

## HOW CONGRESS SHOULD FIX PERSONAL JURISDICTION

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**ABSTRACT**—Personal jurisdiction is a mess, and only Congress can fix it. Courts have sought a single doctrine that simultaneously guarantees convenience for plaintiffs, fairness for defendants, and legitimate authority for the tribunal. With these goals in conflict, each new fact pattern has pulled precedent in a different direction, robbing litigants of certainty and blunting the force of our substantive law. Solving the problem starts with reframing it. Rather than ask *where* a case may be heard, we should ask *who* may hear it. If the parties are from the same state, that state’s courts are open. If not, the federal courts are. But today’s law, thinking about places instead of persons, sows unnecessary confusion by obliging federal courts to follow state jurisdictional rules. This is a mistake, and something we can change. Following the invitation of a recent Supreme Court plurality, this Article suggests a system of nationwide federal personal jurisdiction, relieving federal courts of their jurisdictional dependence on state borders. In a federal forum, the court usually has undoubted authority over the parties—whose convenience can be addressed through well-crafted venue rules, backstopped by due process guarantees. Because our procedural rules have grown up in dependence on state jurisdiction, the Article goes on to draft legislative language addressing the new system’s consequences for venue, choice of law, appeal rights, and other related issues. The Article’s goal isn’t to defend one specific proposal, but to encourage a variety of new proposals and, eventually, to change the direction of the debate. Scholars should spend more time thinking about the jurisdictional rules we would write for ourselves—which the Constitution *actually lets us do*, at least for federal courts. Only Congress can fix personal jurisdiction; we should start telling it how.

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INTRODUCTION

Everybody talks about the weather, but nobody does anything about it. The same goes for personal jurisdiction. The field is widely described as a mess, an irrational and unpredictable due process morass. No one agrees on the foundations; the Supreme Court’s recent foray in *J. McIntyre Machinery, Ltd. v. Nicaastro* bogged down in an incoherent three-way split.<sup>1</sup> And no one likes the results much either. As the cases now stand, plaintiffs can be deprived of any forum, state or federal, for certain suits against defendants who direct activity to the United States and cause injury here. And defendants can be forced to appear in unfamiliar and unexpected state courts, with little ability to shape the laws and procedures that govern them.

For years, scholars have tried to interpret their way to a better system of litigation. In the words of one famous slogan, “Jurisdiction must become venue”<sup>2</sup>—it must become a “less lofty but more expedient” doctrine

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<sup>1</sup> Compare *J. McIntyre Mach., Ltd. v. Nicaastro*, 131 S. Ct. 2780, 2785 (2011) (plurality opinion of Kennedy, J.), with *id.* at 2791 (Breyer, J., concurring in the judgment), and *id.* at 2794 (Ginsburg, J., dissenting).

<sup>2</sup> Albert A. Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103, 113 (1971).

identifying “a procedural venue fair to both parties” and a sensible location for suit.<sup>3</sup> That’s a worthy goal, but scholars have looked for that expedient doctrine in the wrong place. Rules that select fair and sensible venues can’t always be divined from the Due Process Clause. To have bite, to provide determinate results, and (most importantly) to be plausible statements of the law, those rules have to be the product of legislative choice.

The solution, then, starts with rethinking the problem. Personal jurisdiction is usually thought of in terms of places: Where can the defendant be sued? Where would litigation be improper, inconvenient, or just too burdensome? Yet the crucial questions aren’t about places, but persons—not *where*, but *who*. Who should determine the parties’ rights and liabilities? Who ought to set the procedural rules that govern the dispute? A suit between distant parties has to be heard in some place or other, but that doesn’t mean the people living nearby are the only ones whose views matter. In fact, Article III gives all Americans a chance to weigh in.

Because goods and people cross state borders more often than national ones, the hard cases involve the jurisdiction of *state* judges, officers, and legislators. And although federal courts today largely rely on state jurisdiction, they don’t have to; Congress or its delegates could always provide different rules. In other words, this dismal swamp is one Congress can drain.

The plurality in *McIntyre* invited Congress to provide a federal forum when state jurisdiction seems dicey.<sup>4</sup> This Article takes up that invitation—exploring why a federal forum makes sense, how Congress could provide it, what effects that might have, and where we could usefully go from here.

The Article suggests a system of nationwide federal personal jurisdiction, relieving federal courts of their dependence on state borders. A federal district court would have personal jurisdiction over any defendant that has adequate contacts with the United States as a whole. Which federal courthouse to use is largely irrelevant for constitutional purposes and so could be determined through familiar venue considerations of convenience to parties and witnesses. If there are particular benefits to hearing cases in a particular place—say, economic reasons for hearing product liability suits where the product is sold to end users<sup>5</sup>—we could just write a venue statute that says so, subject always to constitutional guarantees of fundamental fairness.

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<sup>3</sup> *Id.* at 112.

<sup>4</sup> *McIntyre*, 131 S. Ct. at 2790 (plurality opinion) (“In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power.”); *see also id.* at 2800 n.12 (Ginsburg, J., dissenting) (discussing this suggestion).

<sup>5</sup> *See* Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012).

Of course, the answer isn't that simple. Federal procedure may not be a seamless web, but it's certainly a giant tangle, in which pulling on any one thread unravels something else. So the Article goes on to consider what a reform like this would break, and what should be done about it. The general venue statute, for example, relies heavily on jurisdictional concepts,<sup>6</sup> and we'd need to make several changes just to keep our current range of proper venues in place. More generally, to avoid an onslaught of forum shopping or other unfairness to defendants, loosening the rules on jurisdiction would mean tightening the rules on venue transfers and choice of law.

The Article therefore includes a draft bill allowing plaintiffs to secure personal jurisdiction in any federal court.<sup>7</sup> In exchange, defendants can enjoy the benefits of narrowed venue rules, as well as the right to propose a better venue—with a transferred case heard under the new forum's choice-of-law rules. The bill also allows discretionary appeals of transfer denials, sanctions unreasonable plaintiffs, and preserves the option of default in unjustified suits. Most importantly, the bill creates an *elective* regime—giving plaintiffs a choice between the existing system and the new, and giving the country a chance to test the reforms before adopting them wholesale.

This is one suggestion; there could be many others. In fact, there should be. As a whole, the academy has spent too much time trying to discern the limits that the Constitution imposes on state courts. Those limits are very important, but they aren't the whole story. Rather than trying to extract our favorite jurisdictional rules from the words “due process,”<sup>8</sup> we should think about the rules we would have if we could write them ourselves—which the Constitution *actually lets us do*, at least for federal courts. Other federal systems, such as the European Union, have faced the same problems; their experience doesn't change the meaning of our Constitution, but it can provide useful models for Congress to consider.

These changes are within the power of Congress, but not all of them are within the power of the Supreme Court. Congress is the only actor that can fix this problem, and only if it's so inclined. The Article therefore concludes by considering the politics of personal jurisdiction, as well as some possibilities for further reform.

## I. WHY REFORM PERSONAL JURISDICTION?

The one thing jurisdiction scholars agree on is the sad state of personal jurisdiction law. Current doctrines are “hollow,”<sup>9</sup> “incoherent,”<sup>10</sup> full of

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<sup>6</sup> See 28 U.S.C. § 1391(b)(3), (c)–(d) (2012).

<sup>7</sup> See *infra* Appendix.

<sup>8</sup> U.S. CONST. amends. V, XIV, § 1.

<sup>9</sup> Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 3 (2010).

“doctrinal confusion,”<sup>11</sup> and “perhaps deserv[ing of] demolition.”<sup>12</sup> These problems aren’t accidental. They’re the direct result of personal jurisdiction being too many things to too many people—of its being used to satisfy multiple purposes, not all of which are consistent. The divergent opinions in *McIntyre*, for example, alternately viewed jurisdictional rules as limits on sovereign authority,<sup>13</sup> principles of “defendant-focused fairness,”<sup>14</sup> or “considerations of litigational convenience and the respective situations of the parties.”<sup>15</sup>

Given these disagreements, what’s the Court to do? Though it’s addressed the topic several times in recent years, it hasn’t reached any consensus on the fundamentals,<sup>16</sup> and it seems unlikely to do so in the future. Adopting one view to the exclusion of the others might clarify the doctrine (assuming the Constitution permits it), but not without compromising some admittedly important purposes that personal jurisdiction tries to serve. The Court has only one lever—due-process-based jurisdiction doctrine—and it can’t push that lever in multiple directions at once.<sup>17</sup> Rather than ask the impossible from the Court, or wait for one view to defeat the others in a long war of attrition, we should consider ways to declare victory and go home—to reform personal jurisdiction without needing to reform the *doctrine* of personal jurisdiction.

#### A. What’s Wrong with Personal Jurisdiction

Scholars of jurisdiction and students agree: The doctrine of personal jurisdiction is “notoriously confusing and imprecise.”<sup>18</sup> A state’s exercise of jurisdiction mustn’t offend “traditional notions of fair play and

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<sup>10</sup> A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 618 (2006).

<sup>11</sup> Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 869 (2012).

<sup>12</sup> John T. Parry, *Introduction: Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on J. McIntyre Machinery v. Nicastro*, 16 LEWIS & CLARK L. REV. 827, 851 (2012); see also Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 618 (2014) (“[T]he United States Supreme Court has proven incapable of providing a coherent vision . . .”).

<sup>13</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion of Kennedy, J.).

<sup>14</sup> *Id.* at 2793 (Breyer, J., concurring in the judgment).

<sup>15</sup> *Id.* at 2804 (Ginsburg, J., dissenting).

<sup>16</sup> See *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). In my view, the lopsided holdings in *Daimler* (unanimous) and *Walden* (8–1) tinkered at the margins of the doctrine rather than addressing core disagreements.

<sup>17</sup> Cf. Ana Rosado, *Tinbergen’s Rule*, in AN EPONYMOUS DICTIONARY OF ECONOMICS 257, 257 (Julio Segura & Carlos Rodríguez Braun eds., 2004) (discussing the well-known economic principle that one can’t target two variables with a single policy instrument).

<sup>18</sup> A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325, 328 (2010).

substantial justice.”<sup>19</sup> In most cases, that requires each suit to arise from the defendant’s “minimum contacts”<sup>20</sup> with the forum, and the exercise of this “specific” jurisdiction must be otherwise fair and reasonable.<sup>21</sup> Alternatively, a state has “general” jurisdiction in any suit against defendants whose contacts are “so continuous and systematic as to render them essentially at home” there.<sup>22</sup> In the hands of skilled lawyers, these “catchphrases and buzzwords” take on a wide variety of meanings,<sup>23</sup> making the actual work of “determining which states possess jurisdiction . . . difficult and fact-[dependent] to the point of resisting formulaic representation.”<sup>24</sup>

This confusion has real costs outside the courtroom. State courts are very different from one another. As Justice Breyer pointed out in *McIntyre*, tort plaintiffs win at trial three times as often in Milwaukee, Wisconsin as opposed to Worcester, Massachusetts.<sup>25</sup> (This isn’t a runaway-jury problem; one study found even greater variation in bench trials.)<sup>26</sup> Knowing that these discrepancies exist, parties invest serious resources in manipulating the choice of forum. When the rules “are neither clear nor coherent,”<sup>27</sup> jurisdiction “consumes an inordinate amount” of time and resources and “contributes to the overall inefficiency of the judicial process.”<sup>28</sup>

These procedural problems also stop substantive law from working as it should. An individual plaintiff who can’t sue in a convenient forum (and who has to hire a lawyer in a distant city) may just give up. On a large

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<sup>19</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (internal quotation marks omitted).

<sup>20</sup> *Id.* (internal quotation marks omitted).

<sup>21</sup> *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (rejecting jurisdiction as “unreasonable and unfair”).

<sup>22</sup> *Goodyear*, 131 S. Ct. at 2851 (internal quotation marks omitted).

<sup>23</sup> Erbsen, *supra* note 9, at 3.

<sup>24</sup> *Id.* at 41.

<sup>25</sup> *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2794 (2011) (Breyer, J., concurring in the judgment).

<sup>26</sup> *See* LYNN LANGTON & THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, app. at 18 tbl.4 (rev. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf>. Of the high-population counties studied, a plaintiff had the best odds of winning before a jury in Franklin County, Ohio (which includes Columbus), at 72 of 101 (71.3%), and the worst in Worcester County, Massachusetts, at 13 of 61 (21.3%). *Id.* A plaintiff in a bench trial had the best odds of winning in El Paso, Texas, at 17 of 19 (89.5%), and the worst in Bexar County, Texas (which includes San Antonio), at 3 of 13 (23.1%)—or in San Francisco, California, at 6 of 21 (28.6%). *Id.* Of course, it’s hardly random which cases go to trial, or before a jury rather than a judge. But judicial personnel and procedures matter, too.

<sup>27</sup> Erbsen, *supra* note 9.

<sup>28</sup> Spencer, *supra* note 18.

scale, this gives defendants less reason to obey the law.<sup>29</sup> And the scale really is large. Looking just at product liability suits, for example, some authors estimate that nearly 80,000 cases are filed every year<sup>30</sup>—many of them surely involving out-of-state defendants. Even if only a small percentage of plaintiffs are hamstrung, that means a lot of people going without recourse.

But defendants suffer as well. The more malleable the doctrine, the broader the forum shopping opportunities of highly sophisticated plaintiffs, who can select courts with plaintiff-friendly judges, juries, procedures, or choice of law. This unsettles substantive law in the other direction. If lawsuits “can end up anywhere,” and if “firms selling in interstate commerce cannot, as a practical matter, match selling prices to varying levels of litigation risk,” then “no state gets a meaningful price signal for the stringency of its rulings.”<sup>31</sup> That creates an artificial incentive to generate plaintiff-friendly law—the costs of which are externalized onto other states.<sup>32</sup> This isn’t just a theory; some state court decisions explicitly discuss the incentive to externalize.<sup>33</sup> Jurisdictional problems don’t stay jurisdictional; they spill over into the rest of the law.

### B. *The Disagreement in McIntyre*

Why is the doctrine in such disrepair? In two recent symposia addressing *McIntyre* (along with *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>34</sup> decided the same day), many authors bemoaned the outcome or the Justices’ disagreement on basic premises.<sup>35</sup> But the problem in

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<sup>29</sup> Cf. Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637, 638 (2012) (arguing that states rely upon “twentieth century special long-arm jurisdiction to regulate the safety of workplaces”).

<sup>30</sup> See A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1439 n.2 (2010) (estimating the total “number of state and federal product liability cases in 2006” to be 78,906).

<sup>31</sup> Stephen F. Williams, *Preemption: First Principles*, 103 NW. U. L. REV. 323, 328 (2009).

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g., *Blankenship v. Gen. Motors Corp.*, 406 S.E.2d 781, 783 (W. Va. 1991) (“Nothing that we do [in West Virginia] will have any impact whatsoever on the set of economic trade-offs that occur in the national economy. And, ironically, trying unilaterally to make the American tort system more rational through being uniquely responsible in West Virginia will only punish our residents severely without, in any regard, improving the system for anyone else.”).

<sup>34</sup> 131 S. Ct. 2846 (2011).

<sup>35</sup> See, e.g., Carrington, *supra* note 29, at 641 (“wrongly decided”); Effron, *supra* note 11, at 870 (“hardly any rule at all”); Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism: Shady Grove Versus Nicaastro*, 16 LEWIS & CLARK L. REV. 905, 907 (2012) (“dysfunctional”); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicaastro*, 63 S.C. L. REV. 481, 515 (2012) (“disappointing”); John Vail, *Six Questions in Light of J. McIntyre Machinery, Ltd. v. Nicaastro*, 63 S.C. L. REV. 517, 517 (2012) (“viscerally upsetting”); see also Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1271 (2011) (“The law of

*McIntyre* wasn't some one-off mistake by a few fallible Justices; it was a real conflict among legitimate goals.

