

JUDGE ROBERT A. AINSWORTH, JR. MEMORIAL LECTURE

MARCH 30, 2017

**DIVERSITY JURISDICTION:
A STORIED PAST, A FLEXIBLE FUTURE**

*Chief Judge Carl E. Stewart**

I am honored to be among the distinguished persons and jurists who have preceded me as lecturers honoring a great judge of the Fifth Circuit, Robert A. Ainsworth. Judge Ainsworth, whose remarkable career and life is celebrated in this lecture series, was born in Gulfport, Mississippi, in 1910.¹ He graduated from Loyola University New Orleans School of Law in 1932,² forty-two years before I received my diploma from this esteemed institution.³ Judge Ainsworth's extraordinarily diverse legal career began in private practice. Thereafter, he was a lieutenant in the United States Navy during World War II, and in 1949, he went on to serve eleven years as a member of the Louisiana State Senate.⁴ During his tenure, he was elected president pro tempore from 1952 to 1956 and again from 1960 to 1961.⁵ He ended his career as a federal judge.⁶

President John F. Kennedy appointed Judge Ainsworth to the U.S. District Court for the Eastern District of Louisiana on October 31, 1961,⁷ within days of Judge J. Skelly Wright, another Loyola

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1. *Ainsworth Services Are Today*, TIMES-PICAYUNE, Dec. 23, 1981, § 1, at 17.

2. *Id.*

3. The law school was officially named Loyola University New Orleans College of Law in 2006. See *Loyola History*, LOYOLA UNIVERSITY NEW ORLEANS, <http://www.loyola.edu/jump/about/loyola-at-a-glance/loyola-history.php> (last visited Aug. 1, 2017).

4. *Ainsworth Services Are Today*, *supra* note 1.

5. *Id.*

6. *Id.*

7. *New US Court Judge Is Sworn*, TIMES-PICAYUNE, Nov. 1, 1961, § 2, at 4.

graduate, ordering the New Orleans schools to desegregate.⁸ This happenstance would foreshadow Judge Ainsworth's judicial career, which, as Justice Ruth Bader Ginsburg described, was of a "state senator who resisted blatant segregationist bills, [and] as a wise and good judge whose moderate, consistent, and forward-looking views helped to keep the Fifth Circuit steady during the tumultuous 1960s."⁹

Judicial efficiency was paramount to Judge Ainsworth's commitment to justice. During his time on the bench, Judge Ainsworth served as chairman of the Committee of the Judicial Conference on Court Administration and as chairman of the Appellate Rules Committee.¹⁰ I am honored to have also chaired the Appellate Rules Committee from November 1, 2005, to September 30, 2009. In 1976, Judge Ainsworth received the Herbert A. Harley Award, an award given by the American Judicature Society for promoting the effective administration of justice.¹¹

The essence of the third branch is that federal courts are courts of limited jurisdiction. Our cases present either federal questions or purely state law questions disputed by citizens of diverse states. One of the most discussed, but not fully considered, issues of judicial efficiency in the federal system is the continued viability of the latter cases—those based in diversity jurisdiction. And so, because of Judge Ainsworth's commitment to judicial efficiency and fairness, it seems only appropriate to pose a question that has been debated for over 200 years: Is diversity jurisdiction a necessary or burdensome component of the federal judicial system? We might not be certain about the answer, "but sometimes it's more important to ask the right questions than to have all the answers. [Judge] Ainsworth was very good at asking the right questions."¹² Like Chief Justice Burger stated in his inaugural Ainsworth Memorial Lecture, "I offer no conclusions—only a challenge."¹³

8. Justice Ruth Bader Ginsburg, *Four Louisiana Giants in the Law*, 48 LOY. L. REV. 253, 253, 259 (2002).

9. *Id.* at 253–54.

10. *Ainsworth Honored by Judicature Society*, TIMES-PICAYUNE, Nov. 10, 1976, § 4, at 4.

11. *Id.*; see *Ainsworth Services Are Today*, *supra* note 1.

12. Chief Justice Warren E. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 206 (1985).

13. *Id.*

Judge Ainsworth wrote nineteen opinions based on diversity jurisdiction and sat on the panel for sixty-seven additional cases, wherein the court either sat in diversity or the application of diversity jurisdiction was contested. In 1974, Judge Ainsworth wrote the opinion in *Mas v. Perry*, which established that a change in domicile requires both physical presence and a simultaneous intent to remain—a case that continues to plague first-year law students to this day.¹⁴

Practitioners, academics, and others often assert that the Founding Fathers established diversity jurisdiction out of concern for potential bias against out-of-state litigants.¹⁵ However, the constitutional grant of diversity of citizenship jurisdiction “was tepidly supported and vigorously opposed during the debates over the ratification of the United States Constitution.”¹⁶ Neither the debates during the Constitutional Convention “nor the records of the First Congress shed any substantial light on why diversity jurisdiction was granted to the federal courts by the Constitution or why the First Congress exercised its option to vest that jurisdiction in the federal courts.”¹⁷

It is similarly unclear what prompted the concern for potential prejudice in the state courts and whether such fears were justified. Judge Henry J. Friendly concluded that in the period prior to the Constitution’s drafting there was no evidence of any partiality on the part of state courts.¹⁸ Others, reviewing the same time frame, are more equivocal, concluding only that “it cannot be said that local prejudice against out-of-staters was inconsequential.”¹⁹

What seems to have been a truer motivator was not angst about state courts, but rather a fear of their legislatures. Many historians believe that the Founding Fathers’ “fear of the state legislatures may have arisen less from interstate hostility than

14. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974).

