

COMMENTARY

XENOPHILIA IN AMERICAN COURTS

Kevin M. Clermont & Theodore Eisenberg***

INTRODUCTION

Foreigner! The word says it all. Verging on the politically incorrect, the expression is full of connotation and implication. A foreigner *will* face bias.

By such a thought process, many people believe that litigants have much to fear in courts foreign to them.¹ In particular, non-Americans fare badly in American courts. Foreigners believe this. Even Americans believe this.

To illustrate these perceptions, we can draw on feedback to our prior empirical work. In a letter regarding foreigners' success rates in American courts, an insightful practitioner commented on his Japanese clients' attitudes:

As you are probably aware, it is the widely held view in Japan that Japanese litigants cannot get a fair jury trial because of anti-Japanese bias among American jurors. Widely publicized losses for Japanese companies, [including] Honeywell's victory over Minolta in a patent case two years ago, cement that view and get wide attention in Japan.²

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¹ See WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 8-9, 13 (1995) (discussing common concern about the home-court advantage in litigation).

² Letter from Jay Cohen, Partner, Paul, Weiss, Rifkind, Wharton & Garrison, to Theodore Eisenberg 1-2 (June 14, 1994) (on file with the Harvard Law School Library) (quoted with permission). The case reference is to *Honeywell, Inc. v. Minolta Camera Co.*, in which a District of New Jersey jury awarded \$96 million. See Edmund L. Andrews, *Minolta Told It Must Pay Honeywell*, N.Y. TIMES, Feb. 8, 1992, at 35; see also MASAYUKI TAKAYAMA & JULIA TACHIKAWA, SOSHÖBOKOKU AMERIKA: HYŌTEKI NI SARERU ZAI-BEI NIKKEI KIGYŌ [AMERICA RUINED BY LITIGATION: JAPANESE FIRMS DOING BUSINESS IN AMERICA ARE TARGETED] 3 (1995) (stating that Japanese firms have been beaten through unfair judgments in American courts); Jack L. Lahr, *Bias and Prejudice Against Foreign Corporations in Patent and Other Technology Jury Trials*, 2 FED. CIRCUIT B.J. 405, 405 (1992) ("A widespread perception within the corporate communities of many industrial countries holds that they will be treated unfairly in U.S. jury trials due to the jury bias and prejudice against foreigners."); David Wippman, *Dispute Resolution*, 7

In a circulated draft of an excellent article on alienage jurisdiction, an American academic wrote:

[T]here is every reason to worry about whether foreigners can obtain an impartial resolution of these disputes [with U.S. citizens] in the U.S. justice system. Xenophobia, long a staple of American life, might be expected to influence the litigation of such disputes.

. . . .

Despite fears that judges and juries may be influenced by anti-foreign bias, hard empirical data demonstrating such bias in the state or federal courts is difficult to come by. . . . The existence of anti-foreign views in the general public, and the influence of such views on the political process, is difficult to question. One would be surprised if such views did not somehow influence the adjudicatory process. Consequently, there is every reason to believe that the anti-foreign sentiment has *some* effect³

Such views about American courts are understandable. After all, the grant of alienage jurisdiction to the federal courts, both original⁴ and removal,⁵ constitutes an official assumption that xenophobic bias is present in state courts.⁶ As James Madison said of state courts: "We well know, sir, that foreigners cannot get justice done them in these courts" ⁷ Moreover, given that sometimes even federal substan-

FLA. J. INT'L L. 93, 95-97 (1992) (discussing Latin American fears of bias); Helen Kahn, *Supreme Court Won't Hear Isuzu's Bias Argument*, AUTOMOTIVE NEWS, Mar. 8, 1993, at 16, available in LEXIS, News library, Autonw file (reporting a Japanese company's accusations that it was the victim of judicial bias).

³ Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. (forthcoming Feb. 1996) (manuscript at 4, 48, on file with the Harvard Law School Library) (quoted with permission, and with the acknowledgment that Professor Johnson now disputes the inferences that we draw from our data); see also Lahr, *supra* note 2, at 408-10 (suggesting that bias may have a material effect on jury verdicts, although there is no empirical evidence).

⁴ See 28 U.S.C. § 1332(a) (1994). Alienage jurisdiction is that subset of diversity jurisdiction that grants the federal courts the power to hear cases between aliens and state citizens. See CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 23, at 141 n.1 (5th ed. 1994).

⁵ See 28 U.S.C. § 1441(a) (1994). Alien defendants normally can remove without regard to the bar to removal faced by in-state citizens. See 14A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3723, at 330 (2d ed. 1985).

⁶ See Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 549, 563-64 (1989) (tracing the jurisdiction's original motivation to the Framers' concern that state-court bias against British creditors would endanger the nation's foreign relations and commerce).

⁷ 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Philadelphia, Lippincott 2d ed. 1876).

tive⁸ and procedural⁹ law expressly disadvantages foreigners, it seems reasonable to conclude that nonlegal bias sometimes also affects the outcome in American litigation involving foreigners.

Available data, however, do not support the conclusion that xenophobia is rampant in American courts. In fact, in federal civil actions,¹⁰ foreign plaintiffs and defendants win substantially more often than domestic litigants. After presenting these data, this Commentary discusses possible explanations for foreigners' higher success rates. The best explanation is that foreigners are more selective in choosing cases to pursue to judgment.

I. EMPIRICAL OBSERVATIONS

We can compare the win rate of domestic and foreign plaintiffs in three kinds of federal civil actions: domestic plaintiff versus domestic defendant, foreign plaintiff versus domestic defendant, and domestic plaintiff versus foreign defendant. In the wholly domestic case, the plaintiff win rate is 64%. Foreign plaintiffs, however, win 80% of their cases. Finally, when domestic plaintiffs sue foreign defendants,

⁸ Because foreigners are not citizens, *see* U.S. CONST. amend. XIV, § 1, they do not enjoy any substantive right predicated on citizenship. They can neither vote, *see id.* amend. XV, nor hold congressional office, *see id.* art. I, § 2, cl. 2 & art. I, § 3, cl. 3. Federal law further permits differential treatment of foreigners. *See, e.g.,* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) (holding that the Fourth Amendment does not apply to searches or seizures of a non-resident alien's property that is located outside the United States); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 580 (1908) (recognizing a state's prerogative to favor domestic creditors over foreign creditors); *cf. Hilton v. Guyot*, 159 U.S. 113, 227-28 (1895) (holding that the judgment of a foreign court against a domestic debtor is not entitled to full faith and credit in United States courts, absent specific statutes or international agreements to the contrary).

⁹ *See, e.g.,* 28 U.S.C. § 1391(d) (1994) ("An alien may be sued in any [judicial] district."); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251-52, 255-56 (1981) (holding that in a *forum non conveniens* inquiry, the special presumption in favor of the plaintiff does not extend to foreign plaintiffs).

¹⁰ Unfortunately, because comparable state data are not available, we do not know foreigners' success rates in state courts. We suspect, however, that state data are not substantially different from federal data for two reasons. First, the level of actual bias should not be much less in federal court than in state courts because federal and state juries and judges are largely similar in characteristics and roles. *See* Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 120. Even such differences as the selection of state juries from smaller geographic areas could sometimes reduce bias if an area were diverse and cosmopolitan; and the fact that state judges are less insulated does not always imply that they are more biased. Second, as we shall argue, the perception of bias is more important than the existence of actual bias in affecting foreigners' success rates. Because federal court has historically been viewed as more familiar and hospitable than state courts, the effect of aversion to American litigation in elevating foreigners' success rates would tend to be more pronounced in state data than in federal data. Given these offsetting influences of actual and perceived bias, we think that the federal and state data would show similar patterns. Indeed, other studies have found certain federal and state data to be similar. *See, e.g.,* Theodore Eisenberg, John Goerd, Brian Ostrom & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait 1* (June 26, 1995) (unpublished manuscript, on file with the Harvard Law School Library) (reporting that win rates in jury trials in federal and state courts are "strikingly similar").

the plaintiff win rate drops to 50%. Thus, domestic plaintiffs fare worse than foreign plaintiffs, and furthermore, domestic defendants fare worse than foreign defendants.

