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# Ruralism and Patent Litigation in the Eastern District of Texas

*Debra Lyn Bassett\**

Good morning. I would like to thank Professor Xuan-Thao Nguyen and Southern Methodist University Dedman School of Law for inviting me to participate in this Symposium. I am delighted to be here.

Over the past few years, the most popular locations for filing patent claims have included the Northern District of California, the Central District of California, and the Eastern District of Texas.<sup>1</sup> The prevalence of patent litigation in the Eastern District of Texas has generated a surprising level of interest, commentary, and criticism, as contrasted with the prevalence of patent actions in the Northern and Central Districts of California.<sup>2</sup> Even more interesting is the nature of the commentary and criticism that seems to be aimed at the rural nature of the Eastern District of Texas, as opposed to any flaws in its jurists or procedures.

Several years ago, I authored an article entitled “The Rural Venue.”<sup>3</sup> In that article, I discussed the concept of ruralism—meaning discrimination on

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- \* Justice Marshall F. McComb Professor of Law, Southwestern Law School. This article is an annotated version of remarks I made at Southern Methodist University Dedman School of Law’s “Symposium on Emerging Intellectual Property Issues: Eastern District of Texas and Patents.” Many thanks to Professor Xuan-Thao Nguyen for inviting me to participate in the Symposium, and to Dean Bryant Garth for his ongoing encouragement and research support.
1. See Xuan-Thao Nguyen, *Dynamic Federalism and Patent Law Reform*, 85 IND. L.J. 449, 487 (2010) [hereinafter Nguyen, *Dynamic Federalism*] (noting that the top venues for patent litigation include the Eastern District of Texas, the Northern District of California, and the Central District of California); see also Comparison of the Most Popular Patent Venues, <http://www.cooley.com/files/Law360.Patent%20Venue%20Article.%20Mitchell.Tilly.pdf> (Dec. 10, 2009) (last visited Apr. 4, 2010) (“The Eastern District of Texas, Central District of California, Districts of New Jersey and Delaware, and Northern District of California are the most popular venues for patent-infringement actions.”).
  2. See, e.g., Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444 (2010); Paul M. Janicke, *Venue Transfers from the Eastern District of Texas: Case by Case or an Endemic Problem?*, LANDSLIDE 14 (Mar./Apr. 2010); Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193 (2007); Alisha Kay Taylor, *What Does Forum Shopping in the Eastern District of Texas Mean for Patent Reform?*, 6 J. MARSHALL REV. INTELL. PROP. L. 570 (2007); Megan Woodhouse, *Shop ‘Til You Drop: Implementing Federal Rules of Patent Litigation Procedure to Wear Out Forum Shopping Patent Plaintiffs*, 99 GEO. L.J. 227 (2010).
  3. *The Rural Venue* is one of six articles and two book chapters that I have authored about rural issues. See Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273 (2003) [hereinafter Bassett, *Ruralism*]; Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119 (2003) [hereinafter Bas-

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the basis of factors stemming from living in a rural area.<sup>4</sup> Like other forms of discrimination, ruralism employs stereotypes, some positive and some negative.<sup>5</sup> The underlying documentation of ruralism began several decades ago in sociological studies and research,<sup>6</sup> and indeed ruralism might have continued to be of only passing sociological interest were it not for the fact that general examples of ruralism—again both positive and negative—can be found in the legal arena as well.<sup>7</sup>

The vast majority of America's population resides, of course, in urban areas.<sup>8</sup> Population density is one of the most obvious differences between urban and non-urban living, and it contributes to a host of additional differences. Higher population densities bring access and availability<sup>9</sup>—more housing, more services, more programs, and more amenities to serve those large numbers of people. Larger numbers of people generate more attention for the needs and demands of those people, resulting in greater power of

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sett, *Hidden Bias*]; Debra Lyn Bassett, *The Politics of the Rural Vote*, 35 ARIZ. ST. L.J. 744 (2003); Debra Lyn Bassett, *The Rural Venue*, 57 ALA. L. REV. 941 (2006) [hereinafter Bassett, *Rural Venue*]; Debra Lyn Bassett, *Distancing Rural Poverty*, 13 GEO. J. POVERTY L. & POL'Y 3 (2006); Debra Lyn Bassett, *Poverty and Global Ruralism*, 13 J. GENDER, RACE & JUSTICE 1 (2009) [hereinafter Bassett, *Global Ruralism*]; see also Debra Lyn Bassett, *Place, Disasters, and Disability*, in LAW AND RECOVERY FROM DISASTER: HURRICANE KATRINA 51 (Robin Paul Malloy ed., 2009); Debra Lyn Bassett, *The Overlooked Significance of Place in Law and Policy: Lessons from Hurricane Katrina*, in RACE, PLACE, AND ENVIRONMENTAL JUSTICE AFTER KATRINA: STRUGGLES TO RECLAIM, REBUILD, AND REVITALIZE NEW ORLEANS AND THE GULF COAST 49 (Robert D. Bullard & Beverly Wright eds., 2009).

