

Foreigners' Fate in America's Courts: Empirical Legal Research

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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 twenty 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.

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

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

² E.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).

³ See *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) (ar-

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.

In this article, we shall review the existing evidence and then provide some new results on the "foreigner effect." But first we give a little background on empirical legal research in general.

II. BACKGROUND ON EMPIRICAL LEGAL RESEARCH

One would think that academics and lawyers should always have been concerned with how the law works in actuality. But law in fact has long ignored empirical methods. The law's theory, doctrine, and administration sprang from logic and intuition, rather than from scientifically appraised experience.

Today, however, a new era is dawning.⁶ Empirical research—empirical studies of the legal system's operation, as distinguished from scientific analyses introduced as evidence in individual legal cases—should soon have a revolutionary impact on the law. In particular as to litigation, a new wave of empirical study is giving a fresh sense of reality to the field. Moreover, there is a growing need for further such study, because in recent years anecdotal evidence has created a frenzy about the current state of litigation and led to a host of ill-conceived reform efforts. Before undertaking reform, one should know whether and to what extent there really is a problem, and then one should realistically assess the proposed reforms.

guing need for federal jurisdiction to assuage "possible fears and apprehensions" of foreign suitors).

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

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

⁶ This background draws heavily from Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 *Cornell L. Rev.* 119, 125-29, 137-42 (2002) [hereinafter *Litigation Realities*].

A. Methods of Empirical Research

The social sciences—economics, psychology, sociology, law, and so on—employ a variety of empirical methods. Empirical methods are those that employ means for the systematic observation of experience in pursuit of inductive ends. The social scientists either create experience by experiment or find experience in records, and then they analyze this experience. In analyzing experience, the social scientists apply a variety of tools. The most powerful of these—and the weapon that has enabled a revolution in legal studies—is statistics. Statistical analysis entails the assembly and organization of plentiful data, which are almost always in the form of numbers, and analysis of the data to reach conclusions.⁷ In the particular arena of legal studies, the statistical research to date divides into three groups, which differ in their method of data assembly.

First, there are statistical analyses of published judicial decisions.⁸ In a sense, this group of studies represented a systematization of traditional legal research. Instead of reporting the fruits of years of subjective reading of opinions that had crossed one's desk, the legal scholar turned to selecting randomly, coding tirelessly, and then analyzing hundreds of cases. This new kind of research was a step forward. And it has become much easier to do given the development of computerized commercial databases of legal materials. But it is a very risky undertaking.⁹ On the one hand, judicial decisions represent only the very tip of the mass of grievances. From that highpoint of actual judicial decisions, it is tough to infer truths about the underlying mass of disputes or of what lies below disputes. On the other hand, published decisions are a skewed sample of that tip composed of judicial decisions. A rather small percentage of judicial decisions reach publication. This shortcoming is indeed becoming more

⁷ See generally Exchange, *Empirical Research and the Goals of Legal Scholarship*, 69 U. Chi. L. Rev. 1 (2002) (presenting several articles debating the utility and relevance of applying social science rules of inference to empirical legal studies).

⁸ See, e.g., Donald R. Songer, Reginald S. Sheehan & Susan B. Haire, *Continuity and Change on the United States Courts of Appeals* (2000); Michael E. Sofimine, *The Quiet Revolution in Personal Jurisdiction*, 73 Tul. L. Rev. 1 (1998).

⁹ See Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 75 (2001) (“Understanding these diverse [determinants of publication] is crucial for . . . legal academics and social scientists who rely upon databases of published opinions to track judicial behavior.”).

serious. The publication rate even for the heavily published decisions of the federal courts of appeals has dipped from almost 50% in 1976 to just over 20% in 2000.¹⁰ This reduced sample is certainly not representative of all judicial decisions. For example, publication choices skew seriously toward publication of reversals rather than affirmances: federal courts of appeals' civil decisions show an 82% affirmance rate for all appeals from tried judgments, but their published decisions in comparable cases show only a 63% affirmance rate.¹¹

Second, the real heroes of empirical research create their own data for their subsequent statistical analyses.¹² They might do this by experimental work or by archival research. That is, they might, for example, feed a series of simulated cases to a number of mock juries. Or they might spend months stumbling around in dusty court files, and then go out in the field to uncover each case's real facts to which the file coldly alludes. These methods have long been possible, and for just as long they have gone rarely employed. And that situation will persist into the future. Basically, the reason is that this kind of work is a drag. It voraciously consumes time and money. Moreover, there is no one to do it. Law-trained persons are unsuited by temperament and training. High opportunity cost and low professional reward also disincline them. Non-law-trained persons are, well, not trained in law. Social scientists have plenty to study that does not require the courage and effort of venturing into the mysterious realm of the law.

Third, the most promising group of statistical studies involves analyses of publicly available, usually governmental, databases.¹³ One could view this ap-

¹⁰ See Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. Ill. L. Rev. 947, 968.

¹¹ See *id.* at 969.

¹² See, e.g., Harry Kalven, Jr. & Hans Zeisel, *The American Jury* (Univ. of Chi. Press 1971) (1966); see also John Kaplan, *Book Review*, 115 U. Pa. L. Rev. 475 (1967) (reviewing Kalven & Zeisel, *supra*); Michael H. Walsh, *The American Jury: A Reassessment*, 79 Yale L.J. 142 (1969) (book review) (same). Kalven and Zeisel's book inaugurated the movement of rigorous empirical legal studies, although the movement has only very recently exploded in interest. See generally Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 Law & Soc. Inquiry 323 (1991) (assessing the historical impact of that book on legal and social science research).

¹³ See, e.g., Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 Wis. L. Rev. 577, 577 (describing "a low cost *bricolage* strategy of trying to capture, refine, and juxtapose scattered data already in the

proach as a way to overcome the limits and risks of published-decision research. Or one could view it as a free-riding version of the heroic approach. Actually, it is both, because it yields valid results by feasible means. Broad and growing databases are available at no cost. Access is easy, especially given the internet's ever-increasing power. Inexpensive but sophisticated commercial statistical software now exists, rendering the analysis step easier. In short, everything is in place for an explosion of empirical work. So it is this group of statistical studies that should have the biggest impact on the law.

One ready source of data comprises those gathered by the Administrative Office of the United States Courts, assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research.¹⁴ These data convey details of all cases terminated in the federal courts since fiscal 1970. When any civil case terminates in a federal district court or court of appeals, the court clerk transmits to the Administrative Office a form containing information about the case. The form includes, *inter alia*, data regarding the names of the parties, the subject matter of the case (the form distinguishes among many subject matter categories, including specific branches of contract, tort, and other areas of law), the case's jurisdictional basis, its origin in the district (as original, removed, or transferred), the amount demanded, the dates of filing and termination in the district court or the court of appeals, the procedural stage of the case at termination, the procedural method of disposi-

public domain"); Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device With No Effects*, 21 *Pace L. Rev.* 203 (2000).