1. *The Decision Itself.*—*McIntyre* concerned an eponymous British manufacturer that sold metal-shearing machines to a distributor in Ohio. At least one machine was resold to a company in New Jersey, where it cut off Robert Nicasastro's fingers and where he sued.<sup>36</sup> According to four Justices, though *McIntyre* had wanted its machines sold throughout America, it didn't particularly target New Jersey (or otherwise submit to that state's authority),<sup>37</sup> and so couldn't be haled into New Jersey courts.<sup>38</sup> Justices Breyer and Alito declined to adopt such a specific requirement,<sup>39</sup> but they voted with the plurality anyway, finding no "regular course of sales" into New Jersey that might provide the "defendant-focused fairness" demanded by due process.<sup>40</sup>

With its majority split, *McIntyre* has little precedential effect<sup>41</sup>—other than its result, which strikes many as unfair.<sup>42</sup> A manufacturer like *McIntyre* might be sued in Ohio, where it sold to a distributor,<sup>43</sup> or perhaps in a miscellany of other states, where it attended trade shows,<sup>44</sup> but not necessarily in New Jersey—where the accident occurred, where the plaintiff lived, where most of the evidence and witnesses were, and in general where litigation seemed to make the most sense. In fact, if *McIntyre* had been just a little more careful (if it had avoided trade shows, say, and retained a distributor in Canada or the British Virgin Islands), it might have seen its machines sold in all fifty states without fear of suit in U.S. courts.

2. *Convenience and Fairness.*—Whatever the strengths or weaknesses of the plurality's legal arguments, they might still fail to produce good results in practice. A defendant's attendance at trade shows or its distribution structure generally shouldn't determine where a case is

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state-court personal jurisdiction is muddier now, from both a theoretical and practical standpoint, than it was before . . .").

<sup>36</sup> See *J. McIntyre Mach., Ltd. v. Nicasastro*, 131 S. Ct. 2780, 2786 (2011); *id.* at 2795 (Ginsburg, J., dissenting).

<sup>37</sup> See *id.* at 2787–88, 2790 (plurality opinion).

<sup>38</sup> See *id.* at 2790–91.

<sup>39</sup> *Id.* at 2793 (Breyer, J., concurring in the judgment).

<sup>40</sup> *Id.* at 2792, 2793 (internal quotation marks omitted).

<sup>41</sup> See Adam N. Steinman, *The Meaning of McIntyre*, 18 SW. J. INT'L LAW 417, 440–44 (2012) (noting the fact-dependence of Justice Breyer's concurrence).

<sup>42</sup> See, e.g., Carrington, *supra* note 29, at 641; Vail, *supra* note 35, at 517–18.

<sup>43</sup> See *McIntyre*, 131 S. Ct. at 2788 (plurality opinion).

<sup>44</sup> *Id.* at 2790.



heard.<sup>45</sup> And if a manufactured product is said to cause injury in a particular state, that state often—though not always—will be the most reasonable place for suit.

These concerns led Justice Ginsburg, in dissent, to reject “state sovereignty” as a ground for deciding the place of litigation.<sup>46</sup> Some scholars agree,<sup>47</sup> and not unreasonably. In some sense, *of course* the forum’s location should depend, as Justice Ginsburg wrote, on “considerations of litigational convenience and the respective situations of the parties.”<sup>48</sup> These are traditional factors in laying venue—a doctrinal category that tries to find the best place, all things considered, for a case to be heard. And once we’ve identified the best place for litigation, all things considered, why would we ever want the case heard somewhere else?

But convenience isn’t everything. Justice Breyer’s concurrence emphasized a different consideration, namely that the burdens of litigating in a particular state might prove unfair to the defendant.<sup>49</sup> Those burdens are real ones; travel expenses might strain parties of limited means. And the “unique burdens” of “defend[ing] oneself in a foreign legal system”<sup>50</sup>—finding trustworthy counsel, securing evidence and witnesses, and so on—can undermine the integrity of the process, inhibiting a meritorious defense or forcing an unfair settlement.<sup>51</sup> Because plaintiffs get to pick the field of battle,<sup>52</sup> whether their choices unduly prejudice the other side is a legitimate concern, and one that finds a natural home in the Court’s due-process-based “fundamental fairness” jurisprudence.<sup>53</sup> Considering fairness also generates different results from convenience alone: When the parties all

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<sup>45</sup> Cf. Transcript of Oral Argument at 17:22–18:5, *McIntyre*, 131 S. Ct. 2780 (No. 09-1343) (statement of Justice Kagan) (raising the possibility of “ten different distributors, each of whom are going to serve five states”).

<sup>46</sup> *McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting).

<sup>47</sup> See, e.g., Borchers, *supra* note 35, at 1263 (“The invocation of sovereignty as the foundation of personal jurisdiction has made little sense since the dawn of the minimum contacts era.”); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1114 (1981) (arguing that sovereignty or federalism limits on personal jurisdiction are “found nowhere in the body of the Constitution” and are irrelevant “as a matter of policy”).

<sup>48</sup> *McIntyre*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting).

<sup>49</sup> *Id.* at 2793–94 (Breyer, J., concurring in the judgment).

<sup>50</sup> See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987).

<sup>51</sup> Cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 301 (1980) (Brennan, J., dissenting) (arguing that the only “constitutionally significant ‘burden’ to be analyzed” should be one that “relates to the mobility of the defendant’s defense”).

<sup>52</sup> See Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 288 (1957) (“Plaintiffs possess the initiative—a priceless strategic advantage in litigation as in war. Within broad limits, they can determine the time when and the place where action is to be brought.”).

<sup>53</sup> *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (internal quotation marks omitted); cf. Redish, *supra* note 47 (arguing that the only “*raison d’être* for constitutionally limiting the reach of state judicial jurisdiction” should be “avoiding injustice to private litigants”).

hail from distant locales, one forum might be the most convenient option overall, but still wildly unfair to a particular defendant.

At the same time, though, fairness to the defendant is an unlikely foundation for modern personal jurisdiction doctrine. Today's case law requires that defendants have contacts with the forum state in particular.<sup>54</sup> But there's "nothing inherently burdensome about crossing a state line"<sup>55</sup>—as "anyone who has driven across Rhode Island" can attest.<sup>56</sup> The federal courthouse in Texarkana straddles both Texas and Arkansas; if a defendant lives on one side with no contacts on the other, is it really *unfair* to make him walk to a courtroom across the hall?<sup>57</sup> Is it that hard to find an attorney licensed to practice in a neighboring state? Viewed the other way around, there's nothing inherently burdenless about *not* crossing state lines: just ask someone who has driven across Texas, which is about as far as the distance between Portland, Maine and Washington, D.C.<sup>58</sup>

More importantly, if due process is supposed to limit the defendant's burden overall,<sup>59</sup> why should the place of litigation figure so prominently? "[A] wide range of orders in civil litigation" may impose greater burdens and receive far less scrutiny, such as "decisions rejecting challenges to the sufficiency of pleadings, the scope of discovery, and the duration of trials."<sup>60</sup> And why be so concerned with the defendant's burden in particular? The plaintiff may choose the field of battle, but to reject that choice on personal jurisdiction grounds is to "redistribute burdens rather than eliminate them: refusing to force a defendant to travel *to* the forum can force the plaintiff to travel *from* the forum."<sup>61</sup> If the "witnesses or evidence" really are "immobile," as in an example used by Justice Brennan,<sup>62</sup> then either side might find itself stuck in the wrong place. As compared to convenience, then, the defendant's burden seems unlikely to have much to say about jurisdiction in particular.

3. *Authority and Sovereignty.*—These concepts of convenience and fairness fail to account for another worry. Whether or not one agrees with

<sup>54</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985).

<sup>55</sup> 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1068.1, at 611 (3d ed. 2002).

<sup>56</sup> Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 617, 617 (2012).

<sup>57</sup> Cf. 28 U.S.C. § 83(b)(1) (2012) ("Court for the Texarkana Division [of the Western District of Arkansas] . . . may be held anywhere within the Federal courthouse in Texarkana that is located astride the State line between Texas and Arkansas."); *id.* § 124(c)(5) (same provision for the Eastern District of Texas).

<sup>58</sup> 4 WRIGHT & MILLER, *supra* note 55, § 1068.1, at 611–12.

<sup>59</sup> See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113–14 (1987).

<sup>60</sup> Erbsen, *supra* note 9, at 25 n.95.

<sup>61</sup> *Id.* at 26.

<sup>62</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 301 (1980) (Brennan, J., dissenting).

the *McIntyre* plurality's contractarian take on sovereignty, the authority of a distant court ought to be supported by *some* theory of political obligation. Suppose that, after an ordinary fender-bender in a neighboring state, an official visits you from the *Tribunal de grande instance de Paris* and says:

The person whose fender you hit has asked us to decide your case. We will hear it according to our own rules of procedure and evidence—not just about the kind of paper you file on, but about how intrusive discovery will be, what kind of experts can testify, and whether you will have to pay the plaintiff's costs and fees if you lose. Your arguments will be considered by a French judge, who was appointed by French politicians or selected by French bureaucrats. Your substantive rights and liabilities will be determined through our choice-of-law principles, which (all else being equal) tend to favor the laws of France. You can get a jury trial only if French law permits one (which it doesn't), so the judge will decide all the facts. And any appeals will run to the regional *cour d'appel* and from there to our *Cour de cassation*.

This isn't optional, by the way.

But you do have some protections. We'll apply whatever U.S. federal law is relevant to your garden-variety tort case; our procedures won't be inconsistent with your Constitution's requirements for state courts; and we've made arrangements for your Supreme Court to hear final appeals, albeit only on federal issues and only if they grant certiorari. And there's no need for you to travel to France; we'll hold all of the proceedings right here in your hometown—even in your living room, if that's what you want.

Most people, on hearing this, would think it horribly improper. So would most lawyers. But what's troubling about this arrangement isn't its *inconvenience*, or any place-based *burden* it imposes. The trial can be held in your living room, and for all we know, French procedures are just as fair as American ones. (Though probably not, if the plaintiff asked for them.) What's troubling about this process is the obvious lack of legitimate *authority*. You haven't voted for the politicians who pick the judges; you haven't been asked what you think of the rules that apply; you haven't had any say in the system that has all the say over you. Where did these French judges get the right to “decree the ownership of all [your] worldly goods”?<sup>63</sup> Why not Bill Gates, or the Pope?

The problem isn't limited to bizarre hypotheticals and foreign courts. It arises daily in all fifty states. Why should other Americans be bound by rules of procedure, evidence, and discovery favored by New Jersey's legislature; obtain a jury trial at New Jersey's pleasure;<sup>64</sup> have their rights and liabilities ascertained by rules preferring New Jersey law; or have their fortunes determined by judges appointed by New Jersey's governor—or,

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<sup>63</sup> *Burnham v. Superior Court*, 495 U.S. 604, 623 (1990) (opinion of Scalia, J.).

<sup>64</sup> The Supreme Court has not treated the Seventh Amendment as being incorporated against the states through the Fourteenth Amendment. *See, e.g., Georgia v. McCollum*, 505 U.S. 42, 52 (1992) (citing *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916)).

worse yet, directly elected by the good people of New Jersey? Sure, the federal government might intervene, if there happened to be federal law on point or constitutional rights at stake. But those issues matter in a vanishingly small fraction of cases. In all the rest, the defendant's fate is placed in others' hands.

What we call "territorial" concerns in personal jurisdiction are still concerns about people, not patches of dirt. We use territory to structure our legal categories: a citizen of New Jersey is just an American who resides within certain metes and bounds.<sup>65</sup> But those categories ultimately address political communities, "not trees or acres."<sup>66</sup> In an insightful article, Allan Erbsen suggests that "the problem with aggressive assertions of personal jurisdiction in state court" is that "in some circumstances the defendant may resist being compelled to appear in the state *by the state*."<sup>67</sup> But the problem is actually more general than that. The issue isn't where a defendant is compelled to go or by whom, but rather who can command the defendant to do *anything*—even in his or her own living room—when the defendant isn't part of the political community giving the command. No jurisdiction, one might say, without representation.

Of course, we don't really expect jurisdiction always to be paired with the vote. When in Rome, we do as the Romans do, and we submit to the jurisdiction of Roman courts. There are some interactions we have with distant polities (going there,<sup>68</sup> causing effects there,<sup>69</sup> manufacturing metal-shearing machines for distribution there<sup>70</sup>) that might justify their exercise of authority, according to our favorite political theory. But we shouldn't be surprised that personal jurisdiction implicates the allocation of power across nations and across states—or that our intuitive answers might actually depend on complex theories of political authority or international law.<sup>71</sup>

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<sup>65</sup> See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.").

<sup>66</sup> *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

<sup>67</sup> Erbsen, *supra* note 9, at 79.

<sup>68</sup> See *Burnham*, 495 U.S. 604, 608.

<sup>69</sup> See *Calder v. Jones*, 465 U.S. 783, 789 (1984).

<sup>70</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2794–95 (2011) (Ginsburg, J., dissenting).

<sup>71</sup> See generally Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987) (discussing the relevance of political philosophy to jurisdiction); Brilmayer & Smith, *supra* note 56 (same); Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125 (2013) (attempting to reconstruct jurisdiction doctrine along these lines). The authority question can be framed in two ways—as an allocation of power among competing states or as a determination of a given state's power over an individual defendant. This Article uses these concepts interchangeably, but they're technically distinct, and some commentators prefer the former to the latter. See, e.g., Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1165 (2013) ("[P]ersonal jurisdiction's concern with sovereignty should focus on whether the forum state's assertion of jurisdiction impermissibly interferes with the interests of some other state . . ."). Yet even when no other state is involved—for example, a

Even Justice Ginsburg takes account of such sovereignty concerns, though her *McIntyre* dissent suggests otherwise.<sup>72</sup> Suppose that a Canadian tire manufacturer sells only to Washington and Idaho. Two people, one in each state, buy a set of tires and later drive to Oregon. The Washington-bought tires work perfectly, but one Idaho-bought tire is defective; it goes flat just across the Oregon border, causing injury. According to Justice Ginsburg's dissent in *McIntyre*, Oregon lacks personal jurisdiction over the manufacturer, who "had done nothing to serve the market" for tires there.<sup>73</sup> But according to her majority opinion in *Goodyear*, Washington lacks personal jurisdiction too. Even if the defendant sells twenty times as many tires there as in Idaho, *those* tires didn't go flat: "[R]egularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."<sup>74</sup>

This is a familiar requirement of specific jurisdiction, that the defendant's forum contacts must have "g[iven] rise to the episode-in-suit."<sup>75</sup> But it's hard to reconcile with a jurisdictional approach giving "prime place to reason and fairness," including concerns of "litigational convenience."<sup>76</sup> The manufacturer had no idea which tire, from which batch of thousands of tires, would prove defective. (Had it known, it wouldn't have sold that one.) And it may be no worse off litigating in one state than another. If its operations in Washington are more extensive than in Idaho, if the two states' choice-of-law regimes are identical, and if the Idaho plaintiff would rather sue in Seattle than at home, then what concern of "due process, not state sovereignty,"<sup>77</sup> bars Washington's courts from compelling an appearance? True, the manufacturer did not "cause[] injury or even death to a local user."<sup>78</sup> But why does that matter, if "the mutually exclusive sovereignty of the States [is not] the central concern"?<sup>79</sup> Why should the Court even discuss the "allocation of adjudicatory authority

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suit alleging negligence by a stateless person, sailing an unregistered ship through international waters—we might still question, say, Nebraska's right to call the defendant to answer.

<sup>72</sup> See 131 S. Ct. at 2798 (Ginsburg, J., dissenting).

<sup>73</sup> *Id.* at 2802; cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) ("Nor does the record show that [petitioners] regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market.").

<sup>74</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 n.6 (2011).

<sup>75</sup> *Id.* at 2853 (emphasis omitted). General jurisdiction wouldn't be available either, unless the contacts were so extensive as to render the manufacturer "at home" in Washington. *Id.* at 2851; accord *Daimler AG v. Bauman*, 134 S. Ct. 746, 760–61 (2014).

<sup>76</sup> *McIntyre*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting).

<sup>77</sup> *Id.* at 2798.

<sup>78</sup> *Id.* at 2794.

<sup>79</sup> *Id.* at 2798 (alteration in original) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

among States,”<sup>80</sup> if the Due Process Clause itself “makes no mention of federalism concerns”?<sup>81</sup>

All this suggests that something else is going on. Whatever makes suit in Idaho, but not Washington, seem fair and reasonable is precisely a theory of the “allocation of adjudicatory authority among States”—a theory, that is, of the extent of a state’s sovereign power over the defendant. Theories of personal jurisdiction *always* “implicate the allocation of regulatory authority between coequal states in a federal system”<sup>82</sup>—once a particular case is filed, only one set of courts will hear it. Political authority concerns are inescapable, and we’re unlikely to reach agreement on them soon.

