five minutes in your local county court and compare the sounds, smells, people, and architecture there with those at the closest federal district court.

One of the main gatekeepers between these two worlds is the amount-in-controversy requirement. It is Congress's chosen tool to define which state law cases deserve access to a federal forum and which do not. The jurisdictional amount shapes

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[1] *See, e.g.*, Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 763 (1989) ("The nation expects and deserves high quality from all its judges, whether state or federal. But it has a special expectation that its federal judges will be men and women of special distinction.").

[2] *See, e.g.*, Tracey E. George, Albert H. Yoon, & Mitu Gulati, *Some Are More Equal Than Others: U.S. Supreme Court Clerkships*, 123 COLUM. L. REV. 146 (2023) (using a dataset of clerks from 1980 to 2020 to demonstrate that educational pedigree, as opposed to academic performance or any other qualification, often distinguishes the winners from the also-rans.).

not only what types of cases are heard in federal court but also what kind of litigants are heard. Will the diversity docket be dominated by big business, pricey disputes, and white shoe lawyers or will there be room for ordinary people with ordinary disputes perhaps even representing themselves?

Given what's at stake, one might expect to find a wealth of analysis and commentary on the use, effectiveness, and consequences of the amount-in-controversy requirement. In fact, the topic has been largely neglected. While one can find many articles exploring the citizenship component of diversity jurisdiction,[3] the amount-in-controversy component has been the focus of but a handful.[4] Few items in Congress's jurisdictional toolkit are so consequential yet so taken for granted, so little examined, or so poorly understood.[5]

It is easy to see why the amount-in-controversy requirement might be taken for granted. Viewed from a distance, it is essential, intuitive, and highly effective. Without some limiting mechanism, diversity jurisdiction (even with a complete diversity requirement) would crush the federal courts.[6]

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[3] *See, e.g.*, James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 1 (1964); Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L. REV. 119, 119 (2003) ("Commentators have repeatedly debated the continued viability of diversity jurisdiction. These debates have tended to focus on . . . the existence of local bias [against foreign citizens]."); Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 267 (2019) (noting the centrality and persistence of the argument that diversity jurisdiction is primarily justified to guard against bias based on citizenship); Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3, 5 (1992) ("[T]he law of diversity jurisdiction is filled with irrational and logically indefensible rules.").

[4] *See, e.g.*, Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299, 302 (1984); Roger M. Baron, *The "Amount in Controversy" Controversy: Using Interest, Costs, and Attorneys' Fees in Computing Its Value*, 41 OKLA. L. REV. 257, 257 (1988); Steven Gensler & Roger Michalski, *The Million-Dollar Diversity Docket*, 47 B.Y.U. L. REV. 1653, 1653 (2022).

[5] Similarly, scholars have recognized the jurisdictional consequences of inadequate parity between state and federal courts in a very different context. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977) (arguing that "the assumption of parity is, at best, a dangerous myth"); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 593–94 (1991) ("During the 1950s and 1960s, the Supreme Court legitimately feared that state courts would frustrate federal decisions protecting civil rights and civil liberties. The widely assumed superiority of federal courts justified expanded federal jurisdiction. In the 1970s, the Burger Court restricted jurisdiction and answered objections by proclaiming parity between federal and state courts.").

[6] *See, e.g.*, Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 501 (1928) (recounting the history of diversity jurisdiction and noting that "[i]t seems to have been recognized from the start that there must be a jurisdictional amount."); Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L.

Diversity jurisdiction would reach state-law disputes over single dollars or even pennies.[7] With it, these smaller stakes state-law cases remain in the state courts. Drawing the line based on case stakes seems like a perfectly reasonable way of keeping the case load in check.[8] And there can be little doubt that the amount-in-controversy requirement has, over the centuries, been effective in blocking jurisdiction over the smallest sorts of cases. Traditionally, this result has been viewed as serving both federal and state interests.[9] Federal judicial resources are preserved for "worthier" matters, while the states retain more sovereign authority over state-law disputes.[10] What more is there to examine or understand?

What we have missed is that, when applied as a docket-control tool, the amount-in-controversy requirement is arbitrary, clumsy, and glitchy. The most important detail is where to set the jurisdictional amount threshold. Congress has no metrics for doing that. At best, the factors deemed most relevant can tell Congress that it should move the amount up (or down), but not *how far* up or where to stop. One might best describe Congress as following a Goldilocks approach of trying to set the threshold at a level that is "neither too high nor too low," but without attempting to formulate criteria that would point more precisely to any particular dividing line.

As a docket-control tool, the amount in controversy is also unexpectedly crude and glitchy. In theory, Congress could use the amount in controversy like a dial, turning it up or down until the diversity docket was calibrated to its ideal size. But

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REV. 97, 99 (emphasizing that "the continuing existence of diversity jurisdiction is a matter of considerable importance at a time when there is widespread, almost unanimous agreement that steps are needed to ease caseload pressures in the federal courts.").

7 *See infra* notes 17–22 and accompanying text.

8 *See generally* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 (1981)] ("[State and federal courts] will continue to be partners in the task of defining and enforcing federal constitutional principles. The question remains as to where to draw the lines; but line-drawing is the correct enterprise.").

9 *See* Baker, *supra* note 4, at 303, 310–311.

10 *See generally* James Bradley Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311, 316 (1891) ("Why is it that a United States court is given this duty of administering the law of another jurisdiction?"); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 506 (1928) ("[T]he proper allocation of authority between United States and state courts is but part of the perennial concern over the wise distribution of power between the states and the nation.").

that's unlikely to work in practice. For one thing, Congress would first have to develop norms for identifying diversity jurisdiction's ideal size, something it's never done thus far. Moreover, the jurisdictional amount is too crude a tool to be used for fine-tuning. To have a measurable impact on the diversity docket, Congress probably would have to double or even triple the jurisdictional amount.[11] Small adjustments would be pointless. But as we discovered in earlier empirical work, adjustments large enough to make a dent in the size of the diversity docket also alter the mix of cases, skewing it away from pro se and contract cases and toward complex tort matters.[12] The jurisdictional threshold is not a dial you can turn to change the single variable of docket size. It is more like a glitchy remote control that changes the channel every time you press hard on the volume button.

Congress is also guilty of taking the amount-in-controversy requirement for granted. At one time, Congress actively used the amount threshold to trim the size of the diversity docket, electing to sacrifice a tier of the diversity docket rather than add all the new judges needed to handle surging dockets.[13] But for the last century, Congress has limited itself to making inflation adjustments.[14] Congress's only discernable policy today is to maintain a rough status quo. Inflation adjustments are important; without them, the size of the diversity docket would grow by neglect.[15] But is that all that's left for a potentially powerful lever—to keep pace with rising prices?

This article continues our quest to explore and understand how case value can be used to regulate the diversity docket. Are there other ways to sort cases according to the stakes involved?[16] Might other ways better implement diversity policy

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11 *See* Gensler & Michalski, *supra* note 4, at 1687–88.

12 *See id.* at 1693–94, 1703.

13 *See* Newman, *supra* note 1, at 767 ("Unless significant changes are made, I foresee the day when the current total of 750 federal judges will increase to 2,000, then 3,000, and, before the end of the next century, even 4,000. When this growth occurs, we will not have a federal judiciary as we now know it. In selection and performance it will be indistinguishable from the judiciary of most states—manned by many capable and conscientious judges, but including within its ranks an unacceptable number of men and women not sufficiently qualified to be the primary adjudicators of federal law.").

14 *See infra* notes 63–67 and accompanying text.

15 *See* Gensler & Michalski, *supra* note 4, at 1715.

16 A further step back would ask whether there are ways to sort cases other than stakes. An obvious candidate is by case type. In the 1960s, one prominent commentator proposed excluding personal injury suits from diversity jurisdiction, estimating that doing so would cut the diversity docket by 60%. *See* Daniel J.

or provide Congress with a more sensitive and useful tool than the current scheme provides? The institutionalization of inflation adjustment as the guiding regulatory principle has left the topic calcified and moribund. Can the amount-in-controversy concept find new life by being asked to play new tricks?

Part I of this Article provides the essential background. Part II then explores several alternative ways of sorting cases based on the damages being sought. The first approach alters the items that count toward satisfying the amount in controversy threshold in an effort to make the valuation process more certain. The second approach lets the states set the amount in controversy for diversity jurisdiction. The third approach abandons the preference for "big" cases and selects based on different criteria. We explore lotteries, auctioning access to the highest bidder, setting an amount in controversy maximum rather than the current minimum, pegging the jurisdictional amount to the minimum wage or the cost of a hamburger, employing relative measures that use multiples (or fractions) of a litigant's income, and other devious proposals. The fourth approach leverages the insight that different types of cases are more prevalent at different jurisdictional amounts, with Congress strategically setting the jurisdictional amount at the level that aligns with its preferred mix of cases.

We're not proposing that Congress implement any of the ideas that follow tomorrow. Some of them are clearly outrageous thought experiments. Others are viable and worthy of some chin-scratching time. Why, exactly, have scholars and legislators never explored this or that option? We wrote this article in the spirit of exploration and adventure. It is as much for the curious as the reform minded. The more we broaden the realm of the imaginable the better situated we are to understand what we already have. In this way, our "altered stakes" analysis provides a new entry point to revisit the conceptual and doctrinal underpinnings of the federal diversity docket specifically and access to federal court generally.

I
The Amount-in-Controversy Requirement

This Part provides an overview of Congress's use of, and approach to, the amount-in-controversy requirement since

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Meador, *A New Approach to Limiting Diversity Jurisdiction*, 46 ABA. J. 383, 384 (1960) (proposing to eliminate personal injury suits from diversity jurisdiction). We leave that topic for another day.

the inception of diversity jurisdiction in 1789. It develops four main points. First, the amount in controversy is used to control the size of the diversity docket. While Congress has had different *reasons* for using it that way, Congress has not used it for any other purpose. Second, Congress has never developed any clear methodology for setting the specific jurisdictional amount. One might best describe Congress as following a Goldilocks approach of trying to set the threshold at a level that is "neither too high nor too low," but without attempting to formulate criteria that would point more precisely to any particular dividing line. Third, its effectiveness as a docket control device is both more limited and more complicated than is generally understood. Only large changes make a difference in the size of the docket, and those large changes have significant and poorly understood effects on the mix of cases in the diversity docket. Fourth, for the last century, Congress has limited itself to making periodic inflation adjustments. While keeping pace with inflation is important, making that its sole focus has arrested amount in controversy policy in a neglected, underdeveloped, and undertheorized state.

A. The Easy Part: Why We Have an Amount-in-Controversy Requirement

For its entire 234-year history, diversity jurisdiction has been limited by a statutory amount-in-controversy requirement. It is not required by the Constitution.[17] There were proposals to include a jurisdictional amount in the Constitution,[18] but they were unsuccessful.[19] Instead, Article III endows Congress with authority to grant federal courts jurisdiction over "Controversies . . . between Citizens of different states," but it

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17 *See* 14AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3701(4th ed. 2023); James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE WEST. L. REV. 179, 218 (2006) ("There is no doubt that Article III in no way requires there to be any minimum amount in controversy for Congress to permit district courts to exercise any type of constitutional subject matter jurisdiction.").

18 *See, e.g.*, Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Feb. 6, 1788), in 2 Elliot's Debates 177 (proposing amount-in-controversy requirements for the Supreme Court and the federal courts); 1 Elliot's Debates 323, 326 (explaining Massachusetts's and New Hampshire's supportive stance on the amount-in-controversy requirements).

19 *See* Friendly, *supra* note 6, at 484 ("A search of the letters and papers of the [Framers] does not reveal that they had given any large amount of thought to the construction of a federal judiciary. Certain it is that diversity of citizenship, as a subject of federal jurisdiction, had not bulked large in their eyes.").

is silent on the details.[20] Congress has total control over the role that case value will play in the statutes that confer jurisdiction based on diversity of citizenship.[21] If it wanted to, Congress could eliminate the amount-in-controversy requirement entirely.[22]

Congress initially set the amount threshold at $500 in the landmark Judiciary Act of 1789.[23] It was still $500 almost 100 years later when, in 1888, Congress quadrupled it to $2,000.[24] As shown in Table 1 below, it has gone up steadily, but intermittently, since then, rising to its current $75,000 in 1996.