¹⁴ See 11 *Admin. Office of the U.S. Courts, Guide to Judiciary Policies and Procedures* transmittal 64, at II-18 to -28 (Mar. 1, 1985) (district court); 11 *Admin. Office of the U.S. Courts, Statistics Manual* ch. I, at 7-43 (June 1989) (court of appeals). For a complete description of the Administrative Office database, see Inter-university Consortium for Political and Social Research, *Federal Court Cases: Integrated Data Base, 1970-1997*, ICPSR 8429 (1998). For easy access to part of this database, see Theodore Eisenberg & Kevin M. Clermont, *Judicial Statistical Inquiry*, at <http://empirical.law.cornell.edu> (last modified Sept. 20, 2002), which is discussed in Theodore Eisenberg & Kevin M. Clermont, *Courts in Cyberspace*, 46 *J. Legal Educ.* 94 (1996). For a more detailed discussion of this database's strengths and weaknesses, 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, 585-87 (1998) [hereinafter *Removal*]; Frank B. Cross, *Comparative Judicial Databases*, 83 *Judicature* 248 (2000); Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 *Mich. L. Rev.* 365, 380-83 (2000).

tion, and, if the court entered judgment or reached decision, the prevailing party and the relief granted. Thus, the computerized database, compiled from these forms, covers all of the millions of federal civil cases over many years from the whole country.

In the aggregate, the Administrative Office data appear reliable.¹⁵ Still, data of such vast coverage, gathered under sometimes confusing instructions, must involve minor *gaps and misclassifications*. Many different people entered the data over an extended period, although this dispersion at least would neutralize mistakes and biases. Also, the standards for coding have changed over time, which necessitates careful attention. Only in fiscal 1979 did the Administrative Office start to record which party prevailed by judgment in the trial court. In fiscal 1986 it began to indicate meaningfully the citizenship of the two principal parties in diversity cases as well as their corporate or individual status.

When working with outcomes, one faces a difficulty in dealing with *formal wins*. This database records only formal outcome, as in judgment for plaintiff or defendant. So a formal loss, which may have been worthwhile for the plaintiff because of its deterrent effect or other long-run benefit, counts as a loss. And a formal win, which may have resulted in an unexpectedly small or economically insufficient recovery, still counts as a win. Nevertheless, formal outcomes, especially when averaged over all cases for many years, can tell the researcher quite a bit.

Yet another difficulty lies in limiting the focus to *technical judgments*. Most lawsuits do not make it all the way through litigation. Most litigated cases settle or terminate in some manner, short of judgment, that prevents ascertaining the winner from afar. Indeed, most grievances do not even become lawsuits. Many grievances are abandoned, claims satisfied, and disputes settled. Thus, harmed persons abandon or settle the overwhelming majority of grievances at some point along the line.¹⁶ Nevertheless, remember that the set of judgments in the database comprises much more than trial outcomes. For Administrative Office purposes, judgments might be the result of adjudication, consent, or default, although they normally do not include voluntary dismissals or dismissals for lack of prosecution. Again, then, although the researcher must keep the

¹⁵ See *infra* note 52.

¹⁶ See Kevin M. Clermont, *Principles of Civil Procedure* § 2.3 (2005).

data's limitations in mind, the study of judgments can yield much information.

Most unfortunately, the Administrative Office data do not contain many other things one would like to know. They show *no particulars* of each lawsuit. For example, although the clerks' form distinguishes among many subject-matter categories, including branches of tort such as medical malpractice and motor vehicle, it does not distinguish among types of claims within the categories. This failing is an important limitation, because outcomes depend heavily on the type of case. In any study, one must control for the case category. But one would always like to control on a finer level than is possible. More generally, these data are just a bunch of codes about a limited number of case features. This situation restricts what one can study about the legal system, and surely makes risky any behavioral inferences one might draw therefrom. But the Administrative Office's data are markedly better than nothing.¹⁷ Finally, other databases do and will exist for the study of other legal matters.

B. Selection Effect

1. Settlement's Effect on Win Rates

As just suggested, a basic truth is that settlement is numerically much more important than actual litigation. Yet empirical research tends to focus on the readily observable, and litigation is much more observable than settlement. Indeed, judgment is the most observable feature of litigation. Therefore, the popular form of recent empirical studies involves examining the parties' success in obtaining judgment after litigation, thus studying the system's output while largely ignoring the hidden but variable composition of its input.

Not only are such judgment data readily available, but they intuitively appear to be full of meaning as well. An analyst usually uses win-rate data to get at some underlying factor affecting outcome generally, such as some substantive or procedural rule or some nonlegal factor favoring one side or the other in the set of all disputes.¹⁸ Yet this interpretive step based on win-rate data can

¹⁷ "It is easy to lie with statistics, but easier to lie without them." Frederick Mosteller, quoted in *Time*, Aug. 7, 2006, at 23.

¹⁸ A disturbing example lies in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-300 (7th Cir. 1995), in which Chief Judge Posner used the defendant drug companies' 92.3% win rate in thirteen prior cases brought by other hemophiliacs to justify denial of class-action status to

easily lead the analyst astray, because win-rate data inherently entail near-fatal ambiguity.

The ambiguity arises from the selection effect of the settlement process, whereby the parties' selection of which cases to push into and through litigation produces a biased sample from the mass of underlying disputes.¹⁹ More specifically, disputes and cases that clearly favor either the plaintiff or the defendant tend to settle readily, because both sides can save costs by settling in light of their knowledge of the applicable law and all other aspects of the case. Difficult cases falling close to the applicable decisional criterion tend not to settle, because the parties are more likely to disagree substantially in their predicted outcomes. These unsettled close cases fall more or less equally on either side of the criterion, regardless of the position of that criterion and regardless of the underlying distribution of disputes. Thus, even if, say, the legal criterion, such as strict liability, highly favors plaintiffs, one might not observe a plaintiff win rate well above 50%. Instead, case selection will leave for adjudication a residue of unsettled close cases, which consequently exhibit some nonextreme equilibrium win rate.

As a consequence of this case-selection effect, the win rate might reveal something about the set of adjudged cases, a universe dominated by close cases—but it reveals little about the underlying, variegated mass of disputes and cases, and indeed little about the litigation process's treatment thereof. Moreover, any distinction between two streams of cases, such as medical malpractice and patent infringement cases, should lead to no difference in adjudicated win rates as long as the parties evaluate the cases without systematic inaccuracy.

Indeed, under simplifying assumptions, and as a limiting implication, case-selection effect theory suggests a trial win rate of 50% for both streams. But actually the theory does not predict any universal win rate, or even that two streams' rates will be precisely the same. Reality is too complicated to produce a 50% win rate. So, what factors might lead to win rates different from 50%? There are three types of such factors.

the hemophiliac plaintiffs in the case at bar. See generally Joel Best, *Damned Lies and Statistics* 162-66 (2001) (contrasting cynical approach to statistics with naive approach to statistics).

¹⁹ For background material regarding selection effect, see sources cited in *Removal*, *supra* note 14, at 588 n.21.

First, different stakes to the parties is the most common explanation of win rates that depart from the idealized predictions of case-selection effect. The doctor whose reputation may be harmed will have more at stake than the dollars that one injured patient seeks. The company defending a product liability action will have more at stake than the money sought in the particular case. Such differential stakes may make defendants more willing to settle the plaintiffs' stronger cases, and so lead to plaintiffs' win rates lower than either 50% or whatever other level one expects absent the differential stakes. Analogously, greater stakes to plaintiffs may raise their win rates.²⁰

Many other factors are of this contextual type, in that they all constitute real-world complications that alter the economic model's simplified assumptions and consequently its purified predictions. Illustratively, for a stream of cases in which the main dispute concerns damages based on clear liability, obviously the win rate would increase. Similarly, differences in the two sides' access to information and competence in forecasting would affect the win rate. Or if the two streams of cases under study differ in costs of litigating or in awards upon winning, win rates would not equalize.

