Are State Courts Biased? Evidence from Choice of Law

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PRELIMINARY DRAFT

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Abstract

Choice-of-law decisions are examined for evidence that courts are biased in favor of local residents. The data suggest that state courts are very biased, choosing pro-plaintiff law roughly twice as often when the plaintiff is local. In contrast, federal courts exhibit no local bias. Evidence of state-court bias suggests the continuing importance of diversity jurisdiction and calls into question the fairness and perhaps even constitutionality of modern choice-of-law methods. Evidence of state-court bias in modern choice-of law decisionmaking also lends support to those who argue that vague standards (as opposed to rigid rules) facilitate biased decisionmaking, because modern choice-of-law doctrine instructs judges to decide cases based on relatively indeterminate factors such as "state interests" and "the most significant relationship."

[**Note to Columbia workshop participants**. This paper is based on a small database of cases. Research assistants are in the process of collecting more data. As noted in the draft, these additional cases will allow exploration of additional variables and will (hopefully) strengthen the results.]

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1. Introduction

An ideal of justice is impartiality, but throughout U.S. history people have feared that state courts would be biased against out-of-state residents. That fear was one of the motivations for the creation of federal diversity jurisdiction, which usually allows out-of-state residents to litigate in federal rather than state court. Nevertheless, in recent decades, many judges and commentators have suggested that state court parochialism is a thing of the past and that diversity jurisdiction is no longer necessary to protect non-residents. Rigorous empirical work in this area, however, has been scarce, so policy makers have lacked the information they needed to make appropriate decisions about the scope and future of diversity jurisdiction.

State court bias is also an important topic for understanding the effect of institutional design on judicial performance. Federal court judges are appointed for life by the President with consent of the Senate, but most state court judges serve limited terms and are elected and/or can be removed by voters. Critics have asserted that the structure of state courts makes them prone to bias. Because only state citizens can vote, judges have an incentive to favor in-state parties and to redistribute from out-of-state litigants to local residents. Again, because of the paucity of research, the effect of institutional structure on bias has been difficult to ascertain.

Choice-of- law decisions provide a valuable window into state court bias. Because choice-of-law decisions are made by judges, one can distinguish between judicial bias and jury bias. Because choice-of-law decisions often result in published opinions, one can identify and control for other factors that might affect outcomes, such as the location of the injury. Because choice-of-law decisions usually are binary – either the law of the forum state[1] is chosen or the law of some other state is chosen – analysis is relatively easy. In addition, because modern choice-of-law methods give broad discretion to judges, they give judges ample opportunity to engage in biased adjudication. Finally, because choice-of-law decisions are made in both federal and state courts, one can compare bias in those two institutional settings.

Analysis of published decisions suggests that state court bias is real. State court judges are about twice as likely to choose law that favors the plaintiff if the plaintiff is local and the defendant is out-of-state than vice version. Federal courts display no such bias.

In addition to its implications for debates about diversity jurisdiction and judicial selection, these data about bias contribute to debates in several other areas of the law. Modern choice-of-law rules were developed and adopted in the late twentieth century and reflected a rejection of earlier rules, that were seen as rigid. Instead, courts adopted more flexible standards that allowed judges to consider a large number of factors. Understanding the actual implementation of the modern choice-of-law doctrine thus contributes to the debate about rules and standards, and, in particular, to whether standards facilitate biased adjudication.

Documenting out-of-state bias also has implications for personal jurisdiction doctrine. As the author has argued in several recent articles, one function of the modern constitutional law of personal jurisdiction is that it helps protect out-of-state litigants from state courts that are likely

[1] The "forum state" is the state where the case is being litigated. So if a California state court chose to apply California law, it would be choosing forum law. On the other hand, if a California state court chose to apply Nevada law, it would not be choosing forum law.

to be biased against them.[2] The validity of that approach depends, in part, on the extent to which state courts are, in fact, biased.

Analysis of bias in modern choice-of-law also, obviously, contributes to the ongoing debate about the wisdom of the "American Choice of Law Revolution."[3] While modern approaches to choice of law have their defendants, some advocate a return to the older First Restatement's rule-based approach, and other urge adoption of new methods. Evidence of bias against out-of-state residents may also, as James Hart Ely argued, suggest that modern choice-of-law approaches are unconstitutional.[4]

Section 2 provides background on choice of law. Section 3 reviews the literature. Section 4 discusses data and methodological issues. Section 5 analyzes the data, and Section 6 concludes.

2. Choice of Law[5]

Choice of law issues generally arise when the plaintiff and/or the defendant do not reside in the place where events most relevant to the dispute took place. A simple example might involve a car accident in Nevada between two residents of California. If Nevada law capped damages, while California law did not, would California or Nevada law apply? Until recently, the answer would have been relatively simple, because the "traditional" rule, embodied in the First Restatement of Choice of Law, was that, in tort cases, courts should apply the law of the place of accident. So, in the simple hypothetical just set out, Nevada law would apply because the accident was in Nevada, so damages would be capped.

