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A Dynamic Formula for the Amount in Controversy±◊

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I. INTRODUCTION

Federal courts possess limited subject matter jurisdiction,[1] in that a federal court must have both constitutional and statutory authority to adjudicate a case before it. Article III of the United States Constitution speaks to the constitutional limits on federal subject matter jurisdiction,[2] broadly affording federal courts the ability to resolve all of the "cases" and "controversies" detailed therein.[3] Despite the various bases for properly invoking a federal court's jurisdiction, the majority of suits filed in federal court implicate the jurisdiction pertaining to "[c]ases . . . arising under th[e] Constitution, [and] the laws of the United States."[4] Indeed, that subset of "cases," commonly characterized as involving a "federal question," currently comprises roughly sixty percent of the federal judiciary's civil

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± The opinions expressed herein are those of the authors alone, and do not reflect the views of their past or present employers.

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1. Subject matter jurisdiction is the legal authority of a court to hear a category of cases relating to a particular subject matter. *See* Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1547-48 (2008) ("Although jurisdiction has been called a word of 'many, too many, meanings,' it can broadly be defined as the court's raw, baseline power and legitimate authority to hear and resolve the legal and factual issues in a class of cases." (footnotes omitted) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 510 (2006))).

2. *See* U.S. CONST. art. III, § 2.

3. As Article III, § 2 provides, the judicial power:

> [S]hall extend to all Cases . . . arising under th[e] Constitution, the Laws of the United States, and Treaties . . . ; to all Cases affecting Ambassadors, other public Ministers and Consuls; . . . to all Cases of admiralty and maritime Jurisdiction; . . . to Controversies to which the United States shall be a Party; . . . to Controversies between two or more states[,] . . . between a State and Citizens of another State[,] . . . between Citizens of different States[,] . . . between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.; *see also* ERWIN CHEMERINKSY, FEDERAL JURISDICTION § 5.1, at 277–83 (6th ed. 2012).

4. U.S. CONST. art. III, § 2.

docket.[5]

A great deal of the remaining forty percent of the cases and controversies federal courts routinely manage implicate Article III's defined category of "diversity and alienage" jurisdiction over "controversies" involving disputes between citizens of different states.[6] Given the lack of any necessary nexus to federal law or federal courts, many of the cases filed based on that jurisdiction involve issues of state law, sometimes novel, which are arguably better directed to a state tribunal. But Article III's door for litigants to fight over the meaning of state law is not wide open. As

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5. *See* Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics: March 31, 2011* (Table C-2), 46 (2011), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C02Mar11.pdf (detailing a sixty percent figure for the twelve-month period ending March 31, 2011). The number of federal question cases in federal court could conceivably be even greater were Congress to allow more expansive exercise of that jurisdiction. Indeed, Article III would, standing alone, ostensibly permit the exercise of subject matter jurisdiction in a great deal of disputes that could conceivably arise because it has been interpreted to require only that a federal issue comprise an "original ingredient" in order for a federal court to constitutionally exercise federal question jurisdiction. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) (the Constitution affords the judicial power to cases that "form [] an ingredient of the original cause"). Under that seemingly broad standard, most cases could logically be construed as being within the constitutional ambit of the federal judiciary. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 492 (1983) ("*Osborn* thus reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law."). *But see* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 861 (2004) ("It is a mistake to view the *Osborn* 'ingredient of an original cause' test through the lens of adaptive notions of what a cause is. In its proper legal context, *Osborn* does not justify as broad a federal jurisdiction as the 'potential ingredient' test allows.").

Congress, however, in its capacity as the overseer of the lower federal courts, *see* U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."); *see also* U.S. CONST., art. I, § 8, cl. 9 (affording Congress the power to "constitute Tribunals inferior to the [S]upreme Court"), has narrowed the scope of the federal judiciary's federal question jurisdiction. Indeed, its jurisdiction-conferring statute, while essentially mirroring the text of Article III, has generally been read to vest jurisdiction much more narrowly than the Constitution allows by limiting federal question jurisdiction to those cases in which the federal question is clear from the face of the plaintiff's claim for relief. *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 153-54 (1908) (espousing the so-called "well-pleaded complaint" rule). That, as a practical matter, means a complaint that does not support federal question jurisdiction on its face may not properly be adjudicated in federal court.

6. U.S. CONST. art. III, § 2. Article III, § 2 defines other categories of controversies which may be adjudicated by federal courts, including disputes between states, citizens and states, and citizens of the same state claiming land in other states. *Id*. However, because of early concerns over the abrogation of state sovereign immunity, *see* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 429–33, 449 (1793) (Iredell, J., dissenting), the Eleventh Amendment was enacted to alter the latter categories to the extent that they make states amenable to suits by citizens, *see* U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State . . . . ").

with federal question jurisdiction,[7] Congress has limited the scope of diversity jurisdiction—and, in so doing, necessarily limited the number of diversity suits—by providing in its jurisdiction-conferring statute that diversity jurisdiction may be exercised only "where the matter in controversy exceeds the sum or value of $75,000."[8]

When enacted in 1997, that amount-in-controversy limitation on Article III's grant of diversity jurisdiction perhaps served Congress's apparent purpose of inhibiting the number of diversity cases. Today, however, it is a hurdle that is easy to plead past that does little to fulfill its function of keeping insubstantial cases in other forums. Congressional inaction is the culprit: the amount in controversy, though an important procedural tool that protects the federal courts from cases that ought to be elsewhere, receives little attention from lawmakers. And even when it does, there is a more systemic problem. Congress, as has been poignantly demonstrated over the past few years, is institutionally slow to change, even when very real problems require immediate attention. We propose a solution that will protect the diversity docket's integrity and that mitigates the need for any future congressional action so long as Congress takes a step today: a formula that modifies the amount in controversy based on established economic indicators and the number of available judges.

We begin in Part II by providing an overview of diversity jurisdiction, including its genesis, the historical arguments both in favor and against it, and the efforts by Congress to reduce the number of diversity jurisdiction cases. We set forth the argument for a formula in Part III and explain how our chosen formula would have adjusted the amount in controversy over the past decade. Finally, we end in Part IV with a brief survey of the costs and benefits of our proposed solution to the diversity jurisdiction problem.

II. OVERVIEW OF DIVERSITY JURISDICTION

A. Historical Foundations and Changing Conceptions

The exercise of diversity and alienage jurisdiction has always been

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7. *See supra* note 5.