Second, another type of powerful explanation of aberrant win rates would be the parties' mutual misperceptions about the prevailing standard of decision. If the parties perceive the adjudicator to be favorable to the plaintiff, but the adjudicator turns out not to be, then the supposedly close cases would turn out to be losers and the win rate would drop. Similarly, if the adjudicator appears to be neutral, but turns out to be unfavorable to the plaintiff, then the win rate would drop. Imagined biases or unperceived biases of the adjudicator therefore affect win rate.²¹

The direction of the effect on win rate is opposite to the misperception. A suppressed win rate might not mean that plaintiffs suffer a disadvantage, but merely that plaintiffs are not as advantaged as the parties think. A slanted win rate might therefore mean almost the opposite of what it seems to mean. This complexity adds a cruel twist to win-rate data's inherent ambiguity.

²⁰ See, e.g., sources cited *id.* at 589 n.25.

²¹ See Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1131-32, 1156-57, 1170-72 (1992) [hereinafter Jury or Judge] (discussing the role of attorneys' misperception of both jury performance and the "adjudicator's standard of decision").

Third, average strength of the cases is a type of factor different in kind from the contextual factors and from misperception. This factor draws on the reassuring thought that a stream of stronger claims should have a higher win rate than a stream of weaker claims. The claims' strength could lie in favorable facts or in an easy legal criterion, or it could result from unevenly matched adversaries or from a biased adjudicator. In other words, case-selection effect is merely a tendency to remove meaning from outcome data, but it may not completely do so.²²

Generally, the factor of case strength is at play throughout the dispute-resolution process. At the earlier termination stages, this factor enjoys greater influence. But its weight tends to diminish as settlement weeds out the cases, so that in trial data this factor has largely but not completely disappeared. In other words, given the tendency of clear cases to drop out as litigation progresses, win rates at the various pretrial stages progressively close in on a nonextreme trial win rate. Still, a strong positive correlation exists between win rates on pretrial motion and at trial.²³ Also, win rates for settlements and for judgments seem to correlate.²⁴ In sum, there exists what may be called a refraction effect: in the progress of litigation, a case stream's win rate usually approaches some nonextreme trial win rate.²⁵ The trial win rate may not convey much meaning by itself, making it often dangerous to work only with trial data. Nevertheless, thanks to the refraction effect, the trial data's meaning becomes clearer as one tracks back to the mass of underlying cases and disputes, and so one can infer

22 See Daniel Kessler, Thomas Meites & Geoffrey Miller, Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation, 25 J. Legal Stud. 233, 244-45 (1996); Joel Waldfogel, The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory, 103 J. Pol. Econ. 229, 232-35 (1995).

23 See Theodore Eisenberg, The Relationship Between Plaintiff Success Rates Before Trial and at Trial, 154 J. Royal Stat. Soc'y ser. A, pt. 1, at 111 (1991).

24 See Theodore Eisenberg, Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals, 19 Law & Soc. Inquiry 275, 292-93 & n.64 (1994).

25 See Joel Waldfogel, Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation, 41 J.L. & Econ. 451, 471-74 (1998) (providing evidence of refraction effect). On the disappearance of the refraction effect on appeal, see Kevin M. Clermont & Theodore Eisenberg, Appeal from Jury or Judge Trial: Defendants' Advantage, 3 Am. L. & Econ. Rev. 125, 135 n.19 (2001).

with greater confidence from win rates.²⁶

2. Settlement's Effect on Data Interpretation

As just explained, our work has shown that one should not expect 50% win rates.²⁷ Real-world win rates are complicated to interpret, because of the interplay of the aforementioned factors. Understanding those factors is therefore essential.

For example, in earlier work we found that transfer of venue out of a forum favorable to the plaintiff results, despite settlement's effect, in a lowered win rate.²⁸ The plaintiffs' win rate in federal civil cases is 58% in cases in which there is no transfer and 29% in transferred cases.²⁹ Interestingly, the comparable win rate for termination at *early* procedural stages is 73% in non-transfer cases and 26% in transfer cases, while the comparable win rates at *trial* are 45% and 47%.³⁰ Given settlement's role in causing win rates to converge but not to equalize as the litigation process progresses, these two streams of nontransfer and transfer cases retain the makings of a potentially meaningful story.

If win rates retain residual meaning, which the settlement process has not obliterated, the challenge becomes to tease out the residual meaning in win-rate data by removing the inherent case-selection ambiguities—thereby isolating, say, the remaining implications of the case-strength factor. Careful research and theorizing can often succeed in overcoming the effect of settlement.

The *first step* of careful research and theorizing involves making sure that the comparison is apples to apples. The most useful tool here is regression—a statistical technique that helps to make the studied cases comparable in kind to

²⁶ See, e.g., Theodore Eisenberg, John Goerdt, Brian Ostrom & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 *Seattle U. L. Rev.* 433, 445-47 (1996) (showing downward time trend in product liability win rate that is observable in earlier stages but not at trial).

²⁷ See, e.g., Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 *J. Legal Stud.* 337 (1990).

²⁸ See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 *Cornell L. Rev.* 1507 (1995).

²⁹ See *id.* at 1511-12.

³⁰ See *id.* at 1520 tbl.1.

other cases and thus to neutralize the case-selection effect.³¹ Multivariate regression works to segregate the independent effects of various variables, such as year and case category, on win rates. The dependent variable—what one is trying to explain—is whether the judgment is a win or a loss for plaintiff. The regression should use a broad set of independent variables—factors that may affect the win rate—as controls. This statistical technique helps to ensure that any comparison of win rates rests on cases that are as similar as possible.

The *second step* involves formulating the possible explanations of the observed phenomenon and then testing them by investigating additional variables. For example, if a possible explanation of a low rate of success is inept counsel, one might compare win rates for corporate and individual parties, to see if the observed effect is more pronounced for individuals with their possibly less qualified counsel. Such a process can eliminate many possible explanations.

The *third step* involves application of a plausibility screen to the surviving explanations. Some will just make much more sense than others, fitting better within the framework of accumulated experience and knowledge. For example, seeing lower conviction rates in judge-tried criminal cases (50%) than in jury-tried criminal cases (80%) probably does not mean that the judges rather than juries are overly sympathetic to the accused; instead, case selection is the more plausible explanation, as criminal defendants with solid defenses tend to prefer judge trials.³² Such reliance on experience and knowledge may not sound too scientific. That is true. In fact, the preceding two steps were less rigorous than they may have sounded.

Our point, indeed, is that this form of analysis is as much art as science. And it is a difficult and subjective art. For example, surely there would be a predilection to accept the first plausible explanation, as one works through the straightforward explanations of case strength before wrestling with the more indirect case-selection contextual explanations or resorting to convoluted ex-

³¹ See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 Harv. L. Rev. 1120, 1129-32 (1996) [hereinafter *Xenophilia*] (discussing the use of multivariate regression to study the effect of party citizenship on outcome). Multivariate regression is a statistical technique that quantifies the influence of each of several factors (independent variables) on the phenomenon being studied (dependent variable). See generally Michael O. Finkelstein & Bruce Levin, *Statistics for Lawyers* 350-479 (2d ed. 2001) (applying regression analysis to various legal issues).