4. *The Limits of Personal Jurisdiction.*—The concerns listed above—convenience, fairness, and political authority—are all perfectly reasonable. We want personal jurisdiction doctrines, whatever they might be, to allow suit in a convenient forum. We want the burden of litigation on the defendant to be fair. And we want the tribunal to have legitimate authority to decide the case.

These aren’t unusual or improper wants, but they are incompatible. There’s simply no way that a single doctrine of personal jurisdiction can achieve all these things at once. A forum that’s fair to the defendants and has undoubted authority, such as the defendants’ domicile, might be grossly inconvenient for plaintiffs. A forum with clear authority, such as a county at the other end of the state, might be convenient for most parties but grossly unfair to one impoverished defendant. And a forum that’s convenient and fair for everyone, such as a neighboring state, might have no legitimate claim to govern the defendants.<sup>83</sup> So it should hardly surprise us that personal jurisdiction doctrine sometimes fails to achieve all three goals at once—or, frankly, that the doctrine should grow less certain, and its formulations ever more tortured, as the Supreme Court responds at different times to different impulses based on different facts.

One approach to the problem would be to grasp the nettle, declare which principle (or weighted combination of principles) should win, and urge the Court to impose that favored solution. This approach hasn’t succeeded yet, because people continue to disagree about which solution to

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 n.10 (1982)).

<sup>82</sup> Erbsen, *supra* note 9, at 6.

<sup>83</sup> *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (“Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”).

impose. And it sidesteps the unavoidable question of whether anyone's favorite solution is actually mandated by the Constitution.

This Article isn't the right place to address the latter question (though I have some thoughts of my own).<sup>84</sup> Instead, it suggests a different tack. Rather than try to solve all three problems at once, we should try to solve each one separately. Rather than litigate the issue of sovereign authority, we should assign litigation, to the extent possible, to a sovereign with undoubted authority over the parties. Rather than make convenience a primarily judicial inquiry, we should handle it through the statutory device of venue. And rather than treat every crossing of state lines as an issue of fundamental fairness, we should reserve such doctrines for actual instances of extraordinary burdens on defendants. We can do all of this at once—if we reform personal jurisdiction.

## II. WHY NATIONWIDE PERSONAL JURISDICTION?

As dire as the situation seems, the Constitution provides a way out. We needn't agree, in theory, on the full extent of a state's jurisdictional reach to agree, in practice, on how to resolve the cases that come up. The hard cases, from a policy perspective, are almost always diversity cases. If the parties are from the same state, they can litigate at home; the plaintiff will never be without a convenient forum. When the right state forum is unclear—say, in a suit between citizens and aliens, or between citizens of different states—Article III offers a federal forum instead. And once a case is in the federal system, we really can decide where to hear it by using venue factors like the parties' convenience.

Unfortunately, that's not how things work today. With only a few unusual exceptions, federal courts subject to Federal Rule of Civil Procedure 4(k) *must* follow the same jurisdictional rules as the states in which they sit.<sup>85</sup>

This is a self-inflicted wound. Congress has no obligation to make federal jurisdiction follow state lines. In certain cases—ERISA, bankruptcy, interpleader, multidistrict litigation, etc.—a statute already provides for nationwide service of process,<sup>86</sup> which really just means

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<sup>84</sup> See Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1875–76 (2012) (suggesting that judicial jurisdiction may be governed by doctrines of general or international law).

<sup>85</sup> See FED. R. CIV. P. 4(k)(1)(A) (permitting jurisdiction over a defendant “who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located”); *see also id.* 4(k)(1)(B)–(C), (2) (creating exceptions when “a party [is] joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued”; “when authorized by a federal statute”; or, in a federal-question case, when “the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction” and “exercising jurisdiction is consistent with the United States Constitution and laws”). Unless otherwise indicated, all subsequent references to a “Rule” are to the Federal Rules of Civil Procedure.

<sup>86</sup> *See, e.g.*, 16 U.S.C. § 1437(l) (2012) (marine sanctuaries); 28 U.S.C. § 4104(b) (2012) (declaratory relief from foreign libel judgments); 42 U.S.C. § 9613(e) (2012) (civil CERCLA actions by

“nationwide personal jurisdiction.” (With the right procedures, process from any district court can be served worldwide,<sup>87</sup> but that only establishes jurisdiction per Rule 4(k).) So long as the defendant has adequate contacts with the United States as a whole, there’s no lack of sovereign power to complain about.

As the *McIntyre* plurality noted,<sup>88</sup> nothing stops Congress from using this tool more broadly. Congress could grant nationwide jurisdiction to all federal courts, largely eliminating personal jurisdiction disputes in the federal system and doing away with any discussion of a defendant’s “minimum contacts” with a state or its “purposeful availment” of that state’s benefits. Nicasastro, for example, could find personal jurisdiction in the District of New Jersey, Newark Division,<sup>89</sup> if not in Bergen County Superior Court.<sup>90</sup> Concerns about the right place for suit could then be handled through carefully drafted venue statutes, which already exist for precisely this purpose. And the Due Process Clause would remain in the background, a safety net assuring fundamental fairness to defendants.<sup>91</sup>

This solution is also more promising than recent proposals that tinker at the margins of existing law. For instance, a state law analogue to Rule 4(k)(2), creating fallback jurisdiction for any claims that otherwise lack a forum,<sup>92</sup> would retain most of the present system’s costs without the benefits of truly nationwide jurisdiction. By contrast, a recent legislative effort to require foreign manufacturers’ consent to state jurisdiction may go further than necessary, potentially complicating our trade relations without guaranteeing American plaintiffs a convenient forum.<sup>93</sup>

#### A. *The Article III Option*

The federal government’s judicial power was designed to help solve the problems of a federal union, both internal and external. The cases and controversies it encompasses—ambassadors, admiralty, land grants from different states<sup>94</sup>—all involve issues that an individual government wouldn’t encounter in isolation. There are obvious reasons to move at least

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the United States); FED. R. BANKR. P. 7004(d) (bankruptcy); *see also, e.g.*, 9 U.S.C. § 9 (2012) (confirmations of arbitration awards); 15 U.S.C. § 22 (2012) (antitrust suits); 28 U.S.C. § 1694 (patent infringement); *id.* § 1695 (derivative actions); *id.* § 1697 (multidistrict litigation); *id.* § 2361 (statutory interpleader); 29 U.S.C. § 1132(e)(2) (2012) (ERISA).

<sup>87</sup> *See generally* FED. R. CIV. P. 4(e)–(h), (j).

<sup>88</sup> *See* J. McIntyre Mach., Ltd. v. Nicasastro, 131 S. Ct. 2780, 2790 (2011).

<sup>89</sup> *See* 28 U.S.C. § 110.

<sup>90</sup> *See* Nicasastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 578 (N.J. 2010), *rev’d sub nom.* J. McIntyre Mach., Ltd. v. Nicasastro, 131 S. Ct. 2780 (2011).

<sup>91</sup> *See infra* text accompanying note 120.

<sup>92</sup> *See infra* text accompanying notes 143–46.

<sup>93</sup> *See infra* text accompanying notes 147–50.

<sup>94</sup> *See* U.S. CONST. art. III, § 2, cl. 1.



some controversies “between Citizens of different States,”<sup>95</sup> or between the citizens of a state and “foreign States, Citizens or Subjects,”<sup>96</sup> out of state courts and into an impartial tribunal.

These controversies are also precisely the ones in which personal jurisdiction matters most. When citizens of the same state are suing each other, that state provides an obvious forum. While the suit might conceivably be brought elsewhere (say, two vacationing New Yorkers get into an accident in Florida), that alternate forum is usually unnecessary from a policy perspective; the courts might even dismiss such a case for forum non conveniens. And if there’s anything wrong with the procedures or judiciary of the parties’ home state, the plaintiff and defendant have roughly equal opportunities to complain; their remedy is at the ballot box, not in the courtroom.<sup>97</sup>

When the parties hail from different states, though—and in particular when the defendant, who can’t pick the field of battle, is sued far from home—the situation changes. Now the forum’s political authority is at issue; the defendant may literally have no vote. But the Constitution empowers the United States, of which the defendant *is* a citizen, to try the case in a federal forum.<sup>98</sup> And even when the case involves foreigners (as in *McIntyre*), the defendant’s relationship to the United States as a whole is *a fortiori* no weaker, and usually far stronger, than its relationship to any one state in particular.<sup>99</sup> Either way, so long as there are adequate connections between the defendant and the United States, the federal government’s authority to hear the dispute is typically undoubted. Indeed, some have speculated that personal jurisdiction was a central concern of Article III—that “the Constitution regulates personal jurisdiction by empowering Congress to authorize removal of cases from state court to federal court.”<sup>100</sup>

Because a federal forum almost always solves the authority problem, it lets us focus all our efforts on convenience and fairness. A federal case can potentially be tried at any place within the United States. With jurisdiction in hand, picking one place over another depends on venue considerations.<sup>101</sup> Those are determined by Congress, not the Constitution, so we can arrange

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 85 (“The proper response of a citizen or resident who objects [to his home state’s personal jurisdiction] is to invoke the State’s political processes, the classic remedy where the State imposes burdens on its own members.”).

<sup>98</sup> Cf. Erbsen, *supra* note 9, at 78 (“[T]he Constitution makes diversity jurisdiction available in virtually all situations where personal jurisdiction could be an issue if the case were tried in state court.”).

<sup>99</sup> Cf. Borchers, *supra* note 35, at 1274 (noting that courts have applied a “national contacts test” when determining federal personal jurisdiction under Rule 4(k)(2)).

<sup>100</sup> Erbsen, *supra* note 9, at 8.

<sup>101</sup> See generally 28 U.S.C. § 1391 (2012).

for a case to be heard wherever best satisfies the convenience factors we find relevant. (If Nicasastro really ought to sue in New Jersey, he can—in a federal court.) To the extent that the Due Process Clause speaks to fairness, that concern can be addressed as well.

Providing nationwide personal jurisdiction in federal courts simplifies the issues tremendously. While some foreign defendants lack adequate contacts even with the United States as a whole, those foreign defendants are the exception, not the rule. Most suits involve conduct that itself establishes U.S. jurisdiction, if not the jurisdiction of any particular state. And nearly all cases raising jurisdictional problems are between citizens of different states, who are uncontroversially amenable to federal suit. The parties would waste no time in litigating which state courts might have jurisdiction of the suit, because they'd be in federal court, where that question ought to be irrelevant. And once the suit were filed in a given district (or removed there), it could be transferred to any other district with proper venue, based on “the convenience of parties and witnesses” and “the interest of justice.”<sup>102</sup> This not only moves the litigation to a sensible place, but also ensures that the right people are ultimately making the decisions—the people of the United States as a whole.

### B. *Would It Be Constitutional?*

1. *Due Process.*—American lawyers have gotten used to thinking about jurisdiction as a due process issue—and, in particular, as a Fourteenth Amendment issue. Our famous personal jurisdiction cases are all Fourteenth Amendment cases.<sup>103</sup> That's a legacy of Rule 4's reliance on state jurisdiction, not on anything in the Constitution.

The Fourteenth Amendment is concerned with what “any State” can do.<sup>104</sup> What the federal government can do is a different matter. In the same way that Fourteenth Amendment due process doctrine asks which states can exercise jurisdiction—and not, say, which county courts within a state—there's no obvious reason why *Fifth* Amendment due process, which binds the federal government, should have to track state lines instead of national borders. In the Judiciary Act of 1789, Congress decided to

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<sup>102</sup> *Id.* § 1404(a).

<sup>103</sup> See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011); *J. McIntyre Mach., Ltd. v. Nicasastro*, 131 S. Ct. 2780, 2786 (2011) (plurality opinion); *Burnham v. Superior Court*, 495 U.S. 604, 607 (1990) (plurality opinion); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105, 113 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985); *Calder v. Jones*, 465 U.S. 783, 788 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 189 (1977); *Hanson v. Denckla*, 357 U.S. 235, 249–50 (1958); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 311 (1945); cf. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878) (suggesting that the Fourteenth Amendment would be applicable in future cases). For a similar suggestion that most Bill of Rights cases are actually Fourteenth Amendment cases, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 138 (1998).

<sup>104</sup> U.S. CONST. amend. XIV, § 1.

organize the judiciary into districts, guaranteeing that no American would have to cross district lines to defend a suit.<sup>105</sup> But federal courts could send some of their process nationwide as early as 1793.<sup>106</sup> And federal personal jurisdiction didn't rely on state lines in particular until the Federal Rules' adoption in 1938<sup>107</sup>—making *in-state* litigation, as opposed to *in-district* litigation or anything else, an odd candidate for a Fifth Amendment requirement.

This history is confirmed by common sense. Congress could have created only a single federal court for civil trials, which could have sat wherever it pleased.<sup>108</sup> So why can't Congress create many such courts, but assign jurisdiction among them in a manner not strictly following state lines?<sup>109</sup> And if the Fifth Amendment does care about state lines, why does it care only at the trial stage? Once trial is over, of course, a successful defendant can be dragged as unwilling appellee from a district court in Arizona or Alaska to an appellate panel in San Francisco, California, and from there to a Supreme Court way off in Washington, D.C.—which the Constitution explicitly allows, in all “Cases in . . . Equity,”<sup>110</sup> to reinvestigate matters of both “Law and Fact.”<sup>111</sup>

The Supreme Court has never formally held that nationwide jurisdiction is permissible.<sup>112</sup> But the issue is about as settled by precedent as it could be. From the early Republic to the present, the Court's

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<sup>105</sup> See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (prohibiting suit against an inhabitant of the United States “in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ”).

<sup>106</sup> See Act of March 2, 1793, ch. 22, § 6, 1 Stat. 333, 335 (subpoenas); *cf.* Act of March 3, 1797, ch. 20, § 6, 1 Stat. 512, 515 (permitting writs of execution on federal judgments for the United States to “run and be executed in any other state, or in any of the territories of the United States”).

<sup>107</sup> See Spencer, *supra* note 18, at 326 & n.8.

<sup>108</sup> See U.S. CONST. art. III, § 1 (permitting “such inferior Courts as the Congress may from time to time ordain and establish”); *id.* amend. VI (requiring “[i]n all criminal prosecutions”—that is, *not* in civil suits—a jury drawn from “the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law”); *cf.* *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 603 (1879) (“It would have been competent for Congress to organize a judicial system analogous to that of England and of some of the States of the Union, and confer all original jurisdiction on a court or courts which should possess the judicial power with which that body thought proper, within the Constitution, to invest them, with authority to exercise that jurisdiction throughout the limits of the Federal government.”).

<sup>109</sup> See Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 *IND. L.J.* 1, 1–2 (1982).

<sup>110</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>111</sup> *Id.* art. III, § 2, cl. 2; *cf. id.* amend. VII (restricting the reexamination of a jury's factual findings “[i]n Suits at common law”).

<sup>112</sup> See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (noting that the Court had not yet had occasion to decide whether “a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits”).

considered dicta has repeatedly approved of nationwide jurisdiction<sup>113</sup>—even suggesting that it’s “not open to question.”<sup>114</sup> Today the power is broadly accepted by the courts of appeals<sup>115</sup> and by the Department of Justice,<sup>116</sup> and it serves as the backbone for everyday practice in statutory interpleader, ERISA, and multidistrict litigation.<sup>117</sup> When federal claims are involved, the civil rules already provide for nationwide jurisdiction when no state court can hear the case.<sup>118</sup> (And just last year, the Court amended Rule 45 to let district courts send subpoenas into faraway districts.)<sup>119</sup>

Absent *extreme* inconvenience, of the kind that might implicate doctrines of fundamental fairness—say, requiring defendants to litigate on an Alaskan mountaintop, or under the sea—any claim that due process restricts the choice of federal trial courts is at best unproven. The burden of articulating (and justifying) a more stringent limit ought to fall on those asserting that one exists.<sup>120</sup> A federal court’s writ may run, if not everywhere, at least farther than that of the state court across the street.