8. 28 U.S.C. § 1332(a). The exercise of diversity jurisdiction also requires complete diversity, which means that "the citizenship of all defendants must be different from the citizenship of all plaintiffs." McPhail v. Deere & Co., 529 F.3d 947, 951 (10th Cir. 2008) (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)); *see* Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 553 (2005) ("In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action."); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 75 & n.17 (1990). We do not consider that component of the diversity rule in this article.

heavily debated.[9] Its origins can be traced back to the Judiciary Act of 1789,[10] which formally created lower courts in the federal judiciary and defined the jurisdictional contours of those courts.[11] The Judiciary Act represents a culmination of fierce debates between the antifederalists[12] and federalists[13] over the propriety of both a federal judiciary and, indeed, the entire notion that federal courts may (or should) adjudicate state-law matters.[14] As Professor Robert Clinton stated:

> [A]ntifederalists expressed a number of interrelated but distinct concerns about the breadth of the potential federal

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9. *See* CHEMERINKSY, *supra* note 3, § 5.3, at 311 n.11 (discussing the arguments on diversity jurisdiction (citing Thomas D. Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 966 (1979))); *see also* 13E CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601, at 2–5 (3d ed. 2009) (noting that the diversity statute "has been a source of considerable controversy, and has been in a constant state of judicial and legislative change").

10. *See* 1 Stat. 73 (1789); Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1478–87 (1989) (providing a detailed historical account of the compromises that led to the enactment of the Judiciary Act of 1789).

11. *See* 1 Stat. 73, Sec. 3, 4 (1789); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 850–51 (1984) (explaining how the Judiciary Act was enacted under the authority given to Congress in Article III to establish "inferior courts").

12. Among concerns with Article III, the antifederalists were particularly wary of a powerful judiciary. *See* Clinton, *supra* note 11, at 801. Relevantly, they "attacked the breadth of federal court jurisdiction established in the [original] constitutional draft, singling out for special attack the diversity jurisdiction and cases in which states may be parties, especially cases involving citizens of other states." *Id*.

13. On the issue of the scope of federal jurisdiction, the federalists were sensitive to the antifederalists' concerns. *See* Clinton, *supra* note 11, at 811.

> [T]he federalists generally met antifederalist attacks on the scope of federal court jurisdiction by stressing the necessity of conferring the cases enumerated as the judicial power of the United States on national courts staffed with judges who were not dependent for appointment, salary, or continuance in office on the legislature of any state.

Id. And, more specifically, the federalists attempted to alleviate the concern that the classes of cases covered under Article III would swallow state authority over local disputes. *See id*. ("In regard to the breadth of the class of cases given to the federal courts, Pendleton of Virginia argued that all eleven classes of controversies set forth as part of the judicial power of the United States were 'of general and not local concern.'" (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE CONVENTION AT PHILADELPHIA 518 (J. Elliot ed. 1901))).

14. *See* Clinton, *supra* note 11, at 801–10 (discussing the sentiments and concerns with a strong federal judiciary). *See generally* 13E WRIGHT, MILLER & COOPER, *supra* note 9, § 3601, at 12 ("Historians are in agreement that there was no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists . . . as that which gave them power over controversies between citizens of different States." (internal quotation marks omitted) (quoting Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81 (1923))). For an interesting and more thorough discussion of the intricacies of the debates, see *id*. at 12–22, and Warren, *supra*.

> judiciary and its potential to annihilate the state courts and unsettle legal expectations created under state law. Specifically, they directly attacked the breadth of federal court jurisdiction established in the constitutional draft, singling out for special attack the diversity jurisdiction and cases in which states may be parties, especially cases involving citizens of other states.[15]

That the Judiciary Act's creation of a statutory basis for diversity jurisdiction was met with marked hostility might surprise given its understood purpose. Diversity jurisdiction was meant to protect out-of-state litigants from judicial bias in a time when America could perhaps be fairly characterized as a collection of different states, rather than an entity that comprised them within its united whole.[16] Indeed, "the formation of a national judiciary appointed for life that was vested with diversity jurisdiction provided an assurance of impartial administration of the law for the protection of out-of-staters, and thus assuaged fears that the rights guaranteed by the Constitution might not be available in the local courts."[17] The notion that state court judges and juries would be more inclined to abandon their duties of impartiality in cases involving non-local citizens was arguably a justifiable one at the time.[18]

The same, of course, can no longer be said with any real certainty, and it is therefore unsurprising that many have questioned the continued vitality of the policy justifications that underlay Article III's grant of diversity jurisdiction.[19] Indeed, since the founding, the traditional arguments in favor

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15. *See* Clinton, *supra* note 11, at 801.

16. *See* CHEMERINKSY, *supra* note 3, § 5.3, at 309–10.

17. 13E WRIGHT, MILLER & COOPER, *supra* note 9, § 3601, at 18–19.

18. *See* James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 183 (2006) (noting that, as the idea was explained by Chief Justice John Marshall, there was a need for the "appearance of a rational and even-handed judicial decision-maker" because of the potential risk of bias (emphasis removed)); 13E WRIGHT, MILLER & COOPER, *supra* note 9, § 3601, at 13–15 (noting that the "traditional[ly]" accepted reason adopted by most scholars for the concerns over the "purpose[s] of the constitutional provision for diversity of citizenship jurisdiction" was the "fear that state courts would be prejudiced against out-of-state litigants"); *see also* Warren, *supra* note 14, at 49–53. There have been other arguments advanced as to the original reasons for diversity jurisdiction, including the claim, for instance, that it was designed to protect commercial interests and provide a better, more efficient forum for litigants. *See* David Crump, *The Case For Restricting Diversity Jurisdiction: The Undeveloped Arguments, From the Race to the Bottom to the Substitution Effect*, 62 ME. L. REV. 1, 3–4 (2010) ("[S]ome scholars believe that diversity jurisdiction was designed to protect commercial interests. The difference between states inhabited by creditors and those inhabited by debtors was one of the major divisions that had to be overcome at the Constitutional Convention." (footnote omitted)).