We can multiply these numbers by their respective frequencies to produce a single result that is fairly astounding. In actions between an American and a non-American, non-Americans win 63% of the cases, whereas, inversely, Americans win only 37%. Thus, the foreigner, as plaintiff or defendant, does almost twice as well as the native. An explanation for these significant differences is not obvious.

A. Data Source

This Commentary uses data generated by the Administrative Office of the United States Courts.¹¹ When any civil case terminates in a federal district court, the court clerk transmits a form to the Administrative Office containing information about the case. The form reports the subject matter of the case, its jurisdictional basis and removal status, the amount demanded, the filing and termination dates, the procedural stage at which the case terminated, the disposition method, and, if the court entered judgment, the prevailing party 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 a diversity or alienage case, are American or foreign.¹² Unfortunately, the Administrative Office data do not contain many other things one would like to know, such as particulars about the foreign party.

Thus, our database comprises the 94,142 diversity and alienage cases, ending in judgment for the plaintiff or defendant, that allow

¹¹ The description of the data in this Commentary is condensed from Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1133-34 (1992). For easy access to this database, see Theodore Eisenberg & Kevin M. Clermont, *Judicial Statistical Inquiry Form*, <http://teddy.law.cornell.edu:8090/questata.htm> (1995). This Web site is discussed in Theodore Eisenberg & Kevin M. Clermont, *Courts in Cyberspace*, 46 J. LEGAL EDUC. (forthcoming Mar. 1996).

¹² The Administrative Office (AO) compiles data according to fiscal year (FY). Because there is a lag in implementing new codes, especially in data classified by termination date, we did not include data for FY 1986. Data after FY 1994 are not yet available. Thus, we used data for FY 1987-1994.

For FY 1987-1991, the fiscal year end was June 30. Consequently, data for calendar year 1986 (from the first half of FY 1987) are presented here. Beginning with FY 1992, the fiscal year end was September 30. Therefore, the AO data for FY 1992 cover 15 months rather than the normal 12 months.

Because the data are organized by case, and not by parties to the case, one cannot observe the fate of each party to each case. Across the thousands of cases in the data, however, one would expect a strong correlation between the fate of cases and the fate associated with any party characteristics identifiable in the cases, such as the foreign status of a principal party. One would also expect a strong correlation between the success of foreign principal parties and the success of foreign parties generally.

calculation and comparison of win rates for domestic and foreign parties.¹³ To be precise, the win rate is the percentage of plaintiff wins among judgments for either the plaintiff or defendant. Judgments comprise much more than trial outcomes. For Administrative Office purposes, judgments might be the result of adjudication, consent, or default, but they normally do not include voluntary dismissals. For our purposes, we further narrowed the definition of judgments to include only those cases in which the data indicate a win by the plaintiff or defendant, not by both or by an unknown party.¹⁴

B. Results by Calendar Year

Figure 1 displays the data on win rates during fiscal years 1987–1994, aggregating all ninety-four federal districts and every case category within diversity and alienage jurisdiction. It shows that foreign plaintiffs and defendants had consistently higher success rates than domestic litigants had — what we term the “foreigner effect.”¹⁵

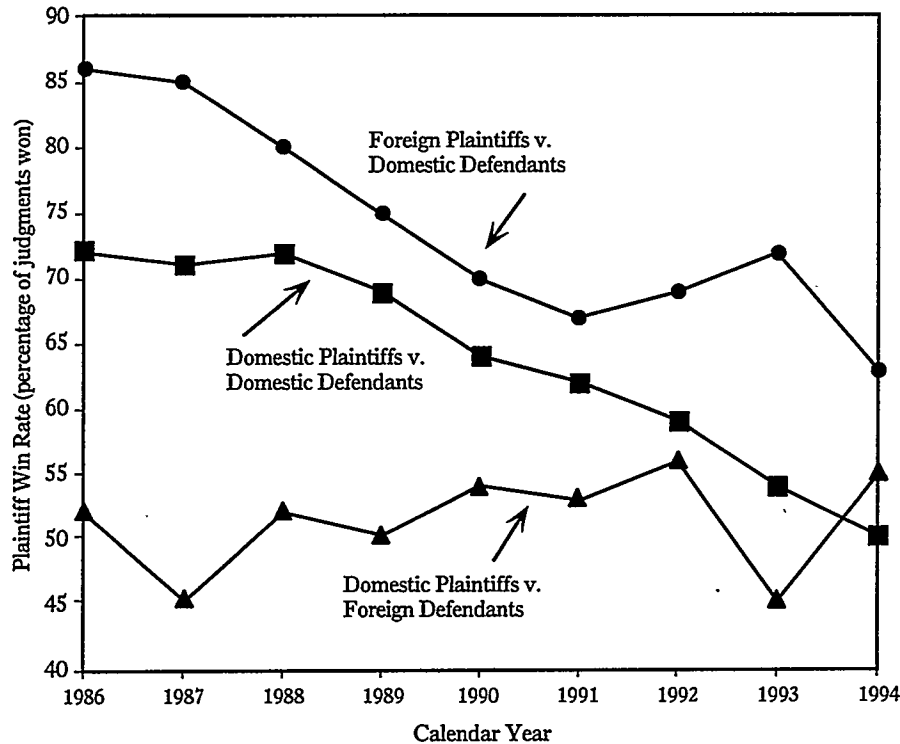
¹³ We excluded 669 cases in which the plaintiff or defendant was a foreign nation, 338 cases in which both principal parties were listed as aliens, and 4 cases in which residence data were missing.

¹⁴ We discuss terminations other than “judgments,” as we have defined that term, on pages 1139–40.

¹⁵ During fiscal years 1987–1994, there was a sharp drop in the number of diversity and alienage judgments. The domestic drop largely relates to the increase in the jurisdictional amount-in-controversy requirement for cases commenced or removed in 1989 or later, as provided in the 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) (1994)). But the foreign decrease is steadier and greater, owing in part to the classification of permanent resident aliens as state citizens by the 1988 statute. *See id.* § 203, 102 Stat. at 4646 (codified at 28 U.S.C. § 1332(a) (1994)); *see also supra* note 12 & *infra* note 22 (presenting additional explanations for the drop based on the lag in seeing effects in data classified by termination date and on a temporary aberration in the foreclosure docket). In the Table below, data for the calendar years 1986 and 1994 were calculated by extrapolation from the stub years that fiscal year data provide:

Calendar Year	NUMBER OF DIVERSITY AND ALIENAGE JUDGMENTS BY YEAR		
	Foreign Plaintiffs v. Domestic Defendants	Domestic Plaintiffs v. Domestic Defendants	Domestic Plaintiffs v. Foreign Defendants
1986	2,632	8,630	2,938
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	8,902	509
1992	332	8,932	366
1993	297	8,116	343
1994	231	7,367	332

FIGURE 1. DOMESTIC AND FOREIGN WIN RATES BY YEAR



Of the three lines, the middle one shows the win rate in cases involving domestic plaintiffs and domestic defendants. The consistently highest line shows the win rate in cases brought by foreign plaintiffs against domestic defendants. In every year, foreign plaintiffs suing domestic defendants had a higher win rate than domestic plaintiffs suing domestic defendants. The lowest line shows the plaintiff win rate when domestic plaintiffs sued foreign defendants. In every year except one, foreign defendants sued by domestic plaintiffs fared better than did domestic defendants sued by domestic plaintiffs.¹⁶

C. Results by Case Category

Table 1 presents the data, disaggregated by the subject matter of the case. One possible explanation for the foreigner effect is that one

¹⁶ All the differences are statistically significant, except for the differences between foreign and domestic defendants in 1992 and 1994. See *infra* note 17.