In the mid-twentieth century, the traditional "place of injury" approach came under sustained criticism, and commentators suggested a variety of different approaches. The most influential was probably Brainerd Currie's "interest analysis." He argued that one must take into account the interests and policies that lie behind each state's laws, and that sometimes one would discover that there was, in fact, no conflict. For example, in the simple hypothetical just proposed, interest analysis might suggest that California law would apply. Nevada's cap on damages, it could be argued, reflects a policy choice by Nevada to lower insurance premia for Nevada residents by reducing tort damages. That is a policy that would be relevant if the defendant were a Nevada resident, but not when, as in the hypothetical, the defendant is a Californian. Capping damages when the defendant is a Californian would have no effect on insurance premia in Nevada, and thus would not further the interests of Nevada or the policies embodied in its law. Similarly, California's choice not to cap damages reflects a sense that Californian's interests in compensation for auto injuries and deterrence of negligent driving are best served by allowing the plaintiff to collect damages that reflect the full extent of his or her injury. So California's interests and the policies underlying its laws would be served by

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[2] Daniel Klerman, Rethinking Personal Jurisdiction, 6 J. Legal Analysis 245 (2014); Daniel Klerman, "Jurisdiction, Choice of Law and Property" in *Law and Economics of Possession*, Yun-chien Chang, ed. (Cambridge University Press, 2015).

[3] Symeon C. Symeonides, *The American Choice of Law Revolution: Past, Present and Future* (2006).

[4] John Hart Ely, "Choice of Law and the State's Interest in Protecting its Own," 23 Wm. & Mary L. Rev. 173 (1981).

[5] Nothing in this section is original. All general treatment of choice of law discuss the issues mentioned here. See, e.g., Symeon C. Symeonides, *The American Choice of Law Revolution: Past, Present and Future* Chapters 2-4 (2006).

application of California law. Since California has an interest in applying its law, and Nevada does not, Currie's interest analysis and most other modern approaches to choice of law would suggest that California's rules on damages would apply to an accident in Nevada involving two Californians.

The hypothetical in the previous paragraph involved a plaintiff and defendant who both resided in the same state, California. Such "common domicile cases" are ones in which modern approaches to choice of law are most powerful and persuasive. Even European countries, which generally resisted the "American Choice of Law Revolution," no longer routinely apply the law of the place of injury in common domicile cases. Unfortunately, most conflict of law cases cannot be resolved so cleanly. Consider, for example, a simple variation on the hypothetical discussed in the prior paragraph. Suppose there was a car accident in Nevada between a Californian and a Nevadan, Nevada capped damages but California did not, and the Californian sued in Nevada state court. In that situation, should the Nevada court apply Nevada law (and cap damages) or California law (and not cap damages)? Currie thought that, in this situation, there was a true conflict between Nevada's interest (protecting defendants and lowering insurance premia) and California's interest (compensation and deterrence). Currie thought the only principled solution in such "true conflict" cases was for the court to apply its own law. Thus, since the plaintiff sued in Nevada, Nevada law would apply.

Currie's solution was considered unsatisfactory by most courts and commentators, because it introduced a strong forum law bias. That is, courts would be much more likely to choose the law of the state where they are sitting (their own law) rather than the law of another state. Such a bias was seen as both unfair (because law would vary depending on where the plaintiff sued), unpredictable (because a potential defendant could not always predict where it would be sued), and as encouraging forum shopping (because plaintiffs can often choose from multiple fora and would naturally chose the one whose law would be more favorable). So many alternative approaches were proposed under which the court would consider the relative strength of the relevant state's interests and other factors. For example, courts would ask whether California had a stronger interest in compensation and deterrence than Nevada had in protecting defendants and lowering insurance premia. Academics and judges proposed a variety of approaches to resolving such cases. For example, California chose the "comparative impairment approach" under which the law of the state whose policies would otherwise be most impaired would be chosen, some Midwestern states instructed their courts to choose the "better law," while the Second Restatement of Conflict of Laws adopted a "most significant relationship" test. Commentators debated the merits of these approaches, although most empirical analysis concluded that there was little difference, in practice, between the various modern approaches.

Critics, however, argued that the new approaches encouraged biased decisionmaking. Faced with doctrine that asked judges to make highly subjective decisions about state interests, the quality of different state's laws, or which aspects of a case were "most significant," it seemed likely that judges would, consciously or unconsciously, chose the simplest course (which would usually be to apply the law they were most familiar with, which was forum law[6]) or to favor parties to whom they were sympathetic (perhaps plaintiffs or local residents).

[6]Forum law, here and elsewhere, means law of the state in which the court is sitting. So a Calfornia state court would apply forum law if it applied California law.

3. Literature

Judge Henry Friendly famously argued that state-court bias was overstated, and that, even if state courts were biased, it was unlikely that federal courts would be better, because federal judges also had local attachments and federal and state court jurors were drawn from a similar pool.[7] Surveys of attorneys reached contradictory results on the extent to which they perceived bias against out-of-state parties.[8] The best recent work on state court bias is that of Eric Helland and Alexander Tabarrok.[9] In two articles, they presented evidence that juries awarded 30% higher damages in state courts when the defendant was from out-of-state and when judges were selected by partisan elections, but that federal courts exhibited no similar bias.