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20 U.S. CONST. art. III, § 2. For example, the requirement of "complete diversity"—that no plaintiff can share a state citizenship with any defendant—is not required by Article III but instead is an interpretation of the general diversity jurisdiction statute. See State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967) (holding that Article III requires only minimal diversity). Congress tapped into its minimal diversity powers twice in the early 2000s, with the Multiparty, Multiforum Trial Jurisdiction Act, 28 U.S.C. § 1369, and the Class Action Fairness Act, 28 U.S.C. § 1332(d); *see generally* Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982) (examining the power of Congress under Article III to shape the jurisdiction of the lower federal courts); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

21 A few examples show the range of Congress's power. The federal impleader statute, 28 U.S.C. § 1335, confers citizenship-based jurisdiction over stakes as low as $500. Jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d), requires an aggregate amount in controversy in excess of $5 million.

22 For over a century, the general federal-question jurisdiction, 28 U.S.C. § 1331, had an amount-in-controversy requirement. Congress eliminated it in 1980. *See* 13D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3561.1 (3d ed. 2023) (providing a history of the amount-in-controversy requirement for federal questions jurisdiction). *See generally* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1052 (1994) ("[T]he Constitution is neutral, implying no preference for litigation in state as opposed to federal court.").

23 *See* Act of September 24, 1789, 1 Stat. 73, 78–79, § 11 (original filing) & § 12 (removal).

24 Careful readers will notice that the jurisdictional amount *decreased* to $400 in 1801, only to return to $500 a year later. The temporary reduction was a part of the Midnight Judges Act, legislation passed by the outgoing Federalist Congress in an effort to enshrine a "pro-federal" judiciary to counteract the incoming Anti-Federalist administration. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 21–30 (1928) (providing a general overview of the Midnight Judges Act and its repeal); *see also generally* Max Farrand, *The Judiciary Act of 1801*, 5 AM. HIST. REV. 682 (1900); Erwin C. Surrency, *The Judiciary Act of 1801*, 2 AM. J. LEGAL HIST. 53 (1958). Most people first encounter the Midnight Judges Act in their introductory Constitutional Law classes; when Marbury sued Madison, it was to secure the delivery of a judicial commission contained in the legislation.

Table 1: Summary of Legislation Concerning Amount-in-Controversy in Diversity Jurisdiction

Year	Statutory Amount	Interval Since Last Change	Percentage Increase
1789	500		
1801	400	12 years	–20%
1802	500	1 year	25%
1888	2,000	86 years	300%
1911	3,000	23 years	50%
1958	10,000	47 years	233%
1988	50,000	30 years	400%
1996	75,000	8 years	50%

The basic reasons for having some amount-in-controversy requirement are well-known and rather obvious. Without some amount threshold, the federal courts would be opened up to state-law disputes over a single dollar or even pennies. The additional number of cases that potentially could make their way into federal court would be enormous.[25] Critics of diversity jurisdiction often deride it as a poor use of federal judicial resources.[26] We can't imagine Congress would be eager to fund the judges and facilities needed to hear all those small-dollar state-law claims.

Nor do we think the states would be happy with such a vast expansion of the diversity docket. Every time a state-law case is decided in federal court, a state forum is sent to the sidelines. The amount-in-controversy requirement reduces the intrusion into the states' dockets.[27] While any one case may feel

25 For example, diversity jurisdiction would then reach a lawsuit by one of the authors (citizens of Oklahoma) against McDonald's Corporation (a citizen of Illinois and Delaware) over a $5.00 claim for not getting an item ordered and paid for. We don't know—and have made no effort to determine—how many such cases might exist. Nor have we attempted to estimate how many of those cases would be filed in or removed to federal court if jurisdiction were available.

26 *See, e.g.*, HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 141 (1973) ("The first and greatest single objection to the federal courts entertaining [diversity cases] is the diversion of judge-power urgently needed for tasks which only federal courts can handle or which, because of their expertise, they can handle significantly better than the courts of a state."); Kramer, *supra* note 6, at 102 ("[P]erhaps no other major class of cases has a weaker claim on federal judicial resources.").

27 *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 39 (1990) [hereinafter FCSC] ("To limit federal court intrusion into everyday lawsuits, the first Congress established a jurisdictional minimum of $500.").

like a negligible displacement of state judicial sovereignty, the cumulative effect of eliminating any amount-based limitation would be substantial. Moreover, *every* additional case presents an additional *opportunity* for a substantial intrusion into state judicial sovereignty if it involves a novel question of state law.[28]

Finally, the federal court system lacks any equivalent of a small claims practice.[29] The Federal Rules of Civil Procedure apply to all civil cases without regard to the amount or type of relief being sought.[30] Few districts have formal mechanisms for parties to opt for streamlined procedures, and few attorneys opt for them where they exist.[31] Whether one does or does not subscribe to the view that federal civil procedure works well only for the largest of cases,[32] it is surely a mismatch for truly small claims.

B. The Harder Part: Setting the Amount

What is not obvious is where to draw the line. We first discuss the factors Congress has considered when setting or changing the jurisdictional amount threshold. We then demonstrate that none of the relevant factors indicate where the line

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28 The most we can say at this point is that a larger diversity docket presents more opportunities for federal judges to make wrong "Erie guesses." *See generally* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1495 (1997) (discussing "predictive approach" and its risks). We don't know whether smaller-value cases present fewer or more novel issues. We also don't know whether federal judges would be more or less inclined to avail themselves of state-court certification mechanisms in smaller-value cases. *See* Kenneth F. Ripple & Kari Anne Gallagher, *Certification Comes of Age: Reflections on the Past, Present, and Future of Cooperative Judicial Federalism*, 95 NOTRE DAME L. REV. 1927, 1939 (2020) (noting that federal and state criteria for certification both favor matters that "are . . . important and far reaching").

29 *See* William W. Schwarzer, *Let's Try a Small Claims Calendar for the U.S. Courts*, 78 JUDICATURE 221, 221 (1995) (proposing that federal courts create a small claims calendar to provide a more economical alternative especially for pro se and small-value cases).

30 FED. R. CIV. P. 1; *see also* Steven S. Gensler & Jason A. Cantone, *Expedited Trial Programs in Federal Court: Why Won't Attorneys Get on the Fast Track?*, 55 WAKE FOREST L. REV. 525, 534–39 (2020) (discussing application of the Federal Rules across all case types); Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1796 (2002) (discussing a proposal, since abandoned, to develop simplified rules for "smaller" cases).

31 *See* Gensler & Cantone, *supra* note 30, at 543–53.

32 *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1010 (2016) (criticizing the Federal Rules scheme and amendment process as catering to the needs of complex cases and business interests at the expense of ordinary cases and ordinary litigants).

should be drawn. Rather, they form the basic moving parts of a balancing process that generally guides Congress to move the amount in one direction or the other. At best, that balancing process can suggest not just a direction but a very large range of values that might serve Congress's goals. What it can't do, however, is pick a specific number.

When Congress set the amount threshold at $500 in the Judiciary Act of 1789, it was playing politics in the highest order. During the Constitutional Convention, a fierce battle waged between those who wanted to create lower federal courts and those who wanted to leave trial-level adjudication to the state courts.[33] The stalemate was broken by a compromise that leaves the matter to Congress.[34] The compromise really just kicked the can down the road. Given the breadth of the potential judicial power set forth in Article III, Congress would have the power to create an enormously large federal judiciary. That prospect served as fodder for the opposition at the ratification debates, and the Federalist supporters had to backpedal to ensure ratification, promising that any implementing legislation would contain appropriate limits.[35]

When the matter came to Congress after the Constitution was ratified, Congress took those concerns—and those promises—to heart, enacting a Judiciary Act that conferred only a fraction of the potential Article III judicial power.[36] For diversity jurisdiction, a key limit was the $500 amount-in-controversy requirement, a sum that excluded a large proportion of diversity-eligible cases,[37] but still left federal courts with sufficient meaningful work.[38] In particular, the chosen amount

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33 *See* Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52–56 (1975); *see generally* Friendly, *supra* note 6.

34 *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.").

35 *See* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1471 (1989) (describing the limits Federalists promised in hopes to retain the broad judicial power outlined in article III).

36 *See* FRIENDLY, *supra* note 26, at 53–54; Holt, *supra* note 35, at 1485–89; FRANKFURTER & LANDIS, *supra* note 24, at 12 ("The content of jurisdiction conferred on the new judiciary was very limited in comparison with what it now exercises.").

37 *See* Holt, *supra* note 35, at 1487–88.

38 *See generally* FRIENDLY, *supra* note 26, at 141 (noting that without diversity jurisdiction "the circuit courts created by the First Judiciary Act would have had very little to do"); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3 (1948).

left in state court most British debt claims[39] and likely all of the politically volatile quit rent claims deriving from the estate of Lord Fairfax in Virginia.[40] In other words, the original $500 jurisdictional amount likely was selected to appease the opposition, even though it dramatically reduced the reach of diversity docket, and did so by leaving in state court a cohort of cases where "local bias" was all but assured.[41]

As Congress has changed the amount threshold, certain themes appear with some consistency. Sheer docket control probably has been foremost among them. (We set aside for now the question of inflation adjustments, which are more properly understood as a mechanism for preserving the value status quo.) If the goal is to maximize the size of the diversity docket, then the right move is to minimize the amount threshold.[42] If the goal is to minimize the size of the diversity docket, then the right move is to push for an ever-higher amount threshold.

There is no doubt that Congress knows that it can use the amount in controversy threshold to alter the size of the diversity docket. The clearest example occurred in 1888, when Congress raised the amount in controversy from $500 to $2,000.[43] Docket reduction was the primary goal. In the years after the Civil War, the federal courts had become overburdened, in no small part because of all of the new federal-law cases being brought under the newly-conferred general federal question jurisdiction statute.[44] Rather than expand the federal judiciary to the full extent needed to accommodate the docket growth, Congress raised the amount threshold in an effort to eliminate a chunk of the diversity docket.[45] The cases eliminated were deemed expendable, and they were willingly sacrificed in order to make room for "more deserving" cases.[46] When Congress raised the jurisdictional amount to $3,000 in 1911, it again

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39 *See* Holt, *supra* note 35, at 1488.

40 *See* Baker, *supra* note 4, at 305.

41 *See* Patrick Woolley, *Diversity Jurisdiction and the Common-Law Scope of the Civil Action*, 99 WASH. UNIV. L. REV. 573, 584 (2021); *see also* Holt, *supra* note 35, at 1487–88.

42 *See* FRIENDLY, *supra* note 26, at 12 (describing steps to implement a "maximum" approach to diversity jurisdiction).

43 *See* Gensler & Michalski, *supra* note 4, at 1668.

44 *See* FRANKFURTER & LANDIS, *supra* note 24, at 60–69.

45 *Id.* at 88–94; Baker, *supra* note 4, at 307–08.

46 *See* Gensler & Michalski, *supra* note 4, at 1668. The view that the primary mission of the federal courts is to resolve federal-law cases has become sufficiently entrenched that, a century later, the Federal Courts Study Committee described the amount-in-controversy requirement as "a pragmatic but essentially arbitrary

acted with the goal of eliminating a tier of diversity cases to help deal with increasing caseloads.[47]

Cost and hassle have factored into the equation too. When Congress initially set the amount in controversy at $500 in 1789, it seems likely that Congress was also acting, at least in part, to spare litigants with smaller cases from the burden and expense of litigating in the new federal circuit courts.[48] The cost-and-hassle theme was evident when Congress increased the amount threshold in 1888,[49] and was again present in 1911 and 1958, though to a lesser degree.[50]

One characteristic that the relevant factors share is that they do not provide a basis for selecting any particular jurisdictional amount. A desire to increase or decrease the size of the diversity docket can push Congress to set the jurisdictional amount higher or lower, but it doesn't offer any guidance about how much higher or how much lower. In other words, it offers guidance about the direction in which the amount threshold should be moving, but it doesn't answer the question of when it should stop moving in that direction and settle on a particular

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attempt to limit the diversion of federal courts from their primary role of litigating federal constitutional and statutory issues." FCSC, *supra* note 27, at 40.