TABLE 1. DOMESTIC AND FOREIGN PARTIES IN FEDERAL CIVIL CASES, FY 1987-1994: SUBJECT MATTER AND WIN RATES

SUBJECT MATTER	Admin. Code	Number of Judgments				Domestic Parties		Foreign Plaintiffs v. Domestic Defendants		Domestic Plaintiffs v. Foreign Defendants	
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	
CONTRACT											
Insurance	110	9,747	761	1,078	48.25	60.58	0.000	42.12	0.000		
Marine	120	200	51	22	75.12	68.63	0.376	63.64	0.395		
Negotiable Instruments	140	3,862	427	170	90.55	91.33	0.862	85.88	0.001		
Recovery of Overpayments & Enforcement of Judgments	150	394	49	18	82.57	83.67	1.000	71.22	0.338		
Stockholders Suits	160	226	13	17	45.13	46.15	1.000	41.18	0.805		
General Contract	190	29,942	3,086	3,031	74.93	81.95	0.000	64.01	0.000		
REAL PROPERTY AND TORT											
Foreclosure	220	8,975	1,384	24	98.93	99.42	0.109	87.50	0.002		
Rent, Lease, Ejectment	230	343	25	19	77.55	76.00	0.808	63.16	0.164		
Torts to Land	240	241	5	35	40.00	40.00	1.000	40.00	1.000		
Other Real Property Actions	290	612	48	58	43.63	60.42	0.034	41.38	0.783		
Airplane Personal Injury	310	339	19	89	38.05	63.16	0.051	52.81	0.015		
Assault, Libel & Slander	320	771	30	113	26.98	36.67	0.295	21.24	0.210		
Marine Personal Injury	340	348	19	152	39.94	52.63	0.339	40.79	0.921		
Motor Vehicle Personal Injury	350	4,645	103	362	58.45	67.90	0.055	57.73	0.855		
Other Personal Injury	360	7,623	173	1,072	34.57	40.46	0.125	32.93	0.393		
Medical Malpractice	382	1,485	35	70	24.16	42.86	0.016	41.43	0.002		
Product Liability	*	6,888	115	1,745	41.80	43.48	0.775	38.80	0.024		
General Fraud	370	1,465	143	124	54.81	60.14	0.252	51.61	0.512		
Torts to Personal Property	380	1,002	110	101	46.11	58.18	0.020	43.56	0.676		
Other Categories	**	216	10	13	37.96	50.00	0.514	40.15	0.569		
Total		79,223	6,608	8,313	64.45	79.94	0.000	50.04	0.000		

*Win rates are the percentage of judgments won by plaintiffs.

*By convention, p-values at or below the 0.05 level are considered statistically significant. See *supra* note 17.

* This category combines Administrative Office Codes 195, 245, 315, 345, 355, 365, 368, and 385.

** This category combines Administrative Office Codes 210, 371, 470, 890, 950, and 960.

Source: Administrative Office Data, Diversity and Alienage Cases Terminated in FY 1987-1994.

or two unusual case categories account for the observed differences. Table 1, however, shows that the foreigner effect is not category-specific.

The fifth column in Table 1 shows the win rate when domestic plaintiffs sued domestic defendants. For example, the win rate in insurance cases between domestic litigants is 48.25%. The sixth column shows the win rate in cases involving foreign plaintiffs and domestic defendants. For example, the win rate in insurance cases brought by foreign plaintiffs against domestic defendants is 60.58%. Foreign plaintiffs thus won a higher percentage of their insurance cases than did domestic plaintiffs. The seventh column reports the statistical significance of the differences between the win rates of domestic plaintiffs and foreign plaintiffs. In insurance cases, for example, the statistical significance of the difference between domestic-plaintiff and foreign-plaintiff win rates is less than 0.0005, meaning that differences at least as large as the observed difference would occur by chance less than five times in 10,000 if the actual difference were zero.¹⁷

¹⁷ One can view Table 1 as exploring the hypothesis that domestic and foreign parties are equally likely to win their cases. By convention, the hypothesis being tested is called the null hypothesis. See GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, *STATISTICAL METHODS* 64 (8th ed. 1989) (explaining the process of statistical hypothesis-testing). The reported significance levels, which are also called p-values, represent the probability of rejecting the null hypothesis when it is in fact true. In this case, an incorrect rejection of the null hypothesis would lead to the mistaken conclusion that domestic and foreign parties have different win rates. The p-value measures the likelihood that the observed differences in win rates are attributable to mere random variation rather than real differences. See *id.* If the p-value is 0.05, for example, there is a 5% probability that the observed or larger differences could occur by chance if in fact the null hypothesis were true. By arbitrary convention, p-values at or below the 0.05 level are described as statistically significant. See *THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS* 197 (Stephen E. Fienberg ed., 1989). Throughout this Commentary, we use the term "significant" in the formal statistical sense of significance level.

The significance levels in columns 7 and 9 are the product of a process meriting additional explanation. With respect to column 7, a separate significance calculation was done for each of Table 1's rows. For example, for insurance cases in which the court entered judgment for the domestic or foreign plaintiff or the domestic defendant, we constructed a 2 x 2 table in which foreign-plaintiff status (no or yes) constitutes the rows, and judgment for defendant or plaintiff constitutes the columns. The table shows that the plaintiff won 60.58% of the foreign-plaintiff cases. In contrast, the plaintiff won only 48.25% of the wholly domestic cases. A two-sided Fisher's exact test shows that the p-value, or significance level, is < 0.0005. For a discussion of the benefits of Fisher's exact test over Chi-squared tests of significance, see ALAN AGRESTI, *ANALYSIS OF ORDINAL CATEGORICAL DATA II* (1984), which indicates that Fisher's exact test is preferable when cell counts are small.

INSURANCE CASES (Number of judgments in parentheses)		
Foreign Plaintiff	Judgment for Defendant	Judgment for Plaintiff
No	51.75% (5,044)	48.25% (4,703)
Yes	39.42% (300)	60.58% (461)

A similar 2 x 2 table was constructed for each row in Table 1, thus yielding a column 7 value for each case category. Column 9, the second significance column in Table 1, was constructed in

The eighth and ninth columns shift the focus to foreign defendants. The eighth column lists the plaintiff win rates when a domestic plaintiff sued a foreign defendant. The ninth column reports the statistical significance of the differences between the win rates in the fifth and eighth columns.

In seventeen of the twenty categories, foreign plaintiffs did better than domestic plaintiffs against domestic defendants. In *every* category yielding a significant difference, foreign plaintiffs did better than domestic plaintiffs.

Similarly, foreign defendants won more often than did domestic defendants across most categories. Again, in most categories with a significant difference, foreign defendants outperformed domestic defendants.

A closer look at the data in Table 1 reveals part of the explanation for the foreigner effect. Consider the case categories in which plaintiffs generally won a high percentage of their cases. The high-win categories of General Contract and Foreclosure represented 49% of all wholly domestic cases, but they constituted 68% of foreign plaintiffs' cases. On the other hand, the two biggest tort categories, which were the relatively low-win Other Personal Injury and Product Liability, represented 18% of all wholly domestic cases, but only 4% of foreign plaintiffs' cases. Foreign plaintiffs thus appear to have a tendency, relative to domestic plaintiffs, to bring a greater proportion of high-win category cases. This tendency, by itself, would raise foreign plaintiffs' overall win rate.