³² See *Jury or Judge*, supra note 21, at 1165-66.

planations based on parties' misperceptions. Such predilection is dangerous. Caveat emptor accordingly applies to this art form.

Along these lines, consider why empirical studies tend to be surprising. Unlike law and economics, which reassuringly tends to find that the common law makes sense, law and empirical methods' studies tend to be shocking. They tend to upset so-called common knowledge. This tendency is not attributable only to prevailing ignorance. It is more an effect of the researchers' motivations to look for jarring patterns. Researchers see lots of numbers, but they pause on and later report on the numbers that startle. For example, if jury-tried cases did spend more time on the docket than judge-tried cases, as most people supposed, we probably would not have written up our results on disposition time.³³ Yet any surprising empirical result could be largely an artifact of the case-selection effect, and consequently be unrevealing about the realities of the legal system.

Although empirical research can provide valuable insights, the consumer of empirical research must cautiously verify that the researchers had no axe to grind, that they truly immersed themselves in the data, and that they explained their investigatory and reasoning processes in detail. All this requires time and effort from the user and the researchers. Both art and science demand no less.³⁴

III. PRIOR RESEARCH ON THE FOREIGNER EFFECT

A. Xenophilia Article

The first empirical foray into this realm was our own 1996 article.³⁵ It showed that, for cases the Administrative Office of the U.S. Courts coded as

³³ Theodore Eisenberg & Kevin M. Clermont, Trial by Jury or Judge: Which Is Speedier?, 79 *Judicature* 176 (1996) [hereinafter Speed]. Using the Administrative Office database of federal civil cases, but limiting our search to sizable tort and contract categories that clearly involved a choice between jury and judge trial, we showed that judge-tried cases last longer than jury-tried cases over their lives on the docket even though actual jury trials themselves proceed twice as slowly as judge trials: the mean judge-tried case spends 755 days on the district court docket, while the mean jury-tried case terminates in 678 days.

³⁴ See generally Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, *Law & Contemp. Probs.*, Summer 1988, at 55 (discussing problems with the application of empirical research to public policy).

³⁵ *Xenophilia*, *supra* note 31.

terminated during fiscal years 1987-1994 in the federal district courts,³⁶ foreigners won substantially more than domestic litigants, whether they appeared as plaintiff or defendant. We referred to 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%. Foreign plaintiffs, however, won 80% of the time. Finally, when domestic plaintiffs went against foreign defendants, the plaintiff win rate dropped to 50%. 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,³⁷ and did not depend on the procedural route taken to judgment,³⁸ 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.³⁹ 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% chance of the plaintiff's winning, an apparently identical case brought by a foreign plaintiff would enjoy a 61% chance, while substituting instead a foreign defendant for the domestic defendant would drop the 50% chance of the domestic plaintiff's winning to 41%.

From these results, we, of course, did not conclude that xenophilia prevails within the U.S. courts. Instead, we embraced a case-selection explanation.

³⁶ On the situation in state courts, see *id.* at 1122 n.10.

³⁷ See *id.* at 1125-28.

³⁸ See *id.* at 1136-39.

³⁹ See *id.* at 1129-32.

"We believe that the most plausible and powerful explanation for the foreigner effect is that foreigners are reluctant to litigate in America for a variety of reasons, including the apprehension that American courts exhibit xenophobic bias and the pecuniary and nonpecuniary distastes for litigating in a distant place."⁴⁰ 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."⁴¹ 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.⁴² 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 stages⁴³ and by the various disposition methods,⁴⁴ as well as their mix of jury and judge cases⁴⁵ and their differences in case size.⁴⁶ 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.⁴⁷ Finally, we noticed an analogous effect—an elevated success rate due to the party's aversion to the forum—by comparing for wholly domestic diversity cases the in-state plaintiffs' win rate to the significantly higher win rate of out-of-state plaintiffs.⁴⁸

40 *Id.* at 1133 (footnotes omitted).

41 *Id.* at 1133-34 (footnote omitted).

42 See *id.* at 1132-33.

43 See *id.* at 1136-37.

44 See *id.* at 1137-38.

45 See *id.* at 1138-39.

46 See *id.* at 1140-42.

47 See *id.* at 1139-40.

48 See *id.* at 1142-43.

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."⁴⁹

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.⁵⁰ 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."⁵¹ Careful reading of her article shows her to rely essentially on that 64% datum. So, how to explain its stark difference with our quoted result?⁵² Well, basically, the difference is not so

⁴⁹ *Id.* at 1132.

⁵⁰ Kimberly A. Moore, *Xenophobia in American Courts*, 97 *Nw. U. L. Rev.* 1497, 1520 (2003).

⁵¹ *Id.*

⁵² Professor 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 reported the judgment incorrectly" as being for plaintiff or defendant. *Id.* at 1523. She promised, see *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%. 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 e-mail pointing out that even random entries by clerks around the country would produce

stark, as we can demonstrate in three simple steps.

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 4247 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% of those judgments that had gone through trial.⁵³ (c) We finally note that she emphasized results only for jury trials. The 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.⁵⁴ She found that domestic parties won 64% of jury trials against foreigners, but only 46% of bench trials. She theorized that judges perform better because of “a

about a 50% 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.” E-mail from Kevin M. Clermont to Kimberly A. Moore (Sept. 2, 2002) (on file with authors).

The significant 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%—and that the error rate drops under 2% if one omits the mysteriously coded but relatively rare “judgment for both” plaintiff and defendant, as we did in our *Xenophilia* article).

⁵³ The 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 50, 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% of summary judgments, in 54% of bench trials, and in 56% of the judgments by those two methods combined.

⁵⁴ See *id.* at 1549; see also Kimberly A. Moore, *supra* note 14 (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 *Litigation Realities*, *supra* note 6, at 144-47; see also *infra* note 56 and text accompanying note 65.

combination of less prejudice and greater predictability by judges."⁵⁵ 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 below, which treats 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%, not the 37% that came from all judgments.⁵⁶ 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%, "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."⁵⁷ 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].*"

⁵⁵ Moore, *supra* note 50, at 1511.

⁵⁶ The comparable number for bench trials in our results would be 44%, representing a statistically insignificant difference from jury trials.

⁵⁷ Xenophilia, *supra* note 31, at 1136.

Table 1: Jury and Judge Trials in Twelve 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	9337	1664
Number of judge trials	418	3653	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 twelve 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).

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% 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). For an extreme example, if the plaintiff win rates for all types of cases are 70% and if foreigners appear only as defendants, then Professor Moore's measure would yield a domestic parties' success rate of 70%, 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.⁵⁸ Putting those reports together shows that her 64% 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.⁵⁹ 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.⁶⁰ If 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 forth-

⁵⁸ See Moore, *supra* note 50, at 1510, 1527.

⁵⁹ In past work, we have also attributed her atypical jury results, see *supra* note 54, to the uniqueness of patent litigation. See *Litigation Realities*, *supra* note 6, at 145 n.136, 148 n.149.

