

Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11

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This article revisits the controversy regarding how foreigners fare in U.S. courts. The available data, if taken in a sufficiently big sample from numerous case categories and a range of years, indicate that foreigners have fared better in the federal courts than their domestic counterparts have fared. Thus, the data offer no support for the existence of xenophobic bias in U.S. courts. Nor do they establish xenophilia, of course. What the data do show is that case selection drives the outcomes for foreigners. Foreigners' aversion to U.S. forums can elevate the foreigners' success rates, when measured as a percentage of judgments rendered. Yet that aversion waxes and wanes over the years, having generally declined in the last 20 years but with an uptick subsequent to 9/11. Accordingly, that aversion has caused the foreigners' "advantage" to follow the same track.

I. INTRODUCTION

How do foreigners fare in U.S. courts? This obviously important question influences both law's content, such as the appropriate extent of federal jurisdiction, and litigation decisions, such as whether a foreigner should risk litigating in the United States—to say nothing of affecting the country's image and economic well-being or, for that matter, of coloring justice.

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Throughout our country's history, the answer to the question has been just as obvious to many bien-pensants. As James Madison said of state courts: "We well know, sir, that foreigners cannot get justice done them in these courts"¹ And commentary down to the present day deploys the assumption that foreign litigants arrive here at a disadvantage, even in federal courts.² No one can contest the important fact that, from the country's origin³ to the present,⁴ people have believed that xenophobic bias exists. But are they right: Do foreign litigants suffer from such bias in reality?

Some substantive and procedural law and lots of practical considerations do disadvantage foreigners.⁵ It accordingly may seem reasonable to conclude that in court some nonlegal bias against them exists, too, and that it affects outcomes. Still, no one has offered empirical proof of such bias. In fact, evidence to date suggests that xenophobic bias is far from rampant in U.S. courts.

II. PRIOR RESEARCH

A. *Xenophilia Article*

The first empirical foray into this realm was our own 1996 article.⁶ It showed that, for cases the Administrative Office of the U.S. Courts coded as terminated during fiscal years 1987–1994 in the federal district courts,⁷ foreigners

¹3 Jonathan Elliot, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 583 (Philadelphia, Lippincott 2d ed. 1876).

²E.g., Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 *Yale J. Int'l L.* 1 (1996).

³See *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) (arguing need for federal jurisdiction to assuage "possible fears and apprehensions" of foreign suitors).

⁴See Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 *Wake Forest L. Rev.* 1, 45–47 (2006).

⁵See, e.g., 28 U.S.C. § 1391(d) (2006) ("An alien may be sued in any [judicial] district.").

⁶Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 *Harv. L. Rev.* 1120 (1996).

⁷On the situation in state courts, see *id.* at 1122 n.10.

won substantially more than domestic litigants, whether they appeared as plaintiff or defendant. We termed the foreigners' greater success as the "foreigner effect."

More specifically, in the 92,142 federal actions within diversity and alienage jurisdiction, we compared the plaintiff win rate across the three types of actions: domestic plaintiff versus domestic defendant, foreign plaintiff versus domestic defendant, and domestic plaintiff versus foreign defendant. For judgment by any procedural means in wholly domestic cases, the plaintiff win rate was 64 percent. Foreign plaintiffs, however, won 80 percent of the time. Finally, when domestic plaintiffs went against foreign defendants, the plaintiff win rate dropped to 50 percent. Thus, in a way that was significant statistically, domestic plaintiffs fared worse than foreign plaintiffs, while domestic defendants fared worse than foreign defendants.

Before drawing any conclusion, we exhaustively explored all the available variables and reported the results. The foreigner effect was not specific to certain case categories,⁸ and did not depend on the procedural route taken to judgment,⁹ but instead prevailed across the board. Accordingly, the foreigner effect survived multiple regression—which controlled not only for termination year, but also for case category, how the case came into federal court, judicial circuit, whether the domestic party was a corporation or individual and whether its state citizenship was in state or out of state, amount demanded, procedural progress, and disposition method.¹⁰ Indeed, our reported regressions allowed us to calculate the approximate change in the chance of winning attributable to a party's foreign status, all else held constant: compared to a wholly domestic case with a 50 percent chance of the plaintiff's winning, an apparently identical case brought by a foreign plaintiff would enjoy a 61 percent chance, while substituting instead a foreign defendant for the domestic defendant would drop the 50 percent chance of the domestic plaintiff winning to 41 percent.

From these results, we, of course, did not conclude that xenophilia prevails within the U.S. courts. Instead, we embraced a case-selection explanation. "We believe that the most plausible and powerful explanation for the foreigner effect is that foreigners are reluctant to litigate in America for a

⁸Id. at 1125–28.

⁹Id. at 1136–39.

¹⁰Id. at 1129–32.

variety of reasons, including the apprehension that American courts exhibit xenophobic bias and the pecuniary and nonpecuniary distastes for litigating in a distant place.”¹¹ The foreigners’ fear of U.S. litigation makes them selective in choosing strong cases to pursue to judgment. “Foreigners abandon or satisfy most claims and, presumably, persist in the cases that they are most likely to win. Thus, cases involving a foreign litigant, as plaintiff or defendant, are usually cases in which the foreigner has the stronger hand.”¹² When the foreigners in actuality encounter less than the expected bias, they see elevated rates of success, whether as plaintiff or defendant.

No competing explanation survived. On the one hand, we argued that the data on close examination did not comport with other possible explanations, such as that foreign litigants and their lawyers were substantially more capable litigants.¹³ On the other hand, we found circumstantial support for our explanation in a variety of observations based on the data: the systematic differences between domestic and international judgments in the percentages of the caseload terminated at the various procedural stages¹⁴ and by the various disposition methods,¹⁵ as well as their mix of jury and judge cases¹⁶ and their differences in case size.¹⁷ When we broadened the study to include nonjudgment terminations, and thus more settlements, we found further support in an observation that foreign plaintiffs had to go to judgment more often than domestic plaintiffs while foreign defendants obtained more dismissals than domestic defendants.¹⁸ Finally, we noticed an analogous effect—an elevated success rate due to the party’s aversion to the forum—by comparing for wholly domestic

¹¹Id. at 1133 (footnotes omitted).

¹²Id. at 1133–34 (footnote omitted).

¹³Id. at 1132–33.

¹⁴Id. at 1136–37.

¹⁵Id. at 1137–38.

¹⁶Id. at 1138–39.

¹⁷Id. at 1140–42.