Because virtually all the case categories show the foreigner effect, foreigners' preference to litigate certain categories of cases could not explain all of the foreigner effect. Nevertheless, this case-category shift suggests that other analogous shifts in the set of cases that foreigners litigated might contribute to the observed win rate pattern.¹⁸ Perhaps such shifts account for all of what we are seeing as the so-called foreigner effect. To investigate the possibility that the sole explanation for foreigners' higher success rates lies in the different mix of cases that foreigners litigated, we need to investigate foreigner win rates while simultaneously holding other case characteristics constant. Regression techniques allow us to do this.

a similar manner, except that the underlying 2 x 2 table uses foreign defendant status (no or yes) as the rows.

¹⁸ For example, a similar shift lies in the time trend of declining win rates and the number of alienage judgments: a greater proportion of foreign plaintiffs' cases come from the high-win early years, thus raising foreign plaintiffs' overall win rate. See *supra* note 15 and accompanying text.

D. Isolating the Foreigner Effect

Multivariate regression isolates the independent effects of various factors, such as time trend and case category, on win rates.¹⁹ The dependent variable — what we are trying to explain — is whether the judgment for a plaintiff is a win or a loss. The regression uses a broad set of independent variables, which includes whether one of the parties is foreign. A few additional empirical observations will help set the stage for the regression.

First, *removal* plays a role in producing the perceived foreigner effect. In wholly domestic cases, 16.49% of the judgments were in cases that had been removed to federal court from state court, and these removed cases have a characteristically low plaintiff win rate of 33.60%.²⁰ For foreign plaintiffs, however, only 2.07% of judgments were in removed cases, with a plaintiff win rate of 45.99%. For foreign defendants, not surprisingly,²¹ the removed rate jumps to 26.78%, with a plaintiff win rate of 34.95%. Thus, the shifting removal pattern — foreign plaintiffs' having fewer low-win removed cases and foreign defendants' having more — would have the impacts of raising the foreign plaintiff win rate and lowering the win rate against the foreign defendant, both impacts being consistent with the foreigner effect.

Second, the *geographic distribution* of foreign parties' cases also helps explain the differences between domestic and foreign win rates. In fiscal years 1987–1994, the Second Circuit's district courts rendered 6.78% of the judgments in domestic cases with a win rate of 66.51%, whereas the Seventh Circuit's district courts rendered 17.02% of domestic judgments with a win rate of 85.08%.²² Foreign plaintiffs were more concentrated in these two circuits than were domestic plaintiffs: the Second Circuit's district courts decided 15.91% of foreign plaintiffs' cases with a win rate of 81.35%, and the Seventh Circuit's district courts decided 26.28% of foreign plaintiffs' cases with a win rate of 93.38%. Foreign defendants also saw a shift toward the Second Circuit (13.59% of judgments and a win rate of 57.96%), but there

¹⁹ Multivariate regression is a statistical technique that quantifies the independent influence of several factors (independent variables) on the phenomenon being studied (dependent variable). See generally MICHAEL O. FINKELSTEIN & BRUCE LEVIN, *STATISTICS FOR LAWYERS* 323–467 (1990) (applying regression analysis to various legal issues). Because the dependent variable is dichotomous (judgment for plaintiff or defendant), we use logistic regression. See DAVID W. HOSMER, JR., & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION I* (1989).

²⁰ See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 *CORNELL L. REV.* 1507, 1515 n.18 (1995) (discussing the effect of removal in lowering win rate).

²¹ See *supra* note 5. As the rate of removal goes up, one would expect the effect of removal in lowering the plaintiff win rate to dilute and hence lessen. The high rate of removal by foreign defendants probably explains the relatively modest effect of removal on the win rate of the plaintiffs suing them.

²² The Seventh Circuit's high figures largely result from an abnormally large number of almost-sure-win foreclosure cases terminated during 1986–1989. This aberration also helps to explain the decline in the federal courts' caseload shown in note 15.

was a shift away from the Seventh Circuit (6.58% of judgments and a win rate of 49.91%) where plaintiffs generally litigate successfully. Thus, it is necessary to control for circuit in the regression.

Third, for domestic parties only, the Administrative Office data distinguish between *individual and corporate* parties. In our database, domestic and foreign plaintiffs faced corporate defendants 52% and 20% of the time, respectively. Corporate plaintiffs sued domestic and foreign defendants, respectively, 43% and 10% of the time. Because corporate litigants generally outperform individual litigants,²³ foreign parties' less frequent interaction with corporate litigants would tend to increase foreign parties' success rates.²⁴

Accordingly, the independent variables in the regression must include year of termination, case category, how the case came into federal court, judicial circuit, and whether the domestic party was a corporation or not. We also included other variables that we shall discuss later in this Commentary: state citizenship of American parties, amount demanded, procedural progress, and disposition method. There were 58,747 cases containing all of the data needed to perform the regression analysis. Table 2 presents the results.

²³ See Table 2, *infra* p. 1131; cf. Theodore Eisenberg & Henry S. Farber, The Litigious Plaintiff Hypothesis: Case Selection and Resolution 30 (May 6, 1995) (unpublished manuscript, on file with the Harvard Law School Library) (observing that corporate parties are more likely to win at trial than are individuals).

²⁴ The numbers for the various combinations of plaintiffs and defendants follow:

DOMESTIC AND FOREIGN PLAINTIFFS AGAINST INDIVIDUAL AND CORPORATE DEFENDANTS			
	Percent of Total Judgments		Plaintiff Win Rate
	Domestic plaintiffs	Foreign plaintiffs	
Domestic P v. individual D	48.00	—	74.16
Domestic P v. corporate D	52.00	—	55.49
Foreign P v. individual D	—	79.91	83.27
Foreign P v. corporate D	—	20.09	66.69

INDIVIDUAL AND CORPORATE PLAINTIFFS AGAINST DOMESTIC AND FOREIGN DEFENDANTS			
	Percent of Total Judgments		Plaintiff Win Rate
	Domestic defendants	Foreign defendants	
Individual P v. domestic D	57.08	—	52.23
Corporate P v. domestic D	42.92	—	80.72
Individual P v. foreign D	—	90.09	49.19
Corporate P v. foreign D	—	9.91	57.77

TABLE 2. LOGISTIC REGRESSION RESULTS
(Dependent variable = judgment for plaintiff)

Independent Variable	Coefficient	Significance
Foreign plaintiff	0.461	0.000
Foreign defendant	-0.352	0.000
Calendar year	-0.043	0.000
Case category dummy variables	*	
Case origin		
Original proceeding	**	
Removal jurisdiction	-0.526	0.000
Other origin dummy variables	*	
Judicial circuit dummy variables	*	
Corporate plaintiff	0.479	0.000
Corporate defendant	-0.179	0.000
Out-of-state plaintiff	0.250	0.000
Out-of-state defendant	-0.129	0.000
Amount demanded (million \$)	-0.013	0.000
Procedural progress		
Early stage	**	
Middle stage	0.120	0.000
Trial stage	-0.148	0.041
Method of disposition		
Default judgment	**	
Consent judgment	-0.886	0.000
Pretrial motion	-4.086	0.000
Trial method	-2.800	0.000
Other methods	-2.926	0.000
Constant	88.836	0.000

Chi-squared (51) = 29095.68; Prob. > Chi-squared below 0.00005;
Pseudo R-squared = 0.3972; Log Likelihood = -22078.649

* not separately reported

** reference category

When all those variables are held constant in the regression, foreignness continues to have a sizable and significant effect on win rate. Foreign plaintiffs win more often than their domestic counterparts (the independent variable "foreign plaintiff" has a positive coefficient of 0.461), and foreign defendants lose less often than their domestic counterparts (the independent variable "foreign defendant" has a negative coefficient of 0.352). Both results are highly significant statistically. The foreigner effect shown in Figure 1 and Table 1 thus survives this more sophisticated analysis.