15. Russell Chapin, *Federal or State Court: Should Diversity Jurisdiction Be Abolished?*, 15 INTERGOVERNMENTAL PERSPECTIVE 29, 29 (1989).

16. *Id.*; see also Judge Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484–487 (1928).

17. Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction and Related Matters*, 13E FED. PRAC. & PROC. JURIS. § 3601 (3d ed. 2016); see also J. Friendly, *supra* note 16, at 484.

18. Wright et al., *supra* note 17 (citing J. Friendly, *supra* note 16, at 493).

19. *Id.* (citing Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 876 & n.13 (1931)).

from a desire to protect commercial interests from class bias.”²⁰ As Judge Friendly argued, it is possible that the real reason our Founding Fathers created diversity jurisdiction was to advance corporate interests opposed by antibusiness state legislatures and judges, not because out-of-state individuals might have faced some form of bias from the courts.²¹ Indeed, by 1809, Chief Justice John Marshall proclaimed that “the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description.”²²

Since its establishment, there have been several attempts to abolish diversity jurisdiction. Some feel that what is needed is “a total reconsideration of the jurisdiction, guided by the principle that federal judicial energy should be preserved for vindication of those interests, which, because Congress has considered them of national importance, have become the subject of the federal substantive law.”²³ Those who have attempted such a reconsideration have often reached differing conclusions. Some feel that the scales tip decidedly in favor of abolishing the current brand of diversity jurisdiction, while others feel that diversity jurisdiction is essential to the proper administration of justice under our federalism and should be retained in substantially its present form.²⁴

Those in favor of a complete abolition appear to have been and continue to be in the vocal majority.²⁵ In 1914, the Pound Commission—a conference jointly sponsored by the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association—recommended the total elimination of federal diversity jurisdiction as a way to promote judicial efficiency.²⁶ In 1930 and 1932, the Senate Judiciary

20. Wright et al., *supra* note 17; see John P. Frank, *Historical Bases of the Federal Judicial System*, 13 L. & CONTEMP. PROBS. 3, 23, 26–27 (1948). *But see* *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716 n.6 (5th Cir. 1975) (As Judge Ainsworth stated, “The very purpose of federal diversity jurisdiction is to avoid bias against parties from outside the forum state.”).

21. J. Friendly, *supra* note 16, at 495–99.

22. *Bank of U.S. v. Deveaux*, 9 U.S. 61, 87 (1809).

23. Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307, 321 (1983) (quoting Herbert Wechsler, *Federal Jurisdiction and the Revivitation of the Judicial Code*, 13 L. & CONTEMP. PROBS. 216, 238 (1948)).

24. See J. Friendly, *supra* note 16, at 491–92.

25. Victor Eugene Flango, *How Would the Abolition of Federal Diversity Jurisdiction Affect State Courts?*, 74 JUDICATURE 35, 35 n.9 (1990).

26. *Id.* at 35 (citing CHARLES W. ELIOT, M. STOREY, LOUIS BRANDEIS, A.

Committee under Senator George W. Norris introduced bills seeking to amend the Judicial Code by removing all clauses permitting suits “between citizens of different states.”²⁷ In 1978, Congress nearly did away with diversity jurisdiction—the proposed legislation passed in the House only to be defeated in the Senate.²⁸

Because he gave the inaugural Ainsworth Memorial Lecture, it is fitting to note that Chief Justice Burger was an avid proponent of eliminating diversity jurisdiction.²⁹ Other noteworthy abolitionists include: Chief Justice William H. Rehnquist; Associate Justices Louis D. Brandeis and Felix Frankfurter; Judge Henry Friendly; former Harvard Law School dean and namesake of the aforementioned Pound Commission, Roscoe Pound; University of Texas Law Professor Charles Alan Wright; and Associate Justice Robert Jackson,³⁰ who once said that “in [his] judgment the greatest contribution that Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the federal courts which is based solely on the ground that the litigants are citizens of different states.”³¹ Additionally, “The U.S. Department of Justice, the Conference of Chief Justices, and the American Law Institute have [all] passed resolutions supporting the curtailment or [complete] elimination of federal diversity jurisdiction.”³²

But doing away with diversity jurisdiction would mean losing volumes upon volumes of case law, whether it be circuit court precedent interpreting various states’ laws or circuit and Supreme Court precedent defining the contours of § 1332, like Judge Ainsworth’s ruling in *Mas v. Perry* or *Smallwood v. Illinois Central Railroad Co.*,³³ a case the Fifth Circuit heard en banc in 2004.

In *Smallwood*, an Illinois Central Railroad Company

RODENBECK, & ROSCOE POUND, PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE (1914) (advocating the abolition of diversity jurisdiction)).

27. Flango, *supra* note 25.

28. Wright et al., *supra* note 17 (citing S. 2389, 95th Cong. (2d Sess. 1978) and H.R. 9622, 95th Cong. (2d Sess. 1978)).

29. Flango, *supra* note 25.

30. *Id.* at 35–36.

31. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNANCE 37 (1955) (published posthumously).