4. See Bassett, *Rural Venue*, *supra* note 3, at 944.

5. See *id.*

6. See Bassett, *Global Ruralism*, *supra* note 3, at 10.

7. See Bassett, *Rural Venue*, *supra* note 3, at 948; see also Bassett, *Ruralism*, *supra* note 3, at 323–28; Bassett, *Hidden Bias*, *supra* note 3, at 136–44.

8. See STATE PROFILES: THE POPULATION AND ECONOMY OF EACH U.S. STATE 3 (Courtenay M. Slater & Martha G. Davis eds., 1999) (“About 80 percent of the U.S. population lived in metropolitan areas in 1997, and this proportion has changed little since 1990.”).

9. See Bassett, *Ruralism*, *supra* note 3, at 316 (“As a general matter, lack of access and availability is a key problem in rural areas.”).

every dimension.<sup>10</sup> Indeed, America's thinking is dominated by an urban perspective.<sup>11</sup>

The rural remainder are geographical outsiders, living outside metropolitan boundaries. Rural dwellers can also be outsiders in a less literal and more figurative sense—they can be overshadowed and marginalized.<sup>12</sup> My article explored whether from time to time discussions of trial location, including motions to change venue, might be based—whether expressly or subconsciously—on a form of bias against rural areas. And I found some support for the idea that when lawyers talk about the fear of “local bias,” that so-called local bias tends to be rooted in simple anti-rural bias, as references to “local bias” are not commonly used as a challenge to trials in urban areas.<sup>13</sup> Although the vast majority of courts have rejected venue challenges based expressly on rural location as such, some of the proffered arguments

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10. See KNOWING YOUR PLACE: RURAL IDENTITY AND CULTURAL HIERARCHY 2 (Barbara Ching & Gerald W. Creed eds., 1997) (“[T]he rural/urban distinction underlies many of the power relations that shape the experiences of people in nearly every culture.”); *id.* at 17 (“[T]he city remains the locus of political, economic and cultural power.”); Craig Anthony Arnold, *Ignoring the Rural Underclass: The Biases of Federal Housing Policy*, 2 STAN. L. & POL’Y REV. 191, 194–95 (1990) (“[W]hen compared to urban residents, the rural underclass is politically weak. Widely dispersed, they lack the organization, financial resources, and concentrated voting strength necessary to influence public policy.”); Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1295 (1997) (“[A] state’s political and economic power are often associated with size of population . . . .”); See generally Bernice Lott, *Cognitive and Behavioral Distancing from the Poor*, 57 AM. PSYCHOLOGIST 100, 101 (2002) (“Power, defined as access to resources, enables the group with greatest access to set the rules, frame the discourse, and name and describe those with less power. . . . ‘[I]t is power . . . that enables one to discriminate.’”) (second ellipsis in original) (citation omitted).
  11. See Bassett, *Ruralism*, *supra* note 3, at 341 (noting that “[o]ur society has an urban focus”); see also CORNELIA BUTLER FLORA ET AL., RURAL COMMUNITIES: LEGACY AND CHANGE 15 (2d ed. 2004) (noting that America “has become so deeply urbanized that we almost assume urbanization to be a natural law”); RALPH A. WEISHEIT ET AL., CRIME AND POLICING IN RURAL AND SMALL-TOWN AMERICA 2 (2d ed. 1999) (“[C]ontemporary American culture is considered not only homogenous [*sic*], but an urban culture.”).
  12. See Bassett, *Ruralism*, *supra* note 3, at 278, 316–23.
  13. See Bassett, *Rural Venue*, *supra* note 3, at 970–71; see also Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 LAW & SOC’Y REV. 749, 762 (1980) (“The frequency of lawyers mentioning local bias is directly related to the rural nature of the district . . . .”); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 428 (1992) (noting that reports of fear of “out-of-state bias [were] geographically concentrated in primarily rural areas”).

