

**Northern Illinois University College of Law**  
*The Professor's Column*  
**June 19, 2008**

**Finishing a Friendly Argument:  
The Jury and the Historical Origins of Diversity Jurisdiction**

Robert L. Jones

In October of 2007, I published the above entitled article in the New York University Law Review. The article has been well received and has already been cited in some federal and state judicial opinions, as well as in some of the leading treatises on civil procedure and federal jurisdiction. I thought I would take this opportunity in the Professors' Column to share a brief summary of the article with you.

The central premise of my article is that the lower federal courts were created primarily to direct important state law claims into a forum where the composition of the juries could be tightly controlled. Many lawyers assume today that the federal courts were created to facilitate the enforcement of federal law, *e.g.*, by providing a forum for the protection of constitutional rights and the prosecution of federal statutes. It is highly unlikely, however, that such concerns constituted the principal motivating force behind the creation of the lower federal courts, *i.e.*, all federal courts below the Supreme Court. With the exception of a brief one year aberration, it took nearly one hundred years before the lower federal courts were even bestowed with *jurisdiction* over civil claims based on federal law. Prior to 1875, all cases involving the interpretation of federal statutes or the federal constitution had to be litigated, in the first instance, in state court. The lower federal courts, by contrast, were concerned almost exclusively with claims based on state law (by virtue of diversity jurisdiction) and with admiralty claims.

It is also important to bear in mind that the original U.S. Constitution contained very few limitations on state action. None of the civil liberties afforded in the Bill of Rights, for example, applied to the states. If an individual's civil rights were being violated by a state, that individual simply had no recourse under federal law until the passage of the 14th Amendment in 1868 and the subsequent incorporation of the Bill of Rights.

It is similarly anachronistic to think that the lower federal courts were created because of a perceived superiority of the federal judiciary. Even if attributes such as appointment and life tenure were thought to be superior to the contemporary practices of the states, it is a dubious proposition that these differences accounted for the primary motive behind the creation of the lower federal courts. The truth is that juries, rather than judges, decided cases in the courts of eighteenth century America. American juries, in civil cases as well as criminal, generally exercised the right to decide issues of law as well as fact. Counsel were often allowed to argue an interpretation of the law that contradicted the bench (assuming, as was not always the case, that the bench proposed its own interpretation of the law) and the jury was free to select the version of the law that it found preferable. Virtually all of the techniques used by judges to control juries today, furthermore, were unacceptable to eighteenth century practice. Judgments notwithstanding the verdict, for example, simply did not exist. The few jurisdictions that allowed the bench to overturn a jury verdict required that the bench re-submit the cause for the jury's determination.

In light of the sweeping prerogatives enjoyed by eighteenth century juries, it is highly unlikely that the genesis of the lower federal courts was attributable to any putative differences between federal and state judiciaries. The creation of the lower federal courts was far more likely to be attributable to differences between federal and state juries. When

the compositions of those two bodies are actually analyzed, we see dramatic discrepancies between the political, economic, and social compositions of the early federal and state juries.

The discrepancies between federal and state juries were attributable to several factors. First, and perhaps foremost, the differences were attributable to the broad discretion federal marshals employed in the selection of federal juries. Unlike today, where jurors are drawn by lot from the larger community, the prevailing practice in 1787 allowed for the hand selection of jurors. In the majority of federal courts, therefore, the federal marshals (who themselves were appointed by the president) possessed complete freedom to select whomever they desired to serve as federal jurors. The evidence strongly suggests, furthermore, that the marshals consciously exercised this control over jury selection to ensure that particular groups of individuals were repeatedly selected to decide the state law cases brought in federal court. This author conducted a detailed analysis of the federal jurors who decided cases in New York federal court during the period of 1791 to 1808. The study revealed that the federal marshals in New York repeatedly selected the same individuals for jury service, and that the selected jurors tended to share the same political beliefs, economic perspectives, and social status as the marshals. While empirical research remains to be done in the other circuits, there is no reason to think that the results in New York are atypical. Federal marshals in a variety of circuits around the country, for example, utilized their powers over jury selection to manipulate the results of federal prosecutions under the Sedition Act of 1798.

The other principal way in which federal officials dictated the composition of federal juries was through Congress' control over the geography of federal jury pools. In contrast to today's practice, there was no requirement that early federal juries be geographically

connected to the parties or subject matter of the lawsuit (other than the fact that they had to be drawn from somewhere in the same state). Early federal trial courts had jurisdiction over the entire forum state in which they sat. The federal courts were located, however, in only one (or at most two) cities within that forum state. The result, by virtue of the exigencies of travel, was that federal juries were drawn exclusively from the immediate environs of the federal courthouse but had the power to decide cases involving parties and actions based several hundred miles away. The author's study of the New York federal court from 1791 to 1808 confirmed that virtually all of the jurors who decided the cases in New York federal court during that period were drawn from the island of Manhattan.