19. *See, e.g.*, Crump, *supra* note 18, at 2 ("[I]n the twenty-first century, there are more reasons than ever to authorize diversity jurisdiction more selectively."); Underwood, *supra* note 18, at 193–97 (discussing the recent "antagonism for diversity jurisdiction"); *see also* Leading

of diversity jurisdiction have been less frequently advanced.[20] Many commentators have focused their recent scholarship on proposing useful mechanisms to reduce the caseload of the federal courts,[21] or otherwise efficiently allocate cases between federal and state court systems.[22] The reason for that shift in thinking seems clear enough; as one commentator aptly observed, "many judges and practitioners . . . view diversity jurisdiction as an anomaly" that serves "as an unnecessary distraction from the federal courts' primary functions."[23]

B. The Amount in Controversy as a Mechanism to Reduce the Caseload of the Federal Courts

One way that distraction has been mitigated over time is the statutorily-imposed condition that diversity cases involve a dispute that is worth enough money to meet the "amount in controversy," a sum that has been set at $75,000 since 1997.[24] While "[t]he original Congressional intent behind the amount-in-controversy requirement is not entirely clear from legislative history,"[25] the modern view is that it was implemented to serve a gatekeeping role that alleviates the burden diversity jurisdiction causes to the federal docket.[26] And, indeed, it does,[27] though one may well

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Cases, *Corporate Citizenship*, 124 HARV. L. REV. 309, 316–17 (2010) (noting a current "anomaly" that arises in the diversity concept in the corporate context that "cuts against" the "policy historically underlying diversity jurisdiction"); Dolores Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1672 (1992) (noting that "[r]epeated attempts have been made over the last 200 years to abolish or restrict diversity jurisdiction"); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 218 (1948) ("[T]he sum of federal adjudication should represent as prudent use as we can make of the important national resources represented by the federal courts.").

20. *See, e.g.*, Underwood, *supra* note 18, at 208–11 (referencing Congress's enactment of the Multiparty, Multiforum Act, 28 U.S.C. § 1369, which bestows "minimal diversity power" without reference to the "historical perception of diversity's purpose[s]"); *see also* Crump, *supra* note 18, at 5–7.

21. *See, e.g.*, 13E WRIGHT, MILLER & COOPER, *supra* note 9, § 3601, at 25–27 (discussing numerous proposals scholars have offered to delimit diversity jurisdiction); *id*. at 26–27 nn. 58–60 (collecting authorities).

22. *See, e.g.*, Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1212, 1235–38, 1261 (2004) (advocating for a multi-jurisdictional approach to the allocation of cases between the state and federal courts).

23. Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 999–1000 (2007).

24. 28 U.S.C. § 1332(a)–(b) (Supp. 1997).

25. Evan A. Creutz, Note, *Two Sides to Every Story: Measuring the Jurisdictional Amount in Federal Courts*, 68 FORDHAM L. REV. 1719, 1723 (2000). *But see id*. (referencing authority suggesting "that the original purpose of the requirement was to protect defendants from having to travel long distances to defend relatively small claims").

26. *See* Free v. United States, 879 F.2d 1535, 1538–39 (7th Cir. 1989) (Coffey, J.,

question its utility in serving that end given the seemingly arbitrary manner in which it has been periodically adjusted over the years.[28] The growth of the diversity docket is illustrative; as the statistics clearly demonstrate,[29] the diversity docket continues to comprise an exceptionally large portion of the caseload of the federal courts.

The continued growth of the diversity docket seems to have prompted new,[30] and sometimes drastic,[31] ideas aimed to reduce the number of diversity cases filed in federal court. In 2009, for example, the Federal Courts Jurisdiction and Venue Clarification Act of 2009 was introduced in the House of Representatives.[32] In the original version of the bill, Congress considered indexing the amount in controversy to the consumer price index, which generally tracks inflation.[33] While that provision was removed from the bill that ultimately passed in the House and eventually became law,[34] its

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concurring) ("Congress justified its effort to further limit federal diversity jurisdiction [in passing the Judicial Improvements and Access to Justice Act] partly on the federal judiciary's increasing caseload and the potential for reduction thereof through the increase in the threshold jurisdictional amount, predicting that '[t]he increase in the amount in controversy to $50,000 should reduce the Federal diversity caseload by up to 40%.'" (quoting H.R. Rep. No. 889, 100th Cong., 2d Sess. 45 (1988))); Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 128 & n.48 (2003) (discussing the genesis of the amount-in-controversy requirement as a component of the statutory grant of jurisdiction to the federal courts, and noting that "[t]he reason[s] articulated for [subsequent] increases to the amount . . . ha[ve] consistently been to reduce the number of diversity cases that may be heard in federal court"); Note, *Federal Jurisdictional Amount: Determination of the Matter in Controversy*, 73 HARV. L. REV. 1369, 1369 (1960) ("The most reasonable objective to attribute to the jurisdictional minimum is that of enabling federal courts to devote adequate attention to 'important' matters by keeping small claims off the dockets.").

27. *See supra* note 8, and accompanying text.

28. *See* 13E WRIGHT, MILLER & COOPER, *supra* note 9, § 3601, at 30–32; *see also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1480 (2008).

29. *See infra* notes 36–41 and accompanying text.

30. *See* Edward A. Purcell, Jr., *Caseload Burdens and Jurisdictional Limitations: Some Observations From the History of the Federal Courts*, 46 N.Y.L. SCH. L. REV. 7, 11–13 (2003) ("Congress periodically attempted to alleviate the burdensome caseload through a variety of measures, including narrowing diversity jurisdiction, raising the jurisdictional amount, establishing intermediate appellate courts, authorizing new judgeships, streamlining procedural arrangements, and creating special administrative structures to help the courts process cases more efficiently.").

31. As one commentator pointed out, legislation proposed "[a]s recently as 1978 . . . would have eliminated diversity jurisdiction entirely" if enacted. Jones, *supra* note 23, at 1000 & n.4; *see* Harry Phillips, *Diversity Jurisdiction: Problems and a Possible Solution*, 14 U. TOL. L. REV. 747, 749 (1982) ("Some of the congestion of federal court dockets, and some of the delays and frustrations encountered by litigants and their attorneys, could be alleviated if Congress would repeal diversity of citizenship jurisdiction.").

32. H.R. 4113, 111th Cong. (2009).

33. H.R. 4113, § 103.

34. H.R. 4113, 111th Cong. (2010). The enacted version of the bill did not include any changes to the amount in controversy. *See* MB Fin., N.A. v. Stevens, 678 F.3d 497, 498 (7th Cir. 2012) (referencing The Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L.

initial inclusion might demonstrate Congress's recognition that the $75,000 sum it chose in 1997 no longer accurately serves its policy objectives. It also demonstrates that Congress, like many commentators,[35] has begun to consider more innovative ways to control the diversity docket.

