

has the power to take property, then it is equally incongruous to say that a court can violate the Takings Clause.⁸⁰

Given the Takings Clause's two conditions and their presuppositions, it is easy to see why Justice Kennedy stated in his opinion that "select[ing] what property to condemn and . . . ensur[ing] that the taking makes financial sense from the State's point of view . . . are matters for the political branches — the legislature and the executive — not the courts."⁸¹

A careful reading of the text of the Takings Clause and an understanding of its framework not only call into serious doubt the plurality's proposition that the Takings Clause can be applied to the judiciary consistent with its text, but also contradict Justice Scalia's broad assertion that "[t]here is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation."⁸² As demonstrated above, such a textual justification does indeed exist.

II. FEDERAL JURISDICTION AND PROCEDURE

A. Diversity Jurisdiction

Corporate Citizenship. — Federal district courts have subject matter jurisdiction over two types of cases: those presenting a federal

⁸⁰ A reading of the clause's text that forecloses its application to the judiciary is only bolstered by considering the original understanding of the clause. As scholars have observed, the Framers of the Takings Clause did not contemplate applying it to the judiciary. According to Professor Barton Thompson, Jr., the author of the seminal article on judicial takings, "[g]iven the original, limited understanding of a taking, . . . no one in the late-eighteenth century would have considered a mere judicial abandonment of precedent to constitute a taking — even where the abandonment expanded public rights in land and other resources." Thompson, *supra* note 73, at 1459; see also 1 WILLIAM BLACKSTONE, COMMENTARIES *139 ("So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . [T]he legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce.").

Although Justice Scalia acknowledges that the original understanding of the Takings Clause cuts against applying it to the judiciary, he ignores the problem because he finds the text of the Takings Clause to be clear. See *Stop the Beach Renourishment*, 130 S. Ct. at 2606 (plurality opinion); cf. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) ("I argue for the role of tradition in giving content only to *ambiguous* constitutional text; no tradition can supersede the Constitution.").

⁸¹ *Stop the Beach Renourishment*, 130 S. Ct. at 2614 (Kennedy, J., concurring in part and concurring in the judgment).

⁸² *Id.* at 2601 (plurality opinion).

question¹ and those brought in diversity.² For purposes of the diversity inquiry, corporations were once thought to be citizens of their state of incorporation only.³ Fearing corporate abuse of this hard-set jurisdictional rule,⁴ Congress broadened corporate citizenship in 1958 so that a “corporation was to ‘be deemed a citizen of any State by which it has been incorporated *and* of the State where it has its principal place of business.’”⁵ Failing to define “principal place of business,” however, precipitated a severe circuit split as courts sought to make sense of the increasingly muddled doctrine.⁶ Last Term, in *Hertz Corp. v. Friend*,⁷ a unanimous Supreme Court brought harmony to the discordant views of the courts of appeals by adopting the Seventh Circuit’s “nerve center” inquiry as the sole test to determine a corporation’s principal place of business.⁸ In so deciding, the undivided Court trumpeted the benefits of rule-based adjudication in diversity pleading determinations. In rejecting discretionary, standard-based tests, *Hertz* is a paradigmatic example of the Court justifying over- and under-inclusiveness at the margins as a necessary cost of doctrinal clarity.

In September 2007, plaintiff Melinda Friend brought class action claims in California state court against defendant Hertz Corporation.⁹ Hertz sought removal to the federal district court, alleging diversity of citizenship under 28 U.S.C. § 1332.¹⁰ In support of the motion, Hertz submitted evidence that it operates in forty-four states and maintains a corporate headquarters in Park Ridge, New Jersey.¹¹ The threshold jurisdictional inquiry turned on one question: did Hertz have its principal place of business in California?¹² District Court Judge Chesney

¹ 28 U.S.C. § 1331 (2006). See generally Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667 (2008) (outlining federal question doctrine).

² 28 U.S.C. § 1332. For a review of the early history of diversity jurisdiction, see Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

³ *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1188 (2010) (citing, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 522–25 (1928); *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314 (1854)).