32. Flango, *supra* note 25, at 35.

33. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568 (5th Cir. 2004).

locomotive struck a car, injuring passenger Kelli Smallwood.³⁴ The accident occurred at a Mississippi Department of Transportation (MDOT) railroad crossing in Florence, Mississippi.³⁵ After the crash, Smallwood filed suit in Mississippi state court against both Illinois Central and MDOT.³⁶

Because Illinois Central was an Illinois citizen, but Smallwood and MDOT were both citizens of Mississippi, Illinois Central removed the case to federal court on the basis of diversity jurisdiction, alleging that Smallwood had fraudulently joined MDOT.³⁷ Illinois Central asserted that Smallwood's including MDOT as a defendant was duplicitous because she could state no claim against MDOT, given that the Federal Railroad Safety Act (FRSA) preempted her claims against MDOT.³⁸ The district court, agreeing with Illinois Central, determined that MDOT fraudulently joined, denied Smallwood's motion to remand, and dismissed MDOT from the case.³⁹ As the only remaining defendant, Illinois Central then moved for summary judgment on the basis that the FRSA also preempted Smallwood's claim against it.⁴⁰ The district court granted the motion and entered judgment in favor of the railroad.⁴¹

On appeal, Judges King, Higginbotham, and I unanimously concluded that the trial judge erred in finding that MDOT fraudulently joined the suit.⁴² Thereafter, Illinois Central and MDOT filed for and were granted a rehearing en banc.⁴³ The full court, after a much heated and intense debate, reversed the district court's judgment.⁴⁴ The en banc court held, "[W]hen a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant. In such a situation, the entire suit must be remanded to state court."⁴⁵

34. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 571 (5th Cir. 2004).

35. *Id.*

36. *Id.* at 571–572.

37. *Id.* at 572.

38. *Id.*

39. *Smallwood*, 385 F.3d at 571.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 572.

44. *Smallwood*, 385 F.3d at 576.

45. *Id.* at 571.

Smallwood has been cited over 7,000 times, analyzed in depth in hundreds of cases,⁴⁶ and thoroughly discussed in over fifty law review articles.⁴⁷ And there are many others like *Smallwood*. Doing away with diversity jurisdiction would not just limit cases on federal courts' dockets—it would cause hundreds of years of precedent to vanish in an instant.

Although so far I have presented the issue as a binary one, there is a third option. Instead of ridding the federal courts of diversity jurisdiction entirely, many advocate in favor of simply limiting its scope. Associate Justice Antonin Scalia was in this camp. Justice Scalia argued that doing away with diversity jurisdiction would remove the most challenging cases from the federal courts, and therefore, he “preferred the alternative of substantially raising jurisdictional limits.”⁴⁸ Although several legal giants are in favor of abolition, Justice Scalia's view has predominated: the most frequently enacted “compromise” to restricting diversity jurisdiction is to increase the necessary amount in controversy.⁴⁹

From its inception until now, Congress has authorized access to federal court only when the case involves a substantial sum of money according to current economic standards.⁵⁰ In 1789, the necessary amount in controversy was set to \$500.⁵¹ It increased again in 1887 to \$2,000, again in 1911 to \$3,000, and in 1958 to \$10,000.⁵² The largest increase came in 1988, when Congress

46. See, e.g., *Queen v. Am. Gen. Fin., Inc.*, 351 F. Supp. 2d 576 (S.D. Miss. 2005); *Reese v. ICF Emergency Mgmt. Servs., Inc., L.L.C.*, 684 F. Supp. 2d 793 (M.D. La. 2010); *Frisby v. Lumbermens Mut. Cas. Co.*, 500 F. Supp. 2d 697 (S.D. Tex. 2007).

47. See, e.g., Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119 (2006); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49 (2009).

48. Flango, *supra* note 25, at 36 (citing Justice Antonin Scalia, U.S. Supreme Court, Remarks Before Fellows of the American Bar Foundation and National Council of Bar Presidents, (Feb. 15, 1987), reprinted in NATIONAL CENTER'S WASHINGTON MEMORANDUM (March 13, 1987)).

49. Although it is beyond the scope of this Lecture, one interesting exception occurred in 1801. “For the first and only time,” Congress *reduced* the jurisdictional amount in controversy from \$500 to \$400 “as part of the infamous ‘Law of the Midnight Judges’ Act. Why Congress reduced the amount by \$100 is something of a mystery.” 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, 307 (1984).

50. DAVID P. CURRIE, *FEDERAL COURTS* 357 (3d ed. 1982).

51. Baker, *supra* note 49, at 301–04.

52. *Id.* at 315–16.

pped the necessary amount to \$50,000⁵³ as an alternative to the Administrative Office of the U.S. Courts' recommendation that Congress abolish diversity jurisdiction out of consideration for "limited federal funds to deal with mounting caseloads, and the need to concentrate resources on the cases that have a higher claim on federal court time than do diversity cases involving state law questions."⁵⁴ The present day requirement, \$75,000, came about in 1996.⁵⁵

Statistics from the 1789, 1887, and 1911 increases suggest that increasing the amount in controversy "would bring little net reduction in [the federal] case load."⁵⁶ These statistics, however, may have been flawed, and based largely on inappropriate data.⁵⁷ Other data suggest that between 1957 and 1960, the number of diversity cases filed dropped from 23,223 to 17,048 cases.⁵⁸ As for the more drastic 1988 and 1996 increases, it seems those have had a more substantial effect. In 1987, there were 66,408 diversity filings; in 1997, there were only 55,278.⁵⁹

The conundrum created by merely increasing the amount in controversy, however, is that it simply limits cases between natural persons. It is easy to look at the individuals' domiciles, alleged harms, and amount in controversy listed in the complaint to determine whether diversity jurisdiction exists in these cases. With the advent of a perplexing variety of corporate structural forms, determining domicile for an entity, as opposed to a natural person, has become a byzantine task. In essence, increasing the necessary amount in controversy addresses the least difficult aspect of diversity jurisdiction.