47 *See* Baker, *supra* note 4, at 310–11.

48 The concern about travel burden figured most prominently in the decision to limit the Supreme Court's appellate jurisdiction to cases with a value in excess of $2,000. *See* Holt, *supra* note 35, at 1488. But travel would also have been an issue at the trial level. Under the structure of the First Judiciary Act, diversity jurisdiction cases were assigned to the Circuit Courts, a trial-level court composed of two Supreme Court justices ("riding circuit") and the local district judge. *See* First Judiciary Act of 1789, § 4. Whereas state court cases could be heard in local county court, the Circuit Courts met only in the larger cities and at set times of the year. *See* First Judiciary Act of 1789, § 5.

49 *See* 18 Cong. Rec. 613 (Jan. 13, 1887) (Remarks of Rep. Culberson) ("The object of the bill is to diminish the jurisdiction of the circuit courts and the Supreme Court of the United States, to promote the convenience of the people, and to lessen the burden and expense of litigation."); 18 Cong. Rec. 2544 (Mar. 2, 1887) (Remarks of Sen. Edmunds) (expressing concern for "the inconvenience and wrong of subjecting mere local affairs to the great expense of national jurisdiction").

50 *See* Baker, *supra* note 4, at 308–10. Lawyers today send mixed signals about the role of litigation costs as a factor in the diversity debate. There remains a perception among many (though a minority) that litigation in federal court is more expensive than in state court. *See* Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., Federal Judicial Center National, Case-Based Civil Rules Survey, Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules 57 (2009). But when asked directly how cost and timing affected the choice between federal and state court, most attorneys expressed mixed-to-no preferences and reported that it was not a primary consideration. *See* Jason A. Cantone and Emery G. Lee III, Fed. Judicial Ctr., Federal and State Forum Preferences: A Survey of Attorneys in Recently Closed Diversity Jurisdiction Cases 7–8 (2021).

value. Nor does a general desire to protect litigants from the expense and burden of federal court tell Congress to draw the amount threshold line at any particular value.

The same dynamic occurs if one steps back one level and considers the question from the perspective of diversity jurisdiction generally. The prevailing justification for diversity jurisdiction is that it serves as a bulwark against bias toward out-of-state defendants.[51] That rationale provides scant guidance in setting the jurisdictional amount threshold. Every case against an outsider presents the risk of local bias. The current amount of $75,000 is an arbitrary threshold. It's not as though Congress decided that state actors could be trusted to be fair to outsiders in a claim for $74,000 but not if the claim was for $76,000.

Perhaps the jurisdictional amount threshold can be explained as a function not of the risk of local bias but the potential harm such bias might cause.[52] In other words, it's not that local actors are more likely to be saints when the stakes are lower, but that their sins cause less harm.[53] This view accepts that local bias can exist at any case value, but limits recourse to the federal forum only in cases where the results can really sting. Of course, that still requires a subjective (though not arbitrary, if that makes a difference) determination of how much must be at stake before losing would sting.

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51 *See* Dodson, *supra* note 3, at 271–83 (tracing the bias rationale from the founding to the modern era); Richard D. Freer, *The Political Reality of Diversity Jurisdiction*, 94 S. CAL. L. REV. 1083, 1092–93 (2021) (arguing that "whatever bias was feared, it was rooted not in litigants' state of citizenship, but in the region from which they hailed"); Friendly, *supra* note 6, at 492–93 (1928); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923); *see also* THE FEDERALIST NO. 80 (Alexander Hamilton) (citing risk of local bias as supporting a national judiciary to hear claims between citizens of different states).

Some have argued that these concerns were overstated. *See* Friendly, *supra* note 6, at 493–95 (concluding that an examination of reported case outcomes from the states during the period under the Articles of Confederation disclosed no evidence of local bias); *but see* Holt, *supra* note 35, at 1452–58 (persuasively showing that pro-debtor state judges and juries often demonstrated strong bias against out-of-state creditors). But even if the claims of local bias were unfounded, and even if the state courts could in fact be trusted, the perceptions and emotions that fueled those concerns were still a powerful force that threatened to frustrate the unquestioned federal interest in promoting a robust and integrated national economy. As Frankfurter and Landis put it, "[the] fear of parochial prejudice, dealing unjustly with litigants from other states and foreign countries, undermined the sense of security necessary for commercial intercourse." FRANKFURTER & LANDIS, *supra* note 24, at 8–9.

52 *See* Baker, *supra* note 4, at 320.

53 *See* Freer, *supra* note 51, at 1102; Gensler & Michalski, *supra* note 4, at 1665.

Congress has rarely offered any insights into its thought process when considering whether to adjust the amount in controversy. The most notable exception occurred when Congress increased the amount threshold from $3,000 to $10,000 in 1958. In its Report to the House of Representatives, the Committee on the Judiciary explained that the increase was:

> [B]ased on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all *substantial* controversies where the other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies.[54]

In the end, one could fairly say that Congress has taken a Goldilocks-style approach, balancing a range of factors in an effort to set the amount threshold at a level that is neither too high nor too low. Presumably, Congress draws the line at a point that balances the benefits conferred by diversity jurisdiction against its harms. Diversity jurisdiction protects against local bias. But to avoid putting too great a burden on the federal courts, to reduce the intrusion into state judicial sovereignty, and to protect litigants from the added hassle and burden of litigating in federal court, it only kicks in when the risk of harm justifies those costs. That balancing approach makes perfect sense. What should be clear, though, is that there is nothing about the process that points to any particular jurisdictional amount as the right place to draw the line.

C. The Limits and Consequences of Using the Jurisdictional Amount to Control the Size of the Diversity Docket

The amount-in-controversy requirement clearly has an impact on the size of the diversity docket. If there were no amount threshold, the diversity docket would be vastly larger than it currently is, capturing diverse-party cases for dollars or even pennies. At the other end of the spectrum, Congress could virtually eliminate the diversity docket by raising the jurisdictional amount to $1 trillion. A docket control tool with the ability to regulate the flow of cases between 100% and 0% is powerful indeed.

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54 S. Rep. No. 1830 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3101 (emphasis added). The House Report was quoting a passage from a proposal made forwarded by the Judicial Conference of the United States. *See id.* at 3114 (Report of the Committee on Jurisdiction and Venue).

That being said, it is a mistake to think of the amount in controversy as an all-powerful tool in practice. One particular misimpression is that Congress can use it like a dial, turning it up or down to make targeted adjustments to the size of the diversity docket. In reality, Congress has never used it as a tool for fine-tuning the size of the diversity docket. And should it attempt to do so, it would discover that the jurisdictional amount is likely too crude and complicated a tool for the job.

1. *Targeting the Amount Threshold to Docket Size*

There is no question that Congress can use the amount in controversy to adjust the size of the diversity docket "up" or "down." As discussed earlier, the jurisdictional amount lever has a powerful directional effect. If the only thing Congress hopes to achieve is to move the docket size in one direction or the other, turning the dial on the amount threshold will do that (though with limits and significant side effects, which we discuss later).

In theory, Congress could use the amount-in-controversy lever not just directionally, but to achieve a specific docket-size goal. Instead of trying to figure out the "right" amount-in-controversy level and then seeing how many cases it would let in, Congress could reverse engineer the amount in controversy by first deciding how much diversity jurisdiction to support and then setting the amount threshold to get the desired number of cases. Under this model, the docket-size goal could be expressed either as a total number of cases (e.g., setting a target of 100,000 diversity cases) or as a percentage of the civil docket (e.g., setting a target of 40% of the civil docket). Congress would then set the amount in controversy at a level that it predicts would let in that number of cases.

To be clear, Congress has never taken this approach in practice. While Congress has certainly raised the amount threshold to cut the size of the diversity docket, it has never used docket-size as a specific target. In 1888, for example, when Congress raised the amount from $500 to $2,000, it did it to drive down the size of the diversity docket, but it wasn't driving it toward any particular size. Congress just wanted to make the docket smaller to provide some measure of relief to an overburdened federal judiciary. Likewise in 1911. Congress raised the amount in controversy in part to shrink the size of the diversity docket. But it did not reverse engineer the new jurisdictional amount based on a specific docket-size target.

And we see several challenges to implementing a reverse-engineered approach. The first challenge would be for Congress to pick the docket-size target. On what basis would Congress determine that "100,000" diversity cases, or "40 percent" of the civil docket, was the right number to target? We struggle to imagine what metrics would make that determination less arbitrary or less subjective than the gut feel approach Congress has used to set the amount threshold. And as discussed next, we have strong reasons to think that the amount in controversy cannot be used as a dial in that way.

2. *The Limits and Side Effects of "Dialing for Docket Size"*

We now fully address the metaphor of using the jurisdictional amount like a dial, in which Congress turns it one way or the other to make targeted adjustments to the size of the diversity docket. We emphasize again that the jurisdictional amount has powerful directional effects; turning the dial all the way in one direction or all the way in the other direction would expand diversity jurisdiction to its fullest or effectively eliminate it. What we are talking about here is using it to make controlled adjustments within those extremes. In that more practical and realistic setting, "dialing for docket size" is hindered by the size of the changes needed and the side effects of making them.

The size of the diversity docket is largely insensitive to small changes in the jurisdictional amount. What difference would it make, for example, if Congress changed the amount threshold from $75,000 to $80,000? Perhaps it might exclude some extremely small number of contract or debt cases where the value could be pinpointed at, say, $78,000. It likely would have no measurable impact on the diversity tort docket, where the amount in controversy includes emotional distress, pain and suffering, and other types of noneconomic damages that defy pinpoint valuation.

Congress would need to make large changes to the amount in controversy threshold in order to meaningfully alter the size of the diversity docket. For example, we estimate that Congress would have to more than triple the amount from $75,000 to $250,000 to reduce the size of the diversity docket by 20%.[55] Larger increases would produce larger reductions, but with diminishing returns. An increase to $500,000 would reduce the diversity docket by only about 33%.[56] Even if the amount in

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55 Gensler & Michalski, *supra* note 4, at 1688–89.

56 *Id.*

controversy were raised to $1 million dollars, nearly 60% of the diversity docket would remain.[57] So much for fine-tuning.

Using the jurisdictional amount to fine-tune the size of the diversity docket poses another problem. The composition of the diversity docket changes as the jurisdictional amount goes up. Our study confirmed the widely held intuition that the increases to the amount-in-controversy requirement would disproportionately affect contract cases compared to tort cases.[58] But we also found other effects. Federal judges would encounter and interact with fewer pro se litigants.[59] Fewer removed cases would stay in federal court and, eventually, would likely not be removed at all, thus shifting jurisdictional control to plaintiffs who prefer state courts.[60] The diversity docket would tilt increasingly toward complex cases where either the party constellations are complex or where cases are part of MDL proceedings.[61] And these effects would be unevenly distributed across the country.[62]

The data don't allow us to know for sure what is causing these side effects (though we have suspicions about at least some of them) or to know for sure how the various side effects may be linked. What we do know is that the amount in controversy threshold and the composition of the diversity docket are not independent variables. Changes to the amount in controversy level change not just the number of cases in the diversity docket but also the type of cases and their distribution across districts. The jurisdictional amount isn't a simple dial that you can turn up or down. It's more like a glitchy remote control that simultaneously changes the channel every time you press hard on the volume button.

D. Inflation Adjustment: Stuck in Status Quo Mode

There is one change Congress can make to the amount-in-controversy requirement without the need for any clear policy objectives and without risk of altering the mix of cases in the diversity docket. That's to make inflation adjustments.

