Vanderbilt Law Review

Volume 53
Issue 1 *Issue 1 - January 2000*

Article 14

1-2000

Constructing Alternative Avenues of Jurisdictional Protection: Bypassing Burnham's Roadblock Via § 1404(a)

Phillip F. Cramer

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

 Part of the Constitutional Law Commons, and the Jurisdiction Commons

Recommended Citation

Phillip F. Cramer, Constructing Alternative Avenues of Jurisdictional Protection: Bypassing Burnham's Roadblock Via § 1404(a), 53 *Vanderbilt Law Review* 311 (2000)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol53/iss1/14

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Constructing Alternative Avenues of Jurisdictional Protection: Bypassing *Burnham*'s Roadblock Via § 1404(a)

I. INTRODUCTION 312
II. THE IMPORTANCE OF FORUM 315
III. DEVELOPMENT OF CONSTITUTIONAL JURISDICTION JURISPRUDENCE TOWARD RECOGNITION OF WHY FORUM MATTERS 319
A. International Shoe *and its Progeny* 320
B. *Recognition of Jurisdiction as the Imposition of a Regulatory Regime* 325
C. *Determining the Proper Regulatory Regime* 329
D. *Extending Protection to All Assertions of Jurisdiction* 331
IV. *BURNHAM* AND THE DEATH OF CONSTITUTIONAL JURISDICTIONAL PROTECTION FROM A FORUM'S ASSERTION OF GENERAL JURISDICTION 335
V. BUILDING AN ALTERNATIVE AVENUE OF PROTECTION—FORUM NON CONVENIENS 339
A. *The "Inconvenient" Forum* 341
B. *The Inappropriate Forum*—Gulf Oil Corp. v. Gilbert 342
C. *Using Forum Non Conveniens to Ensure the Appropriate Forum* 344
VI. THE FEDERAL TRANSFER STATUTE 346
A. *Determining Appropriate Fora* 348
B. *Finding the Most Appropriate Forum* 349
1. Convenience to the Parties 353
2. Convenience of the Witnesses and Access to Evidence 354
3. Interests of Justice 355
VII. DETOURING AROUND *BURNHAM*'S ROADBLOCK: USING § 1404 TO INSERT FUNDAMENTAL FAIRNESS INTO FORUM SELECTION 357
A. *Moving Beyond the Rhetoric* 357
B. *The Proof is in the Practice* 360
1. Familiarity with the Applicable Law 361
2. Method of Asserting Jurisdiction 362
3. Local Interests Decided at Home 363

4. Plaintiff's Choice of Forum 364
5. Location of Witnesses 366
6. Balancing Regulatory Interests 367
C. *The Critics Provide Credence* 370
VIII. OVERCOMING POTHOLES ALONG THE WAY 373
A. *Transferring Without Review* 373
B. *Transfers Are "Merely a Change of Courthouses"* 375
1. Overcoming *Van Dusen* and *Ferens* 378
2. Protection Without Exceptions 384
IX. CONCLUSION 386

I. INTRODUCTION

A plaintiff from Maine sues an insurance company, incorporated in Maine and having its principal place of business in Maine, on a loss incurred in Maine under a contract negotiated, written, and executed in Maine. The plaintiff files the suit in Alabama to take advantage of its liability law, its statute of limitations, its juries, its rules of evidence, and its posture toward plaintiffs. The plaintiff serves a representative of the insurance company traveling in Alabama en route to an industry convention. For all the reasons the plaintiff seeks a forum in Alabama, the defendant wishes to avoid that forum. The importance of forum and the judicial tools available to ensure that the most appropriate forum adjudicates disputes are the subjects of this Note.

Prior to *Burnham v. Superior Court of California*,[1] a defendant could successfully claim that Alabama's assertion of general jurisdiction should be determined under the constitutional fundamental fairness doctrine developed in the *International Shoe Co. v. Washington*[2] and *Rush v. Savchuk*[3] line of cases. The defendant would explain the regulatory nature of jurisdiction. The defendant would ask the trial court to hold that Alabama's assertion of jurisdiction violates the defendant's due process rights because Alabama lacks a regulatory interest in adjudicating the dispute. The defendant would illustrate Maine's regulatory interests in adjudicating the meaning of contracts, setting policies, and protecting parties whose conduct occurred within its borders.

1. Burnham v. Superior Court, 495 U.S. 604 (1990).
2. International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See infra* Part III.A.
3. Rush v. Savchuk, 444 U.S. 320 (1980). *See infra* Part III.A.

Burnham, with its appeal to tradition and black letter Aristotelian principles, closed this avenue of protection.[4] It held that a forum's assertion of general jurisdiction based on physical presence unrelated to the cause of action was per se constitutional. Defendants must now seek alternative routes to ensure that the most appropriate forum imposes its regulatory regime on the underlying dispute. In the wake of *Burnham*, a small handful of scholars predicted that forum non conveniens doctrine and the Federal Transfer Statute, 28 U.S.C. § 1404(a), might become that avenue by allowing trial courts to reinsert fundamental fairness into jurisdiction determinations. This Note illustrates that § 1404(a) accomplishes this task, although judges and the legal community may not always realize that this is occurring.

Part II explains why forum matters. It examines the phenomenon of forum-shopping and the underlying reasons why plaintiffs (and defendants) favor some fora over others. The Part argues that the selection of a forum embodies more than simply choosing a physical location. The selection signifies the imposition of an entire regulatory regime. This Part illustrates how forum, more than anything else, affects the distribution and adjudication of justice in this country.

Part III explores the evolution of constitutional jurisdictional principles that came to recognize the importance of forum. By focusing on *International Shoe* and its progeny, the section traces the development of constitutional fundamental fairness safeguards against a forum's assertion of general jurisdiction. It explains that when the Supreme Court applied the fundamental fairness doctrine, it was really concerned with the imposition of a regulatory regime. The Court made ad hoc value judgments concerning the appropriateness of a forum's regulatory regime. Subsequent developments in jurisdictional jurisprudence appeared to incorporate fundamental fairness into general jurisdiction,[5] thereby ensuring that only those forums with regulatory interests will adjudicate particular disputes.

Part IV shows how *Burnham v. Superior Court* closed this avenue of constitutional protection. It examines how the Supreme Court's

---

4. *See, e.g.*, Stanley E. Cox, *Would that Burnham Had Not Come to Be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, An Explanation of Why Transient Presence Jurisdiction is Unconstitutional, and Some Thoughts about Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497, 499 (1991); Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 273-76 (1991); Bruce Posnak, *The Court Doesn't Know its* Asahi *from its* Wortman*: A Critical View of the Constitutional Constraints of Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 877 (1990); Scott D. Irwin, Note, Burnham v. Superior Court of California*: The Final Word On Transient Personal Jurisdiction?*, 53 OHIO ST. L.J. 613, 628 (1992).

5. General jurisdiction includes "generally present" and "transient" jurisdiction. *See infra* note 47.

decision in *Burnham* foreclosed further application of the fundamental fairness doctrine developed in the *International Shoe* line of cases to determinations of the constitutionality of general jurisdiction. This Part addresses the criticism and the black letter basis of the decision.

Part V proposes an alternative to *Burnham*. It traces the development, purpose, and application of the common law doctrine of forum non conveniens. The Part explores the Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*,[6] in which the Court borrowed heavily from the fundamental fairness standard of *International Shoe*. *Gulf Oil* incorporated the notion of forum as regulatory regime into forum non conveniens determinations.