To determine where a corporation is domiciled, one looks to the place of incorporation and the corporation's principal place of business. The U.S. Supreme Court has commented many times on how to determine a corporation's principal place of business, but it is not always so easily determined. Similarly, partnerships and unincorporated entities are considered a domiciliary of every

53. Chapin, *supra* note 15, at 29.

54. *Id.*

55. Wright et al., *supra* note 17, at § 3601.

56. Baker, *supra* note 49, at 315.

57. *Id.* at 322 n.151.

58. *Id.* at 322 n.155.

59. Compare Flango, *supra* note 25, at 39, with U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 1997, http://www.uscourts.gov/sites/default/files/statistics_import_dir/c02sep97.pdf (last visited Sept. 7, 2017).

state of which its members are citizens.⁶⁰ Again, this seems simple enough. But a member of an LLC is often another LLC or shell corporation. From time to time, this requires a court to drill down deep, exhausting scarce judicial resources, simply to ascertain whether it can entertain the case before it even scrapes the surface of the case's merits. A district court should decide these issues *sua sponte*, if necessary, before they get to the circuit courts. But that does not always happen.

For example, in *Bank of America N.A. v. Fulcrum Enterprises, LLC*,⁶¹ a case I heard in 2015 along with Judge Haynes and Judge Brown, who sat on the court by designation, the amount in controversy was above the threshold \$75,000 amount, and there were only two parties—Bank of America and Fulcrum Enterprises, LLC. Bank of America was undisputedly a citizen of North Carolina.⁶² The original and amended complaints identified Fulcrum as a citizen of Nevada but made no mention of Fulcrum's members, let alone their respective states of citizenship.⁶³ In the discovery plan the parties agreed on in the district court, they stipulated to diversity jurisdiction on this basis, and the district court dug no further into the issue.⁶⁴

After the parties concluded briefing on appeal, we noticed in the body of its complaint that Bank of America had also alleged that Fulcrum was both “established” and “organized” by a Texas resident, not a Nevada citizen as it had alleged in its jurisdictional statement. So, determining whether the court could retain diversity jurisdiction over Fulcrum required combing through the 4000-page record to find any additional evidence of its sole member's Texas citizenship beyond Fulcrum's admission.

The record evidence indicated that Fulcrum was a one-person operation, with Allan Groves at the helm, meaning that Fulcrum's citizenship was based entirely on Groves's domicile. The record also indicated, however, that Groves did his best to conceal his true citizenship, hiding behind a manager of Fulcrum and his ex-wife, Nancy. In a related bankruptcy case, in which Nancy appeared as a witness—after Groves initially refused to take the oath and the bankruptcy court held him in contempt—Chief Judge Jeff Bohm of the Southern District of Texas

60. *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079 (5th Cir. 2008).

61. *Bank of Am. N.A. v. Fulcrum Enters., LLC*, 608 F. App'x 284 (5th Cir. 2015).

62. *Id.* at 284.

63. *Id.*

64. *See id.*

Bankruptcy Court determined that Nancy had misled the court regarding her knowledge of Groves's citizenship.⁶⁵ Because of these obscurities, we asked Fulcrum's counsel during oral argument about Groves's citizenship, and the lawyers were not able to answer where the members of Fulcrum lived.

Accordingly, we requested letter briefs on whether diversity jurisdiction—the only proffered basis of jurisdiction—existed in this case. After soliciting additional briefing, Bank of America relied on the undisputed initial jurisdictional allegation in its complaint that Fulcrum was a Nevada citizen. Fulcrum, for the first time on appeal, posited that its members were citizens of Georgia, Nevada, New York, and North Carolina, which would defeat diversity, as Bank of America was also a citizen of North Carolina. Under *Harvey v. Grey Wolf Drilling Co.*,⁶⁶ these allegations were facially insufficient to establish the existence of diversity jurisdiction, so we remanded the case back to the district court.⁶⁷ After over three years of litigation, we were still not even sure we had jurisdiction to hear the case.

So, it is not surprising that many of those in favor of eliminating diversity jurisdiction, and even some who advocate for its retention, support the enactment of limitations on corporations. For example, in the early 1930s, then-Attorney General William D. Mitchell proposed that nonresident status be denied to a foreign corporation doing business in a state on a claim arising out of the corporation's activity in that state.⁶⁸ One

65. As the bankruptcy court explained:

During trial, Nancy [] testified that she did not know where [] Groves lived or worked. She was also vague about when she had spoken to him last, stating, "Probably yesterday." Yet, Nancy [] testified that she had known [] Groves for well over fifty years. They had been married for thirty-one years, and although they had been divorced since 1990, the couple nevertheless maintained a good relationship. Nancy [] also testified that she continue[d] to communicate with [] Groves and that she currently shares a P.O. Box with him. In fact, she stated that she had seen [] Groves earlier in the week (i.e., the week that she provided testimony) in order to deliver mail to him.

Countrywide Home Loans, Inc. v. Cowin (In re Cowin), 492 B.R. 858, 881 (Bankr. S.D. Tex. 2013).

66. *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079–80 (5th Cir. 2008) ("Supreme Court precedent, case law from other circuits, and the statutory language of both Section 1332 and Louisiana Revised Statutes § 12:1301(a)(10) overwhelmingly support the position that a LLC should not be treated as a corporation for purposes of diversity jurisdiction. Rather, the citizenship of a LLC is determined by the citizenship of all of its members.").

67. *Bank of Am. N.A. v. Fulcrum Enters., LLC*, 608 F. App'x 284, 285 (5th Cir. 2015).