¹⁸Id. at 1139–40.

diversity cases the in-state plaintiffs' win rate to the significantly higher win rate of out-of-state plaintiffs.¹⁹

In sum, the data from fiscal years 1987–1994 showed a strong case-selection-induced effect of foreigners' litigation success. But we never said or implied that anti-foreign bias is nonexistent. "The parties' strategic behavior, based on their expectations, could be masking the bias and offsetting its influence to such a degree that an opposite foreigner effect appears in case outcomes. But any xenophobic bias that does exist in American courts is perhaps less serious than commonly thought."²⁰

B. Xenophobia Article

The next step in this realm's empirical exploration was the piece published by Kimberly Moore, then a professor and now a judge.²¹ Her study looked only at patent cases in U.S. federal courts. She found that foreigners acquired U.S. patents at a much brisker pace than they chose to enforce them in U.S. courts. She therefore acknowledged that the comparatively low rate of enforcement by foreign patentees supports our theory that foreign aversion to litigating here creates a strong selection effect.

However, she contended that her data indicated we were wrong about the bottom line. "The data in this study [by Moore] substantiate the existence of xenophobic bias in the American courts with American juries in patent suits. Clermont and Eisenberg find that American parties win 37% of all cases in which their adversaries are foreign, while this study finds that American parties win 64% of such cases in the patent context."²² Careful reading of her article shows her to rely essentially on that 64 percent datum. So, how to explain its stark difference with our quoted result?²³ Well, basically, the difference is not so stark, as we can demonstrate in three simple steps.

¹⁹Id. at 1142–43.

²⁰Id. at 1132.

²¹Kimberly A. Moore, *Xenophobia in American Courts*, 97 *Nw. U. L. Rev.* 1497 (2003).

²²Id. at 1520.

²³Professor Moore's favored explanation was that our data from the Administrative Office were inaccurate. She reported that "in a large percentage of the patent cases the Administrative Office (AO) reported the judgment incorrectly" as being for plaintiff or defendant. Id. at 1523.

1. (a) To reconcile our results, we first note that she worked with a different set of cases. She used an original database that she developed by examination of court files in federal cases that the Administrative Office had identified as patent cases. Her database comprised 4,247 patent infringement cases terminated by judgment during (seemingly fiscal years) 1999–2000. Her results are difficult to replicate without access to her data. (b) Next, we note that although she had acquired information on judgments produced by all types of procedural devices, she reported results for only the 5 percent of those judgments that had gone through trial.²⁴ (c) We finally note that she emphasized results only for jury trials. The

She promised, *id.* at 1507 n.34, 1522 n.86, 1523 n.90, to expand on this point in an upcoming article to be entitled “Empirical Studies: Fact or Fiction.”

In an earlier draft of her xenophobia article, she put that AO error rate, as to who had won, at a striking 71 percent. Kimberly A. Moore, *Xenophobia in American Courts: An Empirical Study of Patent Litigation* 35 (Apr. 2, 2002) (manuscript, on file with authors). She changed the stark number into the adjective “large” in the published version, perhaps in response to our email pointing out that even random entries by clerks around the country would produce about a 50 percent error rate, so “a 71% error rate on judgment would have to be wilful, which would make your upcoming AO article a blockbuster. Moreover, there is a ton of field work that confirms the general thrust of the AO data at least for adjudicated cases.” Email from Kevin M. Clermont to Kimberly A. Moore (Sept. 2, 2002) (on file with authors).

The important point is that last one. Despite minor gaps and misclassifications, the relevant variables in the AO data, in the aggregate, appear to be reliable. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 *Cornell L. Rev.* 581, 585 & n.10 (1998); Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 *Notre Dame L. Rev.* 1455, 1470 (2003) (showing the comparable error rate for tort cases to be under 5 percent—and that the error rate drops under 2 percent if one omits the mysteriously coded but relatively rare “judgment for both” plaintiff and defendant, as we did in our xenophilia article).

²⁴The tried cases comprised 119 bench trials (28 involving foreign and domestic sides) and 104 jury trials (36 involving foreign and domestic sides). See Moore, *supra* note 21, at 1512–13; cf. *id.* at 1513–14 (verifying her jury trial result with an expanded data set from 1990–2000). At two points, she mentioned results of granted summary judgments, *id.* at 1509–10, 1543 n.150, which are more numerous than trials, see *id.* at 1512 n.53. But her results are difficult to reconcile: she reported that foreigners prevailed in 43 percent of summary judgments, in 54 percent of bench trials, and in 56 percent of the judgments by those two methods combined. It is unclear how combining the methods could produce a higher win rate than either of the methods produced separately.

However, it is clear that her results for trial do not prevail more generally in patent cases. See, e.g., Paul M. Janicke & LiLan Ren, *Who Wins Patent Infringement Cases?*, 34 *AIPLA Q.J.* 1, 22 & n.38 (2006) (finding that nationality has no statistically significant effect on patent cases finally disposed of by the Federal Circuit).

Table 1: Jury and Judge Trials in 12 Case Categories During FY 1987–1994

	<i>Foreign Plaintiffs</i>	<i>All-Domestic Cases</i>	<i>Foreign Defendants</i>
Jury plaintiff win rate	61.10	50.63	50.00
Judge plaintiff win rate	72.25	61.32	54.60
Number of jury trials	401	9,337	1,664
Number of judge trials	418	3,653	641

NOTE: This table shows that foreigners, over a short period, outperformed their domestic counterparts in both jury trials and judge trials. It gives the plaintiff win rate and the number of fully tried cases in 12 case categories that offer litigants a clear choice between jury and judge: Negotiable Instruments; General Contract; Torts to Land; Airplane Personal Injury; Assault, Libel & Slander; Marine Personal Injury; Motor Vehicle Personal Injury; Other Personal Injury; Medical Malpractice; Product Liability; General Fraud; and Torts to Personal Property.

SOURCE: Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 Harv. L. Rev. 1120, 1139 (1996) (using Administrative Office data for fiscal years 1987–1994).

reason for this narrow focus on the docked tail of the elephant appears to have been an earlier acquired distaste for jury trials in patent cases.²⁵ She found that domestic parties won 64 percent of jury trials against foreigners, but only 46 percent of bench trials. She theorized that judges perform better because of “a combination of less prejudice and greater predictability by judges.”²⁶ That is, juries were at fault. (d) Given her narrow focus, Professor Moore might have phrased her summary in the following way: “*Clermont and Eisenberg find that American parties win 37% of all [alienage judgments], while this study finds that American parties win 64% of [patent jury trials in which their adversaries are foreign].*”

2. Unfortunately, that improved summary still compares apples to oranges, albeit better-described apples and oranges. Given her focus, the most appropriate comparison with our data would have been with our jury trial result. In that corner of our article, our reported results were those that appear in Table 1, which treats

²⁵Moore, *supra* note 21, at 1549; see also Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 Mich. L. Rev. 365 (2000) (concluding that some significant jury/judge differences do exist in patent litigation); Kimberly A. Moore, *Jury Demands: Who’s Asking?* 17 Berkeley Tech. L.J. 847 (2002) (similar). Her critical views of the jury, relative to the judge, run counter to most empirical research. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 Cornell L. Rev. 119, 144–47 (2002); see also *infra* note 27 and text accompanying note 36.