And, as observed above, that is likely a function of the diversity docket's ever-increasing burden on the federal judiciary. More specifically, while the civil caseload of the federal district courts has risen at a moderately increased rate over the past ten years, the number of cases filed under the federal diversity statute has increased at a much higher rate.[36] For example, during the applicable twelve-month period beginning in 2010 (ending in 2011), there were 294,336 total civil actions commenced in the federal district courts, roughly a 4.2% increase from the same period beginning in 2009 (ending in 2010), but only a 15.6% increase from the period beginning in 2000 (ending in 2001).[37] The number of cases filed under the federal diversity statute, by contrast, has increased at a much higher rate: in the period beginning in 2000 (and ending in 2001), only 48,135 private diversity cases were commenced.[38] That number increased

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112–63, 125 Stat. 758 (2011)).

35. *See supra* notes 21–23 and accompanying text. Indeed, one commentator has opined that a provision of the Act that would have allowed a plaintiff to avoid removal to federal court was designed to reduce the diversity docket. *See* Arthur Hellman, *The Federal Courts Jurisdiction and Venue Clarification Act: Some Missing Pieces,* JURIST, Jan. 4, 2012, at 1 (referencing provisions included in an earlier version of the Act that "would have allowed a plaintiff to avoid removal based on diversity by filing a 'declaration' . . . reducing the amount in controversy below the minimum specified in 28 U.S.C. § 1332(a)").

36. Our references to the statistics compiled by the Administrative Office of United States Courts, draw on Table C in the data report titled, "U.S. District Courts–Civil Cases Commenced, Terminated, and Pending" during each applicable twelve-month period. *See, e.g.*, Federal Judicial Caseload Statistics (Table C) 40, http://www.uscourts.gov/Statistics/FederalJudicialCaseload Statistics.aspx. However, the jurisdiction-specific discussion draws from Table C-2. *See, e.g.*, Federal Judicial Caseload Statistics (Table C-2) 46, http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/tables/c02mar 01.pdf. Those statistics reveal that, in the five years preceding 2001, the same was not necessarily true. A report prepared by the Office of Human Resources and Statistics suggests that, from January of 1997 to December of 2001, federal district court filings declined roughly one percent. Office of Human Resources and Statistics, *Federal Judicial Caseload: Recent Trends*, at 2, http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/20015yr.pdf (1997–2001). For more, see the website for the Administrative Office of the United States Courts regarding federal judicial caseload statistics, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx.

37. *See Federal Judicial Caseload Statistics* (Table C), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/ 2011/tables/C02Mar11.pdf, at 40 and (Table C-2), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/tables/c02mar 01.pdf, at 46.

38. *See Federal Judicial Caseload Statistics* (Table C-2), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/tables/c02mar 01.pdf, at 46.

to 63,383 in 2005,[39] and 108,072 in 2011.[40] Thus, without considering the specific fluctuations from the years between 2001 and 2011 (but acknowledging a generally increasing rate), there was a 125% increase in diversity filings in the district courts during that time period.

The principle cause for the recent spike in diversity filings is not readily apparent from the available statistics.[41] Perhaps the statistics reflect a lingering belief among some that, despite the many changes in America's social and political fabric since the 18th century, some out-of-state litigants prefer federal courts due to concerns of bias.[42] The significantly increasing docket may, on the other hand, simply be attributable to attorney preference for the Federal Rules of Civil Procedure and the desire for quick and efficient dispute resolution before high quality judges.[43] Or, the statistics may simply reveal elevated incidence of abuse of the diversity process.[44]

III. A FORMULA TO TEMPER THE DIVERSITY JURISDICTION PROBLEM

Whatever the cause for the influx in the diversity docket, the burden an increased caseload imposes on the federal judiciary is not limited to the caseload itself. In addition to volume, diversity cases present many legal and administrative difficulties for the federal courts.[45] Administratively, diversity cases are difficult because they "are overrepresented among" federal jury trials,[46] and often involve extensive motion practice due (in

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39. *Id*.

40. *Id*.

41. We do note, however, that personal injury tort actions filed under applicable state law constitute by far the largest percentage of diversity filings. For example, during the twelve-month period from March 31, 2009 and 2010, personal injury action accounted for roughly 72% of the total diversity filings in the federal district courts. *See Federal Judicial Caseload Statistics* (Table C-2), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C02Mar10.pdf, at 46.

42. *See* Benjamin T. Clark, *A Device Designed to Manipulate Diversity Jurisdiction: Why Courts Should Refuse to Recognize Post-Removal Damage Stipulations*, 58 OKLA. L. REV. 221, 222 (2005).

43. DAVID W. NUEBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 71 (5th ed. 2010).

44. Indeed, many commentators cite abuse of the diversity-jurisdiction process as a basis for reform. *See, e.g*., 13E WRIGHT, MILLER & COOPER, *supra* note 9, § 3601, at 23 & n.52 (collecting authorities); *cf., e.g*., *id*. at 23–24 ("The fact that [before 1958] a corporation could carry on most or all of its business in a particular state, but still resort to the federal courts simply because it was incorporated elsewhere, was recognized by all as an abuse . . . .").

45. *See, e.g*., Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 100–01 (1990). For more on the case against diversity jurisdiction, *see id*. at 102–07.

46. *Id*. at 101. For the twelve-month period ending in June 30, 2009, there were a total of 4,640 cases disposed of in the federal district courts during or after trial (1.9% of the total filings). *Federal Judicial Caseload Statistics* (Table C-4), 57 (2009), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C04Mar09.pdf. Diversity cases constituted roughly 50% of the total. *Id*.

part) to the body of complex jurisdictional law the exercise of diversity jurisdiction demands.[47] Resolving those jurisdictional issues is a challenge, of course, but a good deal of the legal labor for judges relates to the merits of the dispute. Although many diversity cases do not involve complex underlying legal issues,[48] some present novel or unfamiliar questions of state law that are arguably better directed to state tribunals.