68. *Wright et al.*, *supra* note 17, at n.59.

major step in curtailing the abuses of diversity jurisdiction as it relates to corporations came in 1958 when Congress amended 28 U.S.C. § 1332(c) to redefine the bounds of corporate citizenship.⁶⁹ Since that time, however, various forms of unincorporated associations have developed, which have a fairly amorphous delineation of citizenship.⁷⁰ Further exacerbating the issue, in *C.T. Carden v. Arkoma Ass'ns*,⁷¹ the U.S. Supreme Court refused to extend the statute, 28 U.S.C. § 1332(c), to unincorporated associations, such as LLCs.⁷²

Putting aside the sometimes difficult question of determining diversity jurisdiction, diversity cases do not always pose simple questions, and cases based on diversity jurisdiction constitute approximately 32% of the federal civil docket.⁷³ In 1941, over 7,200 diversity cases were filed in federal court—by 1956 that number rose to almost 21,000 cases.⁷⁴ By 1987, 66,408 diversity cases were filed across the United States.⁷⁵ In 2015, a total of 87,772 diversity cases were filed.⁷⁶

Between 2006 and 2015, total civil filings in the U.S. district courts declined 7% (down 22,212 cases) to 281,608 cases.⁷⁷ “This reduction happened mainly because diversity of citizenship filings . . . fell [seventeen] percent to 87,772.”⁷⁸ In addition to

69. 28 U.S.C. § 1332(c), *as amended* by Act of July 25, 1958, § 2, 72 Stat. 415. The legislative history shows that this provision was intended to avoid “the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State.” Sen. Rep. No. 1830, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 3099, 3101–02.

70. *See, e.g.*, *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008) (explaining that an LLC shares the citizenship of each of its members). Because an LLC member can itself be an unincorporated entity, a diversity-destroying person or entity may be far removed from the LLC party and in no way associated with the underlying litigation. *See, e.g.*, *Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt., LLC*, 692 F.3d 42, 49 (2d Cir. 2012); *Quantlab Fin., LLC v. Tower Research Capital, LLC*, 715 F. Supp. 2d 542 (S.D.N.Y. 2010) (analyzing over ten layers of citizenship before determining the court lacked jurisdiction based on nondiverse parties).

71. *C.T. Carden v. Arkoma Ass'ns*, 494 U.S. 185 (1990).

72. *Id.* at 189.

73. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics> (last visited July 15, 2017).

74. *Compare id.*, with *Flango*, *supra* note 25, at 37.

75. *Flango*, *supra* note 25, at 39.

76. U.S. COURTS, *supra* note 73.

77. *Id.*

78. *Id.*

constituting a large portion of the federal docket, cases before the federal courts based on diversity consume about 10% of the federal judicial budget.⁷⁹

It is hard to say whether our Founding Fathers could have anticipated the gargantuan case load of the federal courts, and if they had, whether the seemingly spurious excuse of potential bias would require them to institute diversity jurisdiction nevertheless. What we can say for certain, however, is that today, “state court bias” is hardly ever a factor in deciding to remove to or file a case in federal district court.⁸⁰ In the arena of actually asserting jurisdiction, many complicated issues have arisen; for example, “[d]iversity jurisdiction, unlike its younger sibling federal-question jurisdiction, is grounded in the character of the parties rather than the character of the claim. This feature makes diversity jurisdiction both more complicated than federal-question jurisdiction and more susceptible to party gamesmanship.”⁸¹ For example,

One nettlesome but unsettled complication of the requirement of complete diversity is simply illustrated. Consider a suit in federal court in which a single plaintiff from Texas asserts state-law claims against two defendants—one from California and the other from Texas—and alleges claims for \$500,000 against each defendant. It is beyond dispute that the federal court lacks diversity jurisdiction over the plaintiff’s claim against the nondiverse Texas defendant, and thus lacks diversity jurisdiction over the action as a whole. But does the court nevertheless have jurisdiction over the plaintiff’s claim against the diverse California defendant? If no, then the court must dismiss the entire case. If yes, then the court could dismiss the nondiverse claim and proceed with the diverse claim.⁸²

Diversity jurisdiction also raises several issues concerning federalism. Are we not a republic based on the premise of states’ rights? As state court bias is no longer a viable reason to justify the need for diversity jurisdiction, if it ever was, the answer to whether federal courts should retain diversity jurisdiction likely lies

79. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1674 (1992).

80. Chapin, *supra* note 15, at 29; *see also* J. Friendly, *supra* note 16, at 510.

81. Scott Dodson & Philip A. Pucillo, *Joint and Several Jurisdiction*, 65 DUKE L.J. 1323, 1325–26 (2016).

82. *Id.* at 1326–27.

in discussions of federalism.⁸³ Federal courts that are deciding questions of purely state law might infringe on state autonomy because there is no state control over or review of federal decisions applying state law. In this way, federal courts assume a portion of state administration, thereby rendering the state's judicial power less extensive than its legislative power. Some contend that this disparity threatens to interfere with the federal plan of state autonomy to promulgate policy through the legislative and judicial processes.⁸⁴

A second type of possible interference is that federal decisions could be wrong on the merits of state law and, therefore, could be effectively frustrating the enforcement of valid state policy. However, one study of the Seventh Circuit and its relationship with the Wisconsin, Illinois, and Indiana state supreme courts "suggests that the . . . apprehension regarding the effect of present diversity jurisdiction on state autonomy is perhaps unwarranted."⁸⁵

"In a diversity jurisdiction action, federal courts are required to apply the law of the state in which the court sits, except when deciding procedural matters, constitutional issues, or matters specifically governed by acts of Congress."⁸⁶ So, when we sit in diversity, we must apply the law as if we were a state court of the state in which the district court sat. In interpreting state law, we begin by scrutinizing any decisions of the state's highest court germane to the issue at bar. When there is no case directly on point, we must make what is informally referred to as an "*Erie* guess," or an "attempt to predict what a state's highest court would decide if it were to address the issue itself."⁸⁷

The Fifth Circuit must frequently decide questions of law involving the law of Texas, Mississippi, and Louisiana and occasionally addresses the law of more far-flung jurisdictions. This presents a challenging decision-making task for the court and the potential for incorrect determinations of state law on matters of first impression, requiring us to make the infamous "guess."