2. *The “Principle of Erie.”*—If nationwide jurisdiction survives due process review, is it consistent with *Erie Railroad Co. v. Tompkins*?<sup>121</sup> The core goal of *Erie* is “uniformity in the administration of [state law],”<sup>122</sup> yet the essence of nationwide jurisdiction is to produce different results in federal and state court, even on state-law claims. The claim dismissed for lack of jurisdiction in state court might go forward in a federal one. In

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<sup>113</sup> See, e.g., *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 442 (1946) (“Congress could provide for service of process anywhere in the United States.”); *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 374 (1927); *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925); *Union Pacific*, 98 U.S. at 603–04; *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838); *accord* *Picquet v. Swan*, 19 F. Cas. 609, 611 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134) (“It was doubtless competent for congress to have authorized original as well as final process, to have issued from the circuit courts and run into every state in the Union.”). See generally Memorandum from Kate David to Discovery Subcommittee (Dec. 15, 2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2011.pdf#page=29> (summarizing existing case law).

<sup>114</sup> *Eastman Kodak*, 273 U.S. at 374.

<sup>115</sup> See Jackie Gardina, *The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction and the Bankruptcy Code*, 16 AM. BANKR. INST. L. REV. 37, 46 (2008) (criticizing the rule, but recognizing that all courts have “essentially reach[ed] the same conclusion” on this point).

<sup>116</sup> See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioner at 11 n.6, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (No. 12-574), 2013 WL 2445027, at \*11 n.6.

<sup>117</sup> See sources cited *supra* note 86.

<sup>118</sup> FED. R. CIV. P. 4(k)(2).

<sup>119</sup> See H.R. Doc. No. 113–29, at 8–10 (2013).

<sup>120</sup> See, e.g., Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 16 (1988) (suggesting that Fifth Amendment “due process requires a reasonably convenient forum” in federal court); *id.* at 34 (“Granting that Congress is empowered to authorize nationwide service of process, the case by case implementation of that authority should still be limited by a due process requirement of fairness to the defendant in the choice of the particular forum.”).

<sup>121</sup> 304 U.S. 64 (1938).

<sup>122</sup> *Id.* at 75.

1989, the Judicial Conference’s Rules Committee suggested that a “necessary application of the principle of *Erie*” would exclude state law claims from nationwide jurisdiction.<sup>123</sup> If *Erie* requires federal–state uniformity, how can Congress give certain litigants more options in federal courts?<sup>124</sup>

That depends on what kind of principle “the principle of *Erie*” is supposed to be. If it’s a principle of enumerated power, namely that “Congress has no power to declare substantive rules of common law applicable in a State,”<sup>125</sup> then this objection is silly. Moving litigation around the federal courts is squarely within Congress’s power to “constitute Tribunals inferior to the supreme Court,” as well as to “carry[] into Execution” various “other Powers” vested in the judicial department.<sup>126</sup> Post-*Erie* precedent lets Congress regulate anything “rationally capable of classification” as procedure,<sup>127</sup> and personal jurisdiction sails over that bar. Assuming that *Erie* actually has a constitutional foundation—something that’s unclear at best<sup>128</sup>—there’s nothing in the Constitution to offend here. The Rules Committee offered no authorities supporting its “principle of *Erie*”; its one citation actually pointed the other way.<sup>129</sup> And if the “principle of *Erie*” is merely statutory, based on the correct interpretation of the Rules of Decision Act,<sup>130</sup> then it’s up to Congress to change.

Alternatively, if the “principle of *Erie*” is a principle of policy—a worry about “discrimination” in favor of other states’ citizens,<sup>131</sup> about “forum-shopping” and the “inequitable administration of the laws”<sup>132</sup>—then

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<sup>123</sup> COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE FEDERAL RULES OF CIVIL PROCEDURE 32 (1989) (discussing the federal fallback in what is now Rule 4(k)(2)).

<sup>124</sup> See, e.g., Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 746 (1988) (suggesting that nationwide personal jurisdiction in diversity cases “would present a serious constitutional issue” because it “would cut deeply against the grain of [*Erie*], and would provide a powerful incentive to forum-shop” (footnote omitted)).

<sup>125</sup> *Erie*, 304 U.S. at 78.

<sup>126</sup> U.S. CONST. art. I, § 8, cls. 9, 18.

<sup>127</sup> *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

<sup>128</sup> See Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 973–84 (2013) (challenging constitutional arguments for *Erie*).

<sup>129</sup> The Committee cited *Arrowsmith v. United Press International*, 320 F.2d 219 (2d Cir. 1963) (en banc) (Friendly, J.), which held that in the absence of a federal statute or rule—this being before the modern Rule 4(k)—federal courts’ jurisdiction should follow state law. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *supra* note 123. But rather than constrain Congress or the Court, *Arrowsmith* “fully concede[d] that the constitutional doctrine announced in [*Erie*] would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the state court would not.” 320 F.2d at 226.

<sup>130</sup> 28 U.S.C. § 1652 (2012); see *Erie*, 304 U.S. at 72–73.

<sup>131</sup> *Erie*, 304 U.S. at 75.

<sup>132</sup> *Hanna*, 380 U.S. at 468.

there's little to be feared from nationwide jurisdiction, so long as it's accompanied by good venue rules. Efforts to manipulate diversity, like the attempt to reincorporate across state lines in the famous *Black & White Taxicab* case,<sup>133</sup> would offer little by way of advantage; not many people need the ability to file suits in districts far away. Even that's possible only with proper venue; and if the matter is essentially local, the case may well be transferred right back. Besides, *Erie's* policy against diversity of citizenship producing different results on state law claims doesn't really apply to jurisdiction anyway. The fact that the parties hail from different states is a perfectly good reason to consider trying the case in different places. A Congress considering nationwide jurisdiction shouldn't let *Erie* stand in the way.

### C. *Would It Make Sense?*

Even if nationwide jurisdiction is consistent with the Constitution, it still might seem to violate common sense. How can a suit that the Constitution bars from state court be filed in the federal court next door? Justice Ginsburg expressed what a sympathetic commentator termed “wonderment”<sup>134</sup> at the plurality’s “curious limitation” on state jurisdiction, asking why McIntyre could be haled into a federal courthouse in Newark but not a state courthouse in nearby Bergen County.<sup>135</sup>

But that puzzlement is itself rather puzzling. Nationwide-service-of-process statutes already make defendants travel across the country. Justice Ginsburg’s objection implicitly suggests that it *does* violate due process for a federal court to hear a case whenever the state court next door could not. If so, then statutory interpleader, ERISA, and Rule 4(k)’s 100-mile bulge,<sup>136</sup> among other familiar rules,<sup>137</sup> are all unconstitutional. That really would be “curious”—indeed, entirely contrary to modern case law.

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<sup>133</sup> *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

<sup>134</sup> Borchers, *supra* note 35, at 1275.

<sup>135</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2800 n.12 (2011) (Ginsburg, J., dissenting) (seeing “no basis in the Due Process Clause” for the “curious limitation” of compelling McIntyre “to bear the burden of traveling to New Jersey and defending itself there under New Jersey’s products liability law,” so long as it received “federal adjudication of Nicastro’s state-law claim”); accord Vail, *supra* note 35, at 525 (finding the distinction “bizarre”). The drive from the Bergen County Superior Court, where Nicastro sued, see *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 578 (N.J. 2000), *rev’d sub nom. J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), to the federal courthouse in Newark is sixteen miles long. Driving Directions from Superior Court, Bergen County, to U.S. District Court, Newark, NJ, GOOGLE MAPS, <http://maps.google.com> (last visited April 13, 2014) (searched “from Superior Court Clerk, Bergen County, NJ, to U.S. District Court Clerk, Newark, NJ”).

<sup>136</sup> See FED. R. CIV. P. 4(k)(1)(B) (permitting jurisdiction over parties joined under Rules 14 or 19 who are served within 100 miles of the court).

<sup>137</sup> See *supra* note 86 and accompanying text.

Justice Ginsburg's objection confuses two very different questions: *where* the case may be heard, and *who* may hear it. A Manhattanite might be more annoyed by suit in Buffalo than across the river in Hoboken, but New Jersey's courts might still lack jurisdiction. Even if the witnesses have retired en masse to Hoboken, making it the most sensible *place* for litigation, that doesn't make New Jersey's judges the right *people* to decide the case—any more than French judges, Bill Gates, or the Pope. In contrast, federal judges are always the right people to decide cases in federal court, which is why they can hear some cases that state judges can't.

A system of nationwide jurisdiction can produce some surprising results, especially in multiparty cases. Suppose that a Vermonter and a Californian drive cross-country and collide in Ohio; the Californian sues, naming the Vermonter and Detroit car manufacturers as defendants. Under current law, maybe the Eastern District of Michigan would be a proper venue.<sup>138</sup> But can it really be that the Vermonter is dragged all the way to Michigan, a state where he's never set foot? Don't we need personal jurisdiction to prevent this kind of result?

Technically we don't, as Congress could always recreate current personal jurisdiction law through venue. (If we did that, of course, the whole exercise would be silly; we might as well keep the law we have.) The more important point is that the parade of horrors might not actually be so bad. For instance, is it so much worse for the driver to be sued in Michigan, compared to Ohio, a state that's equally a plane ride away, and to which he equally never planned to return?

Those of us whose minds have been shaped by law school might exclaim, "But there are no contacts with Michigan!" My armchair speculation, though, having been just as warped by civil procedure as anyone else, is that nonlawyers typically care less about "contacts" with particular states than about actual inconveniences to their daily lives. Sure, the accident took place in Ohio—but it's not as if the defendant chose Ohio, in particular, for more dangerous driving because he was content to be sued there. The accident happened where it happened, without anyone planning for it in advance; returning to the scene to litigate would be about as onerous wherever that might turn out to be.

And although the state judges of Michigan, of all places, surely have no right to sit in judgment of this Vermonter's actions, which *federal* courthouse to use is another matter. Congress can always decide, through the venue statutes, whether the entire case should be handled in a single forum or whether some parties or claims should be severed and handled separately. But if Congress has determined that this case really is best handled as a single whole in a courtroom in Detroit, using the same

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<sup>138</sup> See *supra* note 86 and accompanying text; see also 28 U.S.C. § 1391(b)(2) (2012). I owe this example to Christopher Mueller.

procedures and federally selected personnel that you'd find anywhere else, it's not obvious why that policy decision is wrong. If the accident turned out to be a 300-car pileup, albeit through no fault of this driver, everyone would understand why Congress might choose to consolidate the suits in a single district;<sup>139</sup> that's just a question of benefits and costs. Or if a tax audit required the Vermonter to travel to an IRS Regional Office located out of state, he might curse his ill luck or the shortage of regional offices, but Congress would obviously be entitled to make that choice.

Federal courthouses aren't all perfect substitutes for one another. Each district court takes on some of the characteristics of its state. In practice, the judges of the Eastern District of Michigan are appointed with the approval of Michigan's elected Senators;<sup>140</sup> as a result, they're typically Michigan citizens who are well-connected in state political circles. If you get sued in that district, you need a lawyer authorized to practice there, face potentially significant local rules and practices, and—most importantly—leave the fact-finding to a local jury.

Yet we shouldn't make too much of these variations. Judicial nominees might need home-state support, but they're chosen by the President and confirmed by the Senate as a whole. Their judgments are reviewed by regional courts of appeals and ultimately by a national Supreme Court. Differences in local rules are almost never more serious than, say, differences in state-court practice—especially as state courts can have local rules, too. And any variations in federal jury pools are already a factor when transferring venue.<sup>141</sup>

In general, there's a reason why lists of alleged “judicial hellholes” focus in particular on state courts.<sup>142</sup> When state systems go off the rails, in favor of plaintiffs *or* of defendants, there are few outside forces that can restrain them. By contrast, the federal structures of appointment, salary and tenure protection, rulemaking, and appeal create strong tendencies for uniformity within the federal judiciary. And in any case, the federal government's claim to political authority is clear.

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<sup>139</sup> See § 1407 (providing for multidistrict litigation).

<sup>140</sup> See Rachel Brand, *Judicial Appointments: Checks and Balances in Practice*, 33 HARV. J.L. & PUB. POL'Y 47, 47–48 (2010) (describing the tradition of the “blue slip”).

<sup>141</sup> See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981) (considering, in the *forum non conveniens* context, “the unfairness of burdening citizens in an unrelated forum with jury duty”); *cf.* *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013) (noting that “both § 1404(a) and the *forum non conveniens* doctrine” apply “the same balancing-of-interests standard”).

<sup>142</sup> AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2013/2014, at 3–4 (2013), available at <http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf>.



#### D. Is It Better than Alternatives?

1. *An Expanded 4(k)(2).*—Nationwide jurisdiction would do more to solve the problem, with fewer attendant costs, than other recent proposals for reform. For example, Patrick Borchers has suggested extending Rule 4(k)(2)’s fallback jurisdiction, which provides a forum for federal claims that can’t be brought in any state, to diversity suits by eliminating the Rule’s requirement that the claim “arise[] under federal law.”<sup>143</sup>

As discussed below, expanding jurisdiction requires new measures to stop venue abuses, lest the cure be worse than the disease. But putting these issues aside, extending 4(k)(2) to state law claims would preserve some troubling aspects of current law. The plaintiff might first have to certify that jurisdiction is lacking in every state<sup>144</sup>—or, more typically, would have to allege as much, at which point the defendant would either concede jurisdiction in a particular state or in federal court under 4(k)(2).<sup>145</sup> But there’s no guarantee that the state the defendant picks for this concession is actually convenient for the plaintiff; the defendant has every incentive for it not to be. And if the plaintiff chose to challenge that concession, the federal courts would be back in the doctrinal morass of defining the state courts’ personal jurisdiction.

Nor would expanding 4(k)(2) do enough to separate jurisdiction from venue. Often the problem isn’t lack of a forum, but lack of a *convenient* forum. For instance, this change probably wouldn’t have given Nicastro “access to a New Jersey forum,”<sup>146</sup> because McIntyre might well have been subject to jurisdiction in Ohio, where its distributor was located. But requiring the injured plaintiff to sue in Ohio state court wouldn’t have made any sense: Ohio is even farther from England than New Jersey is, and it’s doubtful that McIntyre familiarized itself with Ohio’s procedures and court system before retaining a distributor there. If the case belongs anywhere in the United States, it belongs in New Jersey, and we should structure any reform so as to make that possible.

2. *Targeting Foreign Manufacturers.*—A second proposal, which has received some attention in Congress, would specifically address suits against foreign manufacturers. The Foreign Manufacturers Legal Accountability Act would require foreign manufacturers of certain products to appoint an agent for service of process, as well as to consent to some state’s jurisdiction over cases involving the covered product and either U.S. residents or U.S. events.<sup>147</sup> First introduced in 2009, the bill is broadly

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<sup>143</sup> Borchers, *supra* note 35, at 1275 (quoting FED. R. CIV. P. 4(k)(2)).

<sup>144</sup> *See, e.g.,* United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 41 (1st Cir. 1999).

<sup>145</sup> *See, e.g.,* Touchcom, Inc. v. Bereskin & Parr, 574 F.3d 1403, 1414 (Fed. Cir. 2009).

<sup>146</sup> Borchers, *supra* note 35, at 1275.

<sup>147</sup> H.R. 1910, 113th Cong. § 5(a)–(c) (2013).

supported by the plaintiffs' bar.<sup>148</sup> But it's also controversial (largely due to alleged impacts on trade)<sup>149</sup> and said by some to go too far.<sup>150</sup> In important ways, though, the bill doesn't go far enough. It doesn't cover foreign providers of services, for example, and maybe even McIntyre's machine falls outside its scope.<sup>151</sup> There's no guarantee that the state chosen by the manufacturer will be a convenient forum—and in suits against multiple defendants (say, two importers of drugs that caused a dangerous interaction), the manufacturers might have picked different states. Nor would the bill solve the problem domestically; if McIntyre had been based in Alaska instead of England, Nicastro wouldn't have been obviously better off.