While Helland and Tabarrok's studies are powerful, they cannot disentangle the effects of judicial versus jury bias, because damages are generally calculated by jurors, subject to instruction and review by judges. Also, because damages can be influenced by so many factors that are not observable to the researcher, it is difficult to know whether some factor other than bias is responsible for the results. For example, perhaps accidents involving out-of-state corporations tend to be more severe. Because this study uses choice-of-law decisions, which are made exclusively by judges based on a set of criteria that are reasonably well-defined, this study can more easily evaluate judicial bias and exclude other factors.

Several articles have explored bias in choice-of-law.[10] Some have found bias against out-of-state parties, while others have not. While these studies were path-breaking and illuminating, none tried seriously to control for factors influencing choice-of-law at the case level.[11] They measured the fraction of cases with outcomes favoring the in-state resident, but did not control for factors, such as the location of the accident or other relevant events that under all choice-of-law methodologies should influence the outcome. Only one of these studies used regression analysis; the others relied on simple tables.[12] A major advance of this study is that it uses regression analysis to control for various case factors.

4. Data and Methodology

The data for this study (like previous empirical studies of choice of law) are primarily reported court decisions deciding choice of law issues. These data are, of course, problematic for several reasons.

One problem is that these data come from litigated cases. As a result, they are subject to selection biases of the kind explored by Priest and Klein's famous 1984 article and subsequent

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[7] Henry J. Friendly, *Federal Jurisdiction: A General View* 146-52 (1973). For similar arguments, see Richard Posner, *The Federal Courts: Challenge and Reform* 212-13 (1996).

[8] Kristin Bumiller, "Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform," 15 Law & Society Review 749, 751 (1981).

[9] Eric Helland & Alexander Tabarrok, The Effect of Electoral Institutions on Tort Awards, 4AM. L. ECON. REv. 341 (2002); Alexander Tabarrok & Eric Helland, Court Politics: The Political Economy of Tort Awards, 42 J.L. & ECON. 157 (1999).

[10] Patrick J. Borchers, The Choice of Law Revolution: An Empirical Study, 49 WASH. & LEE L. REV. 357 (1992); Michael E. Solimine, An Economic and Empirical Analysis of Choice of Law, 24 GA. L. REV. 49, 85, 87-88 (1989); Stuart E. Thiel, Choice of Law and the Home-Court Advantage: Evidence, 2 AM. L. & ECON. REV. 291 (2000). Christopher A. Whytock, Myth of Mess? International Choice of Law in Action, 84 N.Y.U. L. REV. 719, 764-69 (2009).

[11] The one exception is Whytock, supra, which controlled for the "locus of activity," but analyzed only analyzed federal cases

[12] Thiel, supra.

literature. Nevertheless, as Klerman and Lee show, selection biases are partial.[13] Selection mutes all results, but inferences from litigated cases are still possible. In fact, if empirical analysis uncovers effects in litigated cases, the real effect is likely to be larger than the observed effect.

Another problem is publication bias. Relatively few trial court decisions are published, and even appellate court decisions are not published 100% of the time. Nevertheless, unless the factors determining publication are correlated with local bias, publication bias should not undermine results. Of course, it is possible that judges take into account local bias when deciding about publication. Perhaps they would prefer to avoid public scrutiny of biased decisions. If so, one would expect that reported decisions would *understate* the extent of actual local bias. On the other hand, it is also possible that elected judges would want to advertise their local bias (e.g. the extent to which they are redistributing towards local residents), so perhaps state court judges would be more likely to publish decisions exhibiting local bias. This means that findings of local bias would be *overstated*. Nevertheless, it seems most plausible to believe that judges would not anticipate much scrutiny of their choice-of-law decisions. After all, such decisions are usually seen as rather technical and arcane. Unlike criminal or constitutional cases, choice-of-law cases seldom receive press attention. In addition, detection of bias requires large numbers. As a result, it is difficult to ascertain whether judges collectively are biased, and nearly impossible to determine whether individual judges are biased, because individual judges do not decide enough choice-of-law issues for bias to be detected and measured. Because publication is unlikely to be motivated by publicity for or concealment of bias, publication bias is unlikely to undermine the validity of result based on published cases. In addition, comparison of published cases available on Westlaw to the FDSys.gov database, which contains all recent federal decisions, whether published or not, from selected districts suggests that Westlaw has all decisions that would be relevant to the empirical analysis in this paper. The opinions excluded from Westlaw are so brief that they do not contain sufficient information to be coded and analyzed for local bias. [It appears that New York has a similarly complete database for its state courts, and I plan to use it to analyze publication bias as well.]

A third problem is that cases are not randomly assigned to states. Rather, plaintiffs have considerable choice of forum and take into account choice-of-law when deciding where to sue. Fortunately, this problem can be controlled for by taking into account whether the selected law favors the plaintiff (which is what one would expect given plaintiff selection of forum) or whether the selected law is more likely to favor the plaintiffs only when the plaintiff is local.

A fourth problem is that cases are not randomly assigned to federal or state courts. Plaintiffs strategically decide whether to sue in federal or state court, and defendants often have the option to remove. Nevertheless, the strategic decisions by the parties cannot explain the patterns of judicial decisions presented below.