⁴ See *id.* at 1188–89.

⁵ *Id.* at 1190 (emphasis added) (quoting Pub. L. No. 85-554, § 2, 72 Stat. 415, 415 (1958)).

⁶ See *id.* at 1190–92.

⁷ 130 S. Ct. 1181.

⁸ *Id.* at 1192.

⁹ *Id.* at 1186.

¹⁰ *Id.* Specifically, Hertz invoked 28 U.S.C. § 1332(d), *id.*, which was enacted by the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–12. For a brief overview of CAFA, see generally Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593 (2006).

¹¹ *Hertz*, 130 S. Ct. at 1186.

¹² *Friend v. Hertz Corp.*, No. C-07-5222 MMC, 2008 WL 7071465, at *1 (N.D. Cal. Jan. 15, 2008).

concluded that it did and consequently remanded the case to the state trial court.¹³

In reaching this decision, Judge Chesney applied *Tosco Corp. v. Communities for a Better Environment*,¹⁴ a 2001 opinion articulating the Ninth Circuit’s “significance” standard for determining a corporation’s principal place of business.¹⁵ The test proceeded in three steps. First, the court would ask whether a “majority of a corporation’s business activity” occurred in one state.¹⁶ If the answer was no, and the corporation’s business was spread out among multiple states, the court would then make a “comparison of that corporation’s business activity in the state at issue to its business activity in other individual states.”¹⁷ That is, the court in step two would ask whether the corporation’s business activity in the disputed state was “significantly larger” or “substantially predominate[d]” in one state as compared with the others.¹⁸ Specifically, “the court [would] ‘employ[] a number of factors,’ including ‘the location of employees, tangible property, production activities, sources of income, and where sales take place.’”¹⁹ If those factors significantly predominated in one state, that state was deemed the corporation’s principal place of business.²⁰ But should the court not have found a significant disparity among states, the test defaulted to a third and final step: the location of the corporation’s “nerve center.”²¹

Hertz’s citizenship could not be resolved at step one.²² The lower court thus turned its attention to the two states with the greatest concentration of Hertz business activity: California and Florida. The court determined that the “defendant employs over 43% more employees . . . , holds over 75% more tangible property . . . , earns over 60% more revenue . . . , and processes over 70% more rentals in Cali-

¹³ *Id.* at *3.

¹⁴ 236 F.3d 495 (9th Cir. 2001).

¹⁵ *Id.* at 500–02.

¹⁶ *Friend*, 2008 WL 7071465, at *1.

¹⁷ *Id.* (quoting *Tosco*, 236 F.3d at 500) (internal quotation marks omitted).

¹⁸ *Id.* (quoting *Tosco*, 236 F.3d at 500) (internal quotation marks omitted).

¹⁹ *Id.* (quoting *Tosco*, 236 F.3d at 500).

²⁰ *Id.* “Significant” and “substantially,” however, are vague terms that necessitated their own subanalysis. For example, the court in *Ghaderi v. United Airlines, Inc.*, 136 F. Supp. 2d 1041 (N.D. Cal. 2001), found that California was the corporation’s principal place of business where activity for each relevant business activity category was “between 20% and 33% greater in California than it [was] in [the next closest state].” *Id.* at 1047. Furthermore, the Ninth Circuit did not adjust for California’s population in determining significance. See *Friend v. Hertz Corp.*, 297 F. App’x 690, 691 (9th Cir. 2008).

²¹ *Hertz*, 130 S. Ct. at 1186; *Friend*, 2008 WL 7071465, at *1. The nerve center is “the state where the majority of [the corporation’s] executive and administrative functions are performed.” *Id.* (quoting *Tosco*, 236 F.3d at 500) (internal quotation marks omitted); see also sources cited *infra* note 37.