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skate on little more than rural synonyms. For example, a community's size is often one factor used to evaluate a venue challenge.<sup>14</sup> Since population is ultimately the defining factor for "rural," authorizing a change of venue on the basis of a community's size tends to impact only rural venues.<sup>15</sup>

Motions for change of venue also sometimes include characterizations about the potential jury pool. When the potential jury pool comes from a rural area, anti-rural arguments are sometimes used that indicate underlying assumptions of closed-mindedness and limited intelligence; assumptions that rural jurors will prejudge cases based on rumor and innuendo; and assumptions that rural jurors lack the intelligence, integrity, and objectivity to base their legal conclusions on the evidence presented at trial.<sup>16</sup>

In doing some research into the customary patent litigation practices of the Eastern District of Texas, I saw some similar patterns of commentary and criticism. I was not concerned when I found articles explaining that the Eastern District of Texas was an attractive forum for patent cases because it had knowledgeable judges experienced in patent cases, with special patent rules that resulted in quick and relatively inexpensive trials.<sup>17</sup> But then I was sent an article referring to "the abusive nature of litigating patent cases in the

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14. See, e.g., *People v. Fauber*, 831 P.2d 249, 261 (Cal. 1992) (stating that a change of venue determination "requires consideration of such factors as . . . the size of the community").
  15. See Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the "Rodney King" Case: An Interest Analysis*, 41 CLEV. ST. L. REV. 215, 231–32 (1993) ("[V]enue is more likely to be changed in [small] counties.").
  16. See Bassett, *Rural Venue*, *supra* note 3, at 963–69 (providing examples); see also Jacqueline S. Anderson, *Changing Venue to Obtain a Fair and Impartial Trial: Trial Court Discretion or Subjective Evaluation?*, 70 N.D. L. REV. 675, 686 (1994) (noting that a North Dakota Supreme Court decision "leaves the impression that in less populated counties, jurors may not be trusted to lay aside any biases, impressions, or opinions and render a verdict based on the evidence presented at trial").
  17. See Nguyen, *Dynamic Federalism*, *supra* note 1, at 488 (noting that the Eastern District of Texas has "judges with expertise for patent cases, expertise in patent law, enthusiasm for patent law, and special local rules for managing patent cases efficiently"); see also Xuan-Thao Nguyen, *Justice Scalia's "Renegade Jurisdiction": Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 136, 139, 141 (2008) (describing the judges in the Eastern District of Texas as "knowledgeable," noting the special local rules for patent litigation, and observing "the lack of competing criminal cases in the [Eastern District's] docket"); Li Zhu, *Taking Off: Recent Changes to Venue Transfer of Patent Litigation in the Rocket Docket*, 11 MINN. J. L. SCI. & TECH. 901, 902 (2010) (noting the "knowledgeable judges experienced in patent cases" and "special patent rules that compel quick and inexpensive discovery" among the characteristics of patent litigation in the Eastern District of Texas).

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Banana Republic of East Texas.”<sup>18</sup> And I found another article about patent litigation in East Texas that described Marshall as the “self-proclaimed pottery capital of the world and home to the annual fire ant festival,” and as “a place where friendships last a lifetime and rivalries even longer, where residents still talk about the Civil War, debate on street corners about decades-old high school football games, and conduct midday business meetings over plates of meatloaf, mashed potatoes and banana pudding.”<sup>19</sup> This latter article also made a point of noting that the median family income in Marshall is \$30,000 and that “hiring local in Marshall means that you will get a lawyer who not only knows the jurors, but who also probably knows their friends and even personal details like how often they go to church.”<sup>20</sup>

Another article discussing patent litigation in the Eastern District used a quote describing Marshall “as a cross between *Hee Haw* and *Twin Peaks*.”<sup>21</sup> Still another article referred to the jury pool in the Eastern District as “problematic,”<sup>22</sup> referring to those jurors as “largely uneducated”<sup>23</sup> and “unsophisticated,”<sup>24</sup> and stating that “unlike in larger cities such as Austin or Dallas, where at least some of the jurors are likely to be technologically savvy, all the potential jurors in the Eastern District live and work in small towns and rural areas . . . .”<sup>25</sup> This same article stated that local jurors and local attorneys “go to the same barbecue parties; their children and grandchildren attend the same public schools—in short, they are not strangers like the big city lawyers with their funny Yankee accents.”<sup>26</sup>

Ruralism is discrimination based on distorted assumptions of rural places and rural people. If indeed criticisms of patent litigation in the Eastern District of Texas are warranted, then such criticisms should be based on facts. Unfortunately, some of the articles that have been published about patent litigation in the Eastern District of Texas suggest that at least *some* of the criticisms of the Eastern District have been based not on facts, but on rural stereotypes and assumptions.

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18. See The Prior Art: Eastern District of Texas, Ward Junior May Have Pursued Troll Tracker for Months, [http://thepriorart.typepad.com/the\\_prior\\_art/eastern-district-of-texas/page/2](http://thepriorart.typepad.com/the_prior_art/eastern-district-of-texas/page/2) (last visited April 4, 2011) (reporting a blog posting).

19. See Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, Sept. 24, 2006, at B1.

20. See *id.*

21. See Brenda Sandburg, *The Marshall Plan*, THE RECORDER, June 16, 2003.

22. Leychkis, *supra* note 2, at 219.

23. *Id.* at 232.

24. *Id.* at 213.

25. *Id.* at 220.

26. *Id.*