Most prior analyses compared decisions under different choice-of-law methodologies. For example, Solimine, Borchers, and Thiel compared the percent of cases decided in favor of the forum residents under traditional choice-of-law (the First Restatement of Choice of Law) versus modern methodologies (such as the Second Restatement of Choice of Law, Interest Analysis, or Better Law). This approach implicitly compares cases, in aggregate, across states (because different states have adopted different choice of law methodologies) or over time (because over time most states abandoned traditional choice-of-law for one of the modern

[13] Daniel Klerman and Yoon-Ho Alex Lee, "Inferences from Litigated Cases," 43 Journal of Legal Studies 209-48 (1994).

approaches). Such comparisons are problematic, because they assume that cases are similar across states and over time. To the extent that they found that modern methods were more likely to favor in-state residents, that difference might reflect changes in the composition of cases that were brought. This article takes a different approach. It compares different types of cases decided under modern methodologies and in the same states.[14] For example, consider two classes of cases:

> Class 1. Cases in which the defendant resides in the forum, plaintiff resides outside the forum, the relevant events took place in the forum, and the law of the forum favors the plaintiff
>
> Class 2: Cases in which the plaintiff resides in the forum, defendant resides outside the forum, the relevant events took place in the forum, and the law of the forum favors the plaintiff

The two classes are similar in that both involve acts in the forum and forum law that favors the plaintiff, but the residence of the parties is different in the two classes of cases. In Class 1, the defendant is in-state and the plaintiffs is out-of-sate. Cases in Class 2 the residence of the plaintiff and defendant are reversed. By comparing outcomes between Class 1 and Class 2, one can measure the extent of a pro-resident bias. If cases in Class 2 are more likely to be decided in favor of the plaintiff, that suggests a pro-resident bias. Note that this methodology automatically controls for two other biases that are alleged to affect modern choice-of-law: bias in favor of forum law and bias in favor of pro-plaintiff law. If there were no pro-resident bias, but either or both of these other biases were present, one would predict the same number of cases would be decided for the plaintiff in both classes of cases, because, in both classes, forum law favors the plaintiff, so both forum law bias and pro-plaintiff law bias would predict that forum law would be chosen in both Class 1 and Class 2. Only pro-resident predicts a difference between the two classes. Similarly, since cases in both Class 1 and Class 2 involve events (such as tort injury) that took place in the forum, this methodology controls for at least one factor that legitimately affects choice of law.

Of course, the two classes mentioned above are not the only relevant classes. Consider also, two additional classes, Classes 3 and 4, that are similar to Class 1 and 2, except that in Classes 3 and 4 the relevant events took place outside the forum. Analysis would be similar. In addition, consider Classes 5-8 that are similar to Classes 1-4, except the law of the forum favors the defendant.

The comparisons discussed above keep the place of relevant events, the forum and the law constant, but change the residence of the parties. Alternatively, one could keep the place of relevant events, the residence of the parties and the forum constant, but change the law. For example, consider the following two classes:

> Class A. Plaintiff resides outside-the-forum, defendant resides in forum, the relevant events took place in the forum, and forum law favors the defendant

[14] This paper does not analyze choice-of-law decisions under the traditional approach, because there were not enough of such cases to perform meaningful analysis.

Class B: Plaintiff resides outside-the-forum, defendant resides in forum, the relevant events took place in the forum, and forum law favors the plaintiff

If there is a pro-resident bias, one would expect forum law to be chosen more often in Class A than in Class B. Note that this is opposite of predictions based on a pro-plaintiff bias. Similarly, a pro-forum bias would predict that forum law would be chosen with equal frequency in both situations.

One could also compare two additional classes, Class C and Class D, which are the same as Class A and B, except that plaintiff resides in the forum and defendant resides outside the forum. Analysis would be similar, except one would not be able to distinguish between a pro-plaintiff bias and a pro-resident bias. Similarly, one could consider four more classes, Classes E-H, which are similar to Classes A-D, except relevant events took place outside the forum.

Through comparisons of this nature, both in tabular form and in logistic regression, one can measure the pro-resident bias while controlling for other case factors and potential biases.

In order to further control for case characteristics, analysis is limited two types of tort cases – automobile torts and product liability. Previous studies lumped together all tort cases, which again may cause problems due to changes in the composition of cases. Like prior studies, this analysis focuses on tort cases, because modern approaches to choice-of-law had the biggest impact in tort.

For product liability, all state court cases with choice of law decisions in Westlaw between 1950 and 2010 were coded. For federal courts, only cases every fifth year (1950, 1955…. 2010) were coded. Because there were so many more reported product liability cases in federal court, this approach led to roughly equal numbers of federal and state court cases in the database. Coding in auto torts cases is still in progress. Published federal and state cases from the following years are included in the analysis below: 1955, 1960, 1961, 1965, 1966, 1970, 1971, 1975, 1976, 1980, 1981, 1985, 1990, 1995, 2000, 2004, 2005, and 2010. As coding continues, more cases will be analyzed and analysis in greater depth will become possible.

Although common domicile cases were coded, they do not shed light on the extent of local bias, so they are excluded from analysis in this paper. Cases in which the opinion did not mention the residence of both parties, the location of the accident, and which did not give sufficient information on the content of the chosen law to determine which party it favored, were also excluded.