²⁶Moore, *supra* note 21, at 1511.

those case categories that offer a choice between jury and judge. To get a number comparable to hers would require multiplying the foreign-plaintiff-versus-domestic-party loss rate and the domestic-party-versus-foreign-defendant win rate by their frequencies, summing, and then redividing by total international cases to produce a single percentage. By this calculation performed on our data, the domestic parties' success rate, when appearing as plaintiff or defendant against a foreigner, in judgments reached by jury trial would be 48 percent, not the 37 percent that came from all judgments.²⁷ This higher percentage fits with our hypothesis that the foreigner effect should weaken as the cases approach trial, with the domestic parties' success rate rising toward 50 percent, "arguably because the cases by then are solidly in the hands of American lawyers and have almost survived the settlement process. Yet misperceptions of bias, especially regarding foreign plaintiffs, seem to preserve some foreigner effect even at trial."²⁸ In any event, Professor Moore's summary could then have said: "*Clermont and Eisenberg find that American parties win [48% of certain alienage jury trials], while this study finds that American parties win 64% of [patent jury trials in which their adversaries are foreign].*"

3. However, this refinement of her summary still uses a simplified measure. She did not compare foreign to domestic plaintiffs when facing a domestic defendant, and then compare foreign to domestic defendants when facing a domestic plaintiff. She instead tried to combine these two comparisons into the just-discussed single percentage that compares foreign to domestic litigants. Although her single measure could sometimes be suggestive, it can also be misleading; it can mislead because it ignores the base rate for wins, a failure that becomes troublesome if the frequencies of foreigners' appearances are not equal. For example, if the plaintiff win rates exceed 50 percent and if foreigners appear more often as defendants than as plaintiffs (both of which have in fact been true), then the single conflating percentage will overstate the domestic parties' success rate (and thus understate the complementary foreigners' success rate).

²⁷The comparable number for bench trials in our results would be 44 percent, representing a statistically insignificant difference from jury trials.

²⁸Clermont & Eisenberg, *supra* note 6, at 1136.

For an extreme example, if the plaintiff win rate for all types of cases is 70 percent and if foreigners appear only as defendants, then Professor Moore's measure would yield a domestic parties' success rate of 70 percent, even though foreigners are actually performing exactly the same as domestic parties. Thus, her single percentage is an oversimplification, and her reported results do not permit a direct comparison with our results. However, some of her results allow deducing the direction of the oversimplification's effect. She gave some win rates for foreign and domestic patentees and infringers, and she also reported that foreigners are less likely to enforce their patent rights than Americans.²⁹ Putting those reports together shows that her 64 percent figure considerably overstates the domestic parties' success rate before juries. Although we accept that her regression showed a foreigners' disadvantage, it is hard to see how big that disadvantage is relative to our results. Thus, Professor Moore's results likely support a summary no stronger than this: "*Clermont and Eisenberg find that American parties win [slightly fewer alienage jury trials than their foreign adversaries], while this study finds that American parties [do somewhat better than their foreign adversaries in patent jury trials].*"

In sum, Professor Moore's claim to have proven the existence of xenophobia in American courts rested solely on a finding that domestic parties do better than their foreign adversaries in patent jury trials, to some uncalculated degree. Contrariwise, we had found that foreigners did slightly better than their domestic adversaries in alienage jury trials more generally. Why is there that remaining difference in results? We think that the most plausible explanation for her single difference with all our varied results is that patent cases are unique.³⁰ Indeed, Professor Moore suggested why patent cases would show this special effect. She posited a "liberation hypothesis," whereby the jurors' biases receive freest rein in complex, difficult, and close cases, and she says that patent cases are among the most factually complex of all civil cases.³¹ If

²⁹See Moore, *supra* note 21, at 1510, 1527.

³⁰In past work, we have also attributed her atypical jury results, see *supra* note 25, to the uniqueness of patent litigation. See Clermont & Eisenberg, *supra* note 25, at 145 n.136, 148 n.149.

³¹See Moore, *supra* note 21, at 1521–22; see also James Bessen & Michael J. Meurer, *Lessons from Patent Policy from Empirical Research on Patent Litigation*, 9 *Lewis & Clark L. Rev.* 1, 2 (2005) ("Patent litigation has been called the sport of kings; it is complex, uncertain, and expensive.").

patent cases indeed are unique, her broader conclusions, those that regard rampant xenophobia or inferior juries in cases beyond patent litigation, are shaky.

C. Other Work

The most illuminating of other empirical work in this realm is the forthcoming article by three finance professors on the so-called home court advantage.³² Its principal finding, based on methodologies from financial economics, was that share prices in the home stock market fell significantly more for foreign corporations sued in U.S. courts than share prices in the home stock market fell for domestic corporations sued in U.S. courts. This finding that the news of suit was worse news for foreign defendants than for domestic defendants is consistent with our theory of a widespread perception of xenophobia in U.S. courts.

However, the authors went on to try to explain their finding in terms of actual existence of xenophobia. They ended by concluding that “foreign firms are disadvantaged in U.S. courts.”³³

To reach this conclusion, they developed their own database from the federal judiciary’s Public Access to Court Electronic Records (PACER) project. Their database comprised 3,076 antitrust, breach-of-contract, employment-related, patent infringement, or product liability federal cases filed against a publicly listed corporation as the first-named defendant during (seemingly calendar years) 1995–2000. They found no significant differences in rates of dismissal or settlement. But in the 12 percent of the

³²Utpal Bhattacharya, Neal Galpin & Bruce Haslem, *The Home Court Advantage in International Corporate Litigation* (forthcoming in *J.L. & Econ.*), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=932690> (Aug. 2006). Related realms have seen plenty of empirical work. For example, David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 *U.C. Davis L. Rev.* 511 (2003), was a jury-verdict-reporter study of California state and federal cases based on employment law during 1998–1999; it found that women and minorities fared peculiarly badly as plaintiffs in discrimination and wrongful discharge jury trials, as compared to other kinds of plaintiffs and to other kinds of employment cases. See generally Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 *J. Empirical Legal Stud.* 429 (2004).