²² See *Friend*, 2008 WL 7071465, at *2.

ifornia than in Florida.”²³ Because a “plurality of each of the relevant business activities” predominated in California — and did so to a “significant” degree over Florida — the district court concluded that Hertz was a California citizen for diversity purposes.²⁴ Subject matter jurisdiction thus lacking, the court remanded the case to the Superior Court of the State of California.²⁵

Hertz appealed the remand order to the Ninth Circuit. A three-judge panel affirmed the district court’s decision in a four-paragraph opinion.²⁶ In the Ninth Circuit’s view, Judge Chesney had properly applied the two leading cases, *Tosco* and its predecessor, *Industrial Tectonics, Inc. v. Aero Alloy*,²⁷ in declaring California the principal place of business.²⁸ Hertz petitioned for certiorari.²⁹

The Supreme Court, in a unanimous opinion, vacated and remanded.³⁰ Writing for the Court, Justice Breyer first addressed a “jurisdictional objection.”³¹ Friend had argued that the statute authorizing Hertz to “appeal the District Court’s remand order to the Court of Appeals” prevented review by the Supreme Court where, “as here, this Court’s grant of certiorari comes after [the statute’s sixty-day] time period has elapsed.”³² Justice Breyer rejected this argument as making “far too much of too little.”³³ The Court would not read into the silence surrounding the relevant statutory regime a logic “implicitly modifying or limiting Supreme Court jurisdiction that another statute specifically grants.”³⁴ The statute “simply requir[es] a court of appeals to reach a decision within a specified time — not to deprive this Court of subsequent jurisdiction to review the case.”³⁵

Returning to the substantive inquiry, Justice Breyer formally rejected the Ninth Circuit’s “significance” standard — as well as the var-

²³ *Id.* Had Ninth Circuit courts considered business activity within each state in relation to national figures, the disparity between California and Florida would have fallen in the modest, potentially insignificant 6–10% range. See *id.* (noting that “2299 of defendant’s employees work in California (20.5% of its employees), compared to 1602 employees in Florida (14.3% of its employees); 273 of defendant’s ‘profit-center rental locations’ are located in California (17% of its tangible property), as compared to 155 such locations in Florida (9.7% of its tangible property); . . . defendant earned \$811 million from its operations in California (18.6% of its earned revenue), as compared to \$505 million in Florida (11.6% of its earned revenue)”).

²⁴ *Id.*

²⁵ *Id.* at *3.

²⁶ *Friend v. Hertz Corp.*, 297 F. App’x 690, 691 (9th Cir. 2008).

²⁷ 912 F.2d 1090 (9th Cir. 1990).

²⁸ *Friend*, 297 F. App’x at 691.

²⁹ Petition for Writ of Certiorari, *Hertz*, 130 S. Ct. 1181 (No. 08-1107), 2009 WL 559328.

³⁰ *Hertz*, 130 S. Ct. at 1195.

³¹ *Id.* at 1187.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

ious tests used in a majority of the courts of appeals³⁶ — in favor of the “nerve center” test as applied by the Seventh Circuit.³⁷ In the Court’s view, “‘principal place of business’ is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities.”³⁸ “[I]n practice,” Justice Breyer noted, “it should normally be the place where the corporation maintains its headquarters.”³⁹ But in order to safeguard plaintiffs from fraud, this presumption is a rebuttable one.⁴⁰ The headquarters is not the “nerve center” if, for example, it is “nothing more than a mail drop box, a bare office with a computer, or the location of an annual executive retreat.”⁴¹ Nor would “the mere filing” of the SEC’s Form 10-K be, without more, “sufficient proof to establish a corporation’s ‘nerve center.’”⁴²

The Court found that “[t]hree sets of considerations, taken together, convince us that this approach, while imperfect, is superior to other possibilities.”⁴³ First, the language of the statute strongly militates in favor of the “nerve center” approach.⁴⁴ The Court noted that the statutory term “place” is “in the singular, not the plural.”⁴⁵ Furthermore, “the fact that the word ‘place’ follows the words ‘State where’ means