Part VI begins the discussion of the Federal Transfer Statute, 28 U.S.C. § 1404. It explains the statute's purpose, legislative history, use, and application in the federal judiciary. The Part illustrates how district courts, in their application of § 1404, have developed numerous "factors" that go beyond mere "convenience" to ascertain the appropriateness of transfer.

Part VII looks beyond the rhetoric of convenience and concentrates on the many factors that district courts use in deciding § 1404(a) motions. The Part reveals that some trial judges actually conduct a fundamental fairness analysis to impose the proper regulatory regime. It notes that most scholars have expressed disdain at the plethora of factors and have described the entire § 1404(a) jurisprudence as one marked by chaos and inconsistency. These scholars fail to realize that § 1404(a) is accomplishing what the Supreme Court attempted to frustrate in *Burnham*: the use of ad hoc value judgments under the auspices of fundamental fairness to select the proper forum for a cause of action.

Finally, Part VIII examines the obstacles that may prevent § 1404(a) from actually carrying out the goals of fundamental fairness. It questions the Supreme Court's decisions in *Van Dusen v. Barrack*[7] and *Ferens v. John Deere Co.*[8] The Part provides alternatives and exceptions to the rules developed by those cases. It also answers those who argue that the lack of appellate review of § 1404(a) motions presents a major problem. This Part explains that while these concerns are understandable, they are rooted in appeals to black letter rules and undervalue the need for trial judge discretion to make determinations on a case-by-case basis. Finally, it will advise against seduction

6. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).
7. Van Dusen v. Barrack, 376 U.S. 612 (1964).
8. Ferens v. John Deere Co., 494 U.S. 516 (1990).

by black letter rhetoric and support the ad hoc, case-by-case approach used presently, though surreptitiously, by trial judges.

II. THE IMPORTANCE OF FORUM

The judicial branch is designed to adjudicate disputes between parties, to provide remedies for violations of rights, and to clarify and announce the laws of the sovereign.[9] Sovereigns[10] vest power in their judicial branch as part of their overall regulatory regime.[11] As a part of this regime, it makes intuitive sense that the courts' function is to apply only the laws of its sovereign.[12] For when a forum "purports to do otherwise, it is not enforcing foreign rights but choosing a foreign rule of decision as the appropriate one to apply to the case before it."[13] Yet courts do not merely apply law, they create it.[14] Just as it makes sense that a forum should only apply its own laws, it should only create laws on behalf of its sovereign; for it contravenes the American federal system of governance for courts of one sovereign to make laws for another.[15]

Before a plaintiff brings a suit, his or her attorney will often research the optimal venue in which to file. This process of selecting the

---

9. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION (1994) (discussing the role of the federal judiciary); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1996) (same); Barry Friedman, *Legal Theory: A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U.L. REV. 1 (1990) (same).

10. The use of the term "sovereign" includes any governmental power, but in the context of this Note it refers primarily to states.

11. *See, e.g.*, U.S. CONST. art III. *See also* CHEMERINSKY, *supra* note 9, at 2 (explaining that federal courts were designed "to effectively implement the powers of the natural government"). Black's Law Dictionary provides the following definition of the judicial branch: "An agency of the sovereign created by it directly or indirectly under its authority . . . established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof . . . ." BLACK'S LAW DICTIONARY 425 (4th ed. 1968) (citing Isbill v. Stovall, 92 S.W.2d 1067, 1070 (Tex. Civ. App. 1936)).

12. *See* MYERS MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 5 (1981) ("Rules are not self-applying but are wielded by people acting as decision makers.").

13. Reich v. Purcell, 432 P.2d 727, 729 (Cal. 1967) (en banc); *see* Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There is No Law But Forum Law*, 28 VAL. U. L. REV. 1, 3 (1993) ("[C]ourts exist only to intorpret, create and apply their own government's laws.").

14. *See generally* Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573 (discussing role of the courts and concluding courts possess law-making power as long as deciding cases remains the essential function of the courts).

15. One need look no further than the definition of sovereign, which is "[A] person, body, or state in which independent and supreme authority is vested. . . ." BLACK'S LAW DICTIONARY 1395 (6th ed. 1990).

most favorable forum has evolved into today's practice of forum shopping.[16] Plaintiffs' lawyers realize that when they select a forum they are choosing an entire decision-making regime, complete with its own "substantive" law, "procedural" law, disposition towards plaintiffs, jury pool, and judicial idiosyncrasies.[17] In his dissent in *Stewart Organization, Inc. v. Ricoh Corp.*, Justice Scalia explained that "[v]enue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue. Suit might well not be pursued, or might not be as successful, in a significantly less convenient forum."[18] This observation only makes sense if the use of the word "convenient" assumes a meaning not limited to physical convenience. It is doubtful that physical inconvenience would play an outcome determinant role in a case. With advances in modern transportation and telecommunications, much of the physical inconvenience of a far off location is illusory. Thus Scalia's statement, as well as the prevalence of forum shopping engaged in by both plaintiffs' and defense attorneys, makes sense only if venue includes certain regulatory functions and legal consequences quite apart from the importance of physical location.[19]

---

16. *See* J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) ("Forum-shopping, among both federal and state courts, is a national legal pastime."). *See generally* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267 (1996).

17. *See* Maier & McCoy, *supra* note 4, at 255 (explaining that "selection of the forum selects an entire decision making regime"). *But see* Posnak, *supra* note 4, at 899 & n.130 (explaining somewhat naively that jurisdiction never "necessarily and directly" affects a case's outcome).

18. Stewart Org., v. Ricoh Corp., 487 U.S. 22, 39-40 (1988) (Scalia, J., dissenting). Ironically, Justice Scalia wrote the majority opinion in *Burnham v. Superior Court*, 495 U.S. 604 (1990).

19. Some authors, however, do not acknowledge these factors associated with a forum apart from the forum's substantive law. *See, e.g.*, Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259, 1283 (1986) ("As a tactical matter, it is difficult to see why a plaintiff would continue to prefer a forum far removed from the situs of the dispute once the court has rejected the argument that the forum's substantive law should govern."). This may be explained by the fact that venue is seldom treated at any considerable length in many introductory civil procedure classes. *See* Stowell R. R. Kelner, Note, *"Adrift on an Unchartered Sea": A Survey of Section 1404(a) Transfer in the Federal System*, 67 N.Y.U. L. REV. 612, 613 n.8 (1992) (illustrating the scant attention paid to venue in civil procedure casebooks); *see also* JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS, 326-57, 245-325, 62-244 (7th ed. 1997) (dedicating half as many pages to venue and forum non conveniens as subject matter jurisdiction and one-fifth of the pages dedicated to personal jurisdiction); GEOFFREY C. HAZARD JR. ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE (7th ed. 1994) (devoting 34 pages to venue and forum non conveniens in its 300 page chapter on "Choosing the Proper Court"); MAURICE ROSENBERG ET AL., ELEMENTS OF CIVIL PROCEDURE 335-50 (5th ed. 1990) (dedicating 15 pages to venue, transfer of venue, and forum non conveniens of the 172 pages discussing the courts' adjudicatory authority). Such scant treatment may be explained by commentators seeing questions of jurisdiction and choice of law

Plaintiffs' lawyers often go to great lengths in evaluating prospective forums because the selection has an inescapable, if not determinative, influence on the result—a result that cannot be nullified by the forum's decision to apply the rules of some other sovereign.[20] A party may prefer a forum or venue for a number of reasons beyond the desire to take advantage of more favorable substantive law. Such reasons include: the party's convenience; preference for judges in the chosen forum; preference for the substantive and/or procedural laws in a given forum; jury biases and propensities, including disposition toward plaintiffs and defendants as well as size of awards; the belief that potential jurors in a particular forum are more receptive to the filing party's position; regional biases; local public policy preferences; and docket congestion.[21]