In order to ensure reliability, each case was coded independently by two student research assistants. Corporations are considered local or out-of-state depending on their headquarters, not their state of incorporation. Bias in federal court is measured by examining the location of the federal district court that decided the case in the first instance. So, for example, a federal district court in Nevada would show local bias if it selected law that favored a Nevada party over a California party. If that case were appealed, and the Ninth Circuit affirmed the selection of law that favored the Nevada party, that would still be analyzed as a decision showing local bias, even if the appeal was decided by a panel that met in California and/or was composed of appellate judges who resided in California. Of course, the fact that federal courts of appeals are often composed of judges residing in states different from the district judge whose decision they are reviewing is one of the institutional features that is likely to reduce local bias in federal court. Not only would appellate courts not share the district judge's local bias and thus be more likely to reverse biased decisions, the threat of such reversals is likely to cause district courts to restrain their local biases.

5. Analysis

First consider the simplest analysis, in which one compares the percent of cases won by the plaintiff depending on whether the plaintiff is local or out-of-state.

Table 1. Percent of Cases in Which Pro-Plaintiff Law is Chosen

	Product Liability & Auto Torts Combined		Product Liability Only		Auto Torts Only	
	State Court	Federal Court	State Court	Federal Court	State Court	Federal Court
Out-of-State Plaintiff, Local Defendant	38% (42 cases)	47% (32 cases)	40% (30 cases)	33% (15 cases)	33% (12 cases)	59% (17 cases)
Local Plaintiff, Out-of-State Defendant	72% (39 cases)	35% (40 cases)	75% (24 cases)	24% (21 cases)	67% (15 cases)	47% (19 cases)
Local Bias	Yes	No	Yes	No	Yes	No

The table indicates that there is evidence for local bias in state court, but not federal court. Whether one looks at just product liability cases, just auto torts, or both combined, pro-plaintiff law is much more likely to be chosen in state court, if the plaintiff is local and the defendant is out-of-state than vice versa. For the combined dataset, the difference is 34% percentage points, and nearly the same for product liability and auto torts. This means that pro-plaintiff law is chosen roughly twice as often when the plaintiff is local than otherwise. In contrast, there is no evidence of local bias in federal court. In fact, pro-plaintiff law is somewhat less likely to be chosen when the plaintiff is local.

Of course, Table 1 is very crude, because it does not control for the location of the injury (the key event for choice-of-law purposes)[15] and does not control for whether forum law is pro-plaintiff. As discussed in Section 3, a good way of measuring pro-plaintiff bias is to compare classes of cases that are similar except for the residence of the parties. Tables 2 does that for state court cases.

[15] Future analyses will consider other relevant events, such as the place of manufacture or sale in product liability cases.

Table 2. Percent of Cases in Which Pro-Plaintiff Law is Chosen, Controlling for Case Type, State Court

		Product Liability & Auto Torts Combined	Product Liability Only	Auto Torts Only
Injury in Forum, Forum Law Favors Plaintiff	Out-of-State Plaintiff, Local Defendant	50% (2 cases)	(0 cases)	50% (2 cases)
	Local Plaintiff, Out-of-State Defendant	100% (11 cases)	100% (7 cases)	100% (4 cases)
	Local Bias	Yes		Yes
Injury in Forum, Forum Law Favors Defendant	Out-of-State Plaintiff, Local Defendant	50% (2 cases)	(0 cases)	50% (2 cases)
	Local Plaintiff, Out-of-State Defendant	25% (8 cases)	25% (4 cases)	25% (4 cases)
	Local Bias	No		No
Injury Not in Forum, Forum Law Favors Plaintiff	Out-of-State Plaintiff, Local Defendant	27% (33 cases)	31% (26 cases)	14% (7 cases)
	Local Plaintiff, Out-of-State Defendant	81% (16 cases)	90% (10 cases)	67% (6 cases)
	Local Bias	Yes	Yes	Yes
Injury Not in Forum, Forum Law Favors Defendant	Out-of-State Plaintiff, Local Defendant	100% (5 cases)	100% (4 cases)	100% (1 cases)
	Local Plaintiff, Out-of-State Defendant	50% (4 cases)	33% (3 cases)	100% (1 case)
	Local Bias	No	No	No

The table needs to be interpreted cautiously, because many cells have relatively few cases. The rows with the most cases are the third set, in which the injury is not in the forum state, but forum law favors the plaintiff. In these cases, there is a striking difference in the percentage of cases in which pro-plaintiff law is chosen depending on whether the plaintiff is local. When the plaintiff is local, pro-plaintiff law is chosen 81% of the time in the combined dataset, and 67% or 90% in the component datasets. In contrast, when the defendant is local, pro-plaintiff law is chosen only 28% of the time in the combined dataset, and 31% or 17% in the smaller datasets. The difference is always fifty percentage points or more, which is huge. Pro-plaintiff law is chosen almost three times as often when it favors the local party. Note that these differences cannot be explained by pro-plaintiff or pro-forum law biases. If there were pro-plaintiff and/or pro-forum law biases, but no pro-resident bias, the percent of cases in which pro-

plaintiff law was chosen would be high whether the plaintiff was local or not. In these rows, forum law favors the plaintiff, so if there were no local bias, it would not matter if the plaintiff were local or not.