³⁶ *Id.* at 1191–92. According to the Court: “[D]ifferent circuits (and sometimes different courts within a single circuit) have applied these highly general multifactor tests in different ways.” *Id.* at 1191. The Court relied on 15 J. MOORE ET AL., MOORE’S FEDERAL PRACTICE §§ 102.54(3)–(7), (11)–(13) (3d ed. 2009), which noted:

[T]he First Circuit “has never explained a basis for choosing between ‘the center of corporate activity’ test and the ‘locus of operations’ test”; the Second Circuit uses a “two-part test” similar to that of the Fifth, Ninth, and Eleventh Circuits involving an initial determination as to whether “a corporation’s activities are centralized or decentralized” followed by an application of either the “place of operations” or “nerve center” test; the Third Circuit applies the “center of corporate activities” test searching for the “headquarters of a corporation’s day-to-day activity”; the Fourth Circuit has “endorsed neither [the “nerve center” nor the “place of operations”] test to the exclusion of the other”; the Tenth Circuit directs consideration of the “total activity of the company considered as a whole”).

Hertz, 130 S. Ct. at 1191–92.

³⁷ *Id.* at 1192. For a sampling of Seventh Circuit cases applying the “nerve center” test, see *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282–83 (7th Cir. 1986); *Lamb Farm International, Inc. v. Northern Insurance Co. of New York*, No. 02 C 6055, 2003 WL 260683, at *2–3 (N.D. Ill. Feb. 6, 2003); and *Maple Leaf Bakery v. Raychem Corp.*, No. 99 C 6948, 1999 WL 1101326, at *2–3 (N.D. Ill. Nov. 29, 1999).

³⁸ *Hertz*, 130 S. Ct. at 1192.

³⁹ *Id.*

⁴⁰ *See id.* at 1194–95.

⁴¹ *Id.* at 1195.

⁴² *Id.*

⁴³ *Id.* at 1192.

⁴⁴ A corporation is a citizen of the “State where it has its principal place of business.” *Id.* at 1185 (emphasis omitted) (quoting 28 U.S.C. § 1332(c)(1) (2006)) (internal quotation mark omitted).

⁴⁵ *Id.* at 1192.

that the ‘place’ is a place *within* a State. It is not the State itself.”⁴⁶ A “nerve center” is a discrete location within a state. “By contrast, the application of a more general business activities test has led some courts, as in the present case, to look . . . incorrectly at the State itself”⁴⁷ This, Justice Breyer correctly noted, produced “strange results”⁴⁸ where courts failed to adjust for population, as was the case in the Ninth Circuit.⁴⁹

Second, “administrative simplicity is a major virtue in a jurisdictional statute.”⁵⁰ This is true for parties and courts alike. For litigants, complex tests “encourage gamesmanship,” “produce appeals and reversals,” “eat[] up time and money,” and “diminish the likelihood that results and settlements will reflect a claim’s legal and factual merits.”⁵¹ Simplicity also promotes predictability. Parties need no longer calculate — state by state — revenue or real property value to intuit a corporation’s principal place of business.⁵² For courts that must conduct subject matter inquiries *sua sponte*, complex tests drain judicial resources.⁵³ The “*comparative*[]” simplicity of the “nerve center” approach eases that burden.⁵⁴

Third, the Court found in the legislative history a “simplicity-related interpretive benchmark.”⁵⁵ In the process of amending 28 U.S.C. § 1332 to reach more than a corporation’s state of incorporation, the Judicial Conference initially proposed a “numerical test.”⁵⁶ Under this approach, a corporation would be considered a citizen of the state “that accounted for more than half of its gross income.”⁵⁷ The Conference, however, abandoned the test amid criticism that “such a test would prove too complex and impractical to apply.”⁵⁸ From this history the Court inferred that “the words ‘principal place of business’ should be interpreted to be no more complex than the ini-

⁴⁶ *Id.* at 1193.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* (citing *Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026 (9th Cir. 2009), in which the Ninth Circuit recognized that “nearly every national retailer — no matter how far flung its operations — will be deemed a citizen of California for diversity purposes,” *id.* at 1029–30); *see also* *Friend v. Hertz Corp.*, 297 F. App’x 690, 691 (9th Cir. 2008).