A. The Argument for an Automatic Formula

Recognizing the difficulties associated with the increasing diversity caseload, we aim to present a formula that could potentially alleviate the federal judiciary's burden without requiring extensive Congressional attention or action.[49] Congress's traditional approach to managing diversity caseloads within the federal judiciary has been, among other things, periodic increases to the amount in controversy.[50] While raising the amount in controversy may temporarily depress the diversity caseload, inflationary pressures, both in population and in currency,[51] ultimately erode the effects of such increases.[52] As a result, Congress inevitably revisits the issue only to again pass legislation increasing the amount in controversy. Between Congress's periodic "Band-Aid" fixes that are temporary at best, the judiciary is left to struggle under surging caseloads.[53]

Compounding the stress on the judiciary's caseload of late is the evident inability to confirm judicial nominees so as to fill vacancies in a

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47. *See* Kramer, *supra* note 45, at 105 (referencing the "difficulties [in diversity cases] associated with administering the *Erie* doctrine"); *see also* Crump, *supra* note 18, at 9; *cf.* Friedman, *supra* note 22, at 1252 (noting that some "[f]ederal procedural claims are more common in state proceedings").

48. As noted, the majority of diversity cases are personal injury tort actions. *See supra* note 41. Speaking generally, those actions are not particularly complex or challenging. Much like suits involving constitutional torts with "reasonableness" standards, however, they are often not amenable to summary disposition, and so are more likely to go to trial. *Cf.* Craig M. Reiser, Comment, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. PA. J. CONST. L. 195 (2009) (evaluating the summary judgment standard's application in constitutional tort actions seeking to redress Fourth Amendment violations).

49. Rather regrettably, we believe that such a formula is particularly necessary in light of the recent challenges Congress has faced in enacting legislation and filling vacancies in the federal judiciary. *See infra* notes 54–56 and accompanying text.

50. *See supra* note 26 and accompanying text.

51. *See* Ronald B. Standler, *The Effect of Inflation on Monetary Values in Statutes and Contracts*, at 2 (2004), *available at* http://www.rbs2.com/gold.pdf; H.R. 4113, 111th Cong. § 103 (2010).

52. *See* Standler, *supra* note 51, at 2 (noting that assuming a constant value of the dollar, as the United States government does in setting the amount in controversy, is "absurd" and advocating using the Consumer Price Index to index monetary values in statutes and long-term contracts).

53. *See* Purcell, *supra* note 30, at 11.

timely fashion.[54] This problem has been branded by many as a judicial "crisis" and has even led the Chief Justice of the United States to weigh in:

> The judiciary relies on the president's nominations and the Senate's confirmation process to fill judicial vacancies; we do not comment on the merits of individual nominees. That is as it should be. . . . There remains, however, an urgent need for the political branches to find a long-term solution to this recurring problem.[55]

Fewer judges and more cases lead the federal judiciary to be weighed down by an increasingly unmanageable docket.[56]

B. The Formula

A statutory mechanism that automatically adjusts the amount in controversy on an annual basis would conceivably help quell the aforementioned burden without requiring repeated legislative action.[57] It would take into account the average federal judge's workload, as well as inflation, with the goal of targeting the actual burden placed on the judiciary. This, ideally, would help maintain the fastest growing portion of

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54. *See* David Savage, *Chief justice urges end to partisan stalling*, L.A. TIMES, Jan. 1, 2011 , *available at* http://articles.latimes.com/2011/jan/01/nation/la-na-roberts-report-20110101 (noting that, at the time the article was written, about one in eight federal judgeships were vacant); *see also* Jennifer Bendery, *White House Poised to Take on Judicial Vacancy 'Crisis'*, THE HUFFINGTON POST, June 13, 2011, *available at* http://www.huffingtonpost.com/2011/06/13/white-house-poised-to-take-on-judicial-crisis_n_876185.html (citing a report which suggests that, "[d]uring [President] Obama's first two years in office, judicial vacancies grew from 55 to 97").

55. Savage, *supra* note 54 (quoting Justice Roberts) (internal quotation marks omitted).

56. *See Federal Judicial Caseload: Recent Trends*, at 13–14 n.15, http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/20015yr.pdf (1997–2001) (discussing the definition of a "judicial emergency" in terms of the weighted filings per judge). Of course, the caseloads of Article III judges in different districts can vary tremendously, and Congress has not always acted expeditiously in establishing new judgeships to alleviate the relative caseload burdens. *See, e.g.*, Justice Kennedy Joins Call for New Judgeships for Eastern California Court, News Release: U.S. Courts for the Ninth Circuit, August 30, 2010, *available at* http://www.caed.uscourts.gov/caed/DOCUMENTS/News/Justice_Kennedy_CAE_Remarks.pdf (noting that Justice Kennedy joined the voice of many in "urging Congress to move swiftly to fill vacancies on the federal bench and to authorize additional judgeships for those courts struggling to contend with massive caseloads" in the Eastern District of California).

57. Of course, our assumption is that upward adjustments to the amount in controversy would deflate diversity caseloads. Although that observation should strike as self-evident, it is also supported by empirical research. *See, e.g.*, *Federal Judicial Caseload: Recent Trends*, http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/20015yr.pdf (1997–2001) (attributing an overall decline in diversity filings during an observed time period after 1997 to Congress's 1996 amendment to 28 U.S.C. § 1332, which increased the amount in controversy from $50,000 to $75,000).

the federal docket at a manageable level.

Our proposed mechanism attempts to achieve the foregoing. It takes the form of a formula, which draws from other readily available government statistics such as the judicial caseload statistics compiled by the Administrative Office of United States Courts, so as to make the process of employing it as easy as possible. It is designed to function much like the Consumer Price Index (the CPI) published by the Bureau of Labor Statistics,[58] insofar as the baseline year is assigned an arbitrary value and adjusted each subsequent year for any changes. The formula is equally weighted between two components: the CPI and the ratio of filed diversity cases to the number of active federal district court judges (JI).[59] The formula principally consists of a factor which operates as follows:

$$Factor = .5JI + .5CPI$$

An example does well to illustrate the formula's utility. We begin by using the year 2001 as a baseline of manageable caseloads. Although we employ that particular year as the starting point based on a void in the available data,[60] we believe it represents a comparatively reasonable starting place considering the relatively recent increase in the diversity docket.[61] We next rebase the CPI for 2001 to 100 (instead of its actual value of 177.1),[62] and arbitrarily base JI at 100 for the same year. Doing that yields a factor of 100 for 2001 under our formula. In order to arrive at the current amount in controversy of $75,000, which Congress has tacitly deemed the appropriate sum through its inaction since 1997,[63] we next multiply 100 by 750 to achieve balance.[64]

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58. Detailed information on the CPI can be found at *Consumer Price Index*, BUREAU OF LABOR AND STATISTICS http://www.bls.gov/cpi/ (last visited Feb. 7, 2013).