Rather than try to extend the states' power, a better approach might rely on federal jurisdiction over defendants who reside here or have sufficient contacts with the United States.<sup>152</sup> That would be more effective politically as well as legally; businesses are often plaintiffs as well as defendants, and laws that apply evenhandedly could find more support. A system of nationwide jurisdiction can also assign cases to venues preselected for convenience, rather than only to the particular states that a potential defendant chooses. Coupled with the kinds of defendant-protective provisions suggested below, this might reduce opportunities for forum shopping on both sides, while assuring injured plaintiffs access to a reasonable forum.<sup>153</sup>

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<sup>148</sup> See Press Release, Am. Ass'n for Justice, *Bipartisan Bill Targets Foreign Corporations that Skirt Federal Safety Standards, Legal System* (Dec. 6, 2011), (available at <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/17282.htm>).

<sup>149</sup> See, e.g., Letter from Org. for Int'l Inv. & Nat'l Ass'n of Mfrs., to U.S. House of Representatives (May 23, 2013), (available at [http://www.ofii.org/sites/default/files/OFII\\_NAM\\_FMLAA\\_Letter\\_5.23.13.pdf](http://www.ofii.org/sites/default/files/OFII_NAM_FMLAA_Letter_5.23.13.pdf)).

<sup>150</sup> See, e.g., Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 605 (2012) (suggesting that the bill “fail[s] to limit jurisdiction to cases where the injury occurs in the United States as the result of the distribution of the product in the United States”).

<sup>151</sup> The bill only applies to specific products and their subcomponents, namely FDA-regulated drugs, devices, and cosmetics; biological products; consumer products; chemical substances; and pesticides. See H.R. 1910 § 4(4).

<sup>152</sup> See *supra* text accompanying notes 98–99.

<sup>153</sup> Some commentators have called on Congress to expand state jurisdiction as a general matter. See, e.g., Israel Packel, Guest Commentary, *Congressional Power to Reduce Personal Jurisdiction Litigation*, 59 TEMP. L.Q. 919 (1986); Charles W. Adams, *A Call for a Federal Long Arm Statute to Confer Lawful Authority over Nonresidents on the State Courts* (Univ. of Tulsa Coll. of Law, Legal Studies Research Paper Series, Paper No. 2012-07), (available at <http://ssrn.com/id=2190483>). Whether Congress can use the Commerce Clause or the Full Faith and Credit Clause to overcome Fourteenth Amendment limitations, see *id.* at 85–89, poses delicate questions of delegation, due process, and enumerated powers. But regardless of the constitutional answer, this move reproduces many of the same political-authority worries at the level of policy. Maybe Congress can empower New Jersey judges to hear new suits against nonresidents, but should it? When is that more appropriate, from a

### III. WHAT DOES THIS BREAK, AND HOW CAN WE FIX IT?

Nationwide personal jurisdiction isn't a new idea; others have proposed it before.<sup>154</sup> But prior proposals have rarely recognized how deeply doctrines of state jurisdiction are embedded in the federal system, or how hard it is to root them out. A surprising number of federal doctrines depend, explicitly or implicitly, on a state court's ability to hear the case instead. Getting federal courts out of this quagmire requires thoroughgoing and careful revisions to the law. This Part illustrates the kind of revisions that might be necessary, as well as the choices we'd have to make along the way.

#### A. What Replaces Jurisdiction?

1. *General Considerations.*—If jurisdiction no longer limits the place of suit, what else will? Giving plaintiffs their choice of ninety-four federal judicial districts would create a forum shopper's paradise, in which the threat of suit in distant and inconvenient fora—thousands of miles from defendants' homes—would become a cudgel for settlement. That regime would produce far more injustice than it would prevent.

Yet if we limit where plaintiffs can file, what should that limit be? Should it be defined by *ex ante* rules, or by standards to be applied *ex post*? Taking the latter position to its extreme, some scholars have argued for letting plaintiffs file anywhere, subject to the court's discretionary power to dismiss or transfer<sup>155</sup>—for example, by sending the case to “the most adequate forum,” which the court expects will “achieve the desired social benefits of litigation at the lowest total cost.”<sup>156</sup> An open-ended standard like that may assume too much agreement about the adequacy of different tribunals. After all, the reason we're in this mess is that people disagree. Concentrating on a unitary metric like social cost either writes concerns like fairness or political authority out of the analysis, or it leaves us right where we started—wondering which court, all things considered, ought to

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political-theory standpoint, than having federal officials decide the case instead? A federal-only proposal has the advantage of taking these issues off the table entirely.

<sup>154</sup> See, e.g., Abrams, *supra* note 109, at 1–3; Edward L. Barrett, Jr., *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 608 (1954); Erbsen, *supra* note 9, at 77; Geoffrey C. Hazard, Jr., *Interstate Venue*, 74 NW. U. L. REV. 711, 712–13 (1979); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1123 (1966); Packel, *supra* note 153, at 920; Spencer, *supra* note 18, at 329–34; Adams, *supra* note 153, at 76–102; Geoffrey P. Miller, *A New Procedure for State Court Personal Jurisdiction* (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 13-14, 2013), available at <http://ssrn.com/id=2248719>.

<sup>155</sup> See Packel, *supra* note 153, at 920 (proposing “nationwide personal jurisdiction [for] all state and federal courts . . . subject only to the doctrine of forum non conveniens”); Miller, *supra* note 154, at 18 (suggesting that federal courts “exercise jurisdiction without regard to venue”).

<sup>156</sup> Miller, *supra* note 154, at 17; see also *id.* at 20 (proposing abuse of discretion review on appeal).

hear a given case. And although district judges have some experience applying general standards to venue transfer motions, these transfers are rather tightly constrained by existing rules of jurisdiction and venue.<sup>157</sup> By contrast, a truly open-ended doctrine would deprive defendants of the chance to “structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>158</sup>

At the other extreme lies the European Union’s system.<sup>159</sup> Created by regulation of the European Council, that regime authorizes a type of general jurisdiction in the defendant’s domicile,<sup>160</sup> and then adds specific rules for specific causes of action—“the place of performance in a contract case, the place of the commission of the tortious act or the effect of the injury in a tort case,” and more “specialized rules for maintenance creditors, consumers, and insureds.”<sup>161</sup> Many of these rules echo traditional choice-of-law principles; at its best, such a system might be far more intuitive than current U.S. law.

But rules for locating litigation shouldn’t just be predictable; they should also be good ideas. Today, we know unfortunately little about the substantive consequences of different jurisdictional regimes. For example, Daniel Klerman has argued that product liability suits belong where a consumer first purchases the defective product, because that rule gives manufacturers and distributors the right *ex ante* incentives.<sup>162</sup> Whether his conclusion is right or wrong, this is the kind of research we need, in order for Congress—or, indeed, anybody—to impose sensible rules rather than just acting on a hunch.

2. *Working Out the Specifics.*—Without knowing any more, the best we can do might be to create nationwide jurisdiction in the federal courts, approximate an improved version of today’s venue rules, and then tinker with the whole thing as we go. Speaking very generally, current law on venue lets plaintiffs sue where all the defendants reside, where a substantial part of the events happened, or—when neither of those works—wherever personal jurisdiction is available.<sup>163</sup> The remainder of this Part explores

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<sup>157</sup> Compare *id.* at 34 (finding “no reason to suppose [that district courts] would have greater difficulty under the most adequate forum procedure”), with 28 U.S.C. § 1404(a) (2012) (permitting transfer only to those judicial districts in which the action “might have been brought” under current law, or “to which all parties have consented”).

<sup>158</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>159</sup> See European Community Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1.

<sup>160</sup> *Id.* at 3 (“[P]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”).

<sup>161</sup> Silberman, *supra* note 150, at 608–09 (footnotes omitted).

<sup>162</sup> See Klerman, *supra* note 5.

<sup>163</sup> See 28 U.S.C. § 1391(b) (2012); Am. Law Inst. & Unidroit, *Principles of Transnational Civil Procedure*, 9 UNIFORM L. REV. (n.s.) 758, 762 (2004) (Principle 2.1) (proposing a similar system for transnational litigation).

how Congress might implement nationwide jurisdiction while largely preserving our existing venue rules. Because those rules may or may not be the best ones, this Article doesn't actually call on Congress to enact the draft bill presented below. The point of the draft isn't to serve as shovel-ready legislation, but to illustrate the kinds of considerations that will be necessary to reform the system.

Surprisingly, prior proposals have rarely discussed these issues in detail. Some go no further than recognizing that venue might have to change<sup>164</sup>—or proposing rules that don't go nearly far enough.<sup>165</sup> Others have scratched the surface of the inquiry. For example, one of the more detailed (and well-written) proposals is that of A. Benjamin Spencer, who would have the Supreme Court, not Congress, establish nationwide jurisdiction through the rulemaking process.<sup>166</sup> He suggests tightening venue by limiting the events-based category to districts encompassing “a substantial part of the . . . actions or omissions of the defendant giving rise to the claim.”<sup>167</sup> Spencer suggests that this limit is “likely too restrictive,”<sup>168</sup> which seems justified: McIntyre did nothing in New Jersey, which was part of the reason why the Court found jurisdiction to be absent. Alternatively, if a defendant's “actions” are understood broadly enough to include its manufactured goods being resold in the forum, then focusing on defendants won't dispel the confusion we started with.

Yet the provisions that Spencer doesn't suggest changing pose even bigger problems. For example, under current law, corporate or other entity defendants are deemed to “reside” wherever they are subject to personal jurisdiction.<sup>169</sup> If jurisdiction is available nationwide, then these defendants “reside” everywhere—and suits against corporations could be filed in any district, no matter how distant or unfair the forum.<sup>170</sup> Fixing this provision is only one of a large number of changes, discussed below, that would be necessary to maintain balance between plaintiffs and defendants.

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<sup>164</sup> Hazard, *supra* note 154, at 712–13 (suggesting a system with minimal diversity, nationwide personal jurisdiction, and venue sited in the district “in which the action could most conveniently be tried”); von Mehren & Trautman, *supra* note 154 (“Insofar as the federal judiciary functions as a unitary system, the problem of adjudicatory jurisdiction disappears internally, and determination of the place of trial might well be handled administratively.”).

<sup>165</sup> See, e.g., Barrett, *supra* note 154, at 628–29 (suggesting venue rules similar to the modern § 1391(b)(1)–(2) and (c)); see also Abrams, *supra* note 109, at 44 (proposing venue rules similar to § 1391(b)(2), as well as an expanded version of (b)(1)).

<sup>166</sup> See Spencer, *supra* note 18, at 329 (describing proposed amendments to Rule 4(k)).

<sup>167</sup> *Id.* at 333 (emphasis omitted) (proposing amendments to § 1391).

<sup>168</sup> *Id.*

<sup>169</sup> § 1391(c)(2).

<sup>170</sup> In cases filed under statutes providing for nationwide service of process, a number of courts have held entity defendants to “reside” in every judicial district. See generally Rachel M. Janutis, *Pulling Venue up by Its Own Bootstraps*, 78 ST. JOHN'S L. REV. 37 (2003) (recognizing and criticizing this practice).

This Article describes one possible way of reforming jurisdiction. It's far from the only way, and it's intended mainly as a platform for future discussion and debate. The necessary degree of detail helps explain why, despite the obvious advantages of nationwide jurisdiction, we haven't gotten there yet: there's a great deal of work involved, as well as a great many minefields to be avoided. Yet the draft bill also demonstrates the type of thinking we have to employ if we ever want to leave the dismal swamp of personal jurisdiction.

*B. Creating Nationwide Personal Jurisdiction*

The draft bill establishes a system of nationwide personal jurisdiction, under which any defendant sufficiently connected to the United States can be sued in any federal district court. It then adds restrictions to restore equilibrium between plaintiffs and defendants, based largely on existing venue rules.

Some of these restrictions significantly constrain a plaintiff's litigation options—a necessary consequence of preventing abuse. But changes this big shouldn't be foisted on unwilling plaintiffs before they've been tested in practice. That's why the draft bill creates an *elective* system: it lets plaintiffs decide, when they file their complaint, whether to stay with current law or to request nationwide jurisdiction (together with all the new restrictions) over a particular defendant. That limits the bill's immediate significance, as well as any chance of unfairness: when plaintiffs choose, they have to take the bitter with the sweet.

The first several restrictions narrow the range of proper venues. As noted above, current law often defines venue in terms of personal jurisdiction. Separating the two means supplying new rules for entity defendants, foreign defendants, and fallback venue. It also means addressing the consequences of removal from state court.

The next several restrictions address transfer. Today, transfer rules strongly favor a plaintiff's initial choice of forum. The choice itself gets substantial weight; the court's decision is discretionary; and even if transfer is granted, the plaintiff gets to keep the original forum's choice of law. In the absence of jurisdictional constraints, this pro-plaintiff bias no longer makes sense. If anything, the rules should *favor* transfer, to make sure that a court can send a case where it belongs.

A third set of restrictions tries to provide defendants with defenses similar to those they currently enjoy. Today, if jurisdiction is absent, a defendant can appeal an adverse ruling, seek sanctions for frivolous suits, or even default and attack the judgment later on. But with jurisdiction available nationwide, these defenses disappear. The denial of a venue transfer is almost entirely insulated from appellate review; Rule 11 doesn't effectively deter venue choices that are clearly inconvenient (as opposed to frivolously improper), and a defendant sued in a wildly incorrect venue has

no option to default. The bill addresses each of these points, as well as implementing several technical corrections.

Extensive as they may seem (see Fig. 1), these changes actually take the current range of venues for granted. Far from being a finished product, they're designed to be amended later on. The real benefit of legislative reform is that we can revise our choices over time, as we learn more about where litigation should take place. In other words, the draft bill is only a baby step in a far broader project of fixing personal jurisdiction.

*1. In General.*—The draft bill begins by creating a new section of the U.S. Code:

**SEC. 1. SHORT TITLE.**

This Act may be cited as the “Personal Jurisdiction Reform Act of 2014”.

**SEC. 2. REFORM OF PERSONAL JURISDICTION.**

(a) IN GENERAL.—Chapter 85 of title 28, United States Code, is amended by adding at the end the following:

**“§ 1370. Personal jurisdiction**

“(a) IN GENERAL.—In a civil action in a district court of the United States, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant—

“(1) who is subject to the jurisdiction of a court of general jurisdiction in the State where the district court is located;

“(2) when authorized by a federal statute; or

“(3) when requested in the complaint with reference to that defendant and to this section, if exercising jurisdiction is consistent with the United States Constitution and laws.

Subsection (a) defines three categories of personal jurisdiction in federal civil actions. The first two exist under current law: jurisdiction over defendants “subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located,”<sup>171</sup> and jurisdiction “authorized by a federal statute.”<sup>172</sup> The innovation is the third category, which creates jurisdiction whenever it’s “consistent with the United States Constitution and laws,” in the language of Rule 4(k).<sup>173</sup> This is nationwide, not universal, jurisdiction; it assumes that the defendant already has enough U.S. contacts to permit suit in a federal court. (The other categories of Rule 4(k)—the 100-mile bulge rule and the federal fallback<sup>174</sup>—can be eliminated as unnecessary.)

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<sup>171</sup> FED. R. CIV. P. 4(k)(1)(A).

<sup>172</sup> *Id.* 4(k)(1)(C).

<sup>173</sup> *Id.* 4(k)(2)(B).

<sup>174</sup> *Id.* 4(k)(1)(B), (2).