⁶⁰ See Moore, *supra* note 50, at 1521-22; see also James Bessen & Michael J. Meurer, *Lessons for 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.").

coming article by three finance professors on the so-called Home Court Advantage.⁶¹ 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."⁶²

To reach this conclusion, they developed their own database from the federal judiciary's Public Access to Court Electronic Records project (PACER). Their database comprised 3076 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% of the cases that went to judgment by "trial,"⁶³ the foreign defendants fared significantly worse, with the plaintiff win rate being 19% against U.S. corporate defendants and 28% against foreign corporate defendants. This result survived multiple regression and other checks.

61 Utpal Bhattacharya, Neal Galpin & Bruce Haslem, *The Home Court Advantage in International Corporate Litigation* (forthcoming in *J.L. & Econ.* Apr. 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=932692 (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).

62 Bhattacharya et al., *supra* note 61, at 7, 27.

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

Interestingly, the authors further found that "the bias is in judge trials, not jury trials."⁶⁴ 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."⁶⁵

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.

IV. NEW RESULTS ON THE FOREIGNER EFFECT

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 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.

⁶⁴ *Id.* at 7.

⁶⁵ *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), see *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.

A. Data

We again turn to the available computerized data gathered by the Administrative Office, now going through fiscal year 2005. Since fiscal year 1986, the clerks' form also specifies whether the two principal parties in diversity and alienage cases were American or foreign.⁶⁶ 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.⁶⁷ To be precise, the win rate is the fraction of plaintiff wins among judgments for either the plaintiff or the defendant, as we dropped judgments coded as being won 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. But we consider only the same case categories that we have studied previously on the differences between jury and judge trial, which are twelve sizable case categories where litigants have a clear choice between jury and judge trial.⁶⁸ It is not the whole universe of cases, but it is a bigger world than

⁶⁶ Because 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).

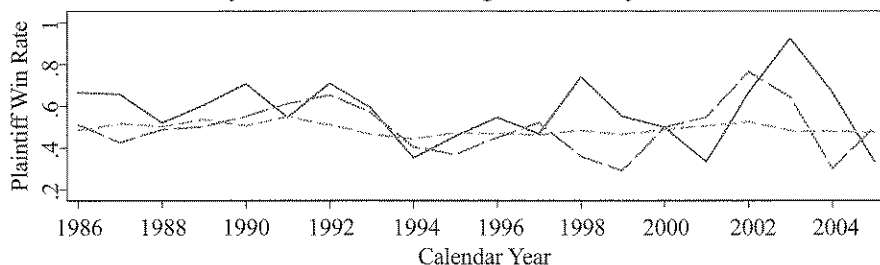
⁶⁷ We excluded 1388 otherwise includible cases in which the plaintiff or the defendant was a foreign nation, 445 cases in which both principal parties were coded as aliens, and 7 cases in which residence data were missing.

⁶⁸ The twelve case categories are Negotiable Instruments; General Contract; Torts to Land; Airplane Personal Injury; Assault, Libel & Slander; Marine Personal Injury; Motor Vehicle

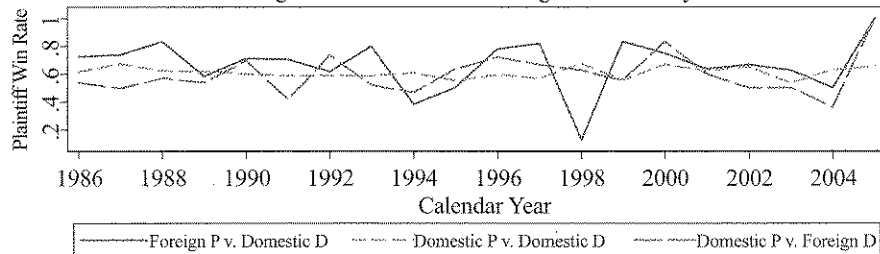
any specific case grouping, such as patent infringement.

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. 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.

Figure 1. Trial Win Rates by Year
 Jury Trial Domestic and Foreign Win Rates by Year



Judge Trial Domestic and Foreign 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 twelve 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.

Personal Injury; Other Personal Injury; Medical Malpractice; Product Liability; General Fraud; and Torts to Personal Property. See, e.g., Speed, supra note 33 (including FELA as a thirteenth category, which does not rest on diversity jurisdiction).

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 judgment has dropped sharply.⁶⁹ Second, the number of trials, and especially the number of bench trials, has plummeted.⁷⁰

Table 2: Jury and Judge Trials in Twelve 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	17621	1910
Number of judge trials	505	5962	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 twelve 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.

⁶⁹ See *infra* text accompanying notes 75-76.

⁷⁰ See 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); Litigation Realities, *supra* note, 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 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 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. But the pattern that then appears is varied enough to exclude any simplistic explanation such as xenophobia or xenophilia in American courts. Case selection seems to be the only explanation possible.

Figure 2 reveals the importance of time trends. Over the last twenty 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.

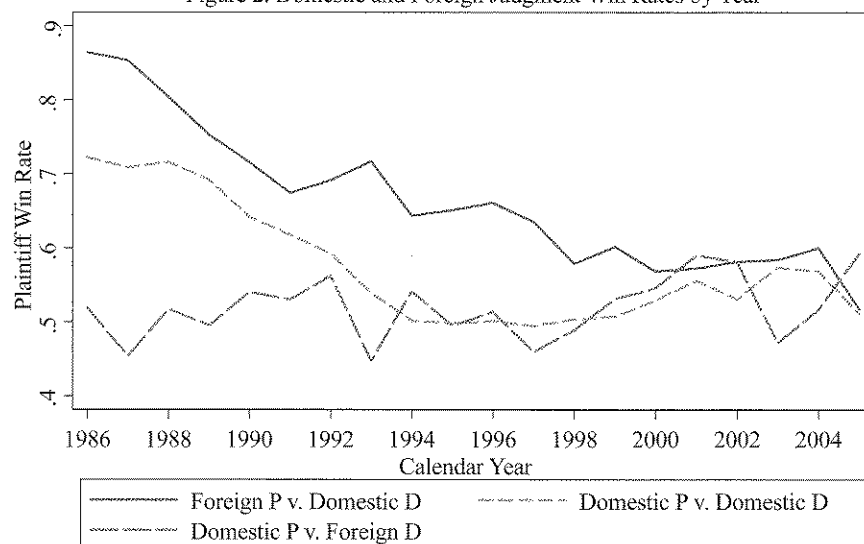
Our Xenophilia article's key result, for 1986-1994,⁷¹ appears as the left half of Figure 2. Foreigners then were enjoying considerable success, both as plaintiffs and defendants. But the dominant long-term time trend, already at play, was just becoming insistent when the plaintiff win rate for domestic 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 difficult-to-explain 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

⁷¹ See Xenophilia, *supra* note, at 1125 fig.1.

holding their own, they in fact were not enjoying the general decline in plaintiff win rate seen in other types of actions. 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.

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 judgment, but more recently the foreigners' "advantage" has all but disappeared.

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

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%, for domestic plaintiff against domestic defendant 58.66%, and for do-

mestic plaintiff against foreign defendant 50.35%.⁷² Multivariate regressions confirm these differences.

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 American 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' 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

⁷² The 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%, 51.26%, and 50.50%; by pre-trial motion they are 51.84%, 32.57%, and 26.58%; 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%, 20.88%, and 31.79%; by default they are 35.03%, 25.09%, and 14.84%; and so this comparison suggests that foreign plaintiffs and defendants have strong cases.