59. The weight of each factor will alter the ultimate results of the formula. As more weight is assigned to the CPI, the variance of the amount in controversy from year to year declines. In other words, judicial caseloads experience greater swings each year than does the CPI. Congress can assign the CPI a greater weight in order to moderate the annual fluctuations in the amount in controversy.

60. The Administrative Office of the United States Courts only breaks down caseloads by type of jurisdiction from 2001 onward. *See Federal Judicial Caseload Statistics*, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx.

61. *See supra* Part II.B. However, assuming data is available for dates prior to 2001, Congress could select any year in which it believed the judicial caseload was acceptable and use that year instead. As explained *infra* in note 64, 1997 would be a particularly ideal starting point as Congress ostensibly believed that $75,000 was adequate to control the diversity docket based on the per judge caseload at that time.

62. *See* U.S. Department of Labor, *Consumer Price Index Historic Averages* (Jan. 16, 2013), *available at* ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.

63. We of course do not believe Congress necessarily deems the sum currently appropriate, *cf. infra* note 64, but accept that it does for purposes of this example.

64. Ideally, we would start with a CPI and JI of 100 using data from 1997 because

Using our rebase of the CPI[65] and the arbitrary sum we selected as the starting point for the JI, as well as its changes since that time,[66] the following chart illustrates how our formula would have impacted the amount-in-controversy requirement were it in place from 2001 to 2009:

Year	**CPI**	**JI**	***Factor***	**Amount in Controversy**
2001	100	100	100	$75,000
2002	101.58	107.02	104.3	$78,225
2003	103.9	124.05	113.98	$85,485
2004	106.66	122.76	114.71	$86,033
2005	110.28	129.16	119.72	$89,790
2006	113.83	126.72	120.28	$90,206
2007	117.08	188.61	152.85	$114,638
2008	121.57	135.11	128.36	$96,251
2009	121.14	168.05	144.59	$108,443
2010	123.13	209.04	166.09	$124,564

Congress expressed its policy preference for the appropriate number of diversity cases by fixing the $75,000 amount in controversy that year. *See* 28 U.S.C. § 1332(b) (Supp. 1997). While Congress's inaction since that time might reflect its judgment that the $75,000 sum continues to be appropriate, the lack of any change to the amount-in-controversy requirement does not necessarily mean that, and the available evidence of Congress's thinking is to the contrary. *See supra* note 33–36 and accompanying text. By using the 1997 data as a starting point, we would be able to ensure that our formula kept the diversity docket at a level already deemed acceptable by Congress. Of course, if Congress opts to employ a dynamic formula for the amount-in-controversy requirement, it can make an alternative policy judgment about the acceptable starting point that would result in our configuration being modified as necessary.

65. As noted, we have rebased 2001 as being 100. Our calculations to that end appear in Appendix B.

66. Raw calculations of the Judicial Index are available in Appendix A. The factor would be adjusted based upon caseload statistics tabulated from prior years. *See supra* notes 36–40 and accompanying text.

2011	127.01	220.54	173.78	$130,335

As our example reflects, the JI factor recognizes the actual burden (approximated from prior years' statistics) that the diversity caseload is causing, and increases the amount-in-controversy requirement accordingly.[67] By using that value, our formula is tailored to the actual growth of the diversity docket, unlike other dynamic solutions, including the original recommendation in the Federal Courts Jurisdiction and Venue Clarification Act of 2009 to index the amount in controversy to inflation alone.[68] And it also accomplishes what that particular proposal sought to do by retaining the sensible element of adjusting the amount-in-controversy requirement to the value of real dollars by way of including the CPI.[69]

IV. THE COSTS AND BENEFITS OF OUR FORMULA

Although the resulting figures derived from the formula (or a reconfiguration of it) are not necessarily numbers capable of easy reference, Congress could consider a way to round off the annually obtained jurisdictional amounts so as to facilitate ease of application.[70] Were it to do so, the administrative complications arising from application of the formula would likely be minimal. We therefore believe that the formula we have chosen provides a very real solution to the amount-in-controversy problem. We realize, of course, that the formula we propose has costs and benefits from a policy perspective. We turn to very briefly examine some of those

67. Utilizing the relevant statistics to approximate the influence of the total caseload, as opposed to the diversity caseload, could be an alternative plug-in preference for the JI component of the formula. This would allow the formula to take account of the total burden of the federal docket. But as we have noted, the total caseload influxes, at least for the better part of the last decade, have been relatively moderate. *See supra* notes 36–37 and accompanying text. And, as we describe the formula, it allows for a more narrow focus on the diversity burden, considering constant the increases in the federal docket as a whole.

68. *See supra* notes 32–34 and accompanying text. We have chosen to incorporate the extent of the diversity docket's burden on the federal judiciary based on our understanding that one of the central purposes of the amount in controversy is to control the diversity docket. *See supra* note 26.

69. Congress may, of course, adjust the formula for any weight it deems more appropriate. Or, it may wish to consider additional factors or modify those we have chosen.

70. In the original House bill, Congress in fact attempted to set the inflation-adjusted amount in controversy to the nearest $5,000 mark. *See* H.R. 4113, 111th Cong. (2009) ("Effective on January 1, 2011, and January 1 of each fifth year thereafter, the dollar amount then in effect as the minimum amount in controversy applicable under subsection . . . shall be adjusted by an amount, rounded to the nearest $5,000 (or, if midway between multiples of $5,000, to the next higher multiple of $5,000), which reflects the change in the Consumer Price Index for the month of September of the appropriate year, over the Consumer Price Index for the month of September of the fifth year preceding the appropriate year."); *see also supra* notes 32–34 and accompanying text.

costs and benefits.