⁵⁰ *Hertz*, 130 S. Ct. at 1193 (citing *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment)).

⁵¹ *Id.*

⁵² *See id.*

⁵³ *Id.* (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1194.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

tial ‘half of gross income’ test.”⁵⁹ The “nerve center” approach “offers such a possibility . . . [but a] general business activities test does not.”⁶⁰

In closing, Justice Breyer conceded that “there may be no perfect test.”⁶¹ Even the “nerve center” inquiry is certain to result in cases in which a finding or nonfinding of citizenship “cut[s] against the basic rationale for” diversity jurisdiction: the concern for local prejudice against out-of-state defendants.⁶² But the Court, in apologetic tones, labeled such situations “anomalies” and vigorously defended its results: unfairness at the margins represents a cost of doing business that litigants “must” accept “in view of the necessity of having a clearer rule.”⁶³

As a matter of practical jurisprudence, the Court’s decision represents a substantial clarification of the “principal place of business” test. Noteworthy, however, was the means by which the Court achieved unanimity. Throughout the opinion, the Court marshaled traditional rule-based arguments to justify its choice of the “nerve center” test against claims of looming unfairness, inflexibility, and under- and overinclusiveness. In this respect, *Hertz* is a prime example of the Justices unanimously embracing the rationale of rules.

“A legal directive is ‘rule’-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts.”⁶⁴ To apply a rule is to apply a background principle uniformly across innumerable fact patterns, including those not anticipated. Standards, in contrast, traditionally favor ex post, case-by-case adjudication in which the decisionmaker is free to manipulate the background policy to achieve equitable results.⁶⁵ The tradeoff here is clear: rules sacrifice the promise of absolute fairness for uniformity. This tradeoff is known in part as a problem of “Over- and Under-inclusiveness.”⁶⁶ Restated, the straightforward application of rules sometimes contradicts or undermines the very policies underlying those rules. Lacking discretion under such a regime, judges must simply accept these counterintuitive results. While the “nerve center” test is composed of both standard- and rule-like elements, the test is

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

⁶⁵ See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568–86 (1992). See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (advocating rules in part because rules minimize judicial discretion while promoting predictability).

⁶⁶ Kaplow, *supra* note 65, at 586; see also *id.* at 586–96.

essentially rule-like in terms of both its benefits *and* its costs. Locking in a set of discrete requirements effectively eliminates judicial discretion in the vast majority of cases in which it applies. In this respect, the “nerve center” test more closely resembles the Judicial Conference’s proposed bright-line “numerical” rule than the Ninth Circuit’s unbounded “significance” standard.

Although the *Hertz* Court did not formally appropriate the terminology of rules and standards, nowhere is the age-old tension more evident — and more relevant — than in the concluding discussion of over- and underinclusiveness. In Justice Breyer’s brief, apologetic conclusion, he spoke of a hypothetical corporation with a visible presence in New Jersey and its sole center of operations “just across the river in New York.”⁶⁷ But hypotheticals are unnecessary. Consider Boeing, the world’s largest commercial airplane manufacturer and a corporation with a century-long presence in the Pacific Northwest.⁶⁸ In 2001, Boeing moved its corporate headquarters from Seattle, Washington, to Chicago, Illinois, where it retains but a fraction of its total employees.⁶⁹ Under the “nerve center” test, Boeing could successfully invoke § 1332 to remove to federal district court a suit brought in Washington state court by a Washington resident injured tortiously in a regional Boeing factory. This anomaly cuts against the notion of “local prejudice,” the policy historically underlying diversity jurisdiction,⁷⁰ insofar as it mandates removal of a case in which neither party would be disadvantaged by a state trial. But under the Court’s rule-based view, such failures are simply the cost of clarity in corporate citizenship doctrine. By contrast, a standard-based test that considered the “totality of the circumstances” or looked to “significance” would give judges greater discretion to reach more equitable outcomes in the application of the “local prejudice” rationale.