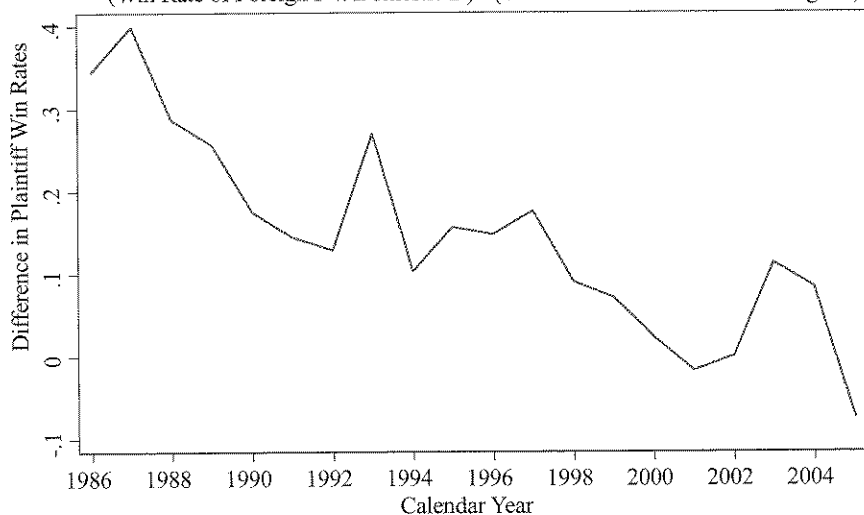
least worldly enough to be subject to suit here, had overcome some of their unwarranted aversion to suit here (and unwarranted willingness to cave in settlement), and so they had seen their success rate become less advantageous and hence more comparable to that of their domestic counterparts. In sum, 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.⁷³ Foreign would-be plaintiffs and 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.

⁷³ See Peter Geier, *The New Bias Hurdle: Middle Eastern Clients*, Nat'l L.J., May 29, 2006, at 4.

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 judgment, that in the past foreigners did outperform their domestic counterparts' success rates by up to 40%, but more recently the foreigners' edge has disappeared or even dropped below 0%.

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

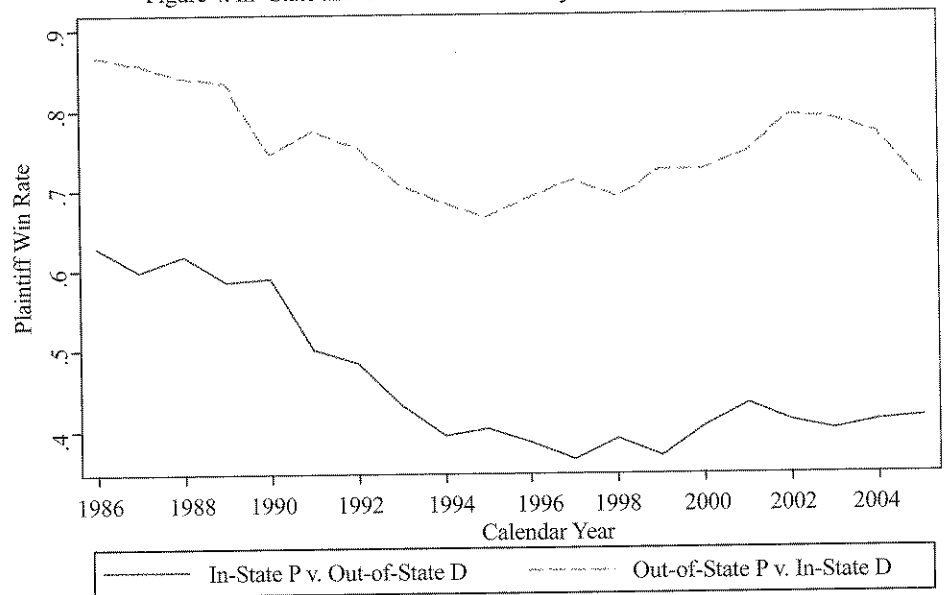
The case-selection explanation becomes even more plausible if we look beyond this comparison between foreign and domestic litigants. In our Xenophilia article, we saw an analogous effect in domestic diversity cases if we compared the in-state U.S. plaintiffs' win rate against U.S. defendants to the win rate of out-of-state U.S. plaintiffs against U.S. defendants.⁷⁴ 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

⁷⁴ See Xenophilia, *supra* note, at 1142-43.

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.

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.

3. Judgments: Numbers

Thus, all seems to be starting to make sense—until one looks at the number of judgments. Over the last twenty years, there has been a sharp 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 relates 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.⁷⁵ But the alienage decrease is steadier and greater.⁷⁶ Looking at other bases of jurisdiction, we can see that big decreases in judgments do not extend beyond diversity and alienage jurisdiction. But there, 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 diversity terminations, as opposed to judgments, have not decreased. But the drop in alienage terminations at least explains why alienage judgments are dropping faster than diversity judgments. Note that the drop in terminations 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.

The overall downward time trends for diversity and alienage cases are so dramatically strong as to mask any smaller short-term effects. Yet those big time trends remain difficult to explain. Still we can combine Tables 3 and 4 into Figure 5, which shows the judgment rate, or the number of judgments divided by the number of terminations. Interestingly, Figure 5 closely resembles Figure 2, so that in pattern, over the years studied, the judgment rate has replicated the plaintiff win rate. Perhaps, then, the judgment rate and plaintiff win rate are related. As the years passed, the domestic defendants may have come to settle more of the strong cases against them and thus lowered the plaintiff win rate. This change has especially impacted the foreign plaintiffs. Unlike foreign defendants, foreign plaintiffs can demonstrate their aversion to suit by staying out

⁷⁵ 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).

⁷⁶ Legal changes 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)).

of court. Consequently, in the early years the result was fewer foreign-plaintiff suits than foreign-defendant suits; but the domestic defendants' reluctance to settle forced the foreign plaintiffs to go to judgment at a much higher rate and so produced an elevated plaintiff win rate. However, in the later years, as the perceptions of xenophobia and the domestic defendants' resistance to settlement decreased, all these effects diminished.

In any event, 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.

But still the dropping numbers make our story of changes in the foreigners' aversion harder to believe. One could instead choose to argue 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 other forces were driving case selection—and that therefore researchers should be ever more wary of drawing general conclusions about our legal system based on the skewed samples of foreigners' terminations and judgments?

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	2592	8552	2896
1987	2012	9803	2393
1988	1002	11642	1395
1989	658	11854	936
1990	440	10097	614
1991	341	8934	511
1992	334	8985	366
1993	297	8155	344
1994	236	7274	336
1995	284	7287	319
1996	257	7415	282
1997	269	7169	300
1998	240	6698	282
1999	211	6909	239
2000	211	6778	196
2001	220	6594	183
2002	177	7468	165
2003	171	6502	161
2004	155	5187	118
2005	113	4157	108
<i>Total</i>	<i>10220</i>	<i>157460</i>	<i>12144</i>

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.