A. Benefits[71]

1. Federalism

The role of the federal courts in adjudicating state-law disputes has been contested since drafting of the Constitution.[72] What seems clear, however, is that the original justifications for diversity jurisdiction have eroded over time.[73] Thus, a system originally created to ensure access to justice has metamorphosed into an implicit jurisdictionally driven subsidy to state judicial systems. Essentially, the federal government is now simply providing means for litigants to compel the federal judiciary to adjudicate matters generally (and more properly) created and reserved for the state courts. Principles of federalism suggest that the federal government should leave more state law disputes to be settled in state law tribunals. State courts are presumably better positioned to interpret their own laws and have the ability to create the binding precedent that our system of justice relies upon.[74]

Indeed, differing interpretations on the contours of state law—by federal district courts and courts of appeal—may create tension with state policy initiatives and diminish state supreme courts' preferential trajectory of the development of state law.[75] And the problem is not easily avoided. Federal courts sitting in diversity inevitably (and frequently) must make guesses on open questions of state law where none of the applicable state courts have had occasion to decide the issue.[76] Worse still are those

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71. As our proposal and discussion to this point have made clear, we believe there are many benefits attending the imposition of increased controls on the diversity docket. We do not endeavor to catalogue them all. Rather, we discuss a sampling of the benefits of decreasing access to federal court via diversity jurisdiction by increasing the amount-in-controversy requirement through our formula.

72. *See, e.g.*, *supra* notes 12–14 and accompanying text.

73. *See, e.g.*, *supra* notes 19–20 and accompanying text.

74. Friedman, *supra* note 22, at 1237 ("[T]he rule is that only the courts of the sovereign (and particularly the sovereign's highest court) can render an authoritative interpretation of that sovereign's laws.").

75. *Cf. id.* at 1238 ("[W]hen federal courts resolve open state law questions there is the potential to create a variety of problems, from the minor to the chaotic."); *see also* Jed I. Bergman, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 998 (1996) ("In light of [interpretation] problems, not to mention the danger to litigants of being stuck, *Batts*-like, with an incorrect result that is not reviewable by the state's highest court, it might be more sensible to allow the federal court simply to abstain from deciding the state-law question, leaving the litigants in state court." (footnote omitted)).

76. Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 238 (2006) ("Disputes litigated in federal court frequently must be decided at least in part according to state law. But the precise content of the state law at issue is not always clear.

instances in which divergence on the question exists within the state-court system because the state's highest court has yet to pass upon it.[77] In those cases, a federal court must decide which of the competing state court decisions most accurately applies state law and its answer can be attractive to litigants. But that solution impedes the definitive development of the question itself because such determinations are not binding on the state courts. So some lower state courts may accept a federal resolution, some may later reject it, and still other questions may skate unresolved for many years thereafter. In the end, the developmental process of the question becomes hampered by the availability of diversity jurisdiction.[78]

Reducing the implicit federal subsidy to the states would perhaps be a welcome change because, among other federalism-driven reasons, it would reduce the prevalence of cross-jurisdictional resolution of dispositive questions of state law.[79]

Sometimes state courts have not addressed the issue to be decided in federal court. Other times state courts have addressed the issue but have reached contradictory conclusions.").

77. *See id*. at 246 ("One situation that is easy to identify as a problem for federal courts is where intermediate state appellate courts directly conflict on a point of legal doctrine.").

78. *See* Sloviter, *supra* note 19, at 1671 ("We have overlooked that the filing of [thousands of] diversity cases in the federal courts each year results in the inevitable erosion of the state courts' sovereign right and duty to develop state law as they deem appropriate."). There are, moreover, other problems with federal courts routinely deciding matters of state law. For instance, "the [federal] circuit courts themselves are [often] confused as to the appropriate weight of their own previous predictions of state law. This confusion compounds that inherent in the task itself. The state law to be applied in federal court is thus frequently unclear along one or more of several directions." *Id*. at 249; *see* Haley N. Schaffer and David F. Herr, *Why Guess?* Erie *Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1626 (2010) ("*Erie* guesses are unreliable because a state court could later decide the same issue differently; thus citizens cannot rely on the federal court prediction in conducting their affairs." (internal quotation marks omitted) (quoting Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 210–11 (2003))).

Nor is certification necessarily the answer. Certification of a question of state law, or the "process whereby a federal court can certify a particular question of state law to the state's highest court," Glassman, *supra* note 76, at 249, is a frequently unreliable process. It adds significant delay to the resolution of a dispute, if the state's certification procedure even ever results in an answer, *see id*. at 250; Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?*, 38 VAL. L. REV. 327, 339–40 (2004) ("The [certification] process is sometimes not as efficient as it might be, and crafting a certified question that properly presents the issue in a workable manner has proven to be difficult on occasion."), and it facilitates a duplication of efforts and resources between two separate sovereigns, Glassman, *supra* note 76, at 253. In other words, we believe it to be more desirable to permit the development of state law via the direct channels in state court.

79. Relatedly, necessity is a source of invention. The resulting influx of cases at the state level may result in innovations injustice. Expanding small claims jurisdiction, mandatory mediation, limited-jurisdiction and other innovations may be introduced to handle the influx. Further, state and local officials will likely be more responsive to complaints about issues in the judicial system than their counterparts in Washington. One cannot find it hard to picture that local accountability may ultimately improve access to justice and produce better outcomes. "Diversity provides litigants who satisfy its requirement a choice of forums, enabling them to pick the court that is 'better' for them in any particular case. As such, its continued existence 'diminishes the

2. Federal Courts Focusing on Federal Questions

One particularly welcoming benefit to moving diversity cases out of the federal docket would be the increased attention federal judges could give to federal questions. Federal courts have the ability to create binding precedent in this area of law and have the (sometimes exclusive)[80] expertise to deal with federal questions. Issue specialization tends to improve outcomes, and the judiciary may not be different in that regard.[81] Analogously, though Article III judges are traditionally classified as generalists, an increase in the jurisdictional focus in federal court would benefit both criminal and civil litigants. That is, the more time Article III judges have to consider federal claims, ideally, better law would conceivably result.

B. Costs

Although there are several conceivable costs, we focus on the one we perceive to be the most significant—the burden our formula, which would increase the amount in controversy on an annual basis, would cause other other judicial and non-judicial tribunals. The diversity cases that are eliminated from the federal docket will not simply disappear from judicial refereeing. Rather, they will migrate to other forums such as state courts and perhaps alternative dispute resolution tribunals (ADR). The burdens of dwindling funding and overworked judges are not unique to the federal system. The recent economic crisis has created a wave of state-level fiscal crises. For example, California has furloughed state employees (including those within the judiciary) causing delays to ripple through the judiciary.[82]

By moving cases out of the federal docket to the state courts, the federal government will arguably strip the states of a federal subsidy at a

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incentives for state court reform.'" Kramer, *supra* note 45, at 106 (quoting 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601, at 354 & n.63 (2d ed. 1984)).