Empirical examples of how these factors influence the choice of forum are readily apparent. Texas has become a very favorable place for a plaintiff to file a suit. During the 1980s, Texas's substantive and procedural laws became considerably more pro-plaintiff, while Texas juries became famous (or infamous) for large awards.[22] Texas courts provide a forum for almost any personal injury or wrongful death action over which they can constitutionally obtain jurisdiction.[23] Not to be outdone, Madison and St. Clair counties in Illinois have worked hard to become "nationally known for pro-plaintiff verdicts and very large damage awards."[24] Alabama has likewise tweaked its laws and policies to attract prospective plaintiffs. One small county in the state, Barbour County, became "nationally recognized [by defendants] as tort hell."[25] Courts in each of these fora represent their respective sovereign's policies and values. In other words, they are a functional part of their sovereign's regulatory regime. Given the propensity for

---

as one in the same, and interrelating forum with venue and transfer issues. Unfortunately, this Note illustrates that this is not often the explanation. *See infra* Part VII.C.

20. *See* Maier & McCoy, *supra* note 4, at 255. The authors explain that plaintiffs go to "great lengths to obtain a forum likely to select policies that will produce results more favorable than those likely to obtain in other available fora, and defendants regularly resist such a forum for precisely the same reasons that led the plaintiff to seek it." *Id.* at 266-67 (footnote omitted).

21. *See id.* at 283 (collecting various factors); Norwood, *supra* note 16, at 272 (same).

22. *See* Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 354 & n.15 (1992) (citing empirical and anecdotal evidence of Texas's claim to fame as a plaintiff's mecca); *see also* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 n.1 (1995) (providing illustrations of the lengths plaintiffs will go to in order to forum-shop).

23. *See* Albright, *supra* note 22, at 354-55.

24. Norwood, *supra* note 16, at 278.

25. Gregory James, *Where the Torts Blossom*, TIME, Mar. 20, 1995, at 38.

abuse and injustice, forum shopping has drawn the ire of judges and commentators who condemn the practice.[26]

Anecdotal evidence of plaintiff forum shopping, however, does not prove that forum shopping results in the imposition of an improper regulatory regime. A recent study by Professors Clermont and Eisenberg illustrates the importance of forum shopping and its real effects on individual justice.[27] The study collected vast amounts of data to show how the choice of a forum affects a plaintiff's chance of winning.[28] The research found that the plaintiff's rate of winning dropped from 58% in cases in which a transfer was not granted to 29% in transferred cases.[29] The findings and statistical analysis demonstrate that forum does affect outcome.[30] This conclusion held true even after controlling for the merits of the case, procedural progress at termination, method of disposition, jurisdictional basis of cases, and additional variables.[31]

Professors Clermont and Eisenberg observed that even though plaintiffs selected a favorable forum and the applicable rule of decision did not change after transfer to a more appropriate forum, the plaintiff's "win rate markedly drops . . . thus, the supposedly procedural device of transfer appears to have a remarkably substantive effect."[32] Another study of more limited data examined the final outcomes in nineteen Supreme Court cases on judicial jurisdiction. It found that the plaintiffs' success rate dropped from 83% in cases in which jurisdiction was upheld to 0% in cases in which it was not.[33]

---

26. *See, e.g.*, Norwood, *supra* note 16, at 301 ("While thousands of cases contain general unsupported dicta criticizing forum-shopping as wrong, our judicial system, in practice, supports shopping for juries and laws.") (footnotes omitted). *But see* Kelner, *supra* note 19, at 638 ("Plaintiff forum shopping is not an evil to be avoided, but rather is an inherent part of our federal court network.").

27. *See generally* Clermont & Eisenberg, *supra* note 22.

28. *See id.* at 1507.

29. *See id.*

30. *See id.*

31. *See id.* at 1518-25. *But see* David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 WASH. U. L.Q. 1479, 1482 (1997) (outlining flaws in Clermont and Eisenberg's methodology).

32. Clermont & Eisenberg, *supra* note 22, at 1514. The authors noted that this illustrates the effects of the transferee court's own procedural law, the local variations of which could affect outcome. In support of this observation they cite Professors Maier and McCoy's thesis of a unified theory for judicial jurisdiction and choice of law. *See supra* note 4.

33. *See* Clermont & Eisenberg, *supra* note 22, at 514 n.18 (citing Christopher D. Cameron & Keven R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 776-78, 817-32 (1995)). *But see* Erwin Chemerinsky, *Assessing Minimum Contacts: A Reply to Professors Cameron and Johnson*, 28 U.C. DAVIS L. REV. 863, 864-65 (1995) (questioning the study).

Professors Clermont and Eisenberg submit that the most powerful explanation of the disparity in success rates involves forum-shopping, insofar as the plaintiff's success rate declines because the plaintiff lost an unfair forum advantage.[34] Courts have long sensed what Professor Clermont and Eisenberg empirically demonstrated. Sensitivity to the importance of forum led to the development of judicial protection for defendants. Courts' first recognition of the importance of forum choice came in the field of jurisdiction. The Supreme Court subsequently created constitutional protection under the Due Process Clause to protect defendants from the assertion of jurisdiction by an inappropriate regulatory regime.[35] Unfortunately, the Court recently blocked this avenue of protection.[36]

III. DEVELOPMENT OF CONSTITUTIONAL JURISDICTION JURISPRUDENCE TOWARD RECOGNITION OF WHY FORUM MATTERS

To understand the development of forum and the Supreme Court's subsequent unwillingness to recognize its importance, it is helpful to review the development of constitutional protection against jurisdiction assertions by inappropriate fora. In the beginning there was *Pennoyer v. Neff*. Decided by the U.S. Supreme Court in 1877, it established two broad categories of jurisdiction, in personam and attachment of property.[37] The former comprises generally present, temporarily present, and minimum contacts/long-arm jurisdiction,[38] while the latter covers in rem, quasi in rem, and *Seider*-style juris-

---

34. *See* Clermont & Eisenberg, *supra* note 22, at 1514. The authors continue:

> Thus, the forum-shopping explanation of the transfer effect leads to a corollary: the effect of transfer in changing outcome is good [because] [t]ransfer removes the plaintiff's forum advantage when the interest of justice so counsels, and therefore removes the plaintiff's opportunity to gain an unjust victory in litigation or to achieve an unjust settlement.

Id. at 1515. *But see* Steinberg, *supra* note 31, at 1481 n.6 ("Professor Clermont and Professor Eisenberg do not discuss the radical implications of their suggestion that transfers lead to more accurate outcomes. Accurate substantive results should be the preeminent goal of litigation.").

35. *See infra* Part III.

36. *See infra* Part IV.

37. Peunoyer v. Neff, 95 U.S. 714, 724 (1877). *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 35 (1990) (describing the difference between in rem and in personam jurisdiction as well as their historical and logical roots). *See generally* Daniel O. Bernstine, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979) (discussing various types of personal jurisdiction); Irwin, *supra* note 4, at 617 n.22.