³³Bhattacharya et al., *supra* note 32, at 7, 27.

cases that went to judgment by “trial,”³⁴ the foreign defendants fared significantly worse, with the plaintiff win rate being 19 percent against U.S. corporate defendants and 28 percent against foreign corporate defendants. This result survived multiple regression and other checks. Interestingly, the authors further found that “the bias is in judge trials, not jury trials.”³⁵ That is, they located their effect solely in U.S. corporate defendants doing significantly better by judicial adjudication. “This seemingly contradicts the finding of Moore (2003), who found prejudice in the jury.”³⁶

In sum, another article has suggested that trial outcomes disfavor foreigners, to some degree. Again, in our study, we expected to see little foreigner effect for cases that had made it all the way through the litigation process to trial, but we did find that foreign defendants did very slightly better than domestic defendants in diversity and alienage trials. Why that difference in results? The explanation perhaps lies in sample sizes and time trends. For a suggestive illustration, our study, which covered the years just before this new article’s coverage, found that the foreigners’ overall advantage was decreasing with the passing years.

III. NEW RESULTS

This basic disagreement in the prior research thus poses the question whether it is xenophobia or xenophilia at work in U.S. courts, or neither. More precisely phrased, is any existing xenophobia more or less powerful than litigants expect, given that misperception is all that outcome data can reveal? Even to answer the latter question, it turns out, requires taking a

³⁴They define trial as a judicial grant of summary judgment, a bench trial, or a jury trial. *Id.* at 9–11. These adjudicated cases comprised 381 cases (300 involved a U.S. corporate defendant, and 81 involved a foreign corporate defendant). *Id.* at 10 tbl.1.

³⁵*Id.* at 7.

³⁶*Id.* at 28 (“In fact, U.S. firms in a jury decision and foreign firms in either a judge or jury decision have statistically indistinguishable win rates.”). However, the authors here seem to have compared jury trials to all sorts of decisions by judges (now including dismissals too), *id.*, tbl.10, so their finding of a judge/jury trial difference (at least as the term “trial” is used in standard legal discourse) may be suspect. It may be that all their data, taken together, point merely to domestic corporate defendants doing somewhat better on granted summary judgments than foreign corporate defendants (or it may be only that grants of summary judgment are more common in domestic litigation), but the authors did not develop any such point.

longer (and broader) view than the prior empirical research has managed. So, to investigate this matter, we decided to reexamine our prior results by including more data, expanding the study through more recent years.

A. Data

We again turn to the available computerized data gathered by the Administrative Office, now going through fiscal year 2005.³⁷ When any civil case terminates in a federal district court, the court clerk transmits to the Administrative Office a form containing information about the case. The form includes the parties' names, the subject matter of the case, its jurisdictional basis and removal or transfer status, the amount demanded, the dates of filing and termination, the procedural stage at which the case terminated, the procedural method of disposition, and, if the court entered a judgment, who prevailed and the relief granted. The form distinguishes among many subject matter categories, including branches of contract, tort, and other areas of law. Since fiscal year 1986, the form also specifies whether the two principal parties in diversity and alienage cases were American or foreign.³⁸ Thus, the database covers all the millions of federal civil cases over many years from the whole country. Unfortunately, however, the Administrative Office data do not contain many other things one would like to know, such as particulars about the foreign party.

For this article, our database comprises the 171,710 diversity and alienage cases, ending in judgment for plaintiff or defendant, that allow calculation and comparison of win rates for domestic and foreign parties.³⁹ To be precise, the win rate is the fraction of plaintiff wins among judgments for either the plaintiff or the defendant. Note that these judgments comprise much more than trial outcomes. For Administrative Office pur-

³⁷For a fuller description of the database, see Clermont & Eisenberg, *supra* note 25, at 127–29.

³⁸Because there is a lag in implementing new codes, especially in data classified by termination as opposed to filing, we did not include data for fiscal year 1986. Data after fiscal year 2005 are not yet available. Thus, we used data for fiscal years 1987–2005.

For fiscal years 1987–1991, the year end was June 30. Consequently, we present some data for calendar year 1986 (from the first half of fiscal year 1987). Beginning with fiscal year 1992, the year ended on September 30. Consequently, we present some data for calendar year 2005 (from the last three-quarters of fiscal year 2005).

³⁹We excluded 1,388 otherwise includible cases in which the plaintiff or the defendant was a foreign nation, 445 cases in which both principal parties were coded as aliens, and 7 cases in which residence data were missing.

poses, judgments might be the result of adjudication, consent, or default, but they normally do not include voluntary dismissals or dismissals for lack of prosecution. For our purposes, however, we narrowed the definition of judgments to include only those cases where the data indicate a win by plaintiff or defendant, not by both or by an unknown party.

B. Results

1. Trials: Win Rates and Numbers

Because the recent research has suggested that foreigners fare badly in federal civil trials, we look first at trial outcomes over the years. Specifically, we use the Administrative Office's procedural progress code to study the fully tried cases. However, we consider only the same case categories that we studied previously on the differences between jury and judge trial, which are 12 sizable case categories where litigants have a clear choice between jury and judge trial.⁴⁰ It is not the whole universe of cases, but it is a bigger world than any specific case grouping, such as patent infringement.

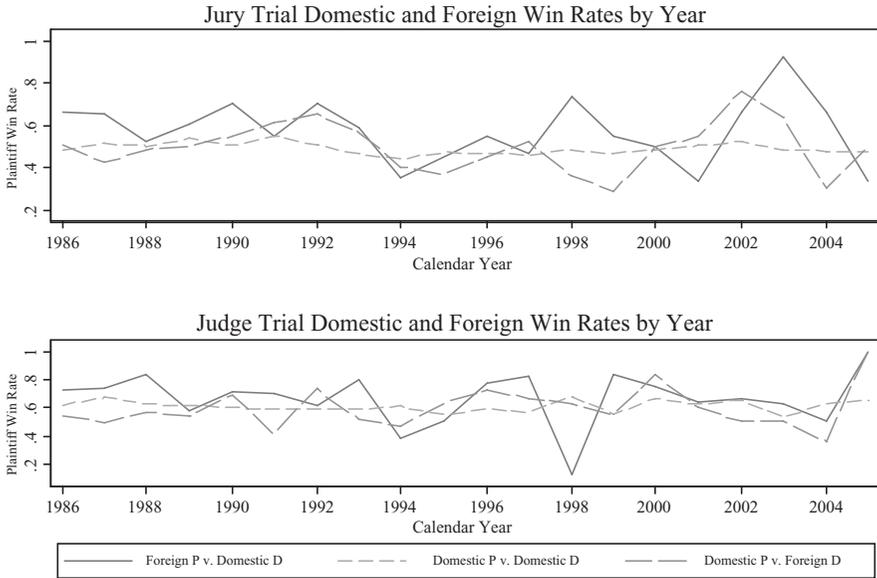
Case-selection theory predicts that any foreigner effect seen in all judgments will diminish as the court's docket contracts while approaching the stage of trial.⁴¹ Accordingly, as one can see in Figure 1, there is no clear story regarding foreigners, whether in jury trials or judge trials. The foreigners' "advantage" as seen only in trials was never big but, if anything, has decreased in recent years.