In this light, Boeing certainly presents a clear case of over-inclusiveness. Rule-based adjudication would simply fail to do equity at the margin where the application of the rule conflicted with a logical application of the local prejudice rationale.⁷¹ But this did not gen-

⁶⁷ *Hertz*, 130 S. Ct. at 1194.

⁶⁸ See *The Boeing Logbook: 1881–1919*, BOEING.COM, <http://www.boeing.com/history/chronology/chron01.html> (last visited Oct. 2, 2010) (explaining that William Boeing purchased a Seattle shipyard in 1910 that would later become his first airplane factory).

⁶⁹ David Barboza, *Chicago, Offering Big Incentives, Will Be Boeing’s New Home*, N.Y. TIMES, May 11, 2001, at C3.

⁷⁰ For more on the canonization of local prejudice as diversity jurisdiction’s *raison d’être*, see *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855); and *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.). Cf. Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 122–36 (2003) (sketching the traditional theories underlying diversity jurisdiction).

⁷¹ One cost of this conflict is administrative: another case on the federal docket. The other, and the focus of discussion in this comment, is the burden of a potentially biased local trial.

erate a dissent.⁷² Why? Three possible explanations offer guidance regarding why the *Hertz* Court discounted the costs of a rule-based approach.

First, in balancing rules and standards, the Justices might have simply concluded that the benefits of rule-based adjudication are substantial. Justice Breyer, for example, suggested that rules minimize gamesmanship and facilitate judicial administration while clarifying the rights of parties.⁷³ And this clarity, it follows, is likely to produce a net benefit for *all* litigants over time. Second, the Justices might have viewed the costs at the margin — the costs of over- and underinclusiveness — as negligible. Such a finding may be warranted as it is unclear whether local prejudice today presents a cost so significant to parties unable to remove their cases that it would constitute an injustice.⁷⁴ Nor was there a suggestion that a corporate structure such as Boeing’s is anything more than an outlier in general practice.⁷⁵ Third and finally, whatever the result of the balancing, the Justices questioned the very notion that the federal courts are capable of identifying “local prejudice” where it does exist.⁷⁶ In sum, with little compelling evidence to the contrary, the Justices were free to discount the effects of over- and underinclusiveness. This is not to suggest, however, that the Court discarded “local prejudice” entirely. The policy continues on with the very existence of diversity jurisdiction, but it does so now in a coherent, streamlined fashion not subject to the complex and inconsistent approaches of the circuits.

This rule-inspired turn promises exceptional clarity for diversity jurisdiction pleadings, the result of which is predictability. Without having to resort to costly litigation, potential litigants will know — *ex ante* and with a reasonable degree of certainty — who will hear their cases

⁷² Such a result was not often the case last Term. *See, e.g.*, *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (dividing over bright lines and standards in police interrogations).

⁷³ *See Hertz*, 130 S. Ct. at 1193.

⁷⁴ Indeed, a great many commentators have called for a lessening of diversity jurisdiction, if not its total abolition. *See, e.g.*, Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1687 (1992) (arguing for a diminution in diversity cases on federalism grounds).

⁷⁵ Should that change, Congress — not the Court — could amend the statutory requirements for diversity.

⁷⁶ In a revealing paragraph, Justice Breyer questioned the ability of courts to apply standards to the “principal place of business” inquiry in order to identify local prejudice. He wrote:

[T]hat task seems doomed to failure. After all, the relevant purposive concern — prejudice against an out-of-state party — will often depend upon factors that courts cannot easily measure, . . . while the factors that courts can more easily measure, for example, its office or plant location, its sales, its employment, or the nature of the goods or services it supplies, will sometimes bear no more than a distant relation to the likelihood of prejudice. At the same time, this approach is at war with administrative simplicity.