38. *See* Shaffer v. Heitner, 433 U.S. 186, 199 (1977) ("[U]nder *Pennoyer* state authority to adjudicate was based on the jurisdiction's power over either persons or property. This fundamental concept is embodied in the very vocabulary which we used to describe judgments.").

diction. *Pennoyer v. Neff* held that a forum may constitutionally assert jurisdiction over a defendant who was "generally" or temporarily present.[39] It also held that in rem jurisdiction did not violate a defendant's due process rights.[40] Later cases, *Harris v. Balk*[41] and *Seider v. Roth*,[42] held that a forum may constitutionally assert quasi in rem jurisdiction and gain jurisdiction over an insured defendant through the attachment of his or her insurance contract. These three cases create the basis of traditional black letter jurisdiction analysis.

A. International Shoe *and its Progeny*

In 1945, the Supreme Court started to provide constitutional protection that deviated from traditional black letter jurisprudence. When the Court decided *International Shoe Co. v. Washington*,[43] it took the first step toward a reconceptualization of jurisdiction.[44] The Court no longer split jurisdiction between jurisdiction over the person and jurisdiction over property.[45] All jurisdiction was over the person.[46] This concept embraced general jurisdiction,[47] which encompassed both

---

39. *Pennoyer*, 95 U.S. at 732-33.

40. *See id.* at 733.

41. Harris v. Balk, 198 U.S. 215, 221-24 (1905).

42. Seider v. Roth, 216 N.E.2d 312, 315 (N.Y. 1966).

43. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

44. *See* Borchers, *supra* note 37, at 54 ("*International Shoe* has been widely heralded as the great 'liberator' of personal jurisdiction from the formalisms of *Pennoyer*, and it is undoubtedly true that *International Shoe* ushered in an era of expanded jurisdictional reach for state courts.") (footnote omitted); Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 415-16 (1981) (describing *International Shoe* as a conceptnal break from *Pennoyer*); Harold K. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 783-84 (1983) (same); Maier & McCoy, *supra* note 4, at 263 (discussing the new, flexible approach *International Shoe* ushered in, representing a departure from *Pennoyer*); Robert T. Mills, *Personal Jurisdiction Over Border State Defendants: What Does Due Process Require?*, 13 S. ILL. U. L. REV. 919, 919 (1989) (explaining *International Shoe*'s break from *Pennoyer*). *But see* David Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 693 (1987) (stating that "*International Shoe* is consistent with *Pennoyer*'s conceptnal framework").

45. The Court in *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977), explained that

> [i]f a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated '*in personam*' and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called '*in rem*' or '*quasi in rem*.'

46. *See International Shoe Co.*, 326 U.S. at 316 ("Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him.") (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1877)).

47. General jurisdiction permits a forum to assert jurisdiction over a cause of action that did not necessarily arise within that forum. It includes transient jurisdiction and generally present jurisdiction. Transient jurisdiction allows a forum to assert jurisdiction over any defendant who

generally present and temporarily present varieties, and special, or specific, jurisdiction,[48] which included for all intents and purposes in rem, quasi in rem, *Seider*-style, and long arm jurisdiction.[49] The Court in *International Shoe* wanted to ensure that the proper regulatory regime could constitutionally assert jurisdiction over the cause of action. It chose not to apply the rules developed in *Pennoyer v. Neff* to an out-of-state defendant. Rather, the Court considered the fundamental fairness of a court in the state of Washington asserting jurisdiction over the defendant under the particular facts of the case.[50]

The Court held that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'tradi-

---

is found within the state. Generally present jurisdiction permits a forum to assert jurisdiction over any defendant who has continuous and systematic contact with the forum.

48. For a definition of special or specific jurisdiction, see Maier & McCoy, *supra* note 4, at 256 n.21.

49. *See* Cox, *supra* note 4, at 522 n.99 (citing those "[r]elatively few writers [who] have explored in any detail the differences between specific vs. general jurisdiction"); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-37 (1966) (coining the terms nearly 20 years prior to the Supreme Court's use of them). The Supreme Court adopted these terms in *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 (1984). It explained them in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.15 (1985). *See generally* Albright, *supra* note 22, at 369 (explaining the distinction between and the relative power provided to the courts by general and specific jurisdiction); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Maier & McCoy, *supra* note 4, at 250 ("The notion of general jurisdiction embodies the presumption that it is fair to subject the defendant to the rigors of litigation in any place where the defendant is generally present, either physically or through a regular course of business or other contacts, even if the cause of action arose in another state and that other state alone possesses prescriptive jurisdiction over the issues in the case."); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 537 n.47 (1995) (providing definitions); Douglas A. Mays, Note, Burnham v. Superior Court*: The Supreme Court Agrees on Transient Jurisdiction in Practice, But Not in Theory*, 69 N.C. L. REV. 1271, 1276 n.51 (1991) (" 'General jurisdiction' is a court's ability te assert personal jurisdiction regardless of the relationship between the cause of action and the defendant's activities in, or affecting, the forum state. In contrast, 'specific jurisdiction' is the power to assert jurisdiction in claims arising out of activities that occur in the forum state or that have a direct effect there.").

50. *See International Shoe Co.*, 326 U.S. at 316. In deciding the fairness of jurisdiction, the Supreme Court looked to the defendant's activities in the state of Washington, which consisted of contracting with between 11 and 13 sales persons under the direct control of sales managers located in St. Louis between 1937 and 1940. *See id.* at 313-14. The sales representatives worked primarily in Washington and International Shoe compensated them by commission. *See id.* The sales agents could only exhibit products and solicit orders, although some set up showrooms and performed other activities to secure orders for International Shoe. *See id.* All the merchandise shipped into Washington was invoiced at the place of shipment, from where collections were also made. *See id.* at 314. The cause of action arose when Washington sought to collect unemployment taxes based on commissions paid by the firm to its Washington-based sales persons. *See id.* at 311-12.

tional notions of fair play and substantial justice.' "[51] The Court struggled to define both "minimum contacts" and "traditional notions of fair play and substantial justice."[52] It noted that a test of fair play might include an estimate of the inconvenience that would result to the defendant corporation from a trial away from its home or principal place of business.[53] The decision had the effect of expanding state jurisdiction through long-arm statutes but restricting state jurisdiction in areas that *Pennoyer*, *Harris*, and *Sieder* considered constitutional.[54] It also brought "a flood of commentary."[55] *International Shoe* thus advanced the notion that a forum with substantial regulatory interests in the underlying dispute should be constitutionally able to assert jurisdiction over the cause of action. It signified the replacement of black letter rules with regulatory interest and appropriateness analysis.

The Supreme Court acknowledged this substitution in *Shaffer v. Heitner*.[56] It held that *International Shoe* had supplanted traditional rules that had placed jurisdiction into two categories, presence and attachment.[57] The Court explicitly substituted the fundamental

---

51. *See id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

52. *See id.* at 316-20. The Court explained that continuous and systematic presence suffices, but casual contact does not. However, the Court stated that when the cause of action arises from the corporation's activities within the forum, an assertion of jurisdiction does not offend notions of fair play and substantial justice. *See id.* The Court concluded that "[w]hether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.* at 319.

53. *See id.* at 317.

54. The Court in *Shaffer v. Heitner*, 433 U.S. 186, 199-200 (1977), explained that

> *Pennoyer* sharply limited the availability of *in personam* jurisdiction over defendants not resident in the forum State. If a nonresident defendant could not be found in a State, he could not be sued there. On the other hand, since the Stato in which property was located was considered to have exclusive sovereignty over that property, *in rem* actions could proceed regardless of the owner's location.