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57 *Id.*

58 *Id.* at 1693–94; *see also* ANTHONY PARTRIDGE, THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION 14–16 (Federal Judicial Center, 1988) (discussing likely disproportionate impact of raising the jurisdictional amount).

59 Gensler & Michalski, *supra* note 4, at 1702–03.

60 *Id.* at 1695–96.

61 *Id.* at 1704–07.

62 *Id.* at 1689–91.

Inflation adjustment has been Congress's dominant concern for roughly a century.[63] The last time Congress predicated an increase on eliminating a tier of cases from the diversity docket was 1911, when Congress raised the amount threshold from $2,000 to $3,000. It was not to offset inflation, which had been roughly 0% since the prior increase in 1888.[64] Rather, Congress cited the same reasons that motivated the 1888 increase—cutting the diversity docket would help alleviate the burden on the federal judiciary and spare litigants with smaller claims from the higher expense of the federal courts.[65]

In 1957, the jurisdictional amount was still only $3,000. But this time inflation was a major factor. To keep up with rising prices, the amount needed to be raised to over $9,000. Congress ultimately determined to increase it to $10,000 to provide some cushion against anticipated future inflation.[66] Congress has increased the amount in controversy twice more since then, raising it to $50,000 in 1988 and to $75,000 in 1996. Both increases were justified as needed to offset inflation that had occurred since the previous increase.[67]

We are overdue for another inflation adjustment, as price increases have effectively lowered the value of the current $75,000 threshold to about $45,000 in 1996 dollars.[68] To regain what has been lost to inflation, Congress would need to increase the amount in controversy to at least $125,000.[69] In 2021, the U.S. Judicial Conference adopted a position supporting an increase to $150,000 to offset the inflation that has occurred and build in a small cushion against the future inflation that is all but certain to occur.[70] The Judicial Conference also reaffirmed its support for automatic adjustments indexed to inflation.[71]

We don't mean to say that inflation adjustments are wholly divorced from jurisdictional policy. Inflation adjustment is itself a policy choice. It is a choice to stick with whatever jurisdictional balance had previously been struck. But *not*

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63 *Id.* at 1670–72.

64 *Id.* at 1667.

65 *Id.* at 1669.

66 *Id.* at 1670–71.

67 *Id.* at 1671.

68 *Id.* at 1714.

69 *Id.* at 1715.

70 JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: SEPT. 28, 2021, at 16 (2021).

71 *Id.*

adjusting for inflation would allow the judicial federalism balance to change by inaction. As we wrote before:

> [T]he reality is that Congress effectively makes jurisdictional policy whether it accounts for inflation or not. Our view is that inattention should not be the mechanism for altering the allocation of state-law cases between the state and federal courts. For that reason, we think that periodic adjustments are Congress's responsibility unless and until Congress elects to revisit the question of what that balance should be.[72]

The important point is that Congress can adhere to a policy of inflation adjustment without having any policy goal other than to stick to the path chosen by the Congresses that came before.

But status quo mode comes with its own price. Congress no longer has any reason to think deeply or seriously about the purposes behind the amount-in-controversy requirement or whether the current amount threshold is achieving them. Perhaps that would be ok if Congress were sticking to a path charted by fully developed and clearly articulated policies. But as we have seen, Congress's approach to the amount-in-controversy requirement is both underdeveloped and undertheorized. And so long as we stay in status quo mode, that's not likely to change.

II
The Amount-in-Controversy Requirement Reimagined

Part I demonstrated that Congress's current approach to the amount in controversy has become calcified and moribund. Congress approaches the amount in controversy strictly as a lever to manipulate the size of the diversity docket. But it lacks any guiding principles about how big or small the diversity docket should be. Moreover, size adjustments large enough to matter come with some serious side effects. For the last century, Congress has fallen back to making periodic inflation adjustments. Along the way, a mechanism that could be a powerful policy lever has become an afterthought, arrested in an underdeveloped and undertheorized state.

In this Part, we reimagine amount-in-controversy methodology, exploring four alternate approaches Congress might take. The first approach alters the items that count toward satisfying the amount in controversy threshold in an effort to

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72 Gensler and Michalski, *supra* note 4, at 1715.

make the valuation process more certain. The second approach lets the states set the amount in controversy for diversity jurisdiction. The third approach abandons the preference for "big" cases and selects based on different criteria. We explore lotteries, auctioning access to the highest bidder, setting an amount in controversy maximum rather than the current minimum, pegging the jurisdictional amount to the minimum wage or the cost of a hamburger, employing relative measures that use multiples (or fractions) of a litigant's income, and other devious proposals. The fourth approach leverages the insight that different types of cases are more prevalent at different jurisdictional amounts, with Congress strategically setting the jurisdictional amount at the level that aligns with its preferred mix of cases.

When one starts exploring the different ways Congress could approach the amount-in-controversy requirement, a strong theme emerges: the only way to choose between the models (or in some cases to use them) is to decide what exactly the diversity docket is intended to achieve. The "diversity debate" is an old one. But we are not aware of any prior work that has used the amount-in-controversy concept as a microscope for scrutinizing diversity policy. Our study provides a new entry-point for examining the normative commitments baked into our current understanding of diversity jurisdiction. In that respect, we would like to think of our findings and their implications as an invitation to revisit the normative, conceptual, and doctrinal underpinnings of the federal diversity docket specifically, and access to federal courts generally.

A. Changing What Gets Counted

For its 230-year history, the amount-in-controversy requirement has not distinguished between the types of damages being claimed. The Judiciary Act of 1789 set the amount required at $500 "exclusive of costs."[73] That was the only exclusion until 1888, when Congress expanded the exclusion to "interest and costs."[74] The amount in controversy thus includes

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73 Act of September 24, 1789, 1 Stat. 73, 78–79, § 11 (original filing), § 12 (removal).

74 Act of August 13, 1888, 25 Stat. 433, 434. The exclusion of interest does not apply to interest that is a form of damages incurred prior to the filing of the lawsuit and stemming from the defendant's alleged misconduct, such as a claim for interest accrued on an unpaid note. *See* 14AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3712, at 817–18 (2011); 15A JAMES WM. MOORE'S FEDERAL PRACTICE § 102–106[5], at 279–81 (2019 ed.). Similarly, costs

all items of relief potentially recoverable unless they fall within the excluded categories of costs and interest. Because they are not excluded, non-economic relief like damages for pain and suffering and punitive damages count.[75] So too do attorney's fees when they are recoverable by contract or by statute.[76]

The inclusion of non-economic damages has a profound effect on the application of the amount-in-controversy requirement. Damages for pain and suffering are notoriously hard to quantify because juries typically are given great latitude to award them in whatever amount they feel is warranted by the circumstances of the case. Absent some objectively ascertainable limit (e.g., a law setting a fixed cap or limiting them to some multiple of economic damages), juries can award pain and suffering damages in any amount up to the point where a court would find the award to be excessive as a matter of law.[77] Juries also have considerable flexibility to award punitive damages, subject to Due Process limits[78] and any more restrictive constraints put in place by state punitive damages law.[79]

These valuation principles combine with the legal certainty test to make it easy for plaintiffs to satisfy the amount-in-controversy requirement when their claims allow for the recovery of non-economic damages. The court can find that the

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count towards the amount-in-controversy requirement when they are an element of the plaintiff's damages, as may occur in a suit seeking to recover expenses wrongly imposed by a prior lawsuit. *See* 14AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, at 805. For further discussion of the "interest and costs" exclusion, see Baron, *supra* note 4.

75 *See* 14AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *supra* note 74, at 740 (discussing difficulties presented by valuing tort claims seeking pain and suffering damages); 15A JAMES WM. MOORE'S FEDERAL PRACTICE, *supra* note 74, at § 102.106[4] (discussing inclusion of punitive damages).

76 *See* 15A JAMES WM. MOORE'S FEDERAL PRACTICE, *supra* note 74, at § 102.106[6].

77 *See* STEIN ON PERSONAL INJURY DAMAGES 8:8, at 8–19 (3d ed. 1997) ("Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. Hence, the amount of damages to be awarded for them must be left to the judgment of the jury, subject only to correction by the courts for abuse and passionate exercise.").

78 *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.").

79 *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433 (2001) ("A good many States have enacted statutes that place limits on the permissible size of punitive damages awards. When juries make particular awards within those limits, the role of the trial judge is 'to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered.'").

amount in controversy is not met only if the court can conclude that no reasonable jury could award the amount of non-economic damages needed to exceed the amount required. With the wide latitude juries enjoy in this area, that is a rare conclusion for a judge to reach. The point is illustrated nicely by the facts underlying *Ortega v. Star-Kist Foods, Inc.*, the companion case to *Exxon Mobil Inc. v. Allapattah*,[80] in which the First Circuit concluded that a little girl who cut her pinky finger on a tuna can lid could potentially recover enough in pain and suffering damages to exceed the $75,000 amount-in-controversy requirement.[81]

Recognizing this phenomenon, various proposals have been made to exclude noneconomic damages from the amount-in-controversy calculation.[82] Readers will recall that Congress increased the amount-in-controversy requirement from $10,000 to $50,000 in 1988. The House subcommittee leading that legislation had made the far more aggressive proposal to raise the amount-in-controversy requirement to "$50,000 *in actual damages*."[83] Though the proposal did not define the term "actual damages," it explained that the term "includes lost wages and out-of-pocket expenses (including medical expenses), but does not include punitive damages or pain and suffering."[84] The House subcommittee's proposal obviously was not enacted. But the Federal Courts Study Committee picked up the mantle two years later, proposing that Congress amend the diversity statute to "specify that the jurisdictional floor does not include non-economic damages, such as pain and suffering, punitive damages, mental anguish, and attorney's fees, which litigants

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80 Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

81 *See* Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 128–29 (1st Cir. 2004). The *Star-Kist* case does provide an interesting counterexample, however, in that the little girl's mother could not recover sufficient damages under Puerto Rico law to meet the amount-in-controversy requirement for her own claim based on observing the incident. *Id.* at 129–31. It was that finding that teed up the mother's assertion, ultimately approved by the Supreme Court, that her claims fell within the court's supplemental jurisdiction.

82 *See generally* Kramer, *supra* note 6, at 124–25 (arguing that "[r]estricting the damages that may be included in the jurisdictional amount would put some teeth into the amount-in-controversy requirement, thereby limiting diversity jurisdiction along the lines contemplated by Congress.").

83 *See* H.R. 4807, 100th Cong. 2d Sess., as introduced June 14, 1988, by Rep. Robert W. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary (emphasis added).

84 *Id.*

use to skirt the jurisdictional minimum."[85] Five years later, the Judicial Conference's Long Range Plan adopted a trimmed-down variation that recommended "amending the statutory specification of the jurisdictional amount to exclude punitive damages from the calculation of the amount in controversy."[86]

The common theme running through these proposals has been that the uncertain valuation of non-economic damages has distorted the application of the amount-in-controversy requirement.[87] Even if it is very unlikely that a plaintiff will receive significant non-economic damages, the fact that they are available is thought to automatically inflate the value of those cases because they are valued at the amount that is possible, not the amount that is typical or likely.[88] In a statement submitted to the House subcommittee, Judge Abner Mikva characterized evaluation of the amount-in-controversy requirement in tort cases as

> kind of a puffing game that you play with the lawyers . . . When it was raised to $10,000, they just added a zero or went from 3 to 10 in the ad damnum. Now that you have made it $50,000, they will erase the 1 and put in a 5.[89]

Judge Albert Maris put it equally bluntly when testifying before a different House subcommittee in 1957 about the impact of the proposed increase from $3,000 to $10,000: "We are

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85 FCSC, *supra* note 27, at 42. *See also* Kramer, *supra* note 6, at 124–25 (endorsing the proposal to measure the jurisdictional amount by actual damages only). The Study Committee's main proposal was to eliminate general diversity jurisdiction entirely, limiting it to a few areas of special need. FCSC, *supra* note 27, at 38 ("Congress should limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation, interpleader, and suits involving aliens."). Appreciating that its proposal was controversial even within the Study Committee, *see id.* at 42–43 (statements of three committee members dissenting from the proposal to abolish general diversity jurisdiction), the proposal to count only actual damages was offered as a self-described "back-up proposal." *Id.* at 42.