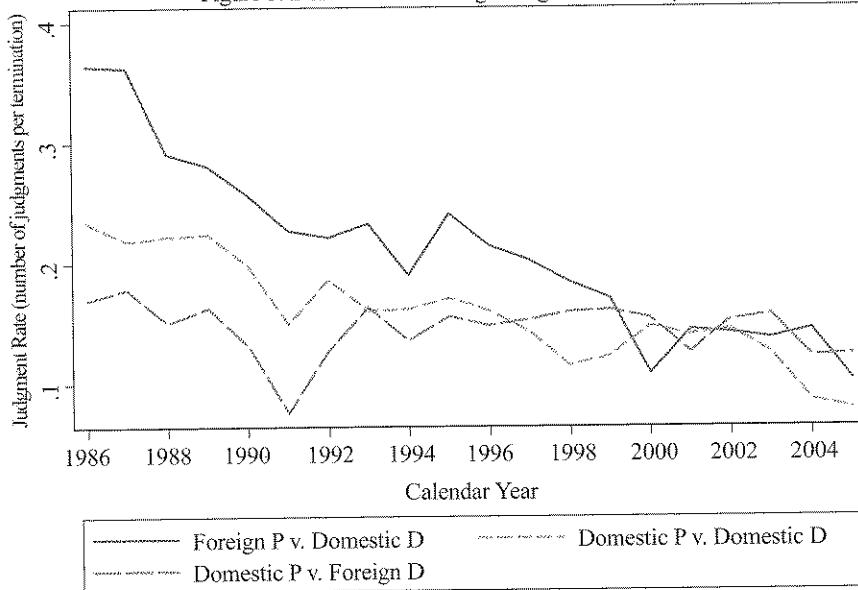
Table 4: Number of Diversity and Alienage Terminations by Year

<i>Calendar Year</i>	<i>Foreign Plaintiffs</i>	<i>All-domestic Cases</i>	<i>Foreign Defendants</i>
1986	7122	36504	17080
1987	5557	44905	13380
1988	3444	52422	9273
1989	2346	52897	5746
1990	1713	50927	4661
1991	1502	59693	6737
1992	1510	48268	2864
1993	1275	50787	2111
1994	1243	44990	2482
1995	1179	42663	2049
1996	1199	46297	1909
1997	1333	50265	1964
1998	1307	58568	1771
1999	1240	56265	1485
2000	1956	46031	1274
2001	1526	47110	1458
2002	1249	51619	1085
2003	1249	51992	1026
2004	1073	60531	965
2005	1101	52843	875
<i>Total</i>	<i>40124</i>	<i>1005577</i>	<i>80195</i>

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.

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.

V. 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 American courts.

What the data do show is that case selection drives the outcomes for foreigners. Foreigners' aversion to an American 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.

外國人在美國法院之命運： 法律實證研究

Kevin M. Clermont and Theodore Eisenberg 著

中文導讀

黃國昌*導讀

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壹、迷思、現實與詮釋 ——Myth, Reality & Interpretation

由立國制憲之初開始，美國對於外國人在美國法院是否能得到公正的審判，即展現高度的關懷，此關懷一方面反映在設計訴訟制度時提供外國人特別的必要保護，一方面實源自於「外國人在美國法院將會受到有形或無形的不公平對待從而較難勝訴」之「迷思」，此一「迷思」不僅普遍瀰漫於美國人之間，同時許多外國人亦是如此看待美國法院。

如此長期間持續的迷思，於1996年面臨嚴峻的正面挑戰。在美國法律實證研究領域享有盛名的兩位康乃爾法學院教授 Kevin M. Clermont 與 Theodore Eisenberg 於 *Harvard Law Review* 發表一篇名為「美國法院的親外情結」論文（以下簡稱「親外一文」）¹，透過縝密設計的實證分析，顯示出令人十分驚訝的結果——外國人在美國聯邦法院獲得有利民事判決之比例，實較美國人取得有利判決的比例更高！打破外國人將較難在美國法院——至少在聯邦法院——獲得勝利的迷思。親外一文所設計之實證研究，更進一步透過「邏輯迴歸分析」(logistic regression)，在控制其他可能之變數後，得出「當事人係外國人或本國人之因素在該研究所分析之94,142個民事案件中與勝訴與否的判決結果密切相關」的結論，兩位教授將之稱為「外國人效應」(foreigner effect)。

不過，「外國人相對於美國人之勝訴率較高」的現象與「外國人效應」的存在，並未使得兩位教授在親外一文直接作出「美國法院具親外情結」之結論。相反地，在逐一討論、排除許多其他可能

1 參 Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996)。

的解釋後，兩位教授在該文論證「案件選擇效應」(case selection effect)方是外國人獲得較高勝訴率之真正原因。

接受中央研究院法律學研究所邀請而在「中研院法學期刊」創刊號第一次發表的本文——「外國人在美國法院之命運：法律實證研究」(以下簡稱「本文」)，則係延續上開親外一文的實質觀點，一方面針對後續學者就相同議題所提出之挑戰²，一一加以回應、批判，一方面將考察的範圍再由1986~1994年擴及延伸至1986~2005年的聯邦法院民事判決，並特別檢視在九一一恐怖攻擊後，所謂的「仇外情結」(Xenophobia)是否果真影響外國人在美國法院取得勝訴判決之機會。

對於我國讀者而言，閱讀本文的重心並非在於究明美國法院是否果真存在所謂的「仇外情結」或「親外情結」，而係藉由本文細膩的分析與精闢的說理，認識實證研究方法論的功能與界限，或許更為重要者，掌握在操作實證研究時所不可或缺的基本視野與態度，避免作出過度簡化的解讀或輕率地進行推論。

貳、實證研究方法論之功能與界限

將實證研究應用於法學領域之重要性與必要性，近年來於我國已逐漸獲得肯認而毋庸再予贅述。或許再借用兩位教授於親外一文的結語，即充分地標明實證研究之功能：

更重要地，本文就外國人在美國法院實際境遇所得發現，揭露了關於認識法律制度的一個更為深層的問題。大多數論者大概都相信外國人在美國法院將較易受到不

² 參 Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497 (2003) (在考察聯邦法院於1999~2000年終結的專利侵權案件後，作出美國法院具有仇外情結之結論)。

利判決。如同往常的，此種想法甚至連基本關於美國法院運作的描述性資訊都欠缺。本評論印證了，即使存在流傳已久的軼聞證據，仍有必要再度檢證向來關於法律制度運作地如何所抱持之根深蒂固的認識是否正確³。

針砭地道破在「迷思」與「現實」間存在之距離。

不過，相對於實證研究得以容易地呈現「現實」，正確地「詮釋」產出的現實所代表之意義以及生成此結果的原因即遠非如此容易，其間涉及了如何設計實證研究模組、如何具體進行操作等高度困難而需仔細構思的問題，本文之核心內容，即在於藉由美國法院是否具仇外情結此一特定議題，為讀者解說如何設計、操作實證研究、如何正確解讀產出之結果以及如何小心界定解讀結論之有效射程範圍。

具體而言，讀者在看到本文「Table 2」所示原告在不同情形下的平均勝訴率數值時，應如何加以解讀呢？該等數值所呈現之結果為：(1)「外國原告 vs. 本國被告」時原告勝訴率最高、「本國原告 vs. 本國被告」時次之、「本國原告 vs. 外國被告」時原告勝訴率最低；(2) 不論在何種情形，原告在由法官判決時之勝訴率均高於在由陪審團判決時之勝訴率。就此結果最為容易生成且或許最為直率的解讀為：(1) 外國人在美國法院較本國人容易取得勝訴判決；(2) 原告在法官面前較在陪審團面前容易取得勝訴判決。本文清楚地為讀者解釋，為何如此之解讀係錯誤的，並提供一個更具說服力之解讀。在繼續進行閱讀之前，讀者或許可以先試圖思考何以此種