See also Borchers, *supra* note 37, at 54 ("*International Shoe* has been widely heralded as the great 'liberator' of personal jurisdiction from the formalisms of *Pennoyer*, and it is undoubtedly true that *International Shoe* ushered in an era of expanded jurisdictional reach for state courts.") (footnote omitted); Cox, *supra* note 4, at 509 ("*Shaffer* explicitly recognized that the constitntional shift to minimum contacts meant both a weakening and strengthening of stato jurisdictional power.").

55. *See* Borchers, *supra* note 37, at 57 & n.227 (citing the "flood of commentary").

56. *See* Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

57. *See id.* at 212 ("We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.") In a footnote, the Court explained that "[i]t would not be fruitful for us te re-examine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled." *Id.* at 212 n.39. *See also* Maier & McCoy, *supra* note 4, at 264.

fairness test of *International Shoe* for the black letter approach of *Pennoyer* and *Harris* in quasi in rem cases.[58] In dicta, the Court also introduced fundamental fairness considerations into in rem cases.[59] The case also illustrates the regulatory nature of jurisdiction and sheds light on the factors that make up "minimum contacts." The Court did not consider the convenience of the parties as an overriding, or even important, factor.[60] Rather, it found the place of the defendant's activities crucial to its determination of minimum contacts.[61] Since the tort did not arise from the defendant's action within the forum, the Court held the forum's exercise of jurisdiction fundamentally unfair, even though the Court found that the forum's substantive tort law should apply.[62] This distinction between choice of jurisdiction and choice of law is one of the most pervasive dichotomies in conflicts law.[63] This distinction has inevitably been at the core of much conflicts law confusion.[64]

Concern over protecting defendants from assertions of jurisdiction by inappropriate fora led the Supreme Court, in *Rush v.*

---

58. *See Shaffer*, 433 U.S. at 209; *see also* Borchers, *supra* note 37, at 64 (noting that *Shaffer* found 'quasi-in-rem holdup' an unconstitutional jurisdictional device). In his concurrence in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 36 (1991), Justice Scalia explained that the Court in *Shaffer*

> invalidated general *quasi in rem* jurisdiction, saying that 'traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage.

Scalia noted his view that such cases are wrongly decided. *See id.* The Court declined to extend *Shaffer* in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806 (1985), to jurisdiction over absent class-action plaintiffs. The Court did, however, recognize the link between choice of jurisdiction and choice of law. *See id.* at 823.

59. *See Shaffer*, 433 U.S. at 204-06, 211; *see also* Stewart, *supra* note 19, at 1274 ("*Shaffer* has sounded the death knell of jurisdiction based upon seizure of property without an evaluation of the contacts which the presence of such property represents between the defendant and the forum."). Due to the nature of the dispute, a purely in rem case will rarely be fundamentally unfair to the defendant because the dispute relates to the defendant's property and presumably the defendant's contacts with the state.

60. *See Shaffer*, 433 U.S. at 213-14 (discussing primarily state interest in regulating the dispute).

61. *See id.* at 216.

62. *See id.*

63. This distinction, however, seems unwarranted given the Supreme Court's recognition of the relationship between the minimum contacts analysis for personal jurisdiction and the nearly identical significant relationship tests for the due process limitations on choice of law. *See, e.g.*, *Phillips Petroleum Co.*, 472 U.S. 797; Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Clay v. Sun Office, Ltd., 377 U.S. 179 (1964); Watsons v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

64. *See* Cox, *supra* note 13, at 5 n.7 ("The Court unfortunately and mistakenly has usually dichotomized personal jurisdiction and choice of law theory.").

Savchuk, to replace the traditional rule of *Seider*-style jurisdiction[65] with an approach that incorporated fundamental fairness concerns.[66] The Supreme Court held that *International Shoe*, and neither *Pennoyer v. Neff* nor *Seider*, provided the appropriate test for jurisdiction over a defendant through attachment of his or her insurance policy.[67] In *Rush*, two Indiana residents were involved in a car accident in which a passenger suffered injuries.[68] State Farm insured the car, which the defendant owned, under a policy issued in Indiana.[69] Indiana's guest statute[70] barred claims by passengers.[71] A year after the accident, the injured passenger moved to Minnesota and commenced an action against State Farm and the defendant in Minnesota.[72] The plaintiff sought jurisdiction over the defendant through attachment of his insurance policy since State Farm was "generally present" in Minnesota.[73] In its opinion, the Court explained that Minnesota unconstitutionally asserted jurisdiction because it was not fundamentally fair to name the defendant-driver in a Minnesota lawsuit against the insurer.[74] In a footnote, the Court explained numerous additional reasons why such an assertion would be fundamentally unfair to the defendant-driver.[75] The Court noted that

---

65. This was the first time the Supreme Court ruled on the constitutionality of *Seider*-style jurisdiction. The Second Circuit had previously approved of the jurisdictional device whereby a plaintiff attaches the defendant's insurance policy to gain jurisdiction over the defeudant. *See* Minishiello v. Rosenberg, 410 F.2d 106 (1968), *adhered to en banc*, 410 F.2d 117 (1968). The Supreme Court in *Rush v. Savchuk*, 444 U.S. 320, 326-27 (1980), noted that while New York, New Hampshire, and Minnesota had adopted *Seider*-style jurisdiction, Maryland, California, Louisiana, New Jersey, Oklahoma, and other states had explicitly rejected the practice based on state law or constitutional grounds. *See id.* at 327 n.13.

66. *See Rush*, 444 U.S. at 326-29; *see also* Borchers, *supra* note 37, at 68 (explaining *Seider*-style jurisdiction and noting that *Rush* found it unconstitutional).

67. *See Rush*, 444 U.S. at 327 (explaining that in *Shaffer v. Heitner* the Court held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny") (citations omitted).

68. *Id.* at 322.

69. *See id.*

70. *See* IND. CODE § 9-3-3-1 (1976) (repealed 1991).

71. *See Rush*, 444 U.S. at 322.

72. *See id.*

73. *See id.*

74. *See id.* at 330-32.

75. *See id.* at 331 n.20:

> A party does not extinguish his legal interest in a dispute by insuring himself against having to pay an eventual judgment out of his own pocket. Moreover, the purpose of insurance is simply to make the defendant whole for the economic costs of the lawsuit; but noneconomic factors may also be important to the defendant. Professional malpractice actions, for example, question the defendant's integrity and competence and may affect his professional standing. Further, one can easily conceive of cases in which the defendant might have a substantial economic stake in *Seider* litigation—if, for example, multiple plaintiffs sued in different States for an aggregate amount in excess of the policy limits, or if a successful claim would affect the policyholder's insurability. For

a judgment against the defendant-driver would affect his insurance rates and his insurability.[76] Additionally, it would allow plaintiffs to sue for damages in excess of the insurance policy limits by permitting them to sue in a number of states.[77] These reasons hold whether the defendant-driver is named or not.[78] *Rush*, and the cases on which it builds, illustrate the Supreme Court's growing sensitivity to the regulatory nature of a forum's assertion of jurisdiction.

B. Recognition of Jurisdiction as the Imposition of a Regulatory Regime

In *Shaffer v. Heitner*, the Supreme Court declared that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[79] Such a declaration illustrates the movement towards a unified theory of jurisdiction based on the idea of jurisdiction as not place but rather the imposition of a regulatory regime.[80] It confirms why forum matters. A forum's assertion of jurisdiction imposes an entire body of local influences[81] that bear on the result even though they have no "functional relationship to the defendant's rights and duties to the plaintiff."[82] Applying the substantive law of the proper regulatory regime[83]

---

these reasons, the defendant's interest in the adjudication of his liability cannot reasonably be characterized as *de minimis*.").