86 JUD. CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS, 30 (Recommendation 7(b)(3)).

87 *See generally* Kramer, *supra* note 6, at 125 (restricting the jurisdictional amount to actual damages would mean "past and probable future damages would be more easily computed, assessment of the value of non-monetary losses would be unnecessary, and exaggerated claims could be more easily identified.").

88 *See generally id.* at 98–99 (noting that Congress raising the jurisdictional amount from $10,000 to $50,000 "is not likely to have much effect given the ease with which a litigant can in good faith plead this amount.").

89 *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Cts., C.L., and the Admin. of Just. of the H. Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess., pt. 1, 313 (1988) (testimony of Hon. Abner J. Mikva, Judge, D.C. Cir.).

quite aware of the fact . . . that the reduction of business that would result from [the proposed increase] is more apparent than real; because in tort cases, as you gentlemen all know, the amount claimed may bear little or no relation to the actual recovery."[90] By excluding these "malleab[le]" and "easy to inflate" damages, Congress could "put some teeth into the amount-in-controversy requirement."[91] Relatedly, excluding the categories of damages that are the least certain and least quantifiable would necessarily simplify the judge's task.

A 1988 study by the Federal Judicial Center concluded that restricting the types of damages that counted towards meeting the amount-in-controversy requirement would very likely take a significant bite out of the diversity docket. The FJC study compared the estimated impact of the enacted increase raising the amount-in-controversy requirement from $10,000 to $50,000 with the estimated impact of the House subcommittee's proposal to include require "$50,000 in actual damages."[92] For each model, the study coded the cases in one of three ways: (1) jurisdiction eliminated; (2) information inconclusive; and (3) jurisdiction unaffected. As shown in Table 2, limiting the calculation to actual damages made a big difference in how the cases fell into those three categories:

Table 2: From the Federal Judicial Center Study

	Jurisdiction Eliminated	**Information Inconclusive**	**Jurisdiction Unaffected**
Increase to $50,000	10.6%	30.1%	59.3%
Increase to $50,000 and Limited to Actual Damages	14.0%	54.9%	31.1%

90 *Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong., 1st Sess., ser. 5, at 30 (testimony of Hon. Albert B. Maris, Judge, 3rd Cir.). Judge Maris simultaneously testified in support of the proposal to add a new provision to the diversity statute authorizing the court to make a prevailing plaintiff bear statutory court costs (normally borne by the losing defendant under Rule 54(d)(1)) if the plaintiff failed to recover more than the jurisdictional amount. *Id.* at 31. Congress enacted that proposal in 1958, locating it at 28 U.S.C. § 1332(b), where it remains today.

91 Kramer, *supra* note 6, at 124–25.

92 *See* PARTRIDGE, *supra* note 58, at 19.

Because the data set frequently did not contain enough information for the author to price the actual damages, the author's appropriately cautious approach was to move most of the cases where the limit to actual damages would make a difference from the "[j]urisdiction unaffected" pile to the "[i]nformation inconclusive" pile.[93] But the point remains that limiting the analysis to actual damages cut the number of cases that would clearly meet the new $50,000 amount requirement by almost one half. And while the study's author was unwilling to draw a definitive conclusion about most of the cases that were now inconclusive, the author added that "[b]ased on impressions formed from reading the complaints in these cases, there is strong reason to suspect that many of the cases in the '[i]nformation inconclusive' column would in fact be taken out of the federal courts by the 'actual damages' restriction."[94]

It is logically unassailable that excluding certain types of damages from the amount-in-controversy calculation would reduce the number of cases that meet the required threshold. Exclusions cannot increase the number of qualifying cases; exclusions can only decrease them or have no impact. Given the amounts potentially recoverable for non-economic damages like pain and suffering and punitive damages, excluding them would have a significant impact, especially if paired with an increase in the target amount. To illustrate one need only think of a standard slip-and-fall case resulting in a significant but non-permanent injury like a broken arm. In a case like this, it is far from certain that the plaintiff would incur economic damages (e.g., medical bills or lost wages) of more than $75,000, and it is even less likely that those damages would exceed a higher amount like $125,000 or $250,000. But one can easily imagine courts finding it possible for the plaintiff to reach those targets when pain and suffering damages are added into the mix.

There are two potential concerns with excluding non-economic damages from the amount-in-controversy calculation. The first concern is that the standard justification for diversity jurisdiction has long been to protect out-of-state litigants from local bias.[95] To whatever extent local bias remains a problem, there is no reason to think that it would manifest

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93 *Id.* at 20.

94 *Id.*

95 *See* FCSC, *supra* note 27, at 42 ("Congress created diversity jurisdiction 200 years ago to avoid possible discrimination against out-of-state parties by providing a forum free of political influences and entanglements.")

in a jury's assessment of economic damages but not its assessment of non-economic damages. Indeed, one might well surmise that out-of-state defendants would be at highest risk of getting "hometowned" by a jury instructed to award whatever amount of money it thought appropriate to compensate a local citizen for her pain and suffering or to punish an out-of-state citizen for its misdeeds.

The second concern is that excluding non-economic damages might be expected to have a disproportionate impact on the tort diversity docket. In general, contract law does not authorize the recovery of pain and suffering damages.[96] Similarly, punitive damages typically are not available in breach of contract actions.[97] Thus, excluding non-economic damages would eliminate major types of damages frequently sought and available in tort cases but not in contract cases.[98]

On the other hand, the effects might not be so lopsided after all. Under the current scheme, if a statutory or contractual basis exists for a party to recover its attorney's fees incurred in the lawsuit, the value of those fees is included in the amount in controversy.[99] Congress might also consider excluding attorney's fees from the amount-in-controversy calculation.[100] Because the fees to be recovered typically are the fees that would be incurred during the course of the lawsuit to follow,[101] valuing them at the start of the lawsuit is highly

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96 *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981).

97 *See Id.*; LINDA L. SCHLUETER, PUNITIVE DAMAGES § 7.2 (2012) ("[I]t is also well established that punitive damages cannot be recovered for a mere breach of contract. This is generally true no matter how reprehensible the breach was by the defendant."). The fact that a breach is deliberate does not mean that the breach was "misconduct" in the sense in which that term is used in punitive damages law. The doctrine of efficient breach, for example, holds that in some cases the most rational result is for a party to breach and pay the standard measure of contract damages. *See* 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.17a, at 290 (2d ed. 1998).

98 *See* Testimony of Judge Maris, *supra* note 90, at 30 (explaining that increasing the amount in controversy has a limited affect in tort cases but that critique "would not apply in contract cases, however. In contract cases a plaintiff claims his actual damages under the contract.").

99 *See* 15A JAMES WM. MOORE'S FEDERAL PRACTICE, *supra* note 74, at § 102.106[6].

100 *See* FCSC, *supra* note 27, at 42 (making proposal).

101 The circuits are currently split on how to value recoverable attorney's fees. Some circuits consider only the amount of fees incurred to that point, concluding that the uncertainty of litigation makes any effort to value future fees too speculative. *See, e.g.*, Gardynski-Leschuck v. Ford Motor Co., 142 F.3d 955, 958–59 (7th Cir. 1998). Some circuits value fees by estimating the amount likely to be incurred in the litigation. *See, e.g.*, Miera v. Dairyland Ins. Co., 143 F.3d 1337, 1340 (10th Cir. 1998). Arguably, both approaches are inconsistent with the legal

uncertain. Thus, if Congress were to adopt as a goal eliminating from consideration the items with the most uncertain value, it could advance that goal by excluding attorney's fees from the amount-in-controversy calculation.

We suspect that excluding attorney's fees would have a disproportionate effect on contract cases. Under the American Rule, litigants are presumed to bear their own attorney's fees.[102] The prevailing party is entitled to recover its attorney's fees from the losing party only when a right to fees is provided by contract or statute.[103] Many (but not all) contract cases will involve contracts with fee-recovery provisions. In contrast, few tort cases would be expected to involve any prior agreement that might include a fee-recovery provision. Depending on the jurisdiction, state-law statutory fee provisions might be equally available to tort and contract claimants, or they might be more or less available to one or the other. We have not attempted to assess the landscape.

We can't say whether excluding attorney's fees would offset the effect of excluding non-economic tort damages. Because our data collection in the *Million-Dollar* study did not specifically track attorney's fees, we do not know how often attorney's fees were an element of the claimed damages. Nor do we know how often including attorney's fees might have made a difference in whether the case satisfied one of our breakpoints. Based on the cases we personally examined (as part of our quality control process), however, our sense is that eliminating attorney's fees from the amount-in-controversy calculation would have a small impact on the overall diversity docket.[104] Our impression is that the cases in which

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certainty test, which defines the amount in controversy based on the recovery that is *possible*, not what is fixed or even likely. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938). Under a pure legal certainty approach, the value of recoverable attorney's fees would be the largest amount a court could award as reasonable for that case.

102 *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.")

103 *Id.* at 257.

104 The Partridge study arguably suggests a more significant impact. It looked at how an increase to the amount threshold from $10,000 to $50,000 would affect the diversity docket if Congress did only that and then asked how many cases would be eliminated if Congress also excluded attorney's fees from the calculation. One reading of the data is that doing both would eliminate an additional 11% of the cases compared to only raising the amount threshold. *See* PARTRIDGE, *supra* note 58, at 20. But a majority of the cases in that cohort were cases that the study had identified as "inconclusive" based on an increase only. *Id.* The

attorney's fees were recoverable by contract tended to be larger cases where the contract damages already surpassed the lower breakpoints. But there surely are smaller contract cases where attorney's fees would boost the total value over $75,000 or, say, $125,000. Those would fall out of the diversity docket if attorney's fees were excluded. And we presume that there also is some number of cases where attorney's fees recoverable under a state-law fee-shifting rule would make the difference between meeting or failing the amount-in-controversy requirement.

In summary, Congress could fundamentally alter the role and impact of the amount-in-controversy requirement by limiting which damages count towards the amount threshold. Excluding pain and suffering, mental anguish, punitive damages, and attorney's fees would greatly simplify the judge's task. At the same time, it would make it much harder for many cases to meet the jurisdictional amount threshold. Congress could thus advance two interests with a single reform. But it would also need to address two likely significant consequences. First, Congress would have to reconcile excluding the "squishy" damages that are *most* susceptible to being manipulated to favor local plaintiffs over outside defendants. Second, Congress would have to confront the strong chance that tort cases would be disproportionately excluded from the diversity docket compared to contract cases. That said, the distinctive feature of this approach is that it explicitly elevates certainty in the valuation process as a goal worth achieving even if it would disrupt the judicial federalism balance Congress otherwise would deem optimal.

B. Giving the States a Voice

State judicial sovereignty is said to be one of the driving forces behind the amount in controversy.[105] Without an amount-in-controversy requirement, diversity jurisdiction would sweep in massive numbers of small-value state-law cases. Every state-law case that is shifted to federal court fractionally reduces the judicial power of the state that otherwise would have resolved it. By extending jurisdiction only to high-value cases, the states retain more control over their own affairs.

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additional 11% were all cases that might have been insufficient even if fees were included. Thus, the study's more limited conclusion was that excluding fees turned those cases from "maybes" to "nos."

105 *See* Baker, *supra* note 4, at 322.

When Congress sets or adjusts the amount in controversy, it balances the goal of diversity jurisdiction (as a bulwark against local bias) against its costs, including the intrusion into state judicial sovereignty.[106] Notably absent from the discussion, however, is any inquiry into how *the states* perceive the balancing task or where *the states* think the line should be drawn. To the extent state interests play a role, it is through Congress's views on how the states might or should feel about the proper allocation of state-law cases.