The demographics of the federal jury pools, therefore, differed dramatically from the state court jury pools that were drawn from diverse cross sections of the states. By virtue of Congress' decision to locate the federal courts in the nation's major commercial, urban centers along the coast, for example, the federal jury pools were dominated by merchants and Federalists. The state court jury pools, by contrast, were composed overwhelmingly of farmers and tended much more often to include anti-federalists. In addition, federal juries were more likely than their state counterparts to be comprised of lawyers and professionals, the wealthy, and the college-educated. The overarching result was that the federal juries much more closely resembled the marshals, and the Framers, than did the state court juries.

The essential point is that these discrepancies between early federal and state juries were neither unforeseen nor unintended. As the Framers undoubtedly understood in 1787 when they drafted the Constitution, the creation of the lower federal courts bestowed federal officials with the power to control the composition of federal juries. At the time of the Constitutional Convention, the prevailing practice in American courts was to allow for the

hand selection of jurors and the manipulation of jury compositions was a relatively common practice in the period leading up to 1787. In fact, numerous Framers in Congress and the first two Administrations played significant roles with respect to the manipulation of early federal jury compositions.

Control over the compositions of federal juries, furthermore, was entirely consistent with the Framers' overarching purpose of creating a federal government that would check the operation of unrestrained democracy in the states. To many Framers, state court juries were a particularly glaring example of the risks associated with allowing ordinary citizens too much control over the governance of the nation. As an autonomous body of common citizens operating with an almost unfettered power to decide legal controversies, juries represented one of the most direct, and therefore dangerous, forms of democracy at the time. Just as the proponents of the Constitution believed that various factors would make the federal legislature and executive superior to their state counterparts—for example, nationwide presidential elections by electors, a relatively small Congress populated by a more elite class of legislators, a more deliberative Senate, larger congressional districts that diffused the influence of “factions,” etc.—the Framers believed that the tight control maintained by federal officials over the selection of federal juries would transform the federal courts into a superior forum, *i.e.*, one that was more aligned with the values and perspectives of the Framers. Whereas the mass of ordinary citizens might have had the power to issue the final word in state court cases, federal officials could judiciously exercise their control over federal jury compositions to ensure that only the “better sort” of Americans would decide cases in the federal courts. It was this desire to ensure that important cases were decided by these jurors, rather than a putative desire to wrest cases

away from state benches or state legislatures, that constituted the single most important force behind the establishment of diversity jurisdiction and the creation of the lower federal courts.

Previous scholarship had missed this essential point regarding the origins of diversity jurisdiction and the lower federal courts. The traditional defense of diversity jurisdiction, for example, has been on grounds that the federal bench is better equipped (or at least more willing) to shield out-of-state litigants from the state prejudices of juries. Whether this defense has any applicability or truth today, it certainly is misguided as an historical explanation for diversity jurisdiction's origins. Juries, rather than judges, possessed the power to decide cases in American courts at the time of the Constitution's drafting and adoption. There were far more salient divisions gripping American society at the time of the Constitution's adoption, furthermore, than those based on state affiliation.

The best prior explanation for the origins of diversity jurisdiction was offered by Henry Friendly in his 1928 article, *The Historic Basis of Diversity Jurisdiction*. Friendly correctly pointed out that diversity jurisdiction had little to do with putative state prejudices. Instead, he argued that diversity jurisdiction was intended to create a forum that would be more favorable to creditors and commercial parties than the existing state courts. Friendly was undoubtedly correct that the federal courts were intended to be a favorable forum for certain classes of litigants such as creditors. He failed to identify, however, the very feature of the federal courts most responsible for converting them into such a forum: their jurors. Equally important, Friendly's account was far too myopic in its depiction of the Framers' interests in creating diversity and the lower federal courts. As important as creditor/debtor relations were at the time, it is unlikely that any single sociopolitical issue could have been

responsible for the Framers' desire to create diversity jurisdiction and the lower federal courts. The Framers' faith that federal officials would be superior to their state counterparts translated into a corresponding faith in federal juries. That faith, in turn, was not limited to any single sociopolitical issue, group of cases, or time period. In fact, the Framers had reason to believe that the composition of federal juries, controlled and regulated as they were by federal officials, would continue to be superior to their state counterparts long after the Framers themselves had ceased to play any role in government and long after the controversies of their day had been superseded by new and unforeseen developments.

Whether diversity jurisdiction plays a beneficial role in our federalist structure of government is an issue that should be continually revisited as our society and its institutions evolve. To conclude that one is uncomfortable with the original purpose of diversity is not to say that the jurisdiction does not perform a valid role in our legal system today. It is an issue, however, with substantial practical consequences. While diversity claims may constitute a relatively small percentage of the federal docket, in many cases the filing or removal of diversity claims in federal court can be outcome-determinative for the litigants or can radically alter the expected values of claims. In so far as our perception of history tends to color debates about our existing institutions, particularly our constitutional ones, future discussions regarding the propriety of diversity jurisdiction should be freed from the weight of these century-old misconceptions regarding the jurisdiction's origins.