76. *See id.*

77. *See id.*

78. Many have questioned the constitutionality of direct action statutes (when a plaintiff sues the defendant's insurance company) for these very reasons. The Supreme Court in *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 417 (1954), declined to decide whether all direct action statutes were unconstitutional, concentrating instead on the narrow issue before the Court: whether federal law on marine vessel insurer liability preempted a Louisiana direct action statute. The Court in *Rush* distinguished direct actions from *Seider*-style actions, leaving doubt over the constitutionality of direct action statutes. *See* Rush v. Savchuk, 444 U.S. 320, 330 (1980).

79. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

80. *See* Cox, *supra* note 4, at 511, 530 (explaining that the "justification for jurisdiction is not the presence of property or a person within the state, but rather the need to regulate the defendant conduct which led to the ligitation" and concluding that "[t]ransient presence jurisdiction is unconstitutional because it attempts to allow a state to assert jurisdiction without any underlying significant connection to the defendant or the litigation"); Maier & McCoy, *supra* note 4, at 257 (arguing that "[a]ll cases should meet the test adopted by the United States Supreme Court in *Shaffer v. Heitner*").

81. *See supra* note 21? and accompanying text.

82. *See* Maier & McCoy, *supra* note 4, at 267.

83. *See* Reich v. Purcell, 432 P.2d 727, 729 (Cal. 1967) (en banc) ("[T]he forum can only apply its own law.... When it purports to do otherwise, it is not enforcing foreign rights but choosing a foreign rule of decision as the appropriate one to apply to the case before it."); Cox, *supra* note 13, at 3 ("[C]ourts exist only to interpret, create and apply their own government's laws.").

cannot mitigate this unfairness to the defendant because "the interpretation, application and other incidents of that rule will be greatly influenced, if not controlled, by the special local mores, attitudes and practices of the forum's decision makers."[84]

Subsequent cases support this proposition.[85] In *Kulko v. Superior Court*, the Court held that California's jurisdictional laws (which gave jurisdiction to a plaintiff in a child custody and support cause of action against an out-of-state defendant who did not possess sufficient minimum contacts with the forum) violated the Due Process Clause of the Fourteenth Amendment.[86] The Court appeared to recognize that jurisdiction was not just a place; rather, it was the imposition of a whole mass of regulatory authority that included California juries, rules of evidence, and choice of law rules. In other words, forum mattered. The Court did not find convenience an overriding consideration even though the plaintiff and her children all lived in California. Instead, the Court concentrated on the defendant's contacts with the forum that related to the specific cause of action. It looked to these contacts in order to determine whether California could appropriately impose its regulatory regime on the cause of action.[87] The Court, perhaps for the first time, explicitly stated that a forum's assertion of jurisdiction constituted the imposition of its sovereign's regulatory machinery. It also recognized that the choice of a state's regulatory regime may dramatically affect a case's outcome.[88]

The Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson* further illustrates this movement toward viewing jurisdiction not as a place but as the imposition of a regulatory regime.[89] All the parties in *World-Wide Volkswagen* understood the importance of forum. The plaintiffs sued in an Oklahoma county notorious for its favorable jury awards to recover for injuries suffered there in an accident involving the allegedly defective placement of the rear gas

84. Maier & McCoy, *supra* note 4, at 267; *see* MCDOUGAL & REISMAN, *supra* note 12, at 5 ("Rules are not self-applying but are wielded by people acting as decisionmakers."). The tremendous amount of forum-shopping in our legal culture offers the best support for this thesis. *See supra* note 16, and accompanying text. *But see* Borchers, *supra* note 37, at 92 (arguing that jurisdiction should not invoke any due process/minimum contacts limitations). However, some explain that *Burnham* is dicta because jurisdiction was possible on specific jurisdiction grounds. *See* Maier & McCoy, *supra* note 4, at 257 n.29.

85. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Clay v. Sun Office, Ltd., 377 U.S. 179 (1964); Watsons v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

86. Kulko v. Superior Court, 436 U.S. 84, 91-94 (1978).

87. *See id.* at 100.

88. *See supra* notes 16-21 and accompanying text.

89. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

tank.[90] The defendants were the distributor of the car, World-Wide Volkswagen (which distributed in New York, New Jersey, and Connecticut), and the dealer, Seaway, a retail dealer in New York. The other two defendants, Audi, which manufactured the vehicle, and Volkswagen of America, which imported the vehicle from Germany, did not appeal jurisdiction to the Supreme Court.[91]

The Supreme Court declared that it was fundamentally unfair for Oklahoma to assert jurisdiction over World-Wide and Seaway because the defendants' conduct and connection with the state were such that they could not reasonably anticipate being haled into an Oklahoma court.[92] The Court employed rhetoric such as "the burden on the defendants," "the forum state's interest," "the plaintiff's interest in obtaining convenient and effective relief," the "interstate judicial system's interest," and "substantial social policies" in support of its determination that the forum unconstitutionally asserted jurisdiction.[93] The Court noted, however, that even if the plaintiff had satisfied all these concerns, a forum's assertion of jurisdiction may still violate due process if fundamentally unfair.[94] In effect, the Court was explaining the inherent unfairness of an Oklahoma forum regulating an activity entirely conducted in New York and New Jersey. The decision cemented the notion that jurisdiction consists of much more than just a brick and mortar courthouse.

World-Wide Volkswagen may be understood as the creation of constitutional jurisdictional protection to ensure the imposition of the proper regulatory regime.[95] The test thus seems to become whether

---

90. *See id.* at 288. The plaintiffs had purchased the car in New York while residing there. The accident occurred en route to Arizona, where the family was relocating. *See id.*

91. *See id.* at 288 & n.3.

92. *See id.* at 297 ("[I]t is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

93. *Id.* at 292.

94. *Id.* at 294 ("*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.") (emphasis added). Professors Maier and McCoy note that "[t]his quotation recognizes a direct relationship between individual liberty values and federalism concerns." Maier & McCoy, *supra* note 4, at 268.

95. Brainerd Currie developed the idea of governmental interest, nnder which the court analyzes the state's relationship to the litigation to determine whether application of its regulatory regime (law and its implications) can reasonably be expected to effectuate the state's policies. *See* Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9-10 (1958). *See generally* Robert A. Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865 (1990) (responding te criticism of

the defendant's activities within the state gave rise to the cause of action before the forum. This test, however, is inadequate, for it would force the plaintiff in *World-Wide Volkswagen* to go to Germany to bring suit against the German manufacturer of the allegedly defective product. Thus jurisdiction must include those actions with reasonably foreseeable consequences that might cause harm within the forum. This is the stream of commerce rationale,[96] which still views jurisdiction as the imposition of a regulatory regime but inserts foreseeability into the test.[97]

---

interest analysis); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 MERCER L. REV. 593 (1983) (responding to more recent critics of Currie and arguing that the interest analysis remains the preferred approach to the resolution of choice of law problems); Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493 (1985) (defending Currie's interest analysis).