NORTHWESTERN UNIVERSITY LAW REVIEW

VENUE		
TOPIC	CURRENT LAW	ELECTIVE REGIME
<i>Where do entities “reside” for venue purposes?</i>	Wherever they’re subject to personal jurisdiction	Where they’ve consented, incorporated, made their principal place of business, or appointed agents
<i>What if a defendant doesn’t reside in the United States?</i>	Venue is proper anywhere	Try a different venue theory
<i>Where is “fallback” venue available?</i>	Anywhere with jurisdiction over one defendant	Look to the parties’ residences first
<i>Is venue always proper after removal from state court?</i>	Yes	No
VENUE TRANSFER		
<i>Does the court have to grant a proper transfer motion?</i>	No, it’s discretionary	Yes, it’s presumptive
<i>Is there a presumption against transfer?</i>	Yes	No
<i>After transfer, which forum’s choice-of-law rules apply?</i>	Plaintiff’s chosen forum (transferor)	Court’s chosen forum (transferee)
ADDITIONAL DEFENSES		
<i>How are transfer denials reviewed?</i>	No appeal, only mandamus	Discretionary appeal, plus mandamus
<i>Are there penalties for unreasonable venue choices?</i>	No	Yes, if they’re not “substantially justified”
<i>When can plaintiffs safely take a default judgment?</i>	Whenever they’re not subject to personal jurisdiction	When venue isn’t “substantially justified” or available nearby

Fig. 1: Summary of changes under the elective regime



To elect the new system, the complaint has to request nationwide jurisdiction over specific defendants. This lets plaintiffs decide whether the benefits outweigh the costs. Rather than making the court analyze where jurisdiction might be proper—or making the defendant do so under an expanded fallback rule<sup>175</sup>—the bill effectively shifts that burden to the plaintiff (or, in practice, to the plaintiff’s attorneys). If ordinary rules of jurisdiction suffice, the plaintiff might as well sue under current law and avoid the draft bill’s new restrictions. But if the defendant can’t be reached otherwise, or if the matter is unclear, then the new system might be worth it.

2. *Amended Complaints.*—In an elective system, there’s always the possibility that a plaintiff might change its mind. This is addressed by subsection (b):

“(b) AMENDED COMPLAINTS.—An amendment to a complaint adding or removing a request for jurisdiction over a defendant previously named in that complaint shall not relate back to the date of the original pleading.

Under Rule 15(c), only some amendments to the complaint “relate[] back” to the date of the original; others are effectively treated as new lawsuits for limitations purposes.<sup>176</sup> To stop a plaintiff from taking two bites at the apple—suing first under one system of jurisdiction, and switching to the other if that strategy proves unwise—subsection (b) of the draft bill bars relation-back for amendments adding or removing a jurisdictional request. In other words, the window for election closes with the limitations period, just like the window for filing a new lawsuit. But this restriction wouldn’t apply when a plaintiff adds a new defendant for the first time; that situation would be governed by the ordinary provisions of Rule 15(c).

### C. *Restricting the Range of Proper Venues*

As explained above, the draft bill tries to offer plaintiffs roughly the same range of venues they enjoy today. But once jurisdiction is made nationwide, maintaining the balance means rewriting some venue rules.

1. *Residence.*—The first change involves the definition of residence. In broad terms, the general venue statute today provides for three types of venue: where the defendants reside;<sup>177</sup> where the underlying events occurred;<sup>178</sup> and—if those don’t work—wherever there’s jurisdiction.<sup>179</sup>

More specifically, 28 U.S.C. § 1391(b)(1) permits venue wherever one defendant resides, so long as “all defendants are residents of the State in

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<sup>175</sup> See *supra* text accompanying notes 143–45.

<sup>176</sup> FED. R. CIV. P. 15(c)(1).

<sup>177</sup> 28 U.S.C. § 1391(b)(1) (2012).

<sup>178</sup> *Id.* § 1391(b)(2).

<sup>179</sup> *Id.* § 1391(b)(3).

which the district is located.” Because entity defendants like corporations don’t really reside anywhere, the law “deem[s]” them to reside, under § 1391(c) and (d), wherever they’d be subject to personal jurisdiction. This makes venue parasitic on jurisdiction; and if jurisdiction were available everywhere, then corporations would reside everywhere, and plaintiffs could sue them everywhere.

To avoid that problem, the draft bill redefines residence for entity defendants, based on categories that actually look like residence:

“(c) VENUE.—If jurisdiction over a defendant is requested under subsection (a)(3), the following provisions apply:

“(1) RESTRICTED VENUE.—

“(A) RESIDENCE.—Notwithstanding section 1391(c)–(d), that defendant, if an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, as a defendant, in any judicial district—

“(i) as to which that defendant has consented to suit with respect to the action; or

“(ii) embracing a place in which a similar action filed exclusively against that defendant could be tried in a court of general jurisdiction in a State (or, if there is no such place, in any judicial district in a State)—

“(I) by which that defendant has been organized or incorporated;

“(II) in which that defendant maintains its principal place of business; or

“(III) as to which that defendant has appointed an applicable agent for service of process.

In other words, an entity resides in states where it ordinarily expects to be sued—because it consented to suit there, is incorporated or has its headquarters there, or appointed an agent who can receive process there. Each of these categories is currently accepted as a ground for general jurisdiction—that is, suit on any subject under the sun.<sup>180</sup> And if each defendant fits one of these categories in a given state, it makes plenty of sense to hold the litigation there.

Yet residence has to be defined as to districts as well as states. At least for corporations, § 1391(d) currently does that with another jurisdiction-

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<sup>180</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 755–56, 760, 761 & n.19 (2014); *accord* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011) (suggesting that the place of incorporation and principal place of business are places “in which the corporation is fairly regarded as at home”); *see also* *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 442 (1946) (holding that consent to suit, including consent “to service of process upon [defendant’s] agent,” suffices for personal jurisdiction); *cf.* *Hertz Corp. v. Friend*, 559 U.S. 77, 80–81 (2010) (interpreting “principal place of business” in § 1332(c)(1) as referring to a corporation’s “nerve center” or “headquarters”).

based test, this time focused on minimum contacts with individual districts. As almost all judicial districts are contained within their states,<sup>181</sup> this is at least as hard as the state-level minimum contacts test (and often harder). The draft bill would avoid that morass of state jurisdictional law by instead incorporating state *venue* law—asking where, within any of the listed states, a similar action filed against that defendant could be tried. Venue rules, being statutory, are usually much more precise than the due process limits on personal jurisdiction. As the listed states are the normal places for these defendants to be sued, they presumably have their own rules about where such suits will be tried—and the defendants would know what those rules are. If that doesn't work, then any district in the state should suffice. (The “filed exclusively” language avoids any complications due to multiple defendants, not all of whom might ordinarily be suable in the same in-state venue.)

2. *Foreign Defendants.*—Redefining residence has another consequence for foreign defendants. Under § 1391, “a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.”<sup>182</sup> In other words, foreign *individual* defendants don't count for determining venue. (Under current law, remember, entities reside where they're subject to jurisdiction. So a foreign entity that's suable in some state—like McIntyre in Ohio—“resides” in the United States for venue purposes.)

Under the bill's new definition, by contrast, many foreign entities would be nonresidents; they're incorporated and headquartered abroad, and they haven't consented to suit or appointed agents here. With unrestricted nationwide jurisdiction, they really could be sued anywhere. Maybe their residence should be ignored when domestic defendants are sued as well; but there's no reason why foreign defendants, if named on their own, should always be suable in *any* district.

So the bill adds the following provision:

“(B) NONRESIDENT DEFENDANTS.—Section 1391(c)(3) shall not apply with respect to that defendant. But the joinder of that defendant, if not resident in the United States, shall be disregarded in determining where the action may be brought with respect to other defendants.

This keeps the second half of § 1391(c)(3)—the “disregarded” part—and drops the first clause. A suit filed only against foreigners would be brought

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<sup>181</sup> *But see* § 131 (including within the District of Wyoming not only all territory within Wyoming, but also “those portions of Yellowstone National Park situated in Montana and Idaho”); Brian C. Kalt, *The Perfect Crime*, 93 GEO. L.J. 675, 678 (2005) (“[T]he District of Wyoming [is] the only district court that includes land in multiple states.”).

<sup>182</sup> § 1391(c)(3).

where the events occurred,<sup>183</sup> or—as discussed in the next section—under “fallback” venue.

3. *Fallback Venue*.—Section 1391(b)(3) creates a safety net for when other venue options run out. In that case, venue will lie wherever “any defendant is subject to the court’s personal jurisdiction with respect to such action.”<sup>184</sup>

To illustrate, suppose that Bob from Brooklyn is injured in a Moscow bar fight by Alice from Albania, Carla from Connecticut, Darla from Delaware, and Fred from New Jersey. The defendants are from different states, and the only relevant events were on foreign soil. With neither of the traditional venue grounds available, the fallback is triggered, and Bob can lay venue anywhere there’s jurisdiction over at least one defendant. (Of course, he’ll still need jurisdiction over the other defendants too, but that’s not a *venue* problem.)

Again, if this provision were left unchanged, nationwide jurisdiction would create a nationwide fallback venue. Bob could sue all four defendants in Alaska if he wants—even though nothing happened there, and most of the parties live on the East Coast. That makes no sense.

Whether any fallback is necessary depends on what kind of venue rules Congress adopts. But assuming that some fallback is needed, the draft bill offers three options for suit:

“(C) FALLBACK VENUE.—Section 1391(b)(3) shall not apply. If there is no district in which the action may otherwise be brought as provided in section 1391, as modified by this section, it may be brought—

“(i) in a judicial district in which any defendant resides, or in which any party resides if each defendant resides in at least one district within 100 miles thereof;

“(ii) if there is no such district, in a judicial district in which any party resides; or

“(iii) if there is no such district, in any judicial district.

Under the first fallback, plaintiffs could lay venue where any one defendant resides—or could pick one of their own home districts, so long as the defendants are all nearby.<sup>185</sup> Because the fallback won’t be triggered if the defendants reside in the same state, or if the underlying events happened here, no single defendant’s home district is an obvious choice; a nearby plaintiff’s district might be more convenient overall. (In the hypothetical above, Bob’s district is within 100 miles of those of Carla,

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<sup>183</sup> *Id.* § 1391(b)(2).

<sup>184</sup> *Id.* § 1391(b)(3).

<sup>185</sup> *Cf.* § 1391(c)(1)–(2) (defining residence, for *plaintiffs*, as domicile for individuals and principal place of business for entities).

Dan, and Fred—and Alice, as a nonresident, is ignored.)<sup>186</sup> Congress can of course choose any distance; 100 miles is just the standard distance that the Federal Rules anticipate parties traveling for litigation.<sup>187</sup> And the parties could still move to transfer venue based on the actual facts of the case.

If that option doesn't work, the next fallback is a "judicial district in which any party resides." If the defendants are all foreign, and nothing of relevance happened here, then the plaintiffs might as well sue at home.

Finally, if none of the parties resides here and nothing relevant happened here either, then the case might as well be brought in any district—though it may well end up dismissed for *forum non conveniens*.

4. *Removal.*—Under current law, when a case is removed from state court, venue is proper wherever the action is pending.<sup>188</sup> That makes sense if you want federal tribunals to be available wherever the state courts are. But when federal tribunals are *more* available than the state courts, removal could be easily abused. A plaintiff might sue in, say, Alaska state court, where personal jurisdiction is lacking; if the defendant then removes to the District of Alaska and moves to dismiss, the plaintiff can just amend its complaint, elect the new jurisdictional rules, and thereby secure both jurisdiction and venue.<sup>189</sup>

To prevent this gambit, the bill makes a simple change:

“(D) REMOVAL.—Removal to the district court shall not establish proper venue as to that defendant.

In other words, a plaintiff that couldn't reach the defendant in state court under the old system—and so decides to elect into the new—should have to justify its choice of forum under the new venue rules, rather than simply on the basis of having removed from a state court.

#### D. Putting the Case in the Right District

Restoring a balance in venue options isn't enough. Today, many otherwise permissible venues are effectively closed to plaintiffs who need personal jurisdiction too. Removing limits on personal jurisdiction means exposing defendants to suit in new districts, some of which might be wildly inconvenient. That means new rules for venue transfers.

Venue is legally proper in more places than it's actually sensible to sue. Suppose that McIntyre had retained a British engineering firm to design its machine, and that this firm (unbeknownst to its client) performed

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<sup>186</sup> See *supra* text accompanying notes 182–83.

<sup>187</sup> See, e.g., FED. R. CIV. P. 4(k)(1)(B) (a 100-mile bulge for service on impleaded defendants and necessary parties), 45(b)(2)(B) (a 100-mile limit on travel for subpoenas).

<sup>188</sup> See § 1390(c); *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953).

<sup>189</sup> See FED. R. CIV. P. 15(a)(1)(B) (permitting amendment as of right within twenty-one days of a 12(b) motion).

some minimal portion of the faulty design work in Hawaii. The district of Hawaii might then be a *possible* venue for a suit against McIntyre under § 1391(b)(2). Absent other circumstances, though, no one would suggest trying the case there, thousands of miles away from where the injury occurred. Similarly, under today's law, a plaintiff suing a nonresident can lay venue anywhere—meaning that an individual claim against McIntyre's CEO could be brought in Hawaii for any reason or no reason at all. We currently use jurisdictional barriers to block such bizarre choices, but those barriers disappear if jurisdiction is nationwide.

One way to address this problem is through transfers of venue under § 1404. That statute allows transfer to another permissible venue, or to one on which the parties have agreed, “[f]or the convenience of parties and witnesses, in the interest of justice.”<sup>190</sup> This is a broad inquiry, accounting for both private interests (convenience for parties and witnesses, access to evidence, where the claim arose) and public ones (justice, judicial economy, court congestion, the “local interest in deciding local controversies at home”).<sup>191</sup> In other words, Congress lays down rules as to where venue is permissible, and judges then apply standards as to where venue makes sense.

But the way judges apply those standards aren't well suited to a world of nationwide jurisdiction. Transfer is discretionary (the statute says “may,” not “shall”);<sup>192</sup> there's a strong presumption that plaintiffs should get to choose their forum; and either way, plaintiffs get to keep the initial choice of law.<sup>193</sup> When a plaintiff actually needs nationwide jurisdiction, though—that is, when the defendant probably lacks minimum contacts with the chosen forum—the chances of unfairness are at their height, offering little reason to defer to the plaintiff's choice.

Instead, the draft bill levels the playing field in three ways: establishing a presumption in favor of venue transfer, eliminating the deference to the plaintiff, and adopting choice-of-law rules based on where the case ends up, not where it began. In fact, the resulting system would look a lot like the one the Supreme Court recently created in *Atlantic Marine Construction Co. v. U.S. District Court*, designed to deprive the plaintiff of any benefit from violating a valid forum selection clause.<sup>194</sup> Although the circumstances are different, both regimes operate to preserve the preexisting balance between the parties, rather than letting plaintiffs gain a potentially illegitimate advantage.

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<sup>190</sup> § 1404(a).

<sup>191</sup> 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3847, at 147 (4th ed. 2013).

<sup>192</sup> 28 U.S.C. § 1404(a).

<sup>193</sup> See 15 WRIGHT ET AL., *supra* note 195, § 3848, at 3 (Supp. 2014).

<sup>194</sup> 134 S. Ct. 568, 581–84 (2013) (revising the standards for § 1404(a) transfer when a valid forum selection clause is present).

1. *Presumptive transfer.*—Under the draft bill, when the plaintiff elects the new system, transfer changes from a discretionary decision to a presumptive one:

“(2) TRANSFER.—

“(A) IN GENERAL.—The court shall grant a proper motion by that defendant for transfer under section 1404(a), unless it finds that the convenience of parties and witnesses or the interest of justice would not be served thereby.

In other words, when the defendant’s transfer motion is procedurally proper, the court must either grant it or make a finding that transfer would be a bad idea. So although the plaintiff gets a perfect right to pick the forum initially, the defendant gets an equally perfect right to suggest a better one—and, if it really *is* the better forum, to have the case moved there. That may carry some cost in efficiency (as any procedural wrangling does), but it also provides incentives for better forum choices by plaintiffs, and in any case corrects for the plaintiff’s expanded discretion in picking the field of battle. Although the § 1404 factors are flexible, requiring a judicial finding to deny transfer puts the court, not the plaintiff, in the driver’s seat: it is the *system* that decides where a case ought to be heard.<sup>195</sup>

2. *Treating parties equally.*—To make transfer decisions fairly, the bill removes any plaintiff-favoring thumb on the scale:

“(B) EQUALITY OF PARTIES.—When acting under this paragraph, the court shall accord no heightened preference to the chosen forum of the party requesting jurisdiction.

If the plaintiff elects the new system of jurisdiction, using an option it didn’t have previously, there’s no particular reason to defer to its forum choice. All parties’ conveniences should count equally, along with that of the witnesses and the interests of the system as a whole.