Thus, the recent research seems misguided in building conclusions on foreigners' supposedly poor performance at trial. In fact, we could instead say that at least foreign plaintiffs seem to fare slightly better than domestic plaintiffs, as Figure 1 suggests over the passing years. But the relatively small number of trials involving foreigners renders the results volatile. The difficulty in inferring conclusions has indeed intensified in recent years, for two reasons. First, the number of cases involving foreigners and going to

⁴⁰The 12 case categories are Negotiable Instruments; General Contract; Torts to Land; Airplane Personal Injury; Assault, Libel & Slander; Marine Personal Injury; Motor Vehicle Personal Injury; Other Personal Injury; Medical Malpractice; Product Liability; General Fraud; and Torts to Personal Property. See, e.g., Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which Is Speedier?* 70 *Judicature* 176 (1996) (including FELA as a 13th category, which does not rest on diversity jurisdiction).

⁴¹See Clermont & Eisenberg, *supra* note 25, at 137–42 (discussing this "refraction effect").

Figure 1: Trial win rates by year.



NOTE: This figure shows, by graphing plaintiff win rate for each year, that foreigners do not substantially outperform their domestic counterparts in jury trials or judge trials. It gives the rates in 12 case categories that offer litigants a clear choice between jury and judge: Negotiable Instruments; General Contract; Torts to Land; Airplane Personal Injury; Assault, Libel & Slander; Marine Personal Injury; Motor Vehicle Personal Injury; Other Personal Injury; Medical Malpractice; Product Liability; General Fraud; and Torts to Personal Property.

SOURCE: Administrative Office data for fiscal years 1987–2005.

judgment has dropped sharply.⁴² Second, the number of trials, and especially the number of bench trials, has plummeted.⁴³

Table 2 shows a foreigners’ “advantage” in its totals for the whole period. But if one were to focus on only a few years, one would be apt to jump to a faulty conclusion. For example, domestic defendants were temporarily outperforming foreign defendants at trial for much of the time period

⁴²See *infra* text accompanying notes 49–50.

⁴³See Ad Hoc Comm. on the Future of the Civil Trial of the Am. College of Trial Lawyers, *The “Vanishing Trial”: The College, the Profession, the Civil Justice System*, 226 F.R.D. 414 (2005); Clermont & Eisenberg, *supra* note 25, at 142–44; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004) (followed by other JELS symposium articles); Symposium, *Vanishing Trial*, 2006 J. Disp. Resol. 1.

Table 2: Jury and Judge Trials in 12 Case Categories During FY 1987–2005

	<i>Foreign Plaintiffs</i>	<i>All-Domestic Cases</i>	<i>Foreign Defendants</i>
Jury plaintiff win rate	59.76	49.32	49.37
Judge plaintiff win rate	70.69	61.05	55.14
Number of jury trials	574	17,621	1,910
Number of judge trials	505	5,962	740

NOTE: This table shows, by compiling total numbers for the whole period, that foreigners generally outperformed their domestic counterparts in jury trials and judge trials. It gives the plaintiff win rate and the number of fully tried cases in 12 case categories that offer litigants a clear choice between jury and judge: Negotiable Instruments; General Contract; Torts to Land; Airplane Personal Injury; Assault, Libel & Slander; Marine Personal Injury; Motor Vehicle Personal Injury; Other Personal Injury; Medical Malpractice; Product Liability; General Fraud; and Torts to Personal Property.

SOURCE: Administrative Office data for fiscal years 1987–2005.

studied in the “home court advantage” article, inducing its conclusion of xenophobia. A lesson for empirical researchers is to be especially sensitive to sample size, and to be sure to sample a range of years (as well as numerous case categories) before drawing general conclusions.

2. Judgments: Win Rates

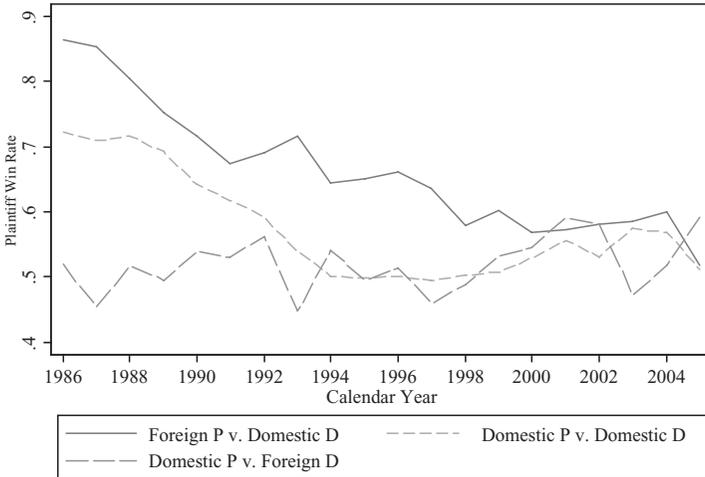
More of the story emerges from an examination of all judgments, rather than just trials, rendered in all diversity and alienage case categories. However, the pattern that then appears is varied enough to exclude any simplistic explanation such as xenophobia or xenophilia in U.S. courts. Case selection seems to be the only explanation possible.

Figure 2 reveals the importance of time trends. Over the last 20 years, foreigners’ success rates have gone from being significantly stronger than their domestic counterparts’ (with the foreign plaintiffs’ line above the middle one, and the foreign defendants’ line below) to being indistinguishable. Indeed, the strong time trend makes suspect any study of short duration, as it might be showing only a passing phenomenon. Any two separate studies could tell very different stories, and yet be entirely consistent, simply because they cover different eras.

Our xenophilia article’s key result, for 1986–1994,⁴⁴ appears as the left half of Figure 2. Foreigners then were enjoying considerable success, both as plaintiffs and defendants. However, the dominant long-term time trend,

⁴⁴See Clermont & Eisenberg, *supra* note 6, at 1125 fig.1.

Figure 2: Domestic and foreign judgment win rates by year.