96. The stream of commerce theory originated as a basis for jurisdiction in products liability cases. *See, e.g.*, Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (Ill. 1961). Citing *Gray*, the Court, in dicta, in *World-Wide Volkswagen* affirmed the application of the stream of commerce theory to manufacturers and distributors. *World-Wide Volkswagen*, 444 U.S. at 297-98. Courts find jurisdiction based on stream of commerce consistent with due process fundamental fairness because the forum state has an interest in regulating the manufacturing process of those products that are released into the stream of commerce and bear a reasonably foreseeable chance of causing harm within the forum. *See, e.g.*, Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081, 1085 (5th Cir. 1984) (emphasizing the stato's interest in regulating tbe economic injury suffered by state resident); Poyner v. Erma Werke Gmbh, 618 F.2d 1186, 1192 (6th Cir. 1980) (explaining that "[i]njuries caused by inherently dangerous articles importod through independent distributors certainly fall within that class of litigation with which the forum state has a deep interest in adjudicating"), *cert denicd*, 449 U.S. 841 (1980). For analysis of stream of commerce, see, for example, CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069 at 348-55 (2d ed. 1987); David P. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; Monroe Leigh, *"Stream of Commerce" Theory as Basis for Assertion of Personal Jurisdiction over Foreign Manufacturer*, 81 A.J.I.L. 654, 656-58 (1987); Martin B. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C. L. REV. 407 (1980); Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243 (1989); Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105 (1991); Harry B. Cummins, Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1963); Erik T. Moe, Comment, Asahi Metal Industry Co. v. Superior Court*: The Stream of Commerce Doctrine, Barely Alive But Still Kicking*, 76 GEO. L.J. 203 (1987).

97. An example illustrates the stream of commerce rationale. If a Texan shoots a gun across the Oklahoma line and kills someone in Oklahoma, then a forum in Oklahoma may constitutionally assert jurisdiction over the Texan defendant because the gunman could reasonably foresee such a consequence. Cox, *supra* noto 4, at 558 n.304, contains a similar example.

C. Determining the Proper Regulatory Regime

Through constitutional jurisdictional principles, the Supreme Court made ad hoc value judgments concerning the appropriateness of imposing a forum's regulatory regime.[98] Unfortunately, the Court frequently cloaked this ad hoc value judgment in black letter rhetoric. Despite the Court's appeal to certain black letter constructs, the results in *Kulko* and *World-Wide Volkswagen* support the proposition that jurisdiction equals the imposition of a regulatory regime.[99] The majority opinion in *World-Wide Volkswagen* explained that a forum's assertion of jurisdiction still must reflect fundamental fairness regardless of convenience to the parties.[100] The majority expressly rejected Justice Brennan's dissent, which couched its discussion in convenience and jurisdiction-as-place terms.[101]

The Court's ad hoc judgments of fairness, however, present three problems. First, Western culture lives in a black letter system in which courts reach back to previous cases and grab terms without necessarily associating them with the underlying concepts.[102] Second, courts can use this rhetoric to justify a forum's assertion of juris-

---

98. *See* Madara v. Hall, 916 F.2d 1510, 1515 (11th Cir. 1990) (explaining that due process inquiry requires more than mere satisfaction of a long-arm statute "because each case will depend upon the facts") (quoting Venetian Salami Co. v. Parthenias, 554 So.2d 499, 500 (Fla. 1989)); Stewart, *supra* note 19, at 1265 (emphasis added) (footnotes omitted):

> According to the Supreme Court, if there are minimum contacts between a defendant and the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice, jurisdiction may properly be asserted. The court must evaluate the contacts in relation to the fair and orderly administration of the laws, and there must be evidence of some intent on the part of the defendant to avail himself of the privilege of conducting activities in the forum, thus invoking the benefits and protections of its laws. In other words, *the propriety of personal jurisdiction depends upon the facts of the case.*

Some commentators have expressed dismay at this case-by-case balancing: "[M]inor changes in circumstances can change the result. That alone would make prediction in a particular case difficult, but the task is even more formidable because courts cannot agree on which facts matter." Weintraub, *supra* note 49, at 540 (footnote omitted). Some courts have echoed these concerns:

> Now, one would think that in a rational system . . . experienced lawyers could simply and with conviction unanimously answer [the merchant buyer's question whether it can get jurisdiction over its merchant seller.] But alas we know, to our embarrassment, that the only honest answer the lawyer can probably give is a 'Gee, I can't say for sure.'

Hall's Specialties, Inc. v. Schupbach, 758 F.2d 214, 216 (7th Cir. 1985).

99. *See* Maier & McCoy, *supra* note 4, at 270 (noting that the comparative inconvenience to the defendant discussed in *International Shoe* received no serious attention from the Court in *Kulko* and *World-Wide Volkswagen*).

100. *World-Wide Volkswagen Corp.*, 444 U.S. at 294.

101. *See id.* at 300-03 (Brennan, J., dissenting).

102. *See generally* Thomas R. McCoy, *Logic v. Value Judgment in Legal and Ethical Thought*, 23 VAND. L. REV. 1277 (1970) (illustrating the pervasive problem of legal shorthand created to identify the legal consequences that should attach to a set of identifiable facts).

diction, not for regulatory reasons, but for convenience reasons. Third, the rhetoric allows its invocation when a court implements a bad objective, such as favoring the plaintiff or defendant.

These problems surfaced in *Asahi Metal Industry Co. v. Superior Court.*[103] The Supreme Court struggled to align its own feelings of fundamental fairness with the rhetoric found in previous cases. The Court knew that in asserting jurisdiction over the indemnity agreement between Asahi and Cheng Shin, California was not attempting to regulate a cause of action that arose within that forum. Rather, California was attempting to regulate contract rights between Asahi and Cheng Shin that did not arise out of conduct within or affecting the forum.[104] The Supreme Court arrived at the correct decision from a regulatory regime point of view but did not articulate regulatory reasoning. The Court's opinion did not distinguish the cause of action that arose from the accident in California from the cause of action that arose from a contract dispute completely outside of the forum.[105] Thus the Court failed to articulate and understand what it instinctively knew. It failed to articulate why constitutional jurisdiction jurisprudence developed in the first place: to recognize why forum matters. Cheng Shin argued that the action arose out of a motorcycle accident and that Asahi had minimum contacts with the forum because the cyclist's suit was foreseeable.[106] Cheng Shin

---

103. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987). The original suit arose from a California motorcyclist's allegation that his injuries and passenger's death were caused by a sudden loss of air and an explosion in the rear tire of the motorcycle. The complaint cited defects in the motorcycle tire, tube, and sealant. It named Cheng Shin Rubber Industrial Co., Ltd. ("Cheng Shin"), the Taiwanese manufacturer of the tube. "Cheng Shin in turn filed a cross-complaint against Asahi Metal Industry Co., Ltd., the manufacturer of the tube's valve assembly," seeking indemnification based on Cheng Shin's agreement with Asahi. The plaintiff settled his claims with Cheng Shin and the other defendants, leaving only Cheng Shin's indemnity action against Asahi. Asahi challenged California's jurisdiction to resolve the indemnity action, and the Supreme Court ultimately agreed with Asahi that California's jurisdiction exceeded constitutional protections. *See id.* at 105-106.

104. *See* Stanley E. Cox, *The Interrelationship of Personal Jurisdiction and Choice of Law: Forging New Theory Through* Asahi Metal Indus. Co. v. Superior Court, 49 U. PITT. L. REV. 189, 214-27 (1987) (arguing that the result in *Asahi*, while correct, should have been reached on the basis of the particular indemnity claims pursued in the action rather than on the basis of stream of commerce arguments not present before the Court). Others have commented that "[i]n light of these facts, *Asahi*'s holding that jurisdiction would be unfair is essentially correct." Moe, *supra* note 96, at 203 (arguing that Asahi should be distinguished from situations involving a resident plaintiff when the state has an overriding interest in asserting jurisdiction over foreign defendants).