On the other hand, if the plaintiff chooses *not* to elect the new system of jurisdiction, it should enjoy any deference it’d get under current law. Under the bill’s definition of “complaint,” discussed below,<sup>196</sup> nationwide jurisdiction can also be requested by *defendants* who file claims—for example, crossclaims against their fellow defendants or third-party claims under Rule 14. One benefit of the new system is to let all these claims to go forward in a single proceeding, even if personal jurisdiction wouldn’t otherwise be available.<sup>197</sup> (As noted above,<sup>198</sup> Congress can then decide if

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<sup>195</sup> When significant public interest reasons favor transfer, the court would retain its current authority to order one sua sponte, regardless of what the parties think. See 15 WRIGHT ET AL., *supra* note 195, § 3844, at 47–51 nn.2–3.

<sup>196</sup> See *infra* note 232.

<sup>197</sup> Cf. 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1433, at 308–09 n.21 (3d ed. 2010) (noting that jurisdiction is not always available over a codefendant); *id.* § 1445, at

any of the claims should be pursued separately.) At the same time, though, a defendant who elects the new system—say, by unnecessarily impleading some third party—shouldn't be allowed to change the transfer rules for everyone else. Instead, the bill only takes away a heightened venue preference from “the party requesting jurisdiction,” whether or not that person is one of the original plaintiffs.

3. *Choice of law.*—Like venue, choice of law today is partially parasitic on jurisdiction: federal courts derive their choice-of-law rules from the state of the initial venue. Typically, a federal court applies the choice-of-law principles of the state in which it sits, as required by *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>199</sup> A venue transfer, though, leaves choice of law alone; under *Van Dusen v. Barrack*, a case is governed by the principles of the state where it originated, even after arriving in another state with different rules.<sup>200</sup> The notion is that the plaintiff had a right to sue where it did, and so is entitled to any “state-law advantages that might accrue from the exercise of this venue privilege.”<sup>201</sup> Indeed, under *Ferens v. John Deere Co.*, these advantages persist even when the *plaintiff* is the one requesting transfer.<sup>202</sup> In other words, a plaintiff can deliberately sue in an inconvenient forum, secure a favorable choice of law, and then, like a patricide seeking mercy as an orphan,<sup>203</sup> beg the court to transfer the case somewhere more convenient.<sup>204</sup>

With the expanded options created by nationwide jurisdiction, plaintiffs could easily shop for a venue with friendly choice-of-law rules and then transfer the case (or let it be transferred) somewhere else. This kind of forum shopping is especially damaging because it lets one side pick the law that applies to the case *ex post*, undermining both sides' *ex ante* ability to conform their primary conduct to the law.

Instead, when a plaintiff elects nationwide jurisdiction and a defendant wins a transfer, the draft bill abrogates *Van Dusen* and *Ferens*:

“(C) CHOICE OF LAW.—The court to which an action is transferred under this paragraph shall apply the choice-of-law principles of the State in which it sits.

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404–05 (same for third-party defendants). Personal jurisdiction over counterclaims isn't an issue, because a plaintiff may be deemed to have waived any jurisdictional objections by submitting a complaint to the court. *See Adam v. Saenger*, 303 U.S. 59, 67–68 (1938).

<sup>198</sup> *See supra* text accompanying notes 138–39.

<sup>199</sup> 313 U.S. 487, 496 (1941).

<sup>200</sup> 376 U.S. 612, 639 (1964).

<sup>201</sup> *Id.* at 635.

<sup>202</sup> 494 U.S. 516, 531 (1990).

<sup>203</sup> *Cf. Breneman v. FAA*, 30 F. App'x 7, 8 (D.C. Cir. 2002) (per curiam) (defining that Circuit's “chutzpah doctrine”).

<sup>204</sup> *Cf. Allan R. Stein, The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 540 (2012) (describing *Ferens* as “an unmitigated train wreck”).



Transfer shall be granted or denied without regard to whether the effect of this subparagraph favors or disfavors any party.

The governing law depends on where the case ends up, not where it's filed. Whatever district is the "right" venue under § 1404, given the various locations of the parties, the witnesses, and the underlying acts, the choice-of-law rules applied there will control. That makes it more likely that the rules governing a dispute are those that *ought* to govern. It also makes the choice-of-law rules (and thus the outcome of the suit) more predictable in advance: compared to the range of possible venues under § 1391, there are usually only a few places where venue actually makes sense.

Because this provision partially overturns *Erie*-inspired case law, some might question Congress's power to change these rules. But *Van Dusen* and *Ferens* aren't constitutional cases; they ground their holdings in congressional intent.<sup>205</sup> And the question in those cases, unlike in *Klaxon*, wasn't whether federal courts have to parrot state choice-of-law rules; the question was *which* state's choice-of-law rules ought to apply after a venue change that's possible only in the federal system. Surely that choice is "rationally capable of classification" as procedure and thus within Congress's power to regulate the federal courts.<sup>206</sup>

4. *The Atlantic Marine model.*—These three changes to the transfer rules strongly resemble the regime recently established for forum selection clauses by the Supreme Court in *Atlantic Marine*.<sup>207</sup> There, the parties signed a contract selecting a Virginia forum, but when the plaintiff filed suit in Texas, the district court denied the defendant's motion to transfer.<sup>208</sup> The Supreme Court, however, reviewed the denial on a substantially more transfer-friendly standard, giving the forum selection clause "controlling weight in all but the most exceptional cases."<sup>209</sup> In particular, the Court:

- created a presumption favoring transfer to the contractually chosen forum (assuming "the private-interest factors to weigh entirely in [its] favor,"<sup>210</sup> and requiring the plaintiff to "bear the burden"<sup>211</sup> of defeating transfer based only on "public-interest factors"<sup>212</sup>);

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<sup>205</sup> *Ferens*, 494 U.S. at 525–26; *Van Dusen*, 376 U.S. at 635–37.

<sup>206</sup> *Hanna v. Plumer*, 380 U.S. 460, 471–72 (1965). Note that the draft bill also instructs a court considering a transfer not to weigh whether the change in law favors or disfavors any party. The transfer motion should be decided on its merits; the selection of the "right" venue should decide the choice of law, not vice versa. That said, courts could still consider the change in law for other reasons—for instance, the public interest in having a case tried "by federal judges who are familiar with the governing state law." 15 WRIGHT ET AL., *supra* note 195, § 3854, at 353.

<sup>207</sup> *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568 (2013).

<sup>208</sup> *Id.* at 575–77.

<sup>209</sup> *Id.* at 581 (internal quotation marks omitted).

<sup>210</sup> *Id.* at 582.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 583.

- held that “the plaintiff’s choice of forum merits no weight,” because a prior agreement deprives plaintiffs of any freedom to choose “whatever forum they consider most advantageous”,<sup>213</sup> and
- determined that a transfer to enforce a forum selection clause “will not carry with it the original venue’s choice of law rules,” as *Van Dusen* and *Ferens* would otherwise require.<sup>214</sup>

All three measures were intended to “hold[] [the] parties to their bargain,”<sup>215</sup> refusing to allow a plaintiff to benefit by “flout[ing] its contractual obligation.”<sup>216</sup> Similar considerations apply to the draft bill. A plaintiff probably won’t elect the new system of jurisdiction, together with all the accompanying restrictions, if it could secure jurisdiction in its chosen forum today. Because the plaintiff that *does* elect the new system receives a benefit unavailable under current law, it “enjoys no . . . ‘privilege’ with respect to its choice of forum” and “is entitled to no concomitant ‘state-law advantages.’”<sup>217</sup> The goal of the new system is to provide a reasonable forum for cases that ought to be heard there, not to give one side a leg up in litigation.

#### E. Additional Protections

1. *Appealing Erroneous Transfer Denials.*—As noted above, a system with nationwide jurisdiction has to put teeth into the venue transfer standard. But no matter what the statutes say, that’s hard to do if a district court’s transfer decision is effectively unreviewable on appeal.

Take one of the hypotheticals above—a suit against McIntyre’s CEO, filed for no good reason in Hawaii, seven thousand miles from McIntyre’s headquarters. Under current law, if the district judge in Hawaii denies transfer, the CEO has no real recourse. Unless the district judge certifies the issue (which seems unlikely), there’s no statutory jurisdiction over interlocutory appeals from transfer denials, and the collateral-order doctrine won’t help.<sup>218</sup> On appeal after final judgment, any error will be harmless unless the CEO can prove that the case would have come out differently in the other forum.<sup>219</sup> The only other route to review is a writ of mandamus,<sup>220</sup>

<sup>213</sup> *Id.* at 581.

<sup>214</sup> *Id.* at 582.

<sup>215</sup> *Id.* at 583.

<sup>216</sup> *Id.* at 582.

<sup>217</sup> *Id.* at 583.

<sup>218</sup> Compare 28 U.S.C. § 1291 (2012) (permitting appeals after final judgment), and *id.* § 1292(a) (permitting interlocutory appeals, but only from certain equitable rulings), with *id.* § 1292(b) (requiring certification for other interlocutory appeals), and *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009) (construing the collateral-order doctrine narrowly). See generally 15 WRIGHT ET AL., *supra* note 195, § 3855 (discussing appellate review of transfer rulings).

<sup>219</sup> See generally 15 WRIGHT ET AL., *supra* note 195, § 3855.

<sup>220</sup> See *id.* § 3855, at 415 n.32 (mandamus available for certain transfer denials).

an extraordinary remedy requiring a “clear and indisputable” right to relief.<sup>221</sup>

That unfairness to the defendant might be worth it—at least compared to the expense and delay of interlocutory appeals—if the CEO could get the case dismissed for lack of jurisdiction. But without jurisdictional constraints, venue (and even venue transfer) may be a defendant’s only safeguard. A decision carrying so much weight shouldn’t be made without threat of reversal on appeal.

So the draft bill lets defendants take discretionary, interlocutory appeals from transfer denials:

“(3) ADDITIONAL PROTECTIONS.—

“(A) APPEAL.—A court of appeals may permit an appeal from an order denying a transfer under paragraph (2) if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. The appeal shall not stay proceedings in the district court unless the district court or the court of appeals so orders.

This process is designed to permit an appeal without disrupting an ongoing case. It follows the model of Rule 23(f), giving the defendant fourteen days to petition the appellate court, which has full discretion to take the case or not. That offers a chance to correct obvious errors without letting a notice of appeal interrupt proceedings—unless the district or appellate court thinks it’s worth issuing a stay.<sup>222</sup> The provision is also intentionally asymmetric: it allows appeals from erroneous transfer denials, but not erroneous transfer *grants*. While a court can be just as wrong in either direction, bad grants probably won’t cause as much harm. After all, defendants only get transfers that federal judges approve, whereas plaintiffs pick the forum with zero outside oversight. So although a judge might wrongly send a case to an inconvenient forum (like Hawaii), it’s much more likely that a plaintiff would wrongly bring it there in the first place. (And should the judge really mess up, there’s always mandamus.)

2. *Corralling Rogue Plaintiffs.*—Forcing defendants to litigate thousands of miles from home—let alone halfway around the world—is a big deal. Like it or not, nationwide jurisdiction expands the opportunities for vexatious litigation in distant fora designed to extort settlements or just to harass. Though courts can correct those abuses *ex post* through transfer

<sup>221</sup> *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004) (internal quotation marks omitted).

<sup>222</sup> One interesting alternative proposal is to send these appeals to the Judicial Panel on Multidistrict Litigation (MDL) under strict time limits for rendering decisions. See Harvey I. Safenstein & Nathan R. Hamler, *Location, Location, Location: A Proposal for Centralized Review of the Now Largely Unreviewable Choice of Venue in Federal Litigation*, 90 OR. L. REV. 1065 (2012). This alternative departs substantially from the usual structure of appellate review, which is why the draft bill doesn’t go so far. That said, the MDL judges are used to making quick decisions on the right places for suit, and a centralized appeal system might help unify the law on transfer. See *id.* at 1076–77, 1083.

and appellate review, they should also be able to deter them *ex ante* by threat of sanctions.

Recall the hypothetical suit against McIntyre's CEO in Hawaii. Today, that suit would be dismissed for lack of jurisdiction, unless the plaintiff opposed the dismissal, in which case its frivolous arguments or jurisdictional allegations would be sanctionable under Rule 11.<sup>223</sup>

But under the new system, jurisdiction would be available nationwide, and venue would still be proper in Hawaii under the substantial-part test.<sup>224</sup> So the plaintiff wouldn't have to say anything to avoid dismissal, even though the court would almost certainly transfer the case. So long as the vexatious plaintiff didn't oppose the transfer, it might escape sanctions entirely, even after purposelessly compelling the defendant's appearance halfway around the world. (A plaintiff has to allege proper subject matter jurisdiction in the complaint but doesn't have to say anything about personal jurisdiction or venue.)<sup>225</sup>

To address this problem, the draft permits sanctions for clearly unreasonable venue choices:

“(B) SANCTIONS.—Except as otherwise provided by statute, the court shall award fees and other expenses incurred in obtaining an order transferring the action under paragraph (2), unless the court finds that the position of the non-moving party was substantially justified or that special circumstances make an award unjust.

A defendant that successfully obtains a transfer under the new rules gets its expenses and attorney's fees back, unless the plaintiff's choice of venue is “substantially justified.” This is a familiar standard from the Equal Access to Justice Act,<sup>226</sup> and it requires a litigation stance that “a reasonable person would approve.”<sup>227</sup> The court would also have the option to deny sanctions that are unjust under the circumstances, to prevent the sanctions provision itself from becoming an instrument of injustice.

3. *The Option of Default.*—When a suit is filed somewhere truly absurd, the defendant's last resort is simply to default. If an ordinary Manhattan fender bender led to a summons from Montana, hiring a Montana lawyer would be a waste of money; most people would do better

<sup>223</sup> FED. R. CIV. P. 11(b)–(c) (imposing sanctions for frivolous arguments or baseless allegations in any “pleading, written motion, or other paper”).

<sup>224</sup> See 28 U.S.C. § 1391(b)(2) (2012) (making venue proper where “a substantial part of the events or omissions giving rise to the claim occurred”).

<sup>225</sup> See FED. R. CIV. P. 8(a)(1) (requiring “a short and plain statement of the grounds for the court's jurisdiction”). Compare 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1206, at 120–21 & nn.19–21 (3d ed. 2004), with *id.* § 1206, at 44 & nn.21.20–23.75 (Supp. 2014) (describing this rule as addressing subject matter jurisdiction only, not venue or personal jurisdiction).

<sup>226</sup> 28 U.S.C. § 2412(d)(1)(A).

<sup>227</sup> *Pierce v. Underwood*, 487 U.S. 552, 566 (1988).

to ignore the summons, take a default judgment, and raise a collateral attack when the plaintiff tries to enforce it.

With nationwide jurisdiction, though, default is off the table: a summons from the District of Montana always requires a response. Some might welcome that change, but the freedom to default serves important purposes in preventing harassment. If filing in Montana, no matter how absurd, still forces the defendant to hire a Montana lawyer, plaintiffs have a much greater incentive to abuse the system.

So the draft bill suggests one way to preserve defaults:

“(C) DEFAULT JUDGMENTS.—That defendant, if it did not appear in the action, may collaterally attack a default judgment against it for improper venue, if—

“(i) the party requesting jurisdiction was not substantially justified in laying venue in that judicial district; and

“(ii) there was no judicial district in which venue would have been proper within 100 miles of the district embracing the place where such action was pending when that defendant was served with process.

Under this provision, defendants who don’t appear can still attack a judgment later, so long as two conditions are met. First, the venue choice must be so improper that it fails the “substantially justified” test—meaning that the plaintiff might be subject to sanctions. That’s unlikely to produce too many defaults. (Remember that, today, defendants can default whenever the plaintiffs’ jurisdictional theory is *incorrect*, even if they were substantially justified in trying it.)