The other rows present more ambiguous results. Sometimes there is a pro-resident bias, and sometimes there is not. The inconsistency probably reflects the small number of cases.

Table 3 replicates Table 2 for federal court.

Table 3. Percent of Cases in Which Pro-Plaintiff Law is Chosen, Controlling for Case Type, Federal Court

		Product Liability & Auto Torts Combined	Product Liability Only	Auto Torts Only
Injury in Forum, Forum Law Favors Plaintiff	Out-of-State Plaintiff, Local Defendant	100% (1 case)	(0 cases)	100% (1 cases)
	Local Plaintiff, Out-of-State Defendant	50% (8 cases)	67% (3 case)	80% (5 cases)
	Local Bias	No		No
Injury in Forum, Forum Law Favors Defendant	Out-of-State Plaintiff, Local Defendant	29% (7 cases)	0% (1 cases)	33% (6 cases)
	Local Plaintiff, Out-of-State Defendant	39% (13 cases)	13% (8 case)	80% (5 cases)
	Local Bias	Yes	Yes	Yes
Injury Not in Forum, Forum Law Favors Plaintiff	Out-of-State Plaintiff, Local Defendant	53% (17 cases)	33% (12 cases)	100% (5 cases)
	Local Plaintiff, Out-of-State Defendant	25% (16 cases)	13% (8 cases)	38% (8 cases)
	Local Bias	No	No	No
Injury Not in Forum, Forum Law Favors Defendant	Out-of-State Plaintiff, Local Defendant	43% (7 cases)	50% (2 cases)	40% (5 cases)
	Local Plaintiff, Out-of-State Defendant	33% (3 cases)	50% (2 cases)	0% (1 case)
	Local Bias	No	No	No

As with state court cases in Table 2, the many cells have very few cases, so the table needs to be interpreted cautiously. The rows with the most cases are again the third set, where the injury was not in the forum state and forum law favors the plaintiff. In contrast to the state cases, federal cases show no local bias in this set of cases. Most other rows also show no local

bias, although the results are inconsistent, probably as a result of the small number of cases in some cells.

Regression analysis in Table 4 below is consistent with the idea that there is bias in state court but not in federal court. As in tables 1 through 3, the dependent variable is whether pro-plaintiff law was chosen. Similarly, the independent variable of interest is whether the plaintiff is out-of-state and the defendant in state, or not. Cases in which both parties are local or both are out-of-state are excluded, so the independent variable can be expresses as a dummy (binary) variable that is one if the plaintiff is local (and the defendant out of state) and zero otherwise. One can control for case characteristics in two ways. First, one can control by including dummy variables for combinations of case characteristics, as in the rows of Tables 2 and 3. Or one can use separate dummy variables for each case characteristic. Under this second approach, one controls for the state of injury by including a dummy variable that is one if the law of the state of injury favors the plaintiff and zero otherwise. Thus, if the place of injury is a key determinant of applicable law (as it is under the Restatement 2nd and other methodologies), one would expect that, if the law of the state of injury is pro-plaintiff, that would increase probability that pro-plaintiff law was chosen. Conversely, if the law of the state of injury were pro-defendant, that would decrease the probability that pro-plaintiff law would be chosen. Thus, one would expect that this dummy variable – whether the law of the state of injury favors the plaintiff -- would have a positive coefficient. Similarly, one can control for the possibility of forum bias by including a dummy variable that is one if forum law is pro-plaintiff. If courts prefer to apply their own law, they will chose pro-plaintiff law more often if forum law is pro-plaintiff. As a result, one would expect that, if there is a forum law bias, that the coefficient on this variable would be positive. One need not control explicitly for the pro-plaintiff bias, because the dependent variable is whether pro-plaintiff law is chosen. Thus, if there is a pro-plaintiff bias, it should affect all conditions equally. That is, a pro-plaintiff bias would push up the percentage of cases in which pro-plaintiff law is chosen, whether plaintiff is local or not, whether the state of injury favors the plaintiff or not, and whether the forum law favors the plaintiff or not. The only place a pro-plaintiff bias might show up is therefore in the constant. Given the binary nature of the dependent variable, logistic regression is appropriate. Tables 4 shows the results for product liability and auto torts combined.

Table 4. Regression of Effect of Plaintiff Residence on Likelihood that Pro-Plaintiff Law is Chosen, Product Liability and Auto Torts Combined

	1	2	3	4
	State Court	Federal Court	State Court	Federal Court
Local Plaintiff, Out-of-State Defendant	1.56*** (0.58)	-0.68 (0.53)	1.46*** (0.54)	-0.53 (0.49)
Injury in Forum, Forum Law Favors Plaintiff	0.61 (1.37)	1.04 (1.00)		
Injury in Forum, Forum Law Favors Defendant	-2.90** (1.16)	0.02 (0.83)		
Injury Not In Forum, Forum Law Favors Plaintiff	-1.44 (0.89)	0.10 (0.75		
Law of State of Injury Pro-Plaintiff			2.50*** (0.78)	0.48 (0.55)
Forum Law Pro-Plaintiff			1.23*	0.35 (0.51)
Constant	0.73 (0.85)	-0.21 (0.67)	-1.94 (0.78)***	-0.44 (0.49)
N	81	72	81	72
Pseudo r^2	0.21	0.03	0.21	0.02

Notes. *** indicates p-value of less than 0.01; ** indicates p-value of between 0.01 and 0.05; * indicates p-value between 0.05 and 0.10.