83. Sloviter, *supra* note 79, at 1687.

84. Note, *The Effect of Diversity Jurisdiction on State Litigation*, 40 IND. L. J. 566, 569 (1965).

85. *Id.* at 586.

86. Haley N. Shaffer & David F. Herr, *Why Guess? Erie Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1626 (2010).

87. *Id.*

For example, in *Bradley v. Allstate Insurance Co.*,⁸⁸ we were tasked with determining whether the insureds, whose home was destroyed during Hurricane Katrina, were entitled to the full extent of their homeowners' insurance policy based on the predominant cause of the home's destruction. This question presented several issues of first impression on a sensitive topic of Louisiana law: Who can recover, and how much, following Hurricane Katrina?

In another case out of Mississippi, a real estate brokerage company, Carpenter Properties (Carpenter), brought an action against JP Morgan Chase Bank (Chase), alleging that Chase breached its contract with Carpenter when it did not pay a market commission following Chase's acquisition of Collegiate Funding Services, the entity with which Carpenter had formed the contract.⁸⁹ In finding in favor of Carpenter, the district court made an *Erie* guess, piercing the corporate veil to hold Chase liable for the commission.⁹⁰ At the time, Mississippi case law almost exclusively addressed situations where plaintiffs were fully aware of who they were contracting with at the point of contract formation, but few addressed changes in expectations arising thereafter. Following a lengthy discussion of Mississippi law in the context of corporate veil piercing, we reversed the district court's holding, as none of the relevant Mississippi precedent directly commanded piercing the corporate veil in this instance.⁹¹ Although we ultimately reversed the district court, we could not say with certainty that a Mississippi court would not have extended its prior precedent the way the district court had.

Understandably, federal courts might not accurately predict how a state's high court would rule. The Fifth Circuit is not immune from this problem and has sometimes failed to correctly predict how state supreme courts will ultimately decide a question. A case from my February 2017 sitting, *Ocwen Loan Servicing, LLC v. Berry*,⁹² is particularly demonstrative of this reality.

In a previous case, *Priester v. JP Morgan Chase Bank*,

88. *Bradley v. Allstate Ins. Co.*, 620 F.3d 509 (5th Cir. 2010).

89. *Carpenter Props., Inc. v. JP Morgan Chase Bank Nat'l Ass'n*, 647 F. App'x 444 (5th Cir. 2016).

90. *Id.* at 454.

91. *Id.*

92. *Ocwen Loan Servicing, LLC v. Berry*, 852 F.3d 469 (5th Cir. 2017).

N.A.,⁹³ the Fifth Circuit was tasked with interpreting § 50(a)(6) of the Texas Constitution. The *Priester* court held that a four-year statute of limitations applied to alleged violations under that section.⁹⁴ Relying on *Priester*, the district court in *Ocwen* held that the defendant's counterclaim was time-barred, finding in favor of the plaintiffs.⁹⁵ The defendant appealed.⁹⁶ After the district court ruled, but before briefing was due to the Fifth Circuit, the Texas Supreme Court held that our prior *Erie* guess in *Priester* regarding § 50(a)(6) was wrong and explicitly rejected our reasoning.⁹⁷ This situation is not as uncommon as one might suppose⁹⁸ and has led many scholars to advocate for certifying questions to the various state supreme courts instead of making the eminent guess.⁹⁹ But certifying questions, like determining a business's domicile, is not as easy as it sounds.

Although they regularly do as a matter of courtesy, state supreme courts are not bound to respond to our certified questions. These courts often have more pressing issues on their dockets, and it may take time for them to consider our question. Between 2001 and 2017, the Fifth Circuit certified fifty-one questions to the United States, Texas, Louisiana, and Mississippi Supreme Courts. The average turn-around for such questions were 98, 482, 215, and 331 days, respectively.¹⁰⁰

The questions we certify to the state supreme courts do not engender simple answers. In *Faulk v. Union Pacific Railroad Co.*,¹⁰¹ for example, we asked the Louisiana Supreme Court “[W]hether the application of La. Rev. Stat. § 48:394 to any of the properties in this case amounts to an unconstitutional taking of private property without a public purpose, in violation of

93. *Priester v. JP Morgan Chase Bank, N.A.*, 708 F.3d 667, 672–73 (5th Cir. 2013).

94. *Id.* at 674.

95. *Ocwen Loan Servicing, LLC v. Berry*, 852 F.3d 469, 473 (5th Cir. 2017).

96. *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 544–45 (Tex. 2016).

97. *Id.* at 548.

98. For example, in *Fountainbleau Mgmt. Servs, LLC v. City of Tupelo*, 599 F. App'x 207, 207 (5th Cir. 2015) (*per curiam*), the Fifth Circuit vacated the district court's grant of summary judgment based on a “change in relevant state law during the pendency of [the] appeal.”

99. Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267, 269 (1946).

100. Email from Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit, to author (Feb. 14, 2017, 14:56 CST) (on file with author).

101. *Faulk v. Union Pac. R.R. Co.*, 449 F. App'x 357 (5th Cir. 2011).