The logistic regression results also permit estimation of the magnitude of the foreigner effect. Using the coefficients for foreign plaintiffs and foreign defendants from Table 2, one can calculate the approximate change in the chance of winning attributable to a party's foreign status. Compared to a domestic case with a 50% chance of the plaintiff's win-

ning, an apparently identical case brought by a foreign plaintiff will enjoy a 61.3% chance.²⁵ Alternatively, substituting a foreign defendant for the domestic defendant will drop the 50% chance of the plaintiff's winning to 41.3%.

II. TENTATIVE EXPLANATIONS

In summary, foreigners win a substantially higher percentage of their cases in federal court than do Americans, whether plaintiff or defendant. The question now becomes why they do so. After rejecting the notion that American courts have a pro-foreign bias, we next argue that foreigners' fear of American courts leads them to pursue only an unusually strong set of cases. This explanation is consistent not only with the results reported above, but also with the additional data analyzed below.

A. *Xenophilia and Other Direct Explanations*

One possibility, of course, is that American courts favor foreign litigants, perhaps to encourage foreign commerce. However, this possibility seems remote at best. We doubt that popular perceptions of xenophobia could be that far off. Nevertheless, we present this possibility to stress the principal point of this Commentary: *the available data offer no support for the belief that there exists xenophobic bias in American courts*. We are not saying that anti-foreign bias is necessarily nonexistent, and we are not arguing for the abolition of federal alienage jurisdiction. 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.

An explanation of the data more plausible than xenophilia is that foreign litigants simply perform better than the average domestic liti-

²⁵ In multivariate logistic regression, each estimated coefficient provides an estimate of the corresponding variable's effect on the logarithm of the dependent variable's odds. See HOSMER & LEMESHOW, *supra* note 19, at 58. The odds multiplier is obtained by taking the anti-log of the regression coefficient. For example, the regression coefficient for foreign plaintiffs in Table 2 is 0.461. This coefficient corresponds to an odds multiplier of $e^{0.461} = 1.586$. An odds multiplier of 1.586 means that, with all other variables held constant, the presence of a foreign plaintiff changes the odds of the plaintiff's winning from 1:1 to 1.586:1. Odds of 1:1 correspond to a probability of winning of 50% ($1/(1+1)$). Odds of 1.586:1 correspond to a probability of winning of 61.3% ($1.586/(1.586+1)$), as stated in the text. Similar calculations yield the 41.3% figure reported in the text.

The regression results showing a foreigner effect are quite robust. We have explored models that omit combinations of the other independent variables in Table 2, and the foreigner effect survives. Thus, it is not a major problem that some of the independent variables in the model, such as disposition method or procedural progress, may be endogenous to the dependent variable. In addition, when we control for the fact that the data are censored in that some filed cases were not yet terminated, the results do not materially change.

gant, because they have better cases on the merits or merely better lawyers. For example, one might hypothesize that foreign litigants, on average, are relatively wealthier and retain elite American law firms that both settle and litigate more effectively. In fact, a slight superiority in litigation capability may very well exist.²⁶ Yet it is hard to believe that such a difference would have an impact sizable enough to explain the foreigner effect seen in the data. Moreover, it is difficult to understand why the effect of such a difference in capability would not largely disappear through the settlement process, with the residues of domestic and foreign cases that go to judgment becoming similar with respect to win rate.²⁷ Nevertheless, to the extent domestic and foreign sides differ specifically in their ability to evaluate the chance of success at trial, the settlement process would not equalize win rates; this difference could help to explain a small part of the foreigner effect.²⁸

In sum, explanations along such lines appear to be either unlikely or weak. An explanation of a very different sort is necessary.

B. Foreign Aversion to American Courts

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 bias²⁹ and the pecuniary and non-pecuniary³⁰ distastes for litigating in a distant place. Foreigners aban-

²⁶ See Leslie Helm, *U.S.-Japan Battle of the Patents: Japanese Firms Are No Longer Quick to Settle American Claims to Lucrative Inventions*, L.A. TIMES, Apr. 24, 1992, at A1, A9 ("Japanese . . . hire the best litigators, the 'best samurai in the forest.'" (quoting a Silicon Valley patent attorney)).

²⁷ According to the well-developed theory of case selection, the selection of adjudicated cases results in a biased sample of the mass of underlying disputes. When the outcome is clear, a case tends to settle readily, because both parties can save the extra cost of further litigation by settling in accordance with their knowledge of the law and facts. Cases will go all the way to adjudication only when the parties substantially disagree on the predicted outcome of trial. Difficult cases falling close to the applicable standard 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 standard, regardless of the underlying distribution of disputes. The settlement process therefore produces a residue of adjudicated cases with some nonextreme win rate. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (discussing the effect of case selection on equalizing win rates).

²⁸ See Donald Wittman, *Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data*, 17 J. LEGAL STUD. 313, 325-27 (1988) (discussing the effect, under case selection theory, of differential capabilities on win rate).

²⁹ See *supra* pp. 1120-22.

³⁰ Nonpecuniary distastes might include not only uncertainties and fears about an unfamiliar legal system, but also particular cultural aversions to litigation. See, e.g., Helm, *supra* note 26, at A1, A9 (reporting that the Japanese are risk-averse and averse to confrontation).

The database permits some inquiry along these lines, because it names the first of the named plaintiffs and of the named defendants. We looked for Asian and Hispanic names in the database for fiscal year 1993. The foreigner effect appeared more pronounced for Asians and nonexistent or reversed for Hispanics. This difference could be seen as some confirmation of the aversion

don or satisfy most claims³¹ 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.

A stronger set of cases will tend to affect directly the win rate in the cases going to judgment.³² Although the settlement process generally mutes that effect on win rate, greater pecuniary and nonpecuniary costs to the foreigner of litigating a case will create differential stakes that will lead to a greater incentive for the foreigner to settle weak cases and thus keep the settlement process from eradicating the effect.³³ Moreover, if both sides and their lawyers misperceive bias, so that they wrongly believe that the court will favor the domestic party, then the settlement process will produce a residue of cases going to adjudication in which the foreigner will do better than expected and thus perpetuate the foreigner effect.³⁴ Whereas domestic litigants may choose to litigate close cases, foreign litigants probably settle the close cases and litigate only the especially strong ones.

Therefore, foreigners' reluctance to come before American courts, together with its subsequent effects on the settlement process, skews the caseload in such a way that foreign plaintiffs win substantially more often than the ordinary domestic plaintiff, and foreign defendants lose substantially less often than the ordinary domestic defendant.

At least three possible explanations exist for the persistence of foreigners' aversion, which endures despite the fact that these litigants have repeatedly observed the results of individual cases. First, surprising and longstanding misperceptions about the legal system are not

explanation, assuming that the greater attention in the press to Japanese aversion indicates a lesser Hispanic aversion, but we would need a much sounder methodology before putting any reliance on such findings.