Congress could easily change that and give the states a direct voice in the matter by empowering individual states to set the amount in controversy for diversity jurisdiction cases filed in or removed to federal courts located in that state. We envision that Congress could set a default jurisdictional amount and then allow individual states to depart by state statute.[107] States that are happy with the balance Congress has struck would not need to do anything. But other states might feel differently. Some states might be happy to have federal courts take a larger share of the docket; those states could elect a lower jurisdictional amount. States that wanted to retain a greater share of their state-law cases could elect a higher jurisdictional amount.

The real-world experiment is all the more interesting because, right now, the federal policy side is adrift. Congress has been in "status quo" mode for almost a century. The only policy Congress has implemented for the last 100 years is to not let inflation change the judicial federalism balance by neglect.[108] Perhaps the states have no better grip on the underlying policy questions than does Congress. Perhaps the states would find that the policy concerns conflict and offset each other. The easiest thing for the states would be to do nothing and let the default stand. Or maybe the states have policies they can clearly articulate and that clearly point to setting an amount that varies from the federally set default.

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106 *See id.*; FCSC, *supra* note 27, at 42–43.

107 Congress would need to set a default threshold because Congress has no authority to order states to enact legislation. *See* Murphy v. NCAA, 138 S. Ct. 1461, 1477 (2018) (even in areas where Congress has legislative authority, it lacks the power to "commandeer" the legislative processes of the States by ordering them to enact legislation). Without a default threshold, a gap would exist in the diversity scheme as to any state that failed to fill it. Creating a default scheme avoids the risk that states will choose not to play the game.

108 *See* Gensler & Michalski, *supra* note 4, at 1670–72.

Giving the states an unrestricted ability to alter the default amount may seem too risky. It would allow states to effectively eliminate diversity jurisdiction by setting the number at $1 trillion. At the other end of the spectrum, states could reduce the amount to a single dollar, effectively eliminating the amount-in-controversy requirement and vastly expanding the number of state-law cases that could be filed in or removed to federal court. These results—even if founded on the states' sincerely held views about the proper role of diversity jurisdiction—would shift the judicial federalism balance too far. Congress may have no clear and articulable policy basis for choosing between, say, $50,000 and $250,000. But even rudimentary jurisdictional policy cuts against letting states control the jurisdictional amount to the point of making it always or never met.

To provide states a voice without drowning out Congress's, Congress could set boundaries on state departures from the default. For example, Congress could establish a default amount in controversy of $125,000—based on the current amount of $75,000 adjusted for inflation since it was last raised[109]—but permit states to reduce it to as little as $50,000 or increase it to as much as $500,000. The act of setting the boundaries would itself force Congress to grapple with the goals and policies of diversity jurisdiction. Setting the low boundary would force Congress to think about the tipping point below which a case is no longer "substantial" enough to warrant the option of a federal forum.[110] Setting the high boundary would force Congress to identify the point at which the bias-protection role of diversity jurisdiction justifies access to federal court notwithstanding a state's preference to keep the affected cases in state court.[111]

Congress could explore even more creative options. For example, Congress might conclude that the current jurisdictional amount is already at the low-end tipping point. In that case, Congress could set a default of $150,000 (again, based on an inflation adjustment to the current $75,000) and let states opt to increase it to $500,000, but not permit them to decrease it. Or Congress might even raise the default to $250,000 and then permit states to reduce it to $125,000 or increase it to $500,000. The important insight is that treating the jurisdictional amount

109 *See* JUD. CONF. OF THE U.S., *supra* note 70, at 16.

110 *See* S. Rep. No. 1830, *supra* note 54, at 3101.

111 *See supra* notes 51–53.

as a default number liberates Congress from having to set the amount at the "right" number, empowering Congress to experiment with using it as a floor, a ceiling, or a nudge.

Another way Congress could put some control over the diversity docket into the states' hands would be to tie the amount-in-controversy requirement to each state's amount threshold for small claims court. Under this type of scheme, states would be able to indirectly control the flow of state-law cases to federal court by raising or lowering their thresholds for small claims court. But before states would use this mechanism to control the diversity docket, they would have to think hard about the impact on their own court systems. In that sense, the scheme has a built-in regulatory control.[112] It is hard to imagine a state raising its small claims threshold to $250,000, for example, just to retain more cases. This is particular true given that the cases retained—which could have a value of up to $250,000—would then fall within the jurisdiction of their small claims courts.

To be perfectly clear, we think this would be a terrible idea—at least if the goal is to endow states with some control over the reach of diversity jurisdiction.[113] Linking the jurisdictional amount for diversity jurisdiction to the small claims court threshold would put the states in an impossible position. Small claims court exists to provide a less formal and less expensive forum for the types of cases that lawyer-driven full procedure would drive out of the courts.[114] A typical threshold is usually

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112 *See generally* 28 U.S.C. § 1738 ("Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.")

113 Judge Henry J. Friendly floated the idea in his landmark book on federal jurisdiction. *See* FRIENDLY, supra note 26, at 12. But he raised it as a way of achieving what he referred to as the "maximum model" of diversity jurisdiction—i.e., the model that would confer federal jurisdiction over the greatest number of cases. *Id.* While the true maximum model would omit a jurisdictional amount requirement entirely, Judge Friendly seemed to be looking for a way to identify the lowest amount that could credibly command the attention of the federal courts. He implicitly concluded that any case not worth full procedure in the states could not be worth taking to federal court. We generally agree with Judge Friendly that a state's small claims court threshold would suffice as a good proxy for identifying a floor below which diversity jurisdiction's amount requirement could not logically fall.

114 *See* JOHN C. RUHNKA, STEVEN WELLER, & JOHN A. MARTIN, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION 1–3 (1978).

somewhere between $5,000 and $10,000.[115] If states stuck with their current thresholds, it would significantly increase the number of cases eligible for diversity jurisdiction. States would have to increase their small claims thresholds to $75,000 or higher to prevent that, but at the cost of forcing a new and potentially very large segment of cases into small claims court.

The greatest irony of linking the small claims and diversity amounts is that it would impede access to the court system most people think of when they think of protecting state jurisdiction—the state courts of general jurisdiction. If a case is below the linked amount, it would stay in state court but go to small claims court. But if the case is above the linked amount, it could be filed in the state's court of general jurisdiction but would be eligible for removal. No policy basis we can think of would be served by that result.

In short, linking the small claims and diversity amounts probably would be the worst way of giving states a voice in the reach of diversity jurisdiction. The most likely result is that states would choose to protect their own systems and accept the impact on diversity jurisdiction as collateral damage. But if they took the bait and raised their small claims thresholds to manipulate the diversity jurisdiction cutoff, they would end up misallocating cases within their own system. States should set the small claims threshold based on their views of which cases are suitable for that state's small claims scheme, not based on which cases should remain in the state-court system generally.

C. Revisiting the Preference for High Value Cases

The next set of approaches are both new and radical. One approach would be to flip the amount-in-controversy requirement from a threshold to a cap, taking only those cases that fall *under* the statutory amount. The other approach would be to abandon the amount in controversy as a filter and instead implement a diversity lottery to regulate the overall size of the diversity docket. In full candor, we concede that there is no realistic chance Congress would ever adopt them. We think they are worth exploring, however, precisely for the reasons that make them so unlikely to be adopted. To wit, they rely on criteria that fail to select the state-law cases generally thought most deserving of a federal forum. But to say that one must first

115 *See* PAULA L. HANNAFORD-AGOR, SCOTT GRAVES, & SHELLEY SPACEK MILLER, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 13 (2015) (map showing small claims thresholds across the United States).

grapple with the purposes underlying diversity jurisdiction. Thus, these approaches shine light on the larger diversity debate by forcing us to articulate why they would yield unwanted results and cut against broader normative commitments.

1. *Changing Sides of the Cut Line*

This avenue of thought is the most radical. It begins from the insight that modifying the jurisdictional amount primarily functions as a throttle to reduce the endless torrent of potential diversity cases. Of course, as the empirical sections have shown, modifying the jurisdictional amount has a complex web of other effects but they are changeable and difficult to predict. Perhaps, this line of thinking suggests, we are better of just focusing on the throttling effects. But one might ask mischievously, why throttle at the high end of the jurisdictional amount? Why not at the low end?

Imagine the complete diversity docket as a distribution curve. Likely it is skewed, with more cases at the low end than the high end. Giving all cases on this curve a federal forum would admit too many cases. Federal courts would be overwhelmed. The amount-in-controversy requirement chops off the left side and the brunt of the distribution, allowing only cases on the far-right side with high amounts in controversies into federal court and denying access to all others. What if we reverse that approach? What if instead of setting a minimal amount in controversy, we instead specify a maximal amount in controversy for diversity cases? That would grant the low end of the spectrum a federal forum but deny access to federal courts to all other cases. If set at the right amount, the overall number of diversity cases would remain unchanged. Thus, the jurisdictional amount would still fulfill its primary role of throttling the number of cases down to a manageable degree.

But what would change, of course, is the type of diversity cases that now reach federal courts. Instead of having more complex cases with sophisticated and well-resourced parties, the lower end of this hypothetical diversity docket would likely include more pro se litigants and less dramatic cases. For example, instead of malfunctioning hip implants there would likely be more slip-and-fall cases. Instead of contract disputes between corporate behemoths this docket would likely contain far more landlord-tenant disputes.

This avenue of thought is radical because, for the entire history of the diversity docket, the jurisdictional amount has been used as a proxy to define what cases are important enough

to warrant the attention of federal courts. A sufficiently high amount-in-controversy requirement sheds minor cases with low stakes and allows federal courts to focus on the important cases. "Important" in this context has always been operationalized as "expensive." This approach inherently tilts the federal diversity docket toward the commercial interactions of the wealthy and rare torts. It intrinsically excludes the quotidian. Federal courts rarely are exposed on the diversity docket to the truly mundane.[116] We suspect that far more disputes in this country are about contracts worth less than $10,000 than those above $75,000, and that far more torts are committed that cause damage below current or likely jurisdictional amounts.

There is a price to pay for the current focus on cases with relatively high amounts in controversy. Federal judges are simply not exposed to most of the type of cases that clog state court houses. Their view of what counts as an ordinary case is likely skewed. That predictably affects a court's "experience and common sense."[117] Relatedly, state courts toil in the shadow of federal courts, all too often denied the prestige, funding, attention, and talent that we lavish on federal courts. Similarly, few litigants experience the grandeur of well-funded federal courts and are instead confined to underfunded and, sadly all too often, shabby and poorly maintained county courthouses. Perhaps there would be unexpected benefits of an infusion of the huddled masses into federal courthouses.

Therefore, this avenue of thought asks us to imagine a new role for the federal diversity docket. It thinks of the amount in controversy as an intervention to refocus federal courts on the humdrum. That would be a sweeping new vision for federal courts. Instead of shiny marble bastions for the (relatively) wealthy and powerful, what if we imagine federal courts as part of the depressingly glum machinery of justice that most litigants typically encounter? Instead of reserving the majesty of the federal courts for those least in need of it, why not bestow it upon the neediest? That would be a new vision for federal courts; one that would require us to reimagine many aspects of federal courts, from their architecture and geographic distribution to the availability of public transportation options.

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116 With the potential and complicated exception of class actions.

117 Ashcroft v. Iqbal, 556 U.S. 662, 663–64 (2009) ("[D]etermining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense.").