Art. I, § 4 of the Louisiana Constitution.”¹⁰² This request took 340 days.¹⁰³ In *Norris v. Thomas (In re Norris)*,¹⁰⁴ we asked whether “a motorized waterborne vessel, used as a primary residence and otherwise fulfilling all of the requirements of a homestead except attachment to land, qualif[ies] for the homestead exemption under Article 16, §§ 50 and 51 of the Texas Constitution,”¹⁰⁵ a question that took the Texas Supreme Court 599 days to answer.¹⁰⁶ Similarly, in *Learmonth v. Sears, Roebuck & Co.*,¹⁰⁷ we asked the Mississippi Supreme Court, “Is Section 11-1-60(2) of the Mississippi Code, which generally limits non-economic damages to \$1 million in civil cases, constitutional?”¹⁰⁸ This question took 586 days for a response.¹⁰⁹ In these cases, it took 3,126, 2,389, and 2,336 days from the time of filing the complaint to issuing an opinion, respectively,¹¹⁰ in other words, in each case it took between six and eight *years* before the litigants had a resolution to their pressing issues.

As I previously mentioned, Judge Ainsworth heard many cases based on diversity jurisdiction. In a particularly contentious case, two insurance companies divided the settlement costs incurred as a result of lawsuits filed against their respective insureds, the Blue Bird Body Company and a Blue Bird employee.¹¹¹ “Not content with this perfectly reasonable arrangement, the insurers [] staged . . . [a] diversity slugfest in which each [sought] to recover back its half of the amount paid in settlement by casting the other in the role of either the sole or the primary insurer.”¹¹² This was an entirely state-based issue; then-Chief Judge John R. Brown labeled his opinion’s headings and subheadings: “Gearing Up,” “In This Corner . . . ,” “The

102. *Faulk v. Union Pac. R.R. Co.*, 449 F. App’x 357, 362 (5th Cir. 2011).

103. Email from Lyle W. Cayce, *supra* note 100.

104. *Norris v. Thomas (In re Norris)*, 413 F.3d 526 (5th Cir. 2005).

105. *Id.* at 530.

106. Email from Lyle W. Cayce, *supra* note 100.

107. *Learmonth v. Sears, Roebuck & Co.*, 631 F.3d 724 (5th Cir. 2011).

108. *Id.* at 740.

109. Email from Lyle W. Cayce, *supra* note 100.

110. *Id.*

111. *Blue Bird Body Co. v. Ryder Truck Rental, Inc.*, 583 F.2d 717, 719, 728 & n.10 (5th Cir. 1978). Chief Judge Brown also noted that the court might not again be bothered with such a case, citing a bill in Congress that would abolish diversity jurisdiction entirely. *Id.* at 727–28 & n.10 (citing H.R. 9622, S. 2389, S. 2094, 95th Cong., 2d Sess. (1978) (bills to abolish diversity jurisdiction)).

112. *Blue Bird Body Co. v. Ryder Truck Rental, Inc.*, 583 F.2d 717, 719 (5th Cir. 1978).

Preliminary Bouts,” “The Main Event,” “Weighing In,” “Choosing a Referee,” and Rounds I, II, and III.¹¹³ In my time on the Fifth Circuit, I too have encountered many a “diversity slugfest.”

In *Forte v. Wal-Mart Stores, Inc.*, the court faced an issue of first impression that called upon us to interpret and apply the Texas Optometry Act.¹¹⁴ Ultimately, the panel certified the question to the Texas Supreme Court after having written a dispositive opinion to avoid a rehearing en banc.¹¹⁵ There, we asked

Whether an action for a “civil penalty” under the Texas Optometry Act is “an action in which a claimant seeks damages relating to a cause of action” within the meaning of Chapter 41 of the Texas Civil Practice and Remedies Code. In other words, are civil penalties awarded under Tex. Occ. Code § 351.605 “damages” as that term is used in Tex. Civ. Prac. & Rem. Code § 41.002(a)?¹¹⁶

We went on to ask whether “civil penalties awarded under the Texas Optometry Act are ‘damages’ as that term is used in [Texas Civil Practice & Remedies Code §] 41.002(a), whether they are ‘exemplary damages’ such that [Texas Civil Practice & Remedies Code §] 41.004(a) precludes their recovery in any case where a plaintiff does not receive damages other than nominal damages.”¹¹⁷ In light of the Texas Supreme Court’s answer, we vacated the district court’s judgment and remanded the case back for further proceedings.¹¹⁸

We certified the question to the Texas Supreme Court on February 20, 2015, and received an answer on May 23, 2016—458 days later. We filed our opinion on October 27, 2016, 616 days after certifying the question and nine years, six months, and twenty-four days after the plaintiffs filed their initial complaint.¹¹⁹

Recently, I sat on the panel for *Republic Waste Services of*

113. See generally *Blue Bird Body Co. v. Ryder Truck Rental, Inc.*, 583 F.2d 717, 719–25 (5th Cir. 1978).

114. *Forte v. Wal-Mart Stores, Inc.*, 780 F.3d 272, 275 (5th Cir. 2015).

115. *Id.* at 283.

116. *Id.*

117. *Id.*

118. *Id.* at 275.

119. Compare Complaint at 1, *Forte v. Wal-Mart Stores, Inc.*, 780 F.3d 272 (5th Cir. 2015) (No. 12-40854), with *Forte*, 780 F.3d at 272.