³¹ See, e.g., *id.* ("Japanese have often sought to quietly settle disputes" rather than litigate in America, which "is still regarded as a courageous act by many in Japan."); Linda Himelstein & Neil Gross, *Japan in the Dock: Beware of the Bashers*, BUS. WK., Nov. 8, 1993, at 101 ("Japanese companies routinely choose to settle cases because they believe they won't get a fair shake from an American jury." (citing a New York lawyer specializing in Japan)); Clayton Jones, *U.S., Japan Closer to Pact on Patent Procedure*, L.A. TIMES, Oct. 12, 1992, at D3 (citing a survey of 173 Japanese firms that reported that they were involved in 207 patent-infringement suits filed by non-Japanese firms, which were mainly American, but had satisfied out of court 248 other claims). Foreign plaintiffs probably have a freer hand in deciding to avoid litigation than do foreign defendants; thus, one would expect the slightly greater foreigner effect for foreign plaintiffs that the data exhibit. Moreover, foreign defendants are arguably less the subject of misperceived bias, see *infra* pp. 1135-38; if so, the foreigner effect in adjudicated cases involving foreign defendants would lessen.

³² See Joel Waldfoegel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229, 232-35 (1995) (discussing the effect, under case selection theory, of case strengths on win rate).

³³ See Clermont & Eisenberg, *supra* note 11, at 1131 (discussing the effect, under case selection theory, of differential stakes on win rate).

³⁴ See *id.* at 1131-32 (discussing the effect, under case selection theory, of misperceptions on win rate).

uncommon.³⁵ Second, this particular aversion seems to accord with human beings' fundamental world views, which are based on experience and anecdote.³⁶ Third, empirical evidence to the contrary has been nonexistent.

Of course, not all foreign litigants are necessarily loath to come to American courts. Product-liability plaintiffs from abroad might even be characterized as eager.³⁷ This tendency may account for the small foreigner effect seen in Table 1 for foreign product liability plaintiffs. However, a number of insights diminish the force of such an observation regarding specific foreign attraction to American courts. First, even a small foreigner effect suggests that foreign plaintiffs might still be more reluctant than domestic plaintiffs to resort to American courts. Second, America's magnetic draw for plaintiffs does not explain the foreign defendant effect in product liability cases,³⁸ a phenomenon that continues to require foreign aversion as an explanation. Third, such category-specific, plaintiff-specific eagerness does not detract from a general explanation based on foreign aversion to American courts — especially when product liability judgments accounted for only 1.74% of foreign-plaintiff judgments compared to 8.69% of wholly domestic judgments.³⁹

³⁵ See, e.g., Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 734 (1992) ("Despite a widespread impression of ever-increasing awards in products cases, evidence of recent declining real-dollar awards is about as persuasive as is evidence of increasing awards."); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 539 (1989) (concluding that many observers of constitutional tort litigation have "exaggerated perceptions"). See generally THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO* 3 (1991) (discussing "imperfections in our cognitive and inferential tools"); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 3 (1980) (arguing that people's "attempts to understand, predict, and control events in the social sphere are seriously compromised" by "underutilization of normatively appropriate strategies and overutilization of more primitive intuitive strategies").

³⁶ See *supra* pp. 1120-22.

³⁷ See DAVID EPSTEIN & JEFFREY L. SNYDER, *INTERNATIONAL LITIGATION* § 1.02, at 1-8 to 1-9 (2d ed. 1994 & Supp. 1995). But cf. GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 222 (2d ed. 1992) (mentioning reasons foreigners might avoid American courts).

³⁸ See Table 1, *supra* p. 1126.

³⁹ The lack of success of foreign defendants in the Medical Malpractice and Airplane Personal Injury categories, seen in Table 1, requires a specific explanation also, but none is very obvious. Worth noting, however, is that, of the domestic cases in our database, these two categories have the two highest rates of completed trial. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 364 & n.110 (1991) (medical malpractice); Eisenberg, Goerd, Ostrom & Rottman, *supra* note 10, at 9 (medical malpractice); Paul Zaffuts, *The General Aviation Accident Settlement/Litigation Decision: An Empirical Examination of Selection Theory* 36 (Spring 1991) (unpublished manuscript, on file with the Harvard Law School Library). Perhaps the usual reluctance of defendants to settle cases in these categories, combined with foreigners' failure to appreciate the bite of American substantive law in these categories until their cases are in the hands of their American law-

C. Supporting Observations

The database includes additional information about the domestic and foreign cases. Subsequent tables set out information on procedural progress of the cases before termination, method of disposition, amount demanded, amount awarded, and time on the docket. Observations based on such additional information form a panorama consistent with our explanation of foreign aversion to American courts.

1. *Procedural Progress at Termination.* — The database includes information on how far a case had proceeded at the time of judgment. The codes conveying this information group into “early,” which means termination before filing of an answer or before any court action; “trial,” in which judgment was entered during or after trial; and “middle,” which comprises the other codes for termination following court action after an answer was filed but before trial was commenced.

As Table 3 shows, the foreigner effect is present at every stage. The effect weakens toward trial, effectively disappearing for foreign defendants, 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.

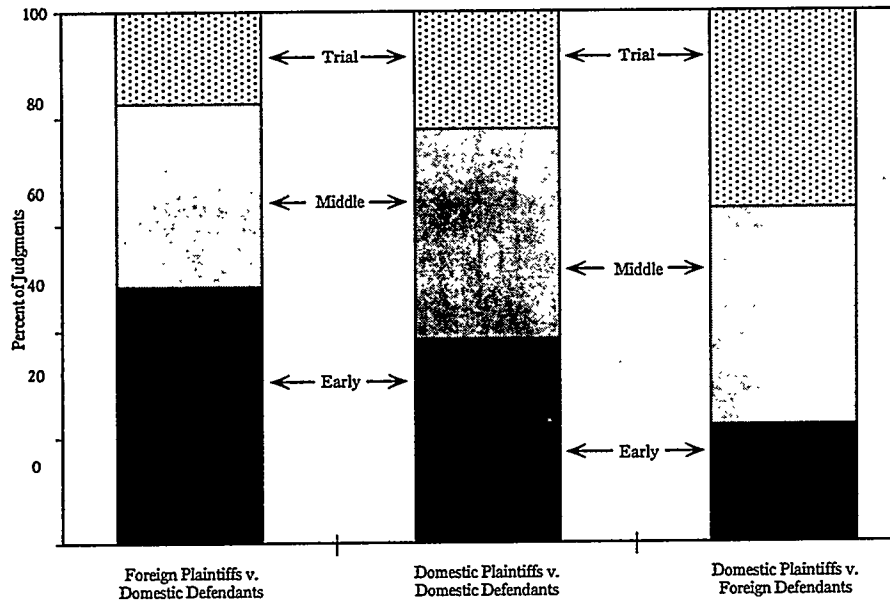
TABLE 3. WIN RATES BY PROCEDURAL STAGE AT TERMINATION
(Percentage of judgments won by plaintiff)

Procedural Stage	Foreign Plaintiffs v. Domestic Defendants	Domestic Plaintiffs v. Domestic Defendants	Domestic Plaintiffs v. Foreign Defendants
Early	91.82	84.29	70.22
Middle	71.22	51.81	38.28
Trial	64.27	52.99	51.36

More interestingly, perhaps, Figure 2 displays the shifting percentages of cases terminated at each stage. It shows that foreign plaintiffs' cases terminate disproportionately at the early stage, whereas foreign defendants' cases proceed disproportionately to trial. This difference is consistent with the hypotheses that foreign plaintiffs arrive on American shores with surprisingly strong cases and that foreign defendants come willing to defend resolutely the weak cases against them.

yers, leads to more cases reaching American courts. Such a lessened aversion would produce a lower rate of success for the foreign defendants.