The difference between federal and state court is striking. In state court, the coefficient on the dummy variable of primary interest -- Local Plaintiff, Out-of-State Defendant – is positive and statistically significant at the 1% level in both regressions. In contrast, in federal court, the coefficient of primary interest is negative and not statistically significant. Regressions 3 and 4 provide ways of measuring the effect of location of injury. As one would expect, the state of injury has a large effect in state court. If the law of the state of injury favors the plaintiff, the law of that state (which favors the plaintiff) is likely to be chosen; the coefficient is positive and statistically significant at the 1% level. There is also some evidence of a bias in favor of forum law. If forum law favors the plaintiff, that law is more likely to be chosen, although that coefficient is significant only at the 10% level. It is notable that, even controlling for the possibility of a forum law bias, the coefficient measuring pro-resident bias – "Local Plaintiff, Out-of-State Defendant" -- is large and highly statistically significant in state court. Surprising, in federal court, no coefficients are statistically significant, not even the coefficient reflecting the influence of the place of accident. The factors motivating choice of law in federal court need

more investigation. It is possible that federal courts are influenced by the location of other events – such as the design, manufacturing, sale, or other events related to the tort.

Regressions on just product liability and just the auto torts data reach similar results. In state court, the coefficient of primary interest is always positive and statistically significant at at least the 10% level. In federal court, the coefficient of primary interest is negative and not statistically significant.

As noted in the Data and Methodology section, another way of measuring the pro-resident bias is to hold case characteristics (residence of the parties and location of injury) constant and to vary the law. Table 5 summarizes the results of that analysis by showing the percent of cases in which forum law is chosen, depending on whether forum law favors the resident or non-resident party:

Table 5. Percent of Cases in Which Forum Law is Chosen

	Product Liability & Auto Torts Combined		Product Liability Only		Auto Torts Only	
	State Court	Federal Court	State Court	Federal Court	State Court	Federal Court
Forum Law Favors Out-of-State Party	38% (47 cases)	59% (34 cases)	39% (33 cases)	55% (22 cases)	39% (14 cases)	67% (12 cases)
Forum Law Favors Local Party	74% (34 cases)	45% (38 cases)	79% (21 cases)	36% (14 cases)	69% (13 cases)	50% (24 cases)
Local Bias	Yes	No	Yes	No	Yes	No

The results are again dramatic. In state court, forum law is almost twice as likely to be chosen if it favors the in-state party, and that result holds true for both product liability and auto torts. The table thus provides additional evidence of state court bias. In contrast, there is no evidence of local bias in federal court. If anything, federal courts seem to favor out-of-state parties.

As with the analysis in Table 1 through 4, which measured local bias by varying the residence of the parties, it is helpful to further breakdown the cases in Table 5 to control for the place of injury and the residence of the parties. Table 6 performs that breakdown for state court cases.

Table 6. Percent of Cases in Which Forum Law is Chosen,
Controlling for Case Type, State Court

		Product Liability & Auto Torts Combined	Product Liability Only	Auto Torts Only
Injury in Forum, Plaintiff Local, Defendant Out-of-State	Forum Law Favors Out-of-State Party (Defendant)	75% (8 cases)	75% (4 cases)	75% (4 cases)
	Forum Law Favors Local Party (Plaintiff)	100% (11 cases)	100% (7 cases)	100% (4 cases)
	Local Bias	Yes	Yes	Yes
Injury in Forum, Defendant Local, Plaintiff Out-of-State	Forum Law Favors Out-of-State Party (Plaintiff)	50% (2 cases)	(0 cases)	50% (2 cases)
	Forum Law Favors Local Party (Defendant)	50% (2 cases)	(0 case)	50% (2 cases)
	Local Bias	No		No
Injury Not in Forum, Plaintiff Local, Defendant Out-of-State	Forum Law Favors Out-of-State Party (Defendant)	50% (4 cases)	67% (3 cases)	0% (5 cases)
	Forum Law Favors Local Party (Plaintiff)	81% (16 cases)	90% (10 cases)	67% (8 cases)
	Local Bias	Yes	Yes	Yes
Injury Not in Forum, Defendant Local, Plaintiff Out-of-State	Forum Law Favors Out-of-State Party (Plaintiff)	27% (33 cases)	31% (26 cases)	14% (7 cases)
	Forum Law Favors Local Party (Defendant)	0% (5 cases)	0% (4 cases)	0% (1 case)
	Local Bias	No	No	No