*Texas, Ltd. v. Texas Disposal Systems, Inc.*¹²⁰ This case considered entirely Texas issues: a Texas contract, an interpretation of Texas law, for services provided in Texas.¹²¹ Republic Waste and the City of San Angelo entered into a contract purporting to allow Republic Waste to maintain the exclusive right to collect and haul waste within the City, including the right to collect non-residential and construction waste.¹²² The appellee, Texas Disposal, had a permit issued by the City for the collection of solid waste, allowing it to provide any service permitted by state law or city ordinance that does not conflict with the City's contract with Republic Waste.¹²³ Pursuant to the permit, Texas Disposal contracted to provide temporary solid waste disposal services to construction projects in the City.¹²⁴ Republic Waste objected to the contract, claiming the exclusive right to collect temporary construction and non-residential waste.¹²⁵ Republic Waste ultimately sued in district court seeking a declaratory judgment that the construction waste provision of its contract with the City was valid and asserting claims of tortious interference against Texas Disposal.¹²⁶ Texas Disposal filed a motion to dismiss, arguing that § 364.034(h) of the Texas Health & Safety Code precludes exclusive contracts for temporary construction waste disposal.¹²⁷ Additionally, making purely a policy argument, Texas Disposal Systems argued that they should prevail on the merits because the opposing party, Republic Waste Services of Texas, despite its name, was actually a citizen of Delaware, not Texas.¹²⁸ This argument, perhaps anecdotally, demonstrates that inter-state bias, at least from litigants, is alive and well.

Similarly, in February of 2017, I heard *Smither v. Ditech Financial, L.L.C.*,¹²⁹ a case involving a Texas home equity loan.¹³⁰ The Smither's loan consisted of a note and a deed of trust, which

120. *Republic Waste Servs. of Tex., Ltd. v. Tex. Disposal Sys., Inc.*, 848 F.3d 342 (5th Cir. 2016).

121. *See generally id.*

122. *Id.* at 343.

123. *Id.*

124. *Id.*

125. *Republic Waste*, 848 F.3d. at 343.

126. *Id.* at 344.

127. *Id.*

128. Brief for Defendant-Appellee, *Republic Waste*, 848 F.3d 342.

129. *Smither v. Ditech Fin., L.L.C.*, No. 16-20392 (5th Cir. 2017), 2017 WL 958314 (No. 15-11035).

130. *Id.*

Bank of America serviced. According to the complaint, Bank of America sent notices of acceleration to the Smithers in July of 2009, and in August of 2009 it initiated a foreclosure suit in state court.¹³¹ Bank of America then dismissed that suit in December of 2009, and Ditech became the servicer of the loan in 2014. Later, Ditech initiated another foreclosure suit, prompting the Smithers to file suit in federal district court seeking (1) to have Ditech's lien on the property declared void based on the expiration of the Texas statute of limitations for enforcement of that lien, (2) damages under the Texas Debt Collection Act (TDCA), (3) attorney's fees, and (4) a temporary restraining order to prevent foreclosure.¹³²

Ditech removed the suit to federal court and filed a motion to dismiss, making arguments based on purely state law,¹³³ and yet, the Fifth Circuit was tasked with solving it.

As these cases demonstrate, difficult issues arise as a concomitant of diversity jurisdiction. These issues include, but are not limited to, complicated corporate forms, considerations of federalism, the time it takes to provide litigants with a definitive answer after certifying a question to the various state supreme courts, and a thinning budget coupled with an ever-increasing federal docket.

In 2016, the Fifth Circuit heard 923 private civil appeals, 397 of which were based on diversity.¹³⁴ Many of these cases required us to make an *Erie* guess.¹³⁵ Although it is offered as a "guess," I assure you that my colleagues and I aim to resolve the question as accurately as we can. Our "guess" is a principled one. Of course, we look first and foremost to the law—but our work is greatly aided and informed by the legal community's examination of a given topic. Whether it be treatises, works from organizations like the Louisiana Law Institute, or notes and articles from outstanding law reviews, such as the *Loyola Law Review*, we find invaluable the insights these discussions provide, and our reliance on this scholarship greatly enhances our final product.

131. *Smither v. Ditech Fin., L.L.C.*, No. 16-20392, p. *1 (5th Cir. 2017), 2017 WL 958314 (No. 15-11035), p. *1.

132. *See generally id.*

133. *See id.*

134. Email from Lyle W. Cayce, *supra* note 100.

135. In 2016 alone, the Fifth Circuit explicitly made an *Erie* guess in over twenty cases.

As Justice Scalia argued, and I agree, diversity cases keep federal judges tied to their state law roots, routinely obliging us to cogitate intricate state laws, like the Louisiana Civil Code. This exercise, while intellectually stimulating, takes up a considerable amount of the federal courts' time, raising questions of efficiency. Judge Ainsworth said it well when he wrote that "[a]gainst th[e] interest in judicial economy, we have the explicit provisions of 28 U.S.C. § 1332[,] which allow federal suits based on diversity of citizenship. For good or ill, Congress has not yet seen fit to relegate essentially state law actions exclusively to state courts."¹³⁶ The words Judge Ainsworth wrote in 1981 still ring true today and will likely continue to do so—in my view, diversity jurisdiction will be with us for the foreseeable future.

As I said in the beginning of this Lecture, my purpose today was not to recommend a solution, but to stimulate your thinking on what role § 1332 has in our modern society, given its attendant complexities. I hope you have gleaned from this brief survey of the topic that the answer is not a simple one. And so, I leave you, my future fellow alumni, by reposing the question for this generation of lawyers to consider: Do we still need § 1332? I wish you well, and as Chief Justice Burger said, "Good hunting."¹³⁷

136. *Dernick v. Bralorne Res., Ltd.*, 639 F.2d 196, 199–200 (5th Cir. 1981).

137. C.J. Burger, *supra* note 12, at 220.