It is easy to dismiss such a thought experiment as a misguided and romanticized revival of Leveler ideology. Let's pull everybody down into the muck! But perhaps this avenue of thought is not as radical as it might seem on first sight. Some non-diversity subject matter jurisdiction cases are already subject to an amount in controversy *maximum*, not a minimum.[118] Statutory interpleader cases are subject to a modest $500 amount-in-controversy requirement—about as close to no requirement at all as one can get.[119]

Elsewhere in diversity jurisprudence courts and legislators have already inverted (or near inverted) key elements to accomplish other policy goals. For example, Congress has lowered the usual "complete diversity" requirement for class, mass, and interpleader actions to a "minimal diversity" requirement. The Multiparty Multiforum Jurisdiction Act of 2002 grants district courts jurisdiction over actions arising from a "single accident, where at least seventy-five natural persons have died in the accident at a discrete location."[120] Subject to various conditions and exceptions, only minimal diversity is required rather than the typical complete diversity.[121] Similarly, the Class Action Fairness Act of 2005 expands diversity jurisdiction in a defined set of cases (again, subject to various conditions and limitations) in part by dropping the complete diversity requirement in favor of a minimal diversity rule.[122] The federal interpleader statute, similarly, modified the diversity requirement for policy reasons.[123]

These modifications reshuffled which part of the diversity jurisdiction case distribution is granted access to federal courts and which is shunned. Both "minimal diversity" and "complete diversity" measure diversity but they accomplish completely different policy goals. Similarly, here, switching from "amount in controversy minimum" to "amount in controversy maximum" would reshuffle which litigants and which cases in which places get access to federal courts.

The question here is not what diversity jurisdiction has been in the past or what work the jurisdictional amount currently does, but whether reimagining the amount-in-controversy

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118 28 U.S.C. § 1346(a)(2).

119 28 U.S.C. § 1335(a).

120 28 U.S.C. § 1369(a).

121 *Id.*

122 28 U.S.C. § 1332(d)(2).

123 *See* 28 U.S.C § 1335. *See also* Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) (clarifying that the stakeholder plaintiff in a statutory interpleader action could have the same citizenship as some of the claimants).

requirement is desirable or not. We take no position on that question in this Article. Instead, our point in this section has been to use our empirical work to enable and encourage a new wave of scholarship on the basic functions and functioning of the federal diversity docket.

2. *The Diversity Lottery*

As demonstrated above, *any* jurisdictional amount has complex selection effects, many of them unintended and suboptimal. So, why not give up on the filtering-function of the amount in controversy altogether and avoid the many difficult normative calls it entails? This avenue of thought seeks a new type of filtering device to fairly select the right mix of cases that receive a federal forum.

Casting around for a fair and unbiased selection device, scholars in other fields have advocated for lotteries to overcome selection effects.[124] Lotteries are tools used to get fair, unbiased, representative samples from a population. As applied here, a lottery could select a representative mix of diversity cases for federal treatment. Modifying the probability of selection could limit the number of state-law cases and prevent federal courts from being swamped with cases. This would accomplish a similar throttling function that the amount-in-controversy requirement has previously fulfilled but without the messy normative decisions of whether to favor this type of case over another or one type of litigant over another. Similarly, different probabilities of selection around the country could even out local bottlenecks.

The upside of this avenue of thought is even-handedness. The downside is normative and practical. First the normative objection: a lottery in the context of diversity jurisdiction gives up on prioritizing some things over others. That might make for fairness, but it abdicates the responsibility to make crucial normative choices.[125] Some cases *are* more important than

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124 *See, e.g.*, Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705 (2018) (Supreme Court docket); Kiel Brennan-Marquez, Darryl K. Brown & Stephen E. Henderson, *The Trial Lottery*, 56 WAKE FOREST L. REV. 1 (2021) (plead-out criminal cases).

125 *See, e.g.*, Moore & Weckstein, *supra* note 3, at 26–27 (1964) ("We realize, of course, that federal dockets are crowded and that a beguiling approach to the problem is to lop off diversity jurisdiction. But if the prime goal is clean dockets, then we can more effectively accomplish it by abolishing all lower federal court jurisdiction. Such an approach is obviously fanciful. In a realistic examination of federal jurisdiction some grants will be found more important to a sound federalism than others.").

others. Some cases *should* receive a federal forum. Some litigants really *are* more worthy of the curse or blessing of having their cases litigated in federal court. Just because we might not be able to agree on which cases and litigants does not mean we should give up on the project, however messy it might be.

On the practical side: any random selection must specify a population to sample from. Here it would be difficult to identify a set of cases to feed into a random selection device without party cooperation (e.g. identifying the citizenship of state court litigants) or opening the potential for gamesmanship. As proposed elsewhere, a lottery system might be more successful in supplementing an existing stock of cases, rather than defining the boundaries of the entire set of cases.[126]

3. *Auctions*

Another, perhaps even more radical approach to amount in controversy determinations utilizes auctions to ascertain the stakes in litigation. As we saw above, determining the amount in controversy at the beginning of litigation can be an inexact science that is wide open to gamesmanship and misrepresentations.[127] Instead of simply asking litigants to self-assess the amount in controversy, perhaps we should force them to put their money where their mouth is. If the stakes are high and access to a federal forum valuable, litigants should be willing to pay for it. The higher the stakes, the higher the value that litigants derive, the higher the amount they would pay to be heard in federal court. And one way to measure value is to ask who would pay the most for it. In a world with low transaction costs, that might lead to the most efficient distribution of a limited resource. And the best way to figure out who would pay for something, keeping in mind humanity's propensity for deception, is to make people actually pay for it. Fixed prices are a bit clumsy for the task. Auctions will determine optimal prices more efficiently.

Under this approach, access to federal courts should be auctioned off to whoever is willing to pay the most. If federal courts are such a prized social good, that is limited and expensive for the public to provide, why not have litigants compete

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126 One alternative, a bit elaborate, would be to weigh probabilities by amount in controversy, giving large-financial stakes cases a higher likelihood of being selected for federal treatment but retaining the possibility of some of the many low-financial stakes cases to be selected as well.

127 *See supra* notes 88–92.

for the privilege of using them? As a bonus this would raise sorely needed money to pay down the national debt, restore crumbling public infrastructure, reduce taxes, or maybe even fund raises for teachers, police officers, and social workers. After all, few object to dedicated highway lanes that charge extra to the rich willing to get to their destinations a few minutes earlier. First class passengers board planes before us plebeians. Even Disneyland has a Fastlane system for rich people unwilling to wait in line with commoners. We also auction off public airwaves, military surplus, and seized assets. Why give away something valuable for free when we could charge the well-heeled good money for access to faster dockets, fancier judges, and less crumbly courthouses?

Alas, there are numerous reasons, and they too teach us something about diversity jurisdiction. Most fundamentally, some things are just not for sale. Children, votes, and military draft requirements; arguably organs and citizenship; perhaps blood, breastmilk, and sex. Market forces work wonders in many domains, but some areas of life are and must be shielded from the crude and dehumanizing logical of supply and demand. Perhaps access to justice is one of those special categories: simply not for sale.

This categorical argument is boosted by instrumental considerations: Buying access to a different court might buy a wealthy litigant access to a different outcome. A different court, a different judge, different procedures, a different jury pool, and perhaps a loss is turned into a win. We hate to admit it but perhaps it would. That would get us uncomfortably close to a justice system for hire where the rich can win not on merit but by checkbook. To some extent, sadly, that is already happening. Forum shopping is a perennial scourge. So is forum selling. The rich have already innumerable advantages in litigation. Most basically, they can afford counsel. Maybe even competent counsel. There is no civil *Gideon v. Wainwright* and many litigants already struggle along pro se against teams of highly-trained and experienced lawyers. Letting the rich buy their way to their preferred federal forum would make those advantages perhaps a bit too obvious, too visible, and too impactful for comfort. There is a roundabout psychological argument to be made for such a move: If only the public could plainly see the impact of wealth in litigation they would call for change. But that is a desperate move indeed. Calling for bad policy in the hope of inspiring good policy is generally a poor strategy.

Beyond simply rejecting the auctioning approach, the more fundamental lesson is that discussions about diversity

jurisdiction specifically and access to federal courts generally must occur in the context of semi-blindness to economic realities. No sensible proposal should be oblivious to the simple fact of wealth, income, and litigation inequality. But no sensible proposal should be oblivious either to the simple fact of capitalism. The challenge is to conceive of diversity jurisdiction while neither countenancing, nor ignoring, nor structuring access to federal courts around it.

There are only a handful of places where civil procedure explicitly considers economic inequality but amongst them are examples of such balancing acts. For example, Federal Rule of Civil Procedure 26(b)(1) considers "the parties' resources" in determining the proportionality of a discovery request.[128] But it does so in the context of a long list of other considerations and without the option of purchasing outright access to discovery or denials of discovery. Balancing can be done better or worse, but balance we must.

To make this balancing act even tricker we must also recognize that a system of auctioning off diversity jurisdiction would not abstractly favor the rich but would likely be most utilized by corporations. As such, a two-tiered justice system would likely be divided between a handful of rich people and many behemoth corporations on the one hand, and most individuals and run-of-the-mill partnerships on the other. This is a reminder that diversity jurisdiction, in part, regulates not only who gets access to federal courts, but what kind of entity gets access. Be that a corporation, LLC, non-profit, partnership, church/synagogue/mosque/temple, labor union, prisoner association, or chess club. Insofar as diversity jurisdiction brings federal courts into contact with the concerns and perspectives of different segments of society, letting monetary concerns (whether hidden or highly visible in the form of an auction) influence access to federal courts shapes whose concerns influence federal judges. What is needed is a mix of litigants in federal courts so that judges can learn about a mix of perspectives, not just those of big corporations.

4. *Different and Relative Yardsticks*

Why use a monetary amount in controversy at all? Traditionally, the amount in controversy has been used as a proxy for something like "sufficiently important for federal courts." The fear is that without it, insignificant diversity disputes

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128 FED. R. CIV. P. 26(b)(1).

would clog the federal courts and dilute resources from impactful diversity cases. But is a monetary amount in controversy a good proxy for importance?

Consider for example a minimum wage multiplier: diversity cases would gain access to federal courts where the amount in controversy amounts to, say 1000 hours of work compensated at the minimum wage. That might sound like a long time to work but notice that it would still only amount to about $7250, less than a tenth of the current threshold. Put differently, in an employment dispute, the minimum wage plaintiff would have to show compensatory losses of more than 10,000 hours of work before reaching the current jurisdictional amount threshold. Making this relationship explicit might give us pause and inspire empathy, a novel effect for the diversity statute.

One could, of course, peg the jurisdictional amount to a broad range of other measures. Consider for example local measures of average personal earnings, household wealth, real estate or rental costs, health care payments, SNAP or social security benefits, a basket of common household goods, or a national Big Mac Index.[129] Or, a bit confrontationally, the salary of a federal judge. How much must be at stake before we can bother a federal judge to hear a dispute. A quarter of her salary? …Half?

The fear with any absolute yardstick, even the unorthodox ones identified above, is that setting it too low would mean federal courts "fritter away their time in the trial of petty controversies."[130] But who says that such controversies are petty to the litigants involved? Why not use a relative amount-in-controversy measure that takes into account the litigant's position? For example, one could use a multiple (or fraction) of the plaintiff or defendant's single or combined income. Surely, a controversy that amounts to a year's worth of income is important to that person. Perhaps the party invoking federal subject matter jurisdiction should be required to show objective importance to them. Notice that this proposal has asymmetry built into it. Consider the case of a poor person suing a rich corporation. If the poor plaintiff filed directly in federal court, her income would be the measuring rod (likely meeting the relative amount-in-controversy requirement). If the poor plaintiff filed in state court and the rich corporation tried to remove to

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129 *Our Big Mac Index Shows How Burger Prices Are Changing*, THE ECONOMIST (Aug. 3, 2023), https://www.economist.com/big-mac-index [https://perma.cc/6VBK-GLYH] (the international BigMac Index).

130 S. Rep. No. 1830, *supra* note 54, at 3101.

federal court, its income would be the measuring rod (likely not meeting that relative threshold). Notice also that this proposal would treat litigants more equally, not formalistically but contextually. The likely result would be that the federal diversity docket is reshuffled to include more poor people and cash-strapped companies. It simply is hard to image Elon Musk having a controversy that amounts to half of his yearly income. It is easy to imagine a poor person having such a dispute.