3 參 Kevin M. Clermont & Theodore Eisenberg, 前註 1, 頁 1143 (“More importantly, these findings about foreigners in American courts reveal a deeper problem with knowledge of the legal system. Most observers probably have believed that judgments run against foreigners in American courts. As usual, even basic descriptive data about the functioning of American courts was lacking. This Commentary demonstrates the need to verify, notwithstanding compelling anecdotal evidence, deeply held beliefs about how the legal system works.”)。

解讀並不正確，並提出自己的解讀。如果您提出的理由是「統計上巧合」、「案件類型不同」等等，代表您的確有仔細閱讀本文之必要，特別是對法律實證研究有興趣的讀者。

在針對訴訟制度進行實證研究時，當觀察之對象係「判決」，研究者必須清楚地意識到其所觀察到的結果僅是「產出」(output)，而不是訴訟的全部，在對「產出」進行任何詮釋前，必須將「產入」(input)與「中途掉出」(dropout)均納入考慮。按訴訟本身是一個「程序」，存在許多的變數影響「潛在性原告」(potential plaintiff)是否進入此程序尋求救濟（此即所謂「產入」），在進入程序後，亦有許多因素影響是否最終會以判決結束，抑或在訴訟中途即透過其他方式（例如和解）終結此程序（此即所謂「中途掉出」），凡此種種，均會影響最後產出判決之結果⁴。準此，以判決作為實證觀察之對象，若欲對此結果進行有意義且具說服力之詮釋，則在此之前即必須先有精心設計之分析模組與不厭其煩之反覆細膩操作，其間所要求工作之困難程度，係遠遠超過將實證研究低貶為單純數字之堆砌的論者所能想像。本文所踐行之實證研究，猶如兩位教授先前所發表之許多實證研究論文般，再一次地提供明證。

就觀察「原告勝訴率」而言，其數值並非僅是「在所有觀察案件中平均上原告請求是否正當、證據是否充分」（即原告之「case strength」）之指標，在其中扮演更大角色者係「和解」。按在法律經濟分析之觀點下，基於節省訴訟成本之考慮，若兩造當事人對原告勝訴可能性抱持差距不大的評估，可期待當事人會以和解終結紛爭，從而在原告之訴明顯有理由或明顯無理由時，通常不會進入「公判」(trial)程序⁵；會導致雙方當事人決定進入公判而以終局判

4 就此觀點之詳細解釋，參 Donald Wittman, *Dispute Resolution, Bargaining, and Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data*, 17 J. LEGAL STUD. 313 (1988)。

5 就關於「訴訟 vs. 和解」較為一般之法律經濟分析原始模組，參 William M. Lan-

決解決紛爭者，絕大多數均係十分接近的案子。當然，最終判決結果將印證某一造當事人評估錯誤，在為數眾多的全體案件中，原告判斷錯誤之機會應與被告判斷錯誤之機會大致相等。準此，在統計法則下，最後觀察所得原告取得勝訴判決之機率應接近百分之五十，此即所謂「百分之五十的假設」(Fifty-Percent Hypothesis)⁶。

在兩位教授先前之作品中，曾實證地測試經濟分析所提出之「百分之五十的假設」是否成立，並就最後觀察所得原告勝訴率偏離百分之五十的結果提出可能的解釋⁷。儘管最終實證研究之結果顯示原告勝訴率偏離百分之五十的現象，但並不因此即使得此理論喪失意義，蓋此理論之建構仍有助於我們更為深入地了解何種訴訟案件將易透過判決予以終結，並在試圖發掘為何最終實際數值並非百分之五十的理由時，對於各種不同案件類型呈現原告勝訴率數值所實際代表之意義，有著更深一層之認識。

奠基於前述之基礎作業，兩位教授於本文所面對之困難工作係：在將和解效應(settlement effect)納入考慮後，應如何詮釋其最終所得的原告勝訴率數值？在本文中詳細說明進行此項困難工作的三個基本步驟後，兩位教授形容「this form of analysis is as art as science」，並強調「資料」(Data)的解讀要求「時間與努力」，而時間與努力正是藝術與科學所共同要求的要素(“Both art and science demand no less”)。儘管經過此種縝密的程序，兩位教授還是小心地

des, *An Economic Analysis of the Courts*, 14 J. LAW & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973)。

6 參 George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984)。

7 例如參 Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992); 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 (1998)。

提醒讀者，不要輕易地跳入「第一個出現的可能解釋」，直接借用其所使用的文字：「Such predilection is dangerous. Caveat emptor accordingly applies to this art form.」。

行文至此，筆者期待讀者會不禁地追問：前述所指的三個基本分析步驟為何？兩位教授到底又是如何解釋外國人在美國法院較本國人有著更高勝訴率的原因？若果能惹起讀者對此些問題的興趣，則本篇導讀的目的即已達成。留待讀者完成的係：是否能由本文所吸取之知識，自行設計一套實證研究分析模組，印證或反駁兩位教授所提出的理論？這是筆者個人閱畢本文後，所完成的工作；如果您也完成了相同的工作，歡迎邁入實證研究的殿堂。

參、結語

筆者在美攻讀博士學位時，有幸在 Clermont 與 Eisenberg 兩位教授的指導下，透過實證分析之視野進行民事訴訟制度之研究⁸；兩位教授除了各有所長外（Clermont 教授係國際著名的民事訴訟法學者；Eisenberg 教授則專精於破產法），在美國訴訟制度實證研究之領域，更是素負盛名，兩人各別或合著發表的許多著名論文，不僅打破許多向來被奉為真理的迷思，更為訴訟制度正確改革途徑之指明，貢獻良多⁹。

Eisenberg 教授於回顧實證研究方法在美國法學界過去十年間之進展時指出：「empirical legal analysis can influence not only individual cases, but also larger policy questions. Much room for progress exists, because misperceptions about the legal system are common.」¹⁰，

8 參 Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device With No Effects*, 21 PACE L. REV. 203 (2000)。

9 就兩人關於訴訟制度研究作品的簡要介紹，參 Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2002)。

10 Theodore Eisenberg, *Empirical Methods and the Law*, 95 J. AM. STAT. ASS'N 665, 667 (2000)。

亦係基於此種信念及評估，康乃爾法學院於2004年正式創辦了美國第一本法律實證研究之專業期刊——*Journal of Empirical Legal Studies*，在短短的時間中，期刊中發表之研究成果已引發廣大之迴響與震撼，促使論者在 *New York Times*、*The Economist*、*The Wall Street Journal* 等著名刊物上對期刊上所提出之觀點進行激辯。

實則，本文係兩位教授原計劃刊載於 *Journal of Empirical Legal Studies* 的文章，在得知中央研究院法律所有意擴展「司法制度的實證研究」並將其列為設所六大重點領域之一後，兩位教授慷慨地割愛本文作為「中研院法學期刊」創刊號之祝稿，並特地為台灣讀者再行加寫第二部分的實證研究方法介紹，表示對於本所此項研究發展計劃的認同與支持。筆者在此藉由短短片語，表達個人最由衷的謝意。