NOTE: This figure shows, by graphing plaintiff win rate for each year, that in the past foreigners did substantially outperform their domestic counterparts in obtaining favorable judgments, but that more recently the foreigners’ “advantage” has all but disappeared.

SOURCE: Administrative Office data for fiscal years 1987–2005.

already at play, was just becoming insistent when the plaintiff win rate for domestic plaintiff versus foreign defendant jumped over the all-domestic plaintiff win rate in 1994. Foreign defendants were then losing more often than their domestic counterparts for the first time since these records were kept. This “jump,” however, resulted more from the diving all-domestic plaintiff win rate than from an increase in the plaintiff win rate for domestic plaintiff versus foreign defendant. Still, although foreign defendants may appear to have been holding their own, they in fact were not enjoying the difficult-to-explain general decline in plaintiff win rate seen widely in other types of actions.⁴⁵ Meanwhile, there was no denying that the foreign plaintiffs’ win rate was taking a serious dive.

In Figure 2’s second decade, the converging lines tended to level out. Any striking foreigners’ advantage (or disadvantage) had vanished. The smaller number of foreigner judgments made their lines ever more volatile. But that volatility made the converged lines even less interesting, at least at first glance.

⁴⁵See *infra* text accompanying note 51.

In overall totals, the first decade's results overwhelm the second decade's: foreigners, and especially foreign plaintiffs, have fared significantly better than their domestic counterparts. The overall plaintiff win rate for foreign plaintiff against domestic defendant for the whole duration of data availability has been 74.83 percent, for domestic plaintiff against domestic defendant 58.66 percent, and for domestic plaintiff against foreign defendant 50.35 percent.⁴⁶ Multivariate regressions confirm these significant differences ($p < 0.0005$).

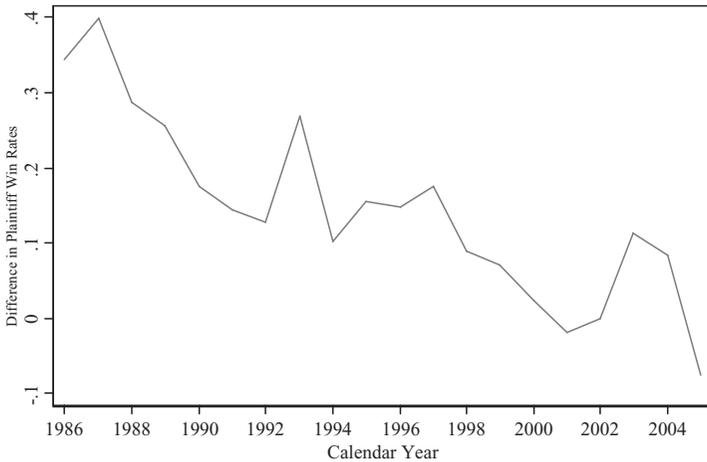
But the convergence over time really remains the big story. Maybe Figure 3 presents a better way to view the time trend. It shows the foreigner effect from 1986 to 2005 by graphing the plaintiff win rate in foreign-plaintiff-versus-domestic-defendant cases minus the plaintiff win rate in domestic-plaintiff-versus-foreign-defendant cases. In other words, it shows the distance between the top and bottom lines in the prior figure, while it neutralizes the effect of the diving plaintiff win rate. The bigger that distance, the greater the success that foreigners are enjoying in judgment outcomes, whether they appear as plaintiff or defendant. As the distance approaches zero, any foreigner effect is disappearing. Thus, Figure 3 shows the sizable foreigners' "advantage" dropping to nothing over the last two decades.

What do Figures 2 and 3 really mean? Well, basically, that only a reflexive sort of case selection—and not some fundamental and enduring structural or cultural cause—could produce such a changeable pattern. Does that mean that the two figures have nothing else to say? No, because conjecture—when combined with our theory that the anticipated xenophobia in U.S. courts and the distaste for litigating away from home produce foreigners' aversion to litigating here (and, of course, their domestic opponents' reciprocal eagerness to litigate here)—can take us further in interpreting the time trends shown in these graphs.

In the 1980s, litigants assumed that xenophobia prevailed, and consequently the outcome data showed foreigners faring well when the courts'

⁴⁶The subsidiary observations from the xenophilia article carry over as well to the new data. For example, over the last two decades, the respective win rates for those three types of actions that ended by the trial method of disposition are 62.55 percent, 51.26 percent, and 50.50 percent; by pretrial motion they are 51.84 percent, 32.57 percent, and 26.58 percent; and so this comparison shows a decreased foreigner effect at trial. The percentage of judgments disposed of by the trial method of disposition for those three types of actions are, respectively, 16.12 percent, 20.88 percent, and 31.79 percent; by default they are 35.03 percent, 25.09 percent, and 14.84 percent; and so this comparison suggests that foreign plaintiffs and defendants have strong cases.

Figure 3: Combined foreign plaintiffs' and defendants' success rates by year (win rate of Foreign P v. Domestic D) – (win rate of Domestic P v. Foreign D).



NOTE: This figure shows, by summing for each year the foreign plaintiffs' advantage and the foreign defendants' advantage in obtaining favorable judgments, that in the past foreigners did outperform their domestic counterparts' success rates by up to 40 percent, but that more recently the foreigners' edge has disappeared or even dropped below 0 percent.

SOURCE: Administrative Office data for fiscal years 1987–2005.

bias proved to be less than expected. But then the Wall came down, and globalization became the watchword, so that during the 1990s foreign plaintiffs lost some of their reluctance to litigate here, and hence they saw a diving win rate. Even more quickly, foreign defendants, who are more likely corporate or at least worldly enough to be subject to suit here, had overcome some of their unwarranted aversion to suit here (and unwarranted willingness to cave in settlement), and so they had seen their success rate become less advantageous and hence more comparable to that of their domestic counterparts. In sum, expectations of bias had come to better match existence of bias.

After 9/11, foreign plaintiffs and foreign defendants both did significantly better in terms of success rate, especially after the lag time necessary for any influence to affect data such as these on the *termination* of cases. Foreigners again feared litigating here.⁴⁷ Foreign would-be plaintiffs and

⁴⁷See Peter Geier, *The New Bias Hurdle: Middle Eastern Clients*, Nat'l L.J., May 29, 2006, at 4.

defendants abandoned or satisfied most claims, and persisted only in the cases they were most likely to win. Then, when they encountered less than the anticipated amount of bias, their success rates rose. But with time and the return toward normalcy, more standard win rates are now reasserting themselves. Such short-term effects suggest that case selection can be quite effective in driving win rates.