Second, the case must be filed in a district far away—more than 100 miles away—from the nearest permissible venue. Given that the District of Montana is within 100 miles of the Districts of North Dakota, South Dakota, Wyoming, Idaho, and Oregon, as well as the Eastern District of Washington, that might have to be *very* far away. But a defendant served with a Montana summons, without any colorable claim of venue anywhere nearby, should feel comfortable throwing the papers in the trash—just as she might do today.<sup>228</sup>

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<sup>228</sup> There are five other, more technical portions of the draft bill that deserve at least some comment. First, as noted above, the bill defines “complaint” and “defendant” to include their third-party equivalents. *See supra* text accompanying notes 200–97. Second, it defines “State” to include D.C. and Puerto Rico, which have federal district courts; purely territorial courts present different jurisdictional issues. *Cf.* 28 U.S.C. § 1404(d) (forbidding venue transfers to territorial courts); *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (stating that territorial courts can’t exercise Article III judicial power). Third, a clerical amendment fixes Title 28’s table of contents. Fourth, because the draft bill renders existing nationwide service of process provisions unnecessary—or even harmful, to the extent that they don’t control for venue or choice-of-law issues—these provisions should be repealed. (The same goes for Rule 4(k); to prevent duplication, Congress could repeal it by statute, or the Court could do it through an ordinary Rules amendment.) Fifth and finally, because some effective date is necessary, the

## IV. FUTURE DIRECTIONS

A. *Where Do We Go from Here?*

As this discussion illustrates, pulling state jurisdictional law out of the federal courts means untangling a great many legal doctrines. Some might wonder, at this point, whether the game is worth the candle. Why go through all this trouble, if the system we have works well enough?

The answer is that the system *doesn't* work well enough, at least as compared to what we could have if it were reformed. We've gotten used to a world in which personal jurisdiction doctrine is lousy. Our current system pursues too many goals and achieves none of them well, depriving defendants of certainty without assuring plaintiffs of a convenient forum. The fifty states, with fifty long-arm statutes, have no particular interest in a coherent or workable system—even if they could coordinate well enough to assemble one. Relieving the federal courts of their dependence on state jurisdiction lets us construct a system that responds to national needs as they arise.

More importantly, the details of the draft bill in this Article are far less important than the possibility of new proposals in the future. Reframing the jurisdictional debate as a debate over statutory policy, not constitutional law, lets us think of other ways in which we could improve the litigation process.

For example, this bill largely relies on the current venue rules, which are relatively flexible and which apply across many substantive areas of law. But future proposals might consider more determinate rules, whether inspired by other federal systems like the European Union<sup>229</sup> or based on specific policy concerns like those identified by Klerman.<sup>230</sup> Congress could adopt these venue rules tomorrow, but they wouldn't work properly—or give parties the right incentives—unless we simultaneously accounted for personal jurisdiction. We might not know yet what rules will turn out to be best, but we can safely bet that they won't be promulgated through case-by-case analysis in the Supreme Court.

Thinking of personal jurisdiction as a topic for Congress, not the courts, also lets us explore other ways to improve the litigation system. If an elective system seems to be working well, Congress could make it mandatory. If parties have trouble finding lawyers after their cases are transferred, Congress could ensure that their old attorneys are admitted *pro hac vice* to practice in the new forum. Looking further afield, we could consider changes to related areas such as choice of law or subject matter

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bill adopts language from the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 205, 125 Stat. 758, 764-65.

<sup>229</sup> See *supra* text accompanying notes 159-61.

<sup>230</sup> See *supra* text accompanying note 162.

jurisdiction. For example, if increased flexibility makes the *Klaxon* rule unwieldy, Congress could pass a statute regulating choice of law in federal courts.<sup>231</sup> Or if jurisdictional problems are easier to fix in a federal system, we might consider moving more cases into that system, relaxing the complete diversity requirement or reducing the minimum amount in controversy.<sup>232</sup> While expanding federal jurisdiction is rarely popular, especially in light of the current workload crisis,<sup>233</sup> reasoning from today's workloads gets things backwards. We should figure out what we want the federal judiciary to do, and then decide how large it needs to be—not pick the number of judges out of a hat and define their tasks accordingly. As our economy becomes more national in scope, and as issues of state jurisdiction become ever more complex, we ought to consider the virtues of handling more judicial business at the national level.

And some troublesome cases will never be within the federal judicial power. Suits between citizens of the same state can always be brought in another state's courts, which might choose to retain them rather than dismiss for *forum non conveniens*. While Congress can't regulate these cases directly, it can regulate state courts through the Full Faith and Credit Clause, imposing narrower rules of personal jurisdiction when "prescrib[ing] . . . the Effect" of state "judicial Proceedings" in other states.<sup>234</sup> (Before the Fourteenth Amendment, legislators often proposed regulating jurisdiction in this way.)<sup>235</sup>

Or perhaps Congress could regulate state choice of law by prescribing the effect of state "Acts,"<sup>236</sup> somewhat diminishing the stakes involved in the choice of forum. National choice-of-law rules wouldn't be a panacea: because every court system uses its own procedures, appellate structures, judges, and juries, the forum would still matter even if the substantive law were the same everywhere. (Parties would still have strong preferences as between, say, the Delaware Chancery or the courts of Madison County, Illinois, even if both theoretically applied the same body of substantive

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<sup>231</sup> See, e.g., Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 130 (1993).

<sup>232</sup> See, e.g., Miller, *supra* note 154, at 17–18.

<sup>233</sup> See Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 402–03 (2013) (describing the strain on federal dockets).

<sup>234</sup> U.S. CONST. art. IV, § 1; see Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1206–07 (2009); Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259, 295–96 (2001).

<sup>235</sup> See Sachs, *supra* note 238, at 1254–55, 1263–64, 1268–70 (providing examples of proposed bills).

<sup>236</sup> U.S. CONST. art. IV, § 1; see Whitten, *supra* note 238, at 287.

law.)<sup>237</sup> But making the substantive law more uniform is one way to lower the stakes in forum choice.

These are broad topics, and there's no obviously right way to address them. In the end, no litigation system is perfect. Any rules we create will be manipulated by sophisticated parties, both before and after Congress passes a bill. And anything we do might sometimes produce bad outcomes, or leave certain cases—say, suits between small-timers from distant states—without any convenient solution. But that shouldn't stop us from thinking about how we'd *like* to handle these problems. We shouldn't think of jurisdiction as something settled by the Constitution and largely out of our control. By separating *who* decides from *where* the case is decided, we can reach better answers on both.

### B. *Why Look to Congress?*

In the story so far, the villains have been the Supreme Court's due process jurisprudence and the Court-issued Rule 4(k). That being the case, why does Congress need to act at all? Why can't the Court just clean up its own mess?

There are two reasons. First, this Article takes the Court's due process jurisprudence as given. Critiquing a decision is a different activity than proposing policy reforms. A judicial opinion might be good policy or not, but first it has to be right on the law. Personal jurisdiction is complex enough that the right answers, constitutionally speaking, are usually less obvious than the right policies. And jurisdiction's inherently conflicting goals mean that some problems are almost certain to stick around—until Congress chooses to fix them.

Second, while the Court can always amend Rule 4(k), that isn't a substitute for new legislation. Fixing the problems of expanded jurisdiction means changing our venue statutes. Maybe the Court could do that on its own—using its statutory powers to permit new interlocutory appeals,<sup>238</sup> and employing the Rules Enabling Act's supersession clause to override the venue statutes.<sup>239</sup> But that would be a dramatic break from the Court's current refusal to “extend or limit” venue through the Federal Rules,<sup>240</sup>

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<sup>237</sup> Compare LEWIS S. BLACK, JR., DEL. DEP'T OF STATE, WHY CORPORATIONS CHOOSE DELAWARE 2 (2007), available at [http://corp.delaware.gov/whycorporations\\_web.pdf](http://corp.delaware.gov/whycorporations_web.pdf) (noting the Delaware Court of Chancery invests Delaware corporation law “with a predictability and respect that cannot be matched”), with Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 527 n.85 (2013) (discussing Madison County as “an attractive forum for plaintiffs’ lawyers due to the particular judicial amenability to class certification”).

<sup>238</sup> See 28 U.S.C. § 1292(e) (2012) (empowering the Supreme Court “to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for” by statute); cf. FED. R. CIV. P. 23(f) (using this power for class certification appeals).

<sup>239</sup> See § 2072(b) (“All laws in conflict with such rules shall be of no further force or effect . . .”).

<sup>240</sup> FED. R. CIV. P. 82.



which might provoke Congress to block the change.<sup>241</sup> And because the draft bill's changes to choice of law would alter the ultimate rules of decision, they might be considered substantive and outside the scope of the Rules Enabling Act,<sup>242</sup> even if they're clearly within Congress's power to legislate. Perhaps Congress could give the Court additional authority to get things done, but that still requires some kind of legislation. In the end, fixing personal jurisdiction by judicial rulemaking is only a second-best solution, a legally shaky means to implement changes that would be better negotiated by Congress.

But *would* Congress ever reform personal jurisdiction? Occasionally it succeeds in implementing technical changes that have no obvious constituencies, other than people who want to see the system work well. (Think of the Federal Courts Jurisdiction and Venue Clarification Act of 2011,<sup>243</sup> which was designed to remove confusing language in existing law and not to advantage either side.) But nationwide personal jurisdiction implicates far too many interests to fall in that category.

What kind of political coalition, then, might support the change? Obviously plaintiffs have something to gain, namely additional options for suit. But defendants could benefit, too. The new options would all be in federal courts, which many defendants find more congenial than state ones. And guaranteeing that nearly all cases can be brought in a convenient forum *somewhere* would relieve the hydraulic pressure that encourages states to expand their long-arm statutes, and that encourages state judges to play fast and loose with the constitutional rules.<sup>244</sup>

In fact, guaranteeing a federal forum may be the best way to put teeth into jurisdictional doctrine at the state level. If, in the end, the Constitution permits a narrower scope for jurisdiction than state courts currently exercise, it's difficult to envision five Justices signing onto that vision if it means kicking too many plaintiffs out of court. Reforming federal jurisdiction frees the Court to pursue the doctrine by its best lights at the state level, without the added pressure of leaving some plaintiffs without a remedy.

#### CONCLUSION

Personal jurisdiction is a quagmire for a reason: the doctrine has been relied on to do too much. Because its textual underpinnings seem weak, jurisdiction has become a field of battle among multiple conflicting visions, each with arguments in its favor and each mutually incompatible with the

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<sup>241</sup> See § 2074(a) (giving Congress a seven-month period to review and disapprove any new rules).

<sup>242</sup> See *id.* § 2072(b) (“Such rules shall not abridge, enlarge or modify any substantive right.”).

<sup>243</sup> Pub. L. No. 112–63, 125 Stat. 758.

<sup>244</sup> See, e.g., *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 582 (N.J. 2010) (exercising jurisdiction partly due to “this State’s public policy to provide a forum for relief for workers victimized by defective products”), *rev’d sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

others. Rather than hope that one side wins, the best solution is to stop fighting and to use different tools to achieve each side's different goals. That means turning to the federal courts for sovereign authority, employing venue statutes to achieve convenience, and relying on due process only when fundamental fairness is really at stake.

That transition won't be easy, as the discussion of the draft bill shows. Doctrines of state personal jurisdiction are deeply embedded in federal procedure; just removing them isn't the same as removing them safely. And the rules that should replace them, both of venue and of choice-of-law, are hardly obvious.

But this Article seeks to begin a conversation on these questions, not to end one. Four decades have passed since Albert Ehrenzweig declared that "[j]urisdiction must become venue."<sup>245</sup> Jurisdiction won't become venue just by our wishing it, or by the steady erosion of jurisdictional rules—at least, not in a way that anyone should like. Jurisdiction will only become venue if we choose to *make* it venue. If so, there's a great deal of work to be done.

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<sup>245</sup> Ehrenzweig, *supra* note 2.

## APPENDIX

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**A BILL**

To amend title 28, United States Code, to reform the personal jurisdiction of the district courts in civil actions.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SEC. 1. SHORT TITLE.**

This Act may be cited as the “Personal Jurisdiction Reform Act of 2014”.

**SEC. 2. REFORM OF PERSONAL JURISDICTION.**

(a) **IN GENERAL.**—Chapter 85 of title 28, United States Code, is amended by adding at the end the following:

**“§ 1370. Personal jurisdiction**

“(a) **IN GENERAL.**—In a civil action in a district court of the United States, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant—

“(1) who is subject to the jurisdiction of a court of general jurisdiction in the State where the district court is located;

“(2) when authorized by a federal statute; or

“(3) when requested in the complaint with reference to that defendant and to this section, if exercising jurisdiction is consistent with the United States Constitution and laws.

“(b) **AMENDED COMPLAINTS.**—An amendment to a complaint adding or removing a request for jurisdiction over a defendant previously named in that complaint shall not relate back to the date of the original pleading.

“(c) **VENUE.**—If jurisdiction over a defendant is requested under subsection (a)(3), the following provisions apply:

“(1) **RESTRICTED VENUE.**—

“(A) **RESIDENCE.**—Notwithstanding section 1391(c)–(d), that defendant, if an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, as a defendant, in any judicial district—

“(i) as to which that defendant has consented to suit with respect to the action; or

“(ii) embracing a place in which a similar action filed exclusively against that defendant could be tried in a court of general jurisdiction in a State (or, if there is no such place, in any judicial district in a State)—

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“(I) by which that defendant has been organized or incorporated;

“(II) in which that defendant maintains its principal place of business; or

“(III) as to which that defendant has appointed an applicable agent for service of process.

“(B) NONRESIDENT DEFENDANTS.—Section 1391(c)(3) shall not apply with respect to that defendant. But the joinder of that defendant, if not resident in the United States, shall be disregarded in determining where the action may be brought with respect to other defendants.

“(C) FALLBACK VENUE.—Section 1391(b)(3) shall not apply. If there is no district in which the action may otherwise be brought as provided in section 1391, as modified by this section, it may be brought—

“(i) in a judicial district in which any defendant resides, or in which any party resides if each defendant resides in at least one district within 100 miles thereof;

“(ii) if there is no such district, in a judicial district in which any party resides; or

“(iii) if there is no such district, in any judicial district.

“(D) REMOVAL.—Removal to the district court shall not establish proper venue as to that defendant.

“(2) TRANSFER.—

“(A) IN GENERAL.—The court shall grant a proper motion by that defendant for transfer under section 1404(a), unless it finds that the convenience of parties and witnesses or the interest of justice would not be served thereby.

“(B) EQUALITY OF PARTIES.—When acting under this paragraph, the court shall accord no heightened preference to the chosen forum of the party requesting jurisdiction.

“(C) CHOICE OF LAW.—The court to which an action is transferred under this paragraph shall apply the choice-of-law principles of the State in which it sits. Transfer shall be granted or denied without regard to whether the effect of this subparagraph favors or disfavors any party.

“(3) ADDITIONAL PROTECTIONS.—

“(A) APPEAL.—A court of appeals may permit an appeal from an order denying a transfer under paragraph (2) if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. The appeal shall not stay proceedings in the district court unless the district court or the court of appeals so orders.

“(B) SANCTIONS.—Except as otherwise provided by statute, the court shall award fees and other expenses incurred in obtaining an order transferring the action under paragraph (2), unless the court finds that the

position of the non-moving party was substantially justified or that special circumstances make an award unjust.

“(C) DEFAULT JUDGMENTS.—That defendant, if it did not appear in the action, may collaterally attack a default judgment against it for improper venue, if—

“(i) the party requesting jurisdiction was not substantially justified in laying venue in that judicial district; and

“(ii) there was no judicial district in which venue would have been proper within 100 miles of the district embracing the place where such action was pending when that defendant was served with process.

“(d) DEFINITIONS.—As used in this section—

“(1) ‘complaint’ includes any pleading that states a claim for relief;

“(2) ‘defendant’ includes any party against whom relief is sought; and

“(3) ‘State’ includes the District of Columbia and the Commonwealth of Puerto Rico.”.

(b) CLERICAL AMENDMENT.—The table of sections for such chapter is amended by adding at the end the following:

“1370. Personal jurisdiction.”.

**SEC. 3. REPEAL OF OBSOLETE PROVISIONS RELATING TO SERVICE OF PROCESS.**

The following provisions are hereby repealed:—

(a) [Rule 4(k) of the Federal Rules of Civil Procedure.]

(b) [ . . . ]

**SEC. 4. EFFECTIVE DATE.**

The amendments made by this Act—

(a) shall take effect upon the expiration of the 30-day period beginning on the date of the enactment of this Act; and

(b) shall apply to—

(1) any action that is commenced in a United States district court on or after such effective date; and

(2) any action that is removed from a State court to a United States district court and that had been commenced, within the meaning of State law, on or after such effective date.