Hertz, 130 S. Ct. at 1192.

and where. But this does not assure absolute certainty. In practice, the “nerve center” test is still subject to its standard-like elements. Federal judges will thus struggle to develop a coherent common law doctrine in those “hard cases” where novel fact patterns arise.⁷⁷ Also present is the risk that judges determined to take considerations of local prejudice into account will forge exceptions to the test that cause it to revert back toward an ungrounded standard.⁷⁸ These rare cases should not, however, diminish *Hertz*’s success. By adopting the “nerve center” test’s language of “direct, control, and coordinate,”⁷⁹ the Court harmonized the doctrine. In short, federal courts are free to debate at the margins, but they are all asking — and answering — the same questions. This development represents a tremendous step forward for courts and parties alike.

But the benefits of rule-like adjudication need not be limited to the question of corporate citizenship. Consider the amount-in-controversy requirement, the other key precondition of 28 U.S.C. § 1332. To satisfy it, parties must establish that the value of their controversy exceeds \$75,000.⁸⁰ Where the plaintiff claims monetary damages greater than \$75,000 and does so plausibly and in good faith, the court will adopt his valuation.⁸¹ Here the Court has adopted a clear, bright-line rule. Complications arise, however, where the parties request not monetary damages, but equitable injunctive or punitive relief. The courts of appeals are split on how to value such claims for diversity purposes.⁸² As to the initial question of whose claim to value, approximately half of the circuit courts apply the “plaintiff-viewpoint rule.” Those courts

⁷⁷ Hard cases might arise with companies that rely on telecommunications to disaggregate the locations of corporate control, *see id.* at 1194, as well as recently merged companies or those with largely independent product lines.

⁷⁸ The Boeing case presents such a risk. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1701 (1976) (“The more general and the more formally realizable the rule, the greater the equitable pull of extreme cases of over- or underinclusion.”).

⁷⁹ *Hertz*, 130 S. Ct. at 1192.

⁸⁰ 28 U.S.C. § 1332(a) (2006).

⁸¹ *See* Jaren Casazza, Note, *Valuation of Diversity Jurisdiction Claims in the Federal Courts*, 104 COLUM. L. REV. 1280, 1280 n.3 (2004) (referencing the “legal certainty” test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 346 (1977)).

⁸² *See* Jason Schwalm, *The Eye of the Beholder: A Defendant-Reliant Approach to Valuing Injunctive Relief for the Purposes of the Amount in Controversy Requirement*, 36 OHIO N.U. L. REV. 171, 175 n.26 (2010) (comparing cases from the Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits (following the “plaintiff viewpoint rule”) with cases from the First, Fourth, Seventh, Tenth, and D.C. Circuits (following the “either viewpoint rule”). Moreover, “some circuits have developed their own internal splits.” Brittain Shaw McInnis, Comment, *The \$75,000.01 Question: What Is the Value of Injunctive Relief?*, 6 GEO. MASON L. REV. 1013, 1021 n.52 (1998). The Ninth Circuit, to further complicate matters, “applies the either-viewpoint rule in single-plaintiff cases, and the plaintiff-viewpoint rule in class actions.” Casazza, *supra* note 81, at 1298–99 (footnotes omitted).

“consider only Plaintiff’s right and its worth to Plaintiff in valuing the claim . . . as opposed to the value of the defendant’s right threatened by the litigation.”⁸³ Other courts follow the “either-viewpoint rule” and would “allow the value of either right to control.”⁸⁴

Although this inquiry is largely rule-like in nature, difficulties in administration abound. Even among the circuits applying the “either-viewpoint rule,” there is disagreement regarding “what variables can be included in valuation of a defendant’s right.”⁸⁵ The Seventh Circuit does not include “clerical or ministerial costs of compliance,”⁸⁶ whereas the Tenth Circuit applies a far more liberal approach to valuation.⁸⁷ Such confusion is representative. Indeed, it is functionally analogous to corporate citizenship doctrine pre-*Hertz*. In both cases, limited textual guidance⁸⁸ precipitated the multiple, often divergent tests that frustrate the ideals of simple judicial administration and predictability in practice. Insofar as *Hertz* demonstrates the Court’s willingness to resolve statutory ambiguities after a half-century of silence and move the doctrine toward greater clarity, it is only fitting that the Court do so with the amount-in-controversy requirement as well.