Surely this conjecture sounds a little silly. Our point, however, is merely that a plausible case-selection story could have produced the pattern observed. It is this possibility that strengthens our belief that foreigners' outcomes, coming from a caseload driven by the parties' perceptions of xenophobia, show predominantly a case-selection effect. These graphs plot uncontrolled outcome data and thus exhibit case selection at work, but they do not and cannot prove the existence of actual xenophobia or xenophilia.

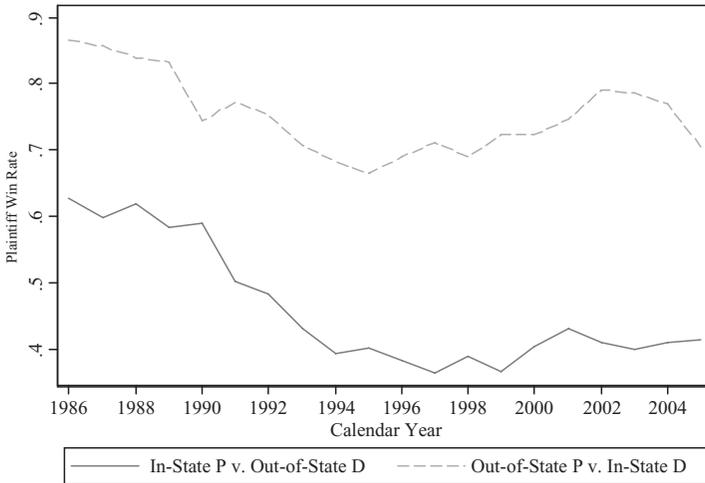
The case-selection explanation becomes even more plausible if we look beyond this comparison between foreign and domestic litigants. In our xenophilia article, we saw an analogous effect in domestic diversity cases if we compared the in-state U.S. plaintiffs' win rate against U.S. defendants to the win rate of out-of-state U.S. plaintiffs against U.S. defendants.⁴⁸ The out-of-staters' win rate was significantly higher. Thus, nonlocals did not fare at all poorly, apparently because they were selective about the cases they chose to litigate away from home.

Now extending the study to recent years, we see a continuation of that pattern, as shown by Figure 4. Although these plaintiff win rates exhibit the typical decline over the recent decades, the top line representing out-of-state plaintiffs has stayed consistently above the bottom line for in-state plaintiffs. The lines do not exhibit the convergence or the bumps that we saw in Figure 2 for foreigners' success rates. In other words, the forces affecting case selection by foreigners seemingly differ from those affecting case selection by Americans. Case selection turns on particularistic forces, and they can change rather quickly with time.

3. Judgments: Numbers

Thus, all seems to be starting to make sense—until one looks at the number of judgments. Over the last 20 years, there has been a considerable drop in the number of diversity and alienage judgments. Table 3 gives the numbers of judgments by year. The drop for wholly domestic diversity cases is impressive,

⁴⁸See Clermont & Eisenberg, *supra* note 6, at 1142–43.

Figure 4: In-state and out-of-state diversity parties' win rates by year.

NOTE: This figure shows, by graphing plaintiff win rate for each year in all-domestic diversity cases, that nonlocal plaintiffs have substantially and consistently outperformed local plaintiffs in winning favorable judgments. Apparently because nonlocals are selective about the cases they choose to litigate away from home, they enjoy elevated win rates.

SOURCE: Administrative Office data for fiscal years 1987–2005.

but the alienage decrease is steadier and greater. For these sets of cases, the system is experiencing the vanishing judgment, similar to the more widely felt vanishing trial.

To get an inkling of the cause of the dropping numbers, it is necessary to note that Table 3 presents only judgments, not overall caseload. Table 4 shows the numbers of terminations by year. Terminations comprise not just judgments for plaintiff or defendant, but all federal cases ending in any manner, including all settlements. It seems that domestic diversity terminations, as opposed to judgments, have not decreased.⁴⁹ But the drop in alienage terminations at least helps explain why alienage judgments are

⁴⁹The drop for domestic diversity judgments might relate in part to such legal changes as the increase in the jurisdictional amount for cases commenced or removed after 1988, again given that it takes some time for any such change to show up in termination data. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646 (1988) (codified at 28 U.S.C. § 1332(a) (2006)); see David A. Greher, Note, The Application of 28 U.S.C. § 1332(c) (1) to Alien Corporations: A Dual Citizenship Analysis, 36 Va. J. Int'l L. 233, 241 n.38 (1995). But the lack of a drop in domestic diversity terminations argues against this explanation.

Table 3: Number of Diversity and Alienage Judgments by Year

<i>Calendar Year</i>	<i>Foreign Plaintiffs</i>	<i>All-Domestic Cases</i>	<i>Foreign Defendants</i>
1986	2,592	8,552	2,896
1987	2,012	9,803	2,393
1988	1,002	11,642	1,395
1989	658	11,854	936
1990	440	10,097	614
1991	341	8,934	511
1992	334	8,985	366
1993	297	8,155	344
1994	236	7,274	336
1995	284	7,287	319
1996	257	7,415	282
1997	269	7,169	300
1998	240	6,698	282
1999	211	6,909	239
2000	211	6,778	196
2001	220	6,594	183
2002	177	7,468	165
2003	171	6,502	161
2004	155	5,187	118
2005	113	4,157	108
Total	10,220	157,460	12,144

NOTE: This table shows the dramatically decreasing number of diversity and alienage judgments over the last two decades. For fiscal years 1987–1991, the year end was June 30. Consequently, we have some data for calendar year 1986 (from the first half of fiscal year 1987). Beginning with fiscal year 1992, the year ended on September 30. Consequently, we have some data for calendar year 2005 (from the last three-quarters of fiscal year 2005). We calculated the above numbers for calendar years 1986 and 2005 by extrapolation from the stub years that fiscal year data yield.

SOURCE: Administrative Office data for fiscal years 1987–2005.

dropping faster than diversity judgments.⁵⁰ Both diversity and alienage cases are experiencing a sharp drop in judgment rate, or the number of judgments divided by the number of terminations. Looking at other bases of jurisdiction, we can see these decreases in judgments are biggest in diversity and alienage jurisdiction.