The results in this table are less informative, because there is no set of cases in which there are a significant number of cases in each cell. For example, in the fourth set of cases – Injury Not in Forum. Defendant Local, Plaintiff Out-of-State --- there are 33 total cases in which Forum Law Favors the Out-of-State Party (where one would expect forum law to be chosen less

often), but only 5 cases in which Forum Law Favors the Local Party (where one would expect forum law to be chosen less often). Only one set of cases has more than five cases in both of the relevant cell: the first set, Injury in Forum, Plaintiff Local, Defendant Out-of-State. There is some evidence of local bias in those cases, because forum law was chosen more often (100% versus 75%) when forum law favored the local party. Nevertheless, the number of cases is so small that one should be very cautious. The table suggests that the apparent evidence of local bias in Table 5 may be the result of composition effects. That is, the results in Table 5 may be driven by the fact that forum law was infrequently chosen in the large number of cases in the 2nd to last data row – Injury Not in Forum, Defendant Local, Plaintiff Out-of-State, Forum Law Favors Out-of-State Party (Plaintiff). In that category, forum law was chosen only 27% of the time. That would seem to indicate local bias (because forum law was infrequently chosen when it favored the out-of-state party). Nevertheless, when one compares that percentage to its closest control – the row below it, which is the same except that forum law favors the local party – forum law is chosen even less often (zero percent of the time). Thus the low percentage of cases in Table 5 in which forum law is chosen when forum law favors the out-of-state party mostly reflects a category of cases where there is, in fact, no evidence of local bias when analyzed by comparing it to cases which are otherwise most similar.

The patterns in Table 6 could be interpreted as suggesting that there is a pro-resident bias only when the plaintiff is local, but not when the defendant is local. That would be consistent with the evidence of local bias in the first and third sets of cases, but not the second and fourth. In the first and third sets, choosing forum law would benefit an in-state plaintiff, whereas in the second and fourth sets, choosing forum law would benefit an in-state defendant. Nevertheless, because the number of cases is so small, the hypothesis of a local plaintiff bias is very tentative.

Table 7 replicates the analysis of Table 6 for federal court.

Table 7. Percent of Cases in Which Forum Law is Chosen, Controlling for Case Type, Federal Court

		Product Liability & Auto Torts Combined	Product Liability Only	Auto Torts Only
Injury in Forum, Plaintiff Local, Defendant Out-of-State	Forum Law Favors Out-of-State Party (Defendant)	62% (13 cases)	88% (8 cases)	20% (5 cases)
	Forum Law Favors Local Party (Plaintiff)	50% (8 cases)	67% (7 cases)	40% (5 cases)
	Local Bias	No	No	No
Injury in Forum, Defendant Local, Plaintiff Out-of-State	Forum Law Favors Out-of-State Party (Plaintiff)	100% (1 case)	(0 cases)	100% (1 cases)
	Forum Law Favors Local Party (Defendant)	71% (7 cases)	100% (1 case)	67% (6 cases)
	Local Bias	No		No
Injury Not in Forum, Plaintiff Local, Defendant Out-of-State	Forum Law Favors Out-of-State Party (Defendant)	67% (3 cases)	50% (2 cases)	100% (1 cases)
	Forum Law Favors Local Party (Plaintiff)	25% (16 cases)	13% (8 cases)	38% (8 cases)
	Local Bias	No	No	No
Injury Not in Forum, Defendant Local, Plaintiff Out-of-State	Forum Law Favors Out-of-State Party (Plaintiff)	53% (17 cases)	33% (12 cases)	100% (5 cases)
	Forum Law Favors Local Party (Defendant)	57% (7 cases)	50% (2 cases)	60% (5 case)
	Local Bias	Yes	Yes	No

As in other analyses, there is hardly any evidence of local bias in federal court. The last set of cases in the table provides some evidence of bias, but the overall difference in the percent of cases in which forum law is chosen when it favors the local versus out-of-state party is very small (53% versus 57%). In addition, the bias is present only in product liability cases, not auto tort cases.

Regression analysis was performed to test for pro-resident bias, holding case characteristics constant and varying the law. The coefficients had the expected sign – positive for bias only in state court – but none were statistically significant and the results are not reported.

[As more cases are coded and added to the database, more in depth analysis will be possible. For example, it will be possible to examine the effect of the location of events other than injury that might affect choice of law. Similarly, it will be possible to compare decisions by appellate courts and trial courts, and the effect of cases that have multiple plaintiff or multiple defendants from different states. It may also be possible to distinguish between different modern approaches, such as the Restatement Second and Better Law approaches. It will also be possible to distinguish between state courts with judiciaries selected by partisan election (which Helland and Tabarrok found especially prone to bias) and those selected by others methods.]

6. Conclusion

The evidence presented here is consistent with the idea that state court judges exhibit a bias toward local parties in their choice-of-law decisions. The evidence is not as strong as one might hope, because the number of cases is small and relevant comparisons cannot always be performed. Nevertheless, the aggregate statistics suggest a strong local bias, and both tabular and regression analysis that controls for other factors are usually consistent with such a bias. One interesting hypothesis suggested by the data is that judges favor local plaintiffs, but do not favor local defendants. That is, in contrast to much of the literature on choice of law, the pro-resident bias may not be general, but rather may affect only cases where the plaintiff is local and the defendant is not.

The existence of local bias is important for many areas of the law (including diversity jurisdiction and subject matter jurisdiction), for issues of institutional design (election versus appointment of judgment), and for doctrinal form (rules versus standards). In addition, the existence of pro-resident bias in choice of law lends support to one critique of modern choice of law and may even cast doubt on its constitutionality.