FIGURE 2. JUDGMENTS BY PROCEDURAL STAGE AT TERMINATION



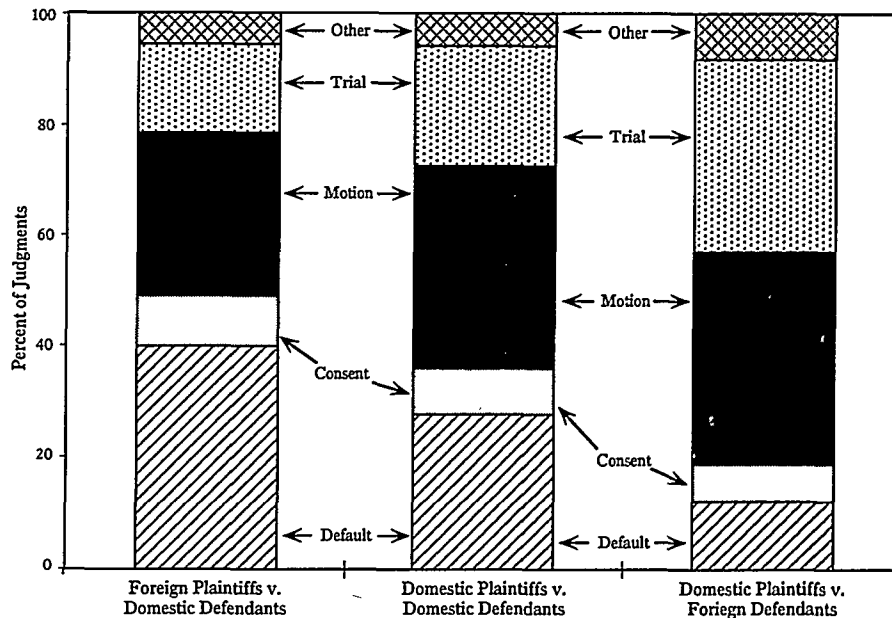
Thus, breaking down the data by termination stage provides support for the view that reluctant foreigners litigate only their strong cases in America. Their aversive behavior affects not only win rates, but also how far the cases are litigated.

2. *Method of Disposition.* — The database also indicates the method of disposition that led to judgment or other termination. Whereas the previously discussed procedural progress at termination represents the stage, or time, at which termination occurred, the method of disposition instead tells the procedural method, or device, for disposing of the case.

Figure 3 divides up the judgments by method: default judgment, consent judgment, judgment on pretrial motion (such as a motion under Federal Rule of Civil Procedure 12 or 56), judgment upon trial, or some other and unusual method (such as judgment on award of arbitrator).⁴⁰

⁴⁰ The win rates on pretrial motion are 39.17% for domestic cases, 59.81% for foreign plaintiffs, and 26.48% for foreign defendants. The win rates upon trial are 52.88%, 64.37%, and 50.66%, respectively. The win rates on all judgments by methods of disposition other than pretrial motion or trial are 92.34%, 95.34%, and 82.47%, respectively (and on consent judgments alone, the win rates are 90.86%, 93.46%, and 83.81%, respectively).

FIGURE 3. JUDGMENTS BY METHOD OF DISPOSITION



On the one hand, Figure 3 shows that foreign plaintiffs obtain far more default judgments than do domestic plaintiffs. This comparison suggests that foreign plaintiffs have a powerful set of cases. On the other hand, foreign defendants suffer far fewer default judgments than do domestic defendants, with a concomitant increase in trials. This difference suggests that foreigners choose to satisfy the stronger claims against them before reaching American courts.

3. *Trial by Jury or Judge.* — This line of analysis focusing on procedural distinctions prompts inquiry into the differences between jury and judge trials. We can look at twelve sizable case categories in which litigants have a clear choice between a jury and a judge trial.⁴¹ Our interest lies in fully tried cases. Table 4 shows the results for this subset of the database.

⁴¹ The twelve 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. These categories are the same ones we studied previously on judge and jury differences. See, e.g., Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which Is Speedier?*, 79 JUDICATURE 176 (1996). That study also included a thirteenth category, Federal Employers' Liability, which does not rest on diversity jurisdiction. See *id.*

TABLE 4. WIN RATES IN JURY AND JUDGE TRIALS

	Foreign Plaintiffs v. Domestic Defendants		Domestic Plaintiffs v. Domestic Defendants		Domestic Plaintiffs v. Foreign Defendants	
	Number	Win rate	Number	Win rate	Number	Win rate
Jury trials	401	61.10	9,337	50.63	1,664	50.00
Judge trials	418	72.25	3,653	61.32	641	54.60

Thus, the foreigner effect prevails before both jury and judge, with foreign plaintiffs and defendants outperforming their domestic counterparts in both settings. That is, this Commentary's principal observation and explanation apply whether one is speaking of jury or judge trials.

It is true that foreign plaintiffs do better before judges than before juries, according with the popular view that juries are particularly xenophobic.⁴² However, plaintiffs in domestic cases also do better before judges than before juries. Moreover, even domestic plaintiffs suing foreign defendants do better before judges than before juries. Thus, the data do not suggest that juries are more xenophobic than judges. Rather, the data probably reveal that the widespread view of juries as generally pro-plaintiff is a misperception. This misperception leads to disappointed expectations that are reflected, after the settlement process, in a lower plaintiff win rate among jury-tried cases.⁴³ This general jury effect overwhelms any actual difference between judges' and juries' xenophobia.

It is also true that the difference in win rates before judges and juries for foreign plaintiffs exceeds that difference for foreign defendants, with the difference in wholly domestic cases falling in between. This observation might support the view that juries are xenophobic. However, regressions within each of the three groups of cases, with the dependent variable being judgment for plaintiff and the independent variables being case categories and trial mode, show the effect of jury trial on win rate to be insignificant for foreign litigants. Thus, one should not infer differences between judge and jury.

4. *Nonjudgment Terminations.* — The foregoing analysis prompts inquiry into cases that do not end in judgment, and thus takes us beyond the database utilized to this point. We can look at the same set of diversity and alienage categories, but not limit the focus to judgments, and then examine disposition codes for terminations other than judgments. These codes group into "dismissals," which normally indicates settle-

⁴² See Leslie Helm, *Jury Orders Nintendo to Pay \$208.3 Million in Patent Case*, L.A. TIMES, Aug. 2, 1994, at D3; Jones, *supra* note 31, at D3; Andrew Pollack, *Japanese Fight Back as U.S. Companies Press Patent Claims*, N.Y. TIMES, Sept. 5, 1992, at A1 (reporting that Japanese see the American jury system "as both inscrutable and biased against them"); P.W. Young, *Current Topics*, 69 AUSTL. L.J. 931, 931 (1995) (arguing, in general, that local juries are biased against foreigners and, in particular, that American juries are biased against Australians). Further evidence that foreigners perceive American juries as biased lies in the small percentage of jury trials for foreign plaintiffs, who evidently opt not to have jury trials.

⁴³ See Clermont & Eisenberg, *supra* note 11, at 1133.

ment, and "others," such as transfer or remand. Table 5 divides up all terminations by method, showing as expected that settlement is the major route out of court. It also shows that many more cases are brought against foreign defendants than are brought by foreign plaintiffs.⁴⁴

TABLE 5. METHOD OF DISPOSITION OF CASES

	Foreign Plaintiffs v. Domestic Defendants		Domestic Plaintiffs v. Domestic Defendants		Domestic Plaintiffs v. Foreign Defendants	
	Number	Percent	Number	Percent	Number	Percent
Judgments	6,606	30	79,223	19	8,313	15
Nonjudgment dismissals	13,517	62	257,693	63	37,257	67
Other nonjudgments	1,834	8	74,487	18	10,027	18
Total	21,957	100	411,403	100	55,597	100

Foreign plaintiffs go to judgment more often, relative to domestic plaintiffs. Foreign defendants, to the contrary, obtain more dismissals, as compared to domestic defendants. These tendencies are at least consistent with the hypothesis that foreigners generally have strong cases.