80. *E.g.*, San Juan Cnty. v. United States, 503 F.3d 1163, 1182 n.5 (10th Cir. 2007) (en banc) (Federal Tort Claims Act).

81. *See* Chris Guthrie, Jeffery J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1479 (2009) ("Based on previous research involving generalist judges—federal district judges, state court judges, and federal magistrate judges—we have developed a model of judicial decision making that explains how even well-qualified, experienced, and well-intentioned judges can make erroneous decisions. . . . [W]e have found that generalist judges appear to rely too heavily on intuition, rather than deliberation, when making judgments.").

82. *See* Maura Dolan & Victoria Kim, *Budget cuts to worsen California court delays, officials say*, L.A. TIMES (July 20, 2011), *available at* http://articles.latimes.com/2011/jul/20/local/la-me-0720-court-cuts-20110720.

particularly inopportune time.[83] But while that argument holds some merit, there is scant empirical evidence suggesting that reducing the federal diversity docket places as substantial a burden on state courts as the failure to alleviate it does on the federal judiciary.[84] On the contrary, many commentators have indeed opined that significantly reducing diversity jurisdiction would not greatly burden state courts.[85]

Additionally, if faced with a legal barrier to litigating in federal court and a practical barrier to litigating in state courts, litigants may also turn to various forms of ADR, driving up its cost due to the sudden increase in demand. However, we found no empirical evidence in forceful support of that argument.[86] Moreover, it is not necessarily true that a great majority of the litigants moving to state court would prefer to utilize ADR rather than the courts, such as to cause a significant price-driving increase in demand.

There are, to be sure, no clear answers on cost shifting in the event the diversity docket is reduced. While we believe that no significant collateral burdens would be placed on opposing court systems and private dispute resolution entities, policymakers may want to, at the very least, consider the

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83. We note, as a corollary, that the shift to overburdened state courts and potentially costly and private litigation raises several fundamental fairness concerns. Should the federal government, traditionally serving as the arbiter of due process when states fail to do so, enact a statute that will ultimately decrease access to justice? Should the federal government encourage the use of private arbitration, thereby eroding the precedent-based system (and public good) of common law used throughout virtually all of the country? Broadly, however, we have uncovered scant evidence or data supporting the proposition that significantly reducing the amount of diversity cases would necessarily prejudice litigants. *See* Kramer, *supra* note 45, at 117–20 (pointing out the weaknesses in the arguments favoring diversity jurisdiction, including the proposition that federal courts provide a higher quality of justice and that they provide protection against out-of-state bias).

84. *See* Kramer, *supra* note 45, at 110–11. On this score, Professor Kramer discusses studies which were conducted on a state-by-state basis and which show that state courts are statistically willing and able to manage the additional cases that would result from an alleviation in the diversity docket. *See id*. at 110–16. He ultimately concludes that the "data should allay fears that shifting diversity cases to the state courts will impose a substantial new burden on the states." *Id*. at 116. While these studies are somewhat outdated, we were unable to find significant evidence suggesting that the composition of state courts nationwide has somehow changed significantly.

85. *See, e.g*., David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 327 (1977) (analyzing authority which suggests that "transferring half the diversity cases to state courts of general jurisdiction would add only about one percent to the volume of those courts' business").

86. As a side note, ADR costs are not much lower than the costs litigants would face in court. *See* Benny L. Kass, *Housing Counsel: Arbitration can sometimes be as expensive as litigation*, WASHINGTON POST (March 25, 2011), *available at* http://www.washingtonpost.com/realestate/housing-counsel-arbitration-can-sometimes-be-as-expensive-as-litigation/2011/03/21/AFMzJzWB_story.html. Thus, for all practical purposes, the net effect of fewer cases in federal court may not significantly raise the cost of all forms of ADR. More specifically, the net effect of a decrease in diversity jurisdiction on ADR procedures may simply not be much different at all.

potential effects.

V. CONCLUSION

While our proposal that Congress adopt a dynamic formula for adjusting the amount in controversy could perhaps be characterized as a exercise in thought provocation, the problem that prompted it is very real. A bloated federal diversity docket limits the judiciary's ability to provide justice for all litigants, as it compels longer decisional periods and less attention to other matters. We believe our formula will help stymie that problem going forward, obviating the need for frequent and arbitrary revisits to put out the diversity conflagration. We recognize that our approach may need modification before being implemented, and we have designed it to be sufficiently malleable so that Congress can use it to achieve a workable allocation of state-law matters without drastically altering the jurisdictional landscape. In the end, while there are multiple costs and benefits affixed to the concept of a dynamic formula (many of which we do not discuss here), we believe our formula provides a contextual starting point for Congress to meaningfully address those and other issues and quell the practical, administrative, and legal problems associated with the rapidly expanding federal diversity docket.

APPENDIX A

Calculation of Judicial Index for Years 2001-2010

Year (A)	**# of District Court Judges (B)**[87]	**Diversity Caseload (C)**[88]	**(C)/(B)**	**JI where 2001 = 100**
2001	665	48,135	72.38	100
2002	665	51,513	77.46	107.02
2003	680	61,059	89.79	124.05
2004	679	60,334	88.86	122.76
2005	678	63,383	93.49	129.16
2006	678	62,188	91.72	126.72
2007	678	92,557	136.51	188.61
2008	678	66,303	97.79	135.11
2009	678	82,466	121.63	168.05
2010	678[89]	102,585	151.31	209.04
2011	677	108,072	159.63	220.54

Example Indexing Calculation for Year 2002

87. http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx
88. http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx
89. As of September 2010.

$$\frac{72.38}{100} = \frac{77.46}{x}$$
$$72.38x = 7746$$
$$x = 107.0185$$

APPENDIX B

Calculation of Rebased CPI for Years 2001-2010

Year	**Actual CPI**	**CPI where 2001 = 100**
2001	177.1	100
2002	179.9	101.58
2003	184	103.9
2004	188.9	106.66
2005	195.3	110.28
2006	201.6	113.83
2007	207.342	117.08
2008	215.303	121.57
2009	214.537	121.14
2010	218.056	123.13
2011	224.939	127.01

Example Rebasing Calculation for Year 2002

$$\frac{177.1}{100} = \frac{179.9}{x}$$
$$177.1x = 17990$$
$$x = 101.58$$