In short, this is a doctrinal question ripe for resolution after *Hertz*. If the Court believes strongly in its rhetoric of rule-like clarity, then it should resolve doctrinal tensions across the key statutory requirements for diversity jurisdiction. That is, prospective litigants should have unambiguous and uniform rules in *all* gateway questions of jurisdictional pleading. Furthermore, by signaling the Supreme Court’s preference for clarity and administrability for *all* 28 U.S.C. § 1332 proceedings, such resolution would provide interpretive guidance going forward for the lower federal courts applying these threshold tests. Moreover, the costs are negligible as the practical and jurisprudential difficulties in taking this next step are few. Given the federal courts’ demonstrated reliance on rule-like adjudication where monetary damages are sought in diversity cases, the Court need not radically re-fashion the balancing underlying the amount-in-controversy doctrine. The Court need only make a choice: what viewpoint will courts use and what factors must they consider? Until then, *Hertz* remains a

⁸³ Casazza, *supra* note 81, at 1296.

⁸⁴ *Id.*

⁸⁵ *Id.* Certain circuits, for example, do not allow the inclusion of certain variables into the calculus, the effect of which is to prevent “‘every case, however trivial, against a large company’ [from necessarily] ‘cross[ing] the threshold’ into federal jurisdiction.” *Id.* (quoting *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997)).

⁸⁶ *Id.* (quoting *Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d at 610) (internal quotation marks omitted).

⁸⁷ *Id.* at 1297.

⁸⁸ *See id.* at 1280.

tremendous, but still only partial, victory for clarity in federal diversity jurisdiction.

B. Federal Rules of Civil Procedure

Preemption of State Procedural Rules. — For federal district courts sitting in diversity, the line between substance and procedure is essential, for it determines whether state or federal law governs a particular question. That line is notoriously fuzzy, however, and courts have struggled to draw it consistently.¹ Last Term, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,² the Supreme Court held that Federal Rule of Civil Procedure 23 preempts, in federal diversity cases, a New York state law that prohibits parties from bringing class action lawsuits on claims seeking statutory damages.³ While five members of the Court joined the portion of the opinion establishing this core disposition, the Court fractured on the more difficult question of whether state procedural rules with substantive motivations could ever displace an otherwise applicable federal rule in a diversity suit.⁴ The Court reached the correct result, but its reasoning will needlessly frustrate federalism interests in future cases.

Under New York law, insurance providers have thirty days to pay benefits claims, and must pay statutory interest if they fail to meet that deadline.⁵ Shady Grove Orthopedic Associates provided medical care to Sonia Galvez after she was in an accident.⁶ It subsequently submitted a claim for benefits to Allstate under Galvez's insurance policy, which Allstate eventually paid late and without interest.⁷

Shady Grove brought a diversity suit in the Eastern District of New York to recover the interest.⁸ Claiming that Allstate routinely reimbursed claims late and refused to pay the resulting statutory interest, Shady Grove sought certification of a class representing all those to whom Allstate owed such interest.⁹ Under New York law, however, a suit to recover a "minimum measure of recovery . . . imposed by statute may not be maintained as a class action."¹⁰ Allstate argued that, because the statutory interest fell within this category, it could not be

¹ See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

² 130 S. Ct. 1431 (2010).

³ N.Y. C.P.L.R. 901(b) (McKinney 2006); see *Shady Grove*, 130 S. Ct. at 1448.

⁴ See *Shady Grove*, 130 S. Ct. at 1436.

⁵ See N.Y. INS. LAW § 5106(a) (McKinney 2009).

⁶ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467, 469 (E.D.N.Y. 2006).

⁷ *Id.* at 470.

⁸ *Id.*

⁹ *Id.*

¹⁰ N.Y. C.P.L.R. 901(b) (McKinney 2006).