Considering terminations other than judgments reveals a broader importance of the existence of a foreigner effect among judgments. Judgments include only a small part of all settlements, but they do include some settlements in the form of consent and default judgments. The foreigner effect observed in those kinds of judgments reflects foreigner strength in imposing settlement terms.⁴⁵ Presumably, the foreigner strength seen there and in the rest of the judgments would carry over to influence all nonjudgment settlements and other resolutions of disputes.⁴⁶ However, foreign aversion to litigation may cause some foreigners to avoid winnable disputes by abandoning or satisfying claims. Similarly, foreigners may be disadvantaged in negotiations if misperceptions of xenophobia prevail at the negotiating table. In these ways, the observed foreigner effect has importance in grievance-remedial and dispute-resolution alternatives to judgment.

5. *Case Size.* — Returning to the judgment database, we see in Table 6 that foreign plaintiffs' cases tend to be relatively small cases, whether measured by demand or award. That foreign plaintiffs nevertheless pursue these cases is consistent with their having a high chance of winning. However, the small size of these cases is still surprising. The explanation of foreign aversion to American courts forecasts that the expected award for foreign plaintiffs will be higher than the expected

⁴⁴ Of the foreign-defendant cases, 12,393 were asbestos cases, of which 97.40% were nonjudgments. Without asbestos cases, the domestic percentages in Table 5 would be 21, 66, and 13, respectively; the foreign-plaintiff percentages would be unchanged; and the foreign-defendant percentages would be 19, 70, and 11, respectively.

⁴⁵ See *supra* note 40.

⁴⁶ Success rates in nonjudgment settlements should correlate with win rates in dispositions by judgment. See Theodore Eisenberg, *Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals*, 19 LAW & SOC. INQUIRY 275, 292-93 & n.64 (1994).

award for domestic cases, not lower. Yet Table 6 shows a lower expected award for foreign plaintiffs. The reconciliation between what one forecasts and what one observes lies in the rapid decrease in the number of foreign cases in recent years.⁴⁷ Recent years have seen higher average awards across many case categories.⁴⁸ A class of cases, such as those brought by foreign plaintiffs, that is sparsely represented in recent years will have relatively fewer high-award cases and thus a lower expected award. When one controls for the declining number of foreign-plaintiff cases over time, foreign plaintiff cases do have a higher expected award than do domestic cases.⁴⁹

Meanwhile, cases against foreigners are characterized by big demands, but not big awards. This pattern suggests a blustering plaintiff with a lower chance of winning. Domestic plaintiffs may believe that xenophobia exists in the court system to a greater extent than it does. Their misperception leads them to bring a relatively weak set of cases against foreign defendants and to inflate claims with an aim to intimidate. Because of the lower win rate, cases against foreigners have a lower expected award than do domestic cases.

TABLE 6. MONETARY AMOUNTS DEMANDED AND AWARDED
(1994 dollars)

	Foreign Plaintiffs v. Domestic Defendants	Domestic Plaintiffs v. Domestic Defendants	Domestic Plaintiffs v. Foreign Defendants
Mean Demand	913,198	1,153,940	2,045,194
Median Demand	73,155	95,196	223,494
Mean Award, if any	1,061,064	1,409,927	1,398,520
Median Award, if any	101,894	105,773	129,267
Expected Award*	848,215	908,698	699,819

* win rate times mean award

Incidentally, cases involving a foreign plaintiff or defendant last longer from filing to termination, as shown by Table 7. The longer duration implies an increase in costs, which reinforces the points that cases involving foreigners are small cases and that the foreigners will likely win them. The overall picture becomes ever more consistent with the explanation of foreign aversion to American courts.

⁴⁷ See *supra* note 15.

⁴⁸ See Eisenberg & Henderson, *supra* note 35, at 784.

⁴⁹ We analyzed expected awards by running a tobit regression, with the dependent variable being the square root of the expected award and the independent variables being foreign plaintiff, foreign defendant, and calendar year. The calendar year variable, in effect, controls for the higher award trend in recent years. Notably, the coefficient for foreign plaintiff is highly significant and strongly positive, whereas the coefficient for foreign defendant is highly significant and strongly negative.

Tobit regression is appropriate because the dependent variable is truncated at zero. See JAN KMENTA, *ELEMENTS OF ECONOMETRICS* 560-62 (2d ed. 1986). Similar results are obtained if one uses ordinary least squares regression.

TABLE 7. DURATION OF CASES
(Days on docket)

	Foreign Plaintiffs v. Domestic Defendants	Domestic Plaintiffs v. Domestic Defendants	Domestic Plaintiffs v. Foreign Defendants
Mean	446	387	729
Median	259	280	574

D. Diversity Analogy

Our explanation of the foreigner effect posits foreign aversion to litigating in American courts rather than any special treatment or capabilities of non-Americans. Thus, one would expect to see a similar effect on win rate in domestic diversity cases as a result of out-of-state parties' similar aversion to coming in to litigate with in-state adversaries. In fact, one does see that effect in the database. For example, out-of-state individual plaintiffs suing in-state individual defendants have a win rate of 67.78%, whereas in-state individuals suing out-of-state individuals have a win rate of only 57.06%. An out-of-state corporation suing a corporation either incorporated or having its principal place of business in the forum state has a win rate of 84.47%, whereas an in-state corporation suing an out-of-state corporation has only a 66.66% win rate. Instead of faring poorly, nonlocals are apparently selective about the cases they litigate away from home and, therefore, enjoy an elevated win rate.⁵⁰

Moreover, foreigners do better in federal court against in-state adversaries than they do against out-of-state adversaries.⁵¹ Perhaps the reason is that the effect of aversion in elevating foreigners' win rate diminishes when the adversary is also averse to the forum.

⁵⁰ In a regression similar to the one that produced Table 2 — but only for diversity proceedings between out-of-state and in-state Americans (fiscal years 1987–1994) — the coefficient for out-of-state plaintiff was 0.358, with a significance level at < 0.0005.

⁵¹ The numbers for the various combinations of plaintiffs and defendants follow:

FOREIGN PLAINTIFFS AGAINST DOMESTIC DEFENDANTS		
	Percent of Total Judgments	Plaintiff Win Rate
Foreign P v. in-state individual D	64.79	84.53
Foreign P v. out-of-state individual D	15.12	77.88
Foreign P v. in-state corporate D	16.70	69.54
Foreign P v. out-of-state corporate D	3.39	52.68
DOMESTIC PLAINTIFFS AGAINST FOREIGN DEFENDANTS		
	Percent of Total Judgments	Plaintiff Win Rate
In-state individual P v. foreign D	76.17	46.53
Out-of-state individual P v. foreign D	13.92	63.79
In-state corporate P v. foreign D	8.76	56.46
Out-of-state corporate P v. foreign D	1.15	67.71

A general principle begins to emerge: parties' aversion to litigation elevates their win rate. More immediately, the fact that an elevated win rate carries over from the foreigner context in alienage jurisdiction to the out-of-stater context in diversity jurisdiction gives convincing support to our aversion explanation.

CONCLUSION

The available data indicate that foreigners do very well in the federal courts. They win a higher percentage of their cases, whether as plaintiff or as defendant, than do their domestic counterparts. Thus, the data offer no support for the existence of xenophobic bias in American courts.

Our explanation for this "foreigner effect" in case outcomes lies in foreigners' aversion to American courts. Because of this aversion, foreign litigants who reach judgment generally have unusually strong cases, which have not encountered the expected bias. The data perhaps suggest, therefore, that foreigners would be wise to lessen their general aversion to litigation in the United States.

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.