D. Using the Amount in Controversy Threshold as a Tool to Alter the Mix of Diversity Cases

One of the main findings of our earlier empirical study is that amount in controversy increases affect different parts of the diversity docket in different ways.[131] So far, we have assumed that Congress would view the differential effects as unintended consequences. Framed that way, the question Congress must decide is whether it is willing to tolerate the side effects of any particular increase in order to achieve the expected reduction in the size of the overall diversity docket.

But what if Congress flipped the model conceptually and viewed the so-called side effects as the goal? In other words, once Congress realizes that the amount in controversy threshold affects different types of cases differently, might it start using the amount-in-controversy requirement as a tool for altering the mix of case in the diversity docket? In that environment, Congress would try to predict what increase would be needed to achieve its desired mix of cases and would then decide whether it could tolerate how that would alter the overall size of the diversity docket.[132]

Of course, different people will have different views of what types of diversity cases are properly in a federal forum and which should remain in state courts. Some of us might wish for more tort cases, more pro se litigants, and more corporate defendants. Others might wish for the opposite. And predictably these choices will vary over time. For example, a careless railroad in the 1890's

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131 *See* Gensler and Michalski, *supra* note 4, at 1686.

132 Many commentators suspect that the First Congress took a version of this approach when setting the $500 amount threshold in the Judiciary Act of 1789. By setting it that high (and it was a high number in those days, *see* FCSC, *supra* note 27), Congress assured that most claims by civil war debtors would remain in state court. *See* Holt, *supra* note 35, at 1487–88 (the $500 amount in controversy "would exclude a huge number of the British debt claims"). Similarly, tenant claims against Lord Fairfax would remain in the Virginia state courts. *See* Baker, *supra* note 4, at 305.

preferred the business-friendly federal courts over more populist state courts in many locales.[133] At other times and places corporations were keen to escape from federal New Deal judges.

Whatever view of the ideal composition of the federal diversity docket you might have, that composition is unlikely to be achieved just by moving the jurisdictional amount slider up or down the spectrum. Doing so might get you close to maximizing some aspect of your ideal docket composition (e.g. the right mix of complex cases) but likely at the cost of suboptimal performance elsewhere (e.g. subject matters). In short, modifying the jurisdictional amount is blunt tool and is unlikely to maximize your welfare curve.

Perhaps it would be better, then, to think of the amount in controversy threshold as a first, rough cut followed by trimming and sanding as needed to get the desired result. Adjusting the amount in controversy might get you close to the right mix of cases but will never be perfect. This view suggests that modifications to the amount in controversy should be accompanied by targeted exceptions and carve-outs. If changing the jurisdictional amount does not get us the socially optimal number of complex cases or pro se cases, for example, then a tweak to the diversity statute or a doctrinal fix might get us there.

This might sound unnecessarily convoluted and unworkable but keep in mind that we are already doing this in significant ways. For example, despite the inclusive language of the diversity statute that does *not* provide for subject-specific exceptions,[134] federal courts routinely refuse to hear domestic relations[135] and probate cases,[136] even where all aspects of the

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133 *See generally* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958 (1992).

134 28 U.S.C. § 1332 ("all civil actions"). Versions of the diversity statute prior to 1948 specified "all suits of a civil nature at common law or in equity." *Id.*

135 *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) (deference to domestic relations state law requires a "domestic relations exception" that "divests the federal courts of power to issue divorce, alimony, and child custody decrees."). *See generally* Mansell v. Mansell, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law"); Moore v. Sims, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern"); In re Burrus, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."); James E. Pfander & Emily K. Damrau, *A Non-Contentious Account of Article III's Domestic Relations Exception*, 92 NOTRE DAME L. REV. 117 (2016).

136 *See, e.g.*, Markham, Alien Prop. Custodian v. Allen, 326 U.S. 490, 494 (1946) ("It is true that a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 . . . did not extend to probate matters."); Sutton v. English,

diversity jurisdiction analysis are met (e.g. complete diversity, AIC).[137] Courts supplement the statutory requirements for diversity jurisdiction with an additional doctrinal carveout.[138] Exceptions to the usual removal rules create further carveouts to the standard diversity jurisdiction rules.[139]

Our point here is not to pass on the wisdom of the domestic relations exception or other carve-outs but to highlight that courts perceived a need to rebalance the diversity docket in ways that a change in the amount in controversy cannot achieve. Many domestic relations and probate cases *are* between parties of diverse citizenship and for sums well beyond the jurisdictional amount but, courts argue, they should still not be in federal court in part because of policy considerations.[140]

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246 U.S. 199, 205 (1918) ("[A]s the authority to make wills is derived from the States, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States"). *See generally* Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1482 (2001) ("[T]he 'probate exception' to federal court jurisdiction . . . has the effect of excluding most probate and probate-related matters from federal court."); James E. Pfander & Michael J. T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533 (2014).

137 *See* Newman, *supra* note 1, at 770–71 ("[C]ases should not be assigned to or barred from federal courts by entire categories; instead, federal judges should exercise their discretion as to whether particular cases within some designated categories may proceed in federal court."). *See generally* Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward A Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571 (1984) ("The federal courts have long viewed domestic relations litigation as beyond their competence, even though such cases often meet the statutory prerequisites for federal subject-matter jurisdiction."); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991).

138 *See generally* Marshall v. Marshall, 547 U.S. 293, 299 (2006) ("Among longstanding limitations on federal jurisdiction otherwise properly exercised are the so-called 'domestic relations' and 'probate' exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history.").

139 *See, e.g.*, 28 U.S.C. § 1445 (Nonremovable actions) & § 1454 (Patent, plant variety protection, and copyright cases).

140 *See, e.g., Ankenbrandt*, 504 U.S. at 703–04 ("Not only is our conclusion rooted in respect for this long-held understanding, it is also supported by sound policy considerations. Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees. Moreover, as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the

If such policy considerations are permissible in the context of family relations and probate matters, why not elsewhere? Why cannot the same arguments be deployed to create a carve-out from the general diversity docket for, say, thorny state tort law questions of products liability?[141] Some proposed arguments for creating additional carve-outs will likely not be persuasive but some might.[142]

Then again, the prospect of Congress using the amount in controversy to manipulate the composition of the diversity docket *after seeing the mix of cases* yielded at a particular amount threshold might persuade some that the distributional effects of the jurisdictional amount slider are a feature, not a bug. They serve as a credible commitment device.[143] Like Ulysses commanding his shipmates to tie him to the mast so that he could hear the harpy's song without mortal peril, so too does fixing an amount in controversy tie legislators, courts, and litigants to the mast (in a good way!). Once a jurisdictional amount is set, the dice are cast and all implications will play themselves out. Perhaps there will be a higher proportion of tort cases in the diversity docket. Perhaps not. Some districts may see small decreases, while others experience larger ones. Que sera, sera.

While this approach will never precisely achieve the ideal social welfare maximizing mix of cases and litigants, it will avoid endless quarreling. The members of Congress are unlikely to agree on what mix of cases would constitute the ideal federal diversity docket. The time-consuming and exhausting

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special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees.").

141 *See generally* Meador, *supra* note 16, at 383 (noting that one way to manage the diversity docket is "by restriction based on subject matter or nature of litigation, as contrasted with restrictions aimed at dollar amounts or parties.").

142 Even how we allocate citizenship is a policy-driven exercise where courts and legislators are happy to carve holes into the otherwise unitary diversity jurisdiction fabric. For example, individuals can only hold one citizenship at a time while corporations can, by statute, hold two. 28 U.S.C. § 1332(c) "([A] corporation shall be deemed to be a citizen of every State . . . by which it has been incorporated and of the State . . . where it has its principal place of business."). Congress enacted this dual-citizenship scheme precisely for the purpose of fine-tuning the number of cases involving corporations that would be eligible for diversity jurisdiction. *See* Hertz Corp. v. Friend, 559 U.S. 77, 84–88 (2010) (discussing history of diversity jurisdiction involving corporations and the events leading up to the 1958 amendments adopting the dual-citizenship test).

143 The basic argument of this section is inspired by JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT AND CONSTRAINTS (2002) (generally) and Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971 (2009) (more specifically).

search for a viable coalition might simply not be worth it given other pressing issues. The unitary policy lever inherent in the amount in controversy determination, then, might be the only viable alternative to smooth over endless difficulties that would arise if Congress opened the Pandora's box of case-by-case, subject matter-by-subject matter, litigant-by-litigant policy tweaks.

Conclusion

Federal courts are buildings, institutions, and a set of legal rules. But they are also an imaginative project. Architecturally and metaphorically, we can imagine them as Republican temples adorned with innumerable Roman symbols,[144] New Deal modernist edifices, or, more recently, we can think of them as siblings to standard-fare office parks.[145] Human resources wise we might think of them as extensions of prosecutor's offices and fancy law firms; or we can consider recruiting from public defenders and public interest lawyers.[146] In civics infographics we might place federal courts above or next to state and

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144 *See generally Neoclassical*, Architect of the Capitol, https://www.aoc.gov/explore-capitol-campus/buildings-grounds/neoclassical [https://perma.cc/6GKX-ZQY9] ("[A] well-known example of the neoclassical architecture style on Capitol Hill is the U.S. Supreme Court Building. Finished and occupied in 1935, the Supreme Court is meant to resemble a great marble temple. The architect of the Supreme Court, Cass Gilbert of New York City, drew upon the classical Roman temple form as the basis for the Court's new building.").

145 *See generally* John Fabian Witt, *Modernism and Antimodernism in the Federal Courts: Reflections on the Federal District Court for the District of Connecticut on the 100th Anniversary of Its New Haven Courthouse*, 48 Conn. L. Rev. 219, 224 (2015) (explaining the connection between architecture and jurisdiction including that "[t]he light architectural footprint of the early court went hand-in-hand with a tiny docket"); Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 Ind. L.J. 823, 827 fig.3 (2012) (charting federal filings for similar purposes); Linda Mulcahy, Legal Architecture: Justice, Due Process and the Place of Law (2011); Judith Resnik and Dennis Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms (2011); Exec. Order No. 13967 (Dec. 18, 2020) (available at: https://www.federalregister.gov/documents/2020/12/23/2020-28605/promoting-beautiful-federal-civic-architecture [https://perma.cc/4FNH-M4CG]) (explaining, recounting, and demonstrating the connection between architecture and governance).

146 *See generally* Steven Zeidman, *Virtuous Prosecutors?*, 25 CUNY L. Rev. Footnote F. 1 (2022) ("A movement is building for President Biden to rewrite the book on judicial appointments and look to civil rights lawyers and public defenders instead of the usual crop of federal prosecutors."); John P. Collins, Jr., *Judging Biden*, 75 SMU L. Rev. F. 150, 152 (2022) (noting variations in "professional experience[s]").

tribal courts.[147] The jurisdictional amount can be imagined as a boring docket management dial that adjusts the overall size of the federal docket as needed; or a more daring imaginative leap views the jurisdictional amount as a gatekeeper that separates the world of haves from the have-nots. In these and many other ways, federal courts can be imagined in innumerable ways and our imagination circumscribes what is worth evaluating and what is dispatched unthinkingly.

Over time, our collective imagination of what federal courts are and could be has narrowed. That is dangerous.[148] If you cannot imagine it, you cannot evaluate it, even just for purposes of rejecting it. If there is only one choice, it is the best, no matter how bad. Time to reimagine federal courts, including and perhaps especially the bits that seem boring,[149] settled, and obvious at first sight.

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147 But it would be hard to imagine them placed below them just as many of us find a South-up map orientation unsettling. Both sentiments benefit from interrogation.

148 *See generally* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769 (1992) ("[A] surprisingly large portion of jurisdictional doctrine makes little sense from any perspective, whether logical, conceptual, or practical.").

149 *See* Friendly, *supra* note 26, at 144 ("[T]he dullest cases, at least in the truly civil field, are generally those arising from the diversity jurisdiction.").