⁵⁰Legal changes might have some effect here, too, such as the 1988 statute’s classifying permanent resident aliens as state citizens and hence decreasing the role for alienage jurisdiction. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 203, 102 Stat. 4642, 4646 (1988) (codified at 28 U.S.C. § 1332(a) (2006)). But note that the drop in terminations

Table 4: Number of Diversity and Alienage Terminations by Year

<i>Calendar Year</i>	<i>Foreign Plaintiffs</i>	<i>All-Domestic Cases</i>	<i>Foreign Defendants</i>
1986	7,122	36,504	17,080
1987	5,557	44,905	13,380
1988	3,444	52,422	9,273
1989	2,346	52,897	5,746
1990	1,713	50,927	4,661
1991	1,502	59,693	6,737
1992	1,510	48,268	2,864
1993	1,275	50,787	2,111
1994	1,243	44,990	2,482
1995	1,179	42,663	2,049
1996	1,199	46,297	1,909
1997	1,333	50,265	1,964
1998	1,307	58,568	1,771
1999	1,240	56,265	1,485
2000	1,956	46,031	1,274
2001	1,526	47,110	1,458
2002	1,249	51,619	1,085
2003	1,249	51,992	1,026
2004	1,073	60,531	965
2005	1,101	52,843	875
Total	40,124	1,005,577	80,195

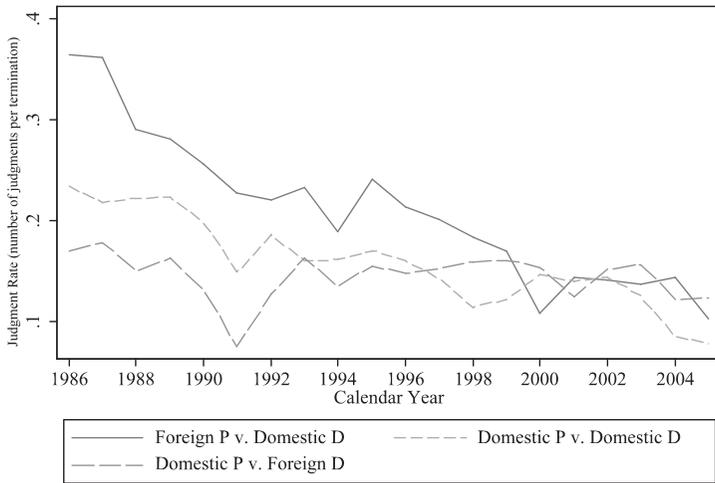
NOTE: This table shows the number of diversity and alienage terminations over the last two decades, as the alienage terminations plummeted. For fiscal years 1987–1991, the year end was June 30. Consequently, we have some data for calendar year 1986 (from the first half of fiscal year 1987). Beginning with fiscal year 1992, the year ended on September 30. Consequently, we have some data for calendar year 2005 (from the last three-quarters of fiscal year 2005). We calculated the above numbers for calendar years 1986 and 2005 by extrapolation from the stub years that fiscal year data yield.

SOURCE: Administrative Office data for fiscal years 1987–2005.

The overall downward time trends in the number and rate of diversity and alienage judgments are so dramatically strong as to mask any smaller short-term effects. Yet those big time trends remain difficult to explain. A drop in the judgment rate suggests an increase in settlements not embodied in a judgment. Consistently with that suggestion, and especially in diversity

involving foreign litigants could extend well beyond alienage cases, given that the Administrative Office has chosen to code foreign citizenship only for that jurisdictional basis and so may be hiding a drop in foreigners litigating on other jurisdictional bases.

Figure 5: Domestic and foreign judgment rates by year.



NOTE: This figure graphs for each year the judgment rate, or the number of judgments divided by the number of terminations. It shows that foreign plaintiffs' suits in the past went all the way to judgment much more often than did domestic plaintiffs' suits and especially those suits against foreign defendants, but that more recently these differences have all but disappeared. Our thanks go to Professor Kuo-Chang Huang for suggesting this figure.

SOURCE: Administrative Office data for fiscal years 1987–2005.

and alienage cases, the number of default and consent judgments have dropped during the recent years while other dismissals have gone up.⁵¹

We can combine Tables 3 and 4 into Figure 5 to show the judgment rates. Interestingly, Figure 5 closely resembles the pattern of plaintiff win rates in Figure 2, so that in pattern, over the years studied, the judgment rates have replicated the plaintiff win rates. Perhaps, then, the judgment rate and the plaintiff win rate are related in such a way that the former explains the latter's downward trend. That is, as the years passed, domestic defendants may have come to be more adverse to litigation and hence to settle more of the strong cases against them, whether brought by foreign or domestic plaintiffs, and

⁵¹But the number of other types of dispositions, such as remand and transfer, have gone way up over the same period of time. Switching focus from the Administrative Office's code for method of disposition to its code for procedural progress, one observes a big increase in early terminations that come after some court action, and a decrease in those that come with no court action. Thus, one cannot say that an increase in settlement rate is at work alone. See Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 *J. Empirical Legal Stud.* 705 (2004).

thus lowered the plaintiff win rates. This change has especially impacted the foreign plaintiffs. Unlike foreign defendants, foreign plaintiffs can demonstrate their aversion to suit in this country by staying out of court. Consequently, in the early years there were fewer foreign plaintiff suits than foreign defendant suits, but the domestic defendants' reluctance to settle forced the foreign plaintiffs to go to judgment in their strong cases at a much higher rate than other plaintiffs and so produced an elevated foreign plaintiff win rate. However, in the more recent years, as the perceptions of xenophobia and the domestic defendants' resistance to settlement decreased, all these foreigner effects diminished.

Whatever the explanation, the drops in the numbers of alienage terminations and judgments do not necessarily imply an increasing aversion by foreigners. Other forces could be dictating the drops, even while the foreigners' exaggerated fear of bias could in fact be decreasing. The relatively fewer cases that do not settle would be the ones that the parties see as close cases. If the foreigners encounter only the expected level of bias in those cases that go to judgment, they would see depressed rates of success.

Still, the dropping numbers make our story of changes in the foreigners' aversion harder to believe. One might therefore choose to argue instead that xenophobia took a grip on the nation in the five-year period after 1986, causing foreigners' terminations, judgments, and success rates to drop like so many rocks and then stay at the bottom. But is that even plausible? Is it not much more likely that forces other than xenophobia were driving case selection—and that therefore researchers should be even more wary of drawing general conclusions about the neutrality of our legal system based on the obviously skewed samples of foreigners' terminations and judgments?

IV. CONCLUSION

The available data, when considered in a big enough sample from numerous case categories and a range of years, indicate that foreigners do not fare poorly in the federal courts—indeed, they have outperformed their domestic counterparts. Thus, the data offer no support for the existence of xenophobic bias in U.S. courts.

What the data do show is that case selection drives the outcomes for foreigners. Foreigners' aversion to a U.S. forum, an aversion that waxes and wanes over the years, can elevate the foreigners' success rates. Consequently, researchers should be wary of drawing structural or cultural explanations from the changeable pattern of outcome data.