105. *See Asahi*, 480 U.S. at *passim*.

106. Cheng Shin provided the affidavit of a manager whose duties included the purchasing of component parts. The manager stated:

> [I]n discussions with Asahi regarding the purchase of valve stem assemblies the fact that my Company sells tubes throughout the world and specifically the United States has

attempted to sell the Court on the rhetorical formula "arising out of" without looking to the underlying meaning.[107] This argument caused the Court much trouble and led at least four justices to reconsider the entire stream of commerce rationale.[108] Had the Court looked to the underlying concepts and separated the causes of action before it, it could have articulated what the Court instinctively knew—that it was fundamentally unfair to the defendant for California to impose its regulatory regime on conduct (in this case a contract dispute) that occurred entirely outside the forum and had no foreseeable consequences within the forum.[109] The failure of the Court to distinguish jurisdiction-as-a-regulatory-regime from jurisdiction-as-a-place fostered the confusion. On the surface, the Court validated the idea of jurisdiction-as-place, but the Court's result makes sense only when regarded as endorsing "jurisdiction as the imposition of a regulatory regime."

D. Extending Protection to All Assertions of Jurisdiction

Subsequent developments in jurisdiction jurisprudence appeared to incorporate fundamental fairness into general jurisdiction.[110] *Helicopteros Nacionales de Colombia v. Hall* provides evidence of this

---

> been discussed. I am informed and believe that Asahi was fully aware that valve stem assemblies sold to my Company and to others would end up throughout the United States and in California.

Asahi Metal Indus. Co. v. Superior Court, 702 P.2d 543, 549-50 n.4 (Cal. 1985). Cheng Shin's lawyers clearly couched their argument in terms of a products liability case that arose out of a motorcycle accident instead of a contract dispute. The record to the Supreme Court did not even include the contract between Cheng Shin and Asahi. *See* Tr. of Oral Arg. at 24. The Supreme Court of California agreed with Cheng Shin that its action "against Asahi arises from Asahi's forum-related activity . . . ." *Asahi*, 702 P.2d at 550 n.6. Asahi argued in vain to the California Supreme Court that "California has no interest in exercising jurisdiction . . . ." *Id.* at 543.

107. The Court failed to understand that the indemnity suit did not arise out of the motorcycle accident. Rather, it arose out of a contract between the two parties that had no affect on the forum.

108. *See* Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 108-13 (1987). Part II.A of Justice O'Connor's opinion for the Court was joined by the Chief Justice and Justices Powell and Scalia.

109. Some commentators argue that this lack of realization justifies limiting *Asahi* to its facts. *See, e.g.*, Moe, *supra* note 96, at 203. Others note that "the parties and the courts apparently lost sight of the forum non conveniens aspects . . . ." Russell J. Weintraub, Asahi *Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55, 62-63 (1988).

110. *See, e.g.*, Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 311-12 (1956) ("It may well be that in the law of jurisdiction over individuals . . . a substantial 'minimum contact' will ultimately be the touchstone of permissible jurisdiction."); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 281 ("Ever since *International Shoe*, *Pennoyer v. Neff* has been eligible for oblivion. . . . [A]ll jurisdictional problems [should] be approached as ones of the existence of minimum contacts between the forum and the transaction in litigation.").

transition.[111] There, the Supreme Court held that Texas's assertion of jurisdiction under its long-arm statute violated the Due Process Clause of the Fourteenth Amendment because the defendant lacked minimum contacts with the forum with respect to the plaintiff's cause of action.[112] The Court found that the defendant was not generally present because it did not have systematic and continuous contacts with the forum.[113] The Court rejected the notion that mere presence suffices. Instead, the Court incorporated *International Shoe* and the fundamental fairness standard into general jurisdiction.[114] Such a result can be explained only by recognizing the importance of forum and the unfairness to a defendant created by an inappropriate sovereign's imposition of its regulatory regime.

The Court's apparent move toward a fundamental fairness standard for both specific and general jurisdiction followed the Restatement (Second) of Conflict of Laws, which stated that *International Shoe* and its progeny governed transient jurisdiction (and perhaps generally present jurisdiction).[115] Numerous lower courts also

---

111. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984).

112. *See id.* at 413-17 (1984).

113. *See id.* at 415-16 ("All parties to the present case concede that [Hall's] claims against Helicol did not 'arise out of,' and are not related to, Helicol's activities within Texas. We thus must explore the nature of Helicol's contacts with the State of Texas to determine whether they constituto the kind of continuous and systematic general business contacts the Court found to exist in *Perkins.* We hold that they do not."). The Supreme Court, however, has provided little guidance with respect to this basis for general jurisdiction, having addressed "the parameters of continuous and systematic contacts only twice." Albright, *supra* note 22, at 375; *see* Linda J. Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 765 (1995) (noting the little guidance from the legislatures or the courts in defining general jurisdiction, which reaches both transient and generally present parties).

114. *See Helicopteros*, 466 U.S. at 416. The Court thought that the plaintiffs conceded the issue of specific jurisdiction and thus analyzed the case only in terms of general jurisdiction. *See id.* at 415 & n.10; *see also* Weintraub, *supra* note 49, at 537 (noting the substantial limitations *Helicopteros* placed on the exercise of general jurisdiction).

115. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24, cmt. b, at 29 (Draft of Proposed Revisions, Apr. 15, 1986) ("One basic principle underlies all rules of jurisdiction. This principle is that a state does not have jurisdiction in the absence of some reasonable basis for exercising it. With respect to judicial jurisdiction, this principle was laid down by the Supreme Court of the United States in International Shoe . . . ."). The Comment continued: "Three inconsistent factors are primarily responsible for existing rules of judicial jurisdiction. Present-day notions of fair play and substantial justice constitute the first facter." *Id.; see also id.* § 28, cmt. b, at 41 ("The Supreme Court held in *Shaffer v. Heitner* that the presence of a thing in a state gives that state jurisdiction to determine intorests in the thing only in situations where the exercise of such jurisdiction would be reasonable. . . . It must likewise follow that considerations of reasonableness qualify the power of a state to exercise personal jurisdiction over an individual on the basis of his physical presence within its territory."); RESTATEMENT (SECOND) OF JUDGMENTS § 8 cmt. a, p. 64 (Tent. Draft No. 5, Mar. 10, 1978) (*Shaffer* establishes " 'minimum contacts' in place of presence as the principal basis for territorial jurisdiction."). These proposed changes and

concluded that transient jurisdiction did not survive *International Shoe* and its progeny.[116] In fact, transient jurisdiction "ha[d] been almost universally criticized by commentators . . . ."[117] This criticism emerged from the idea that a forum asserting transient jurisdiction likely has no interest in imposing its regulatory machinery.[118] *Gulf Oil Corp. v. Gilbert*, decided on forum non conveniens grounds,[119] appeared

---

tentative drafts signaled a departure from the previous text. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1971) ("A state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily."); *id.* § 28, cmt. a (A defendant's "presence in the state, even for an instant, gives the state judicial jurisdiction over him."); *see also* Maier & McCoy, *supra* note 4, at 273 (noting the doctrinal development since *International Shoe*).

116. *See, e.g.*, Nehemiah v. Athletics Congress, 765 F.2d 42, 46-47 (3d Cir. 1985); Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F. Supp. 305, 310-14 (N.D. Ill. 1986); Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079, 1088-91 (D. Kan. 1978), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1979); Bershaw v. Sarbacher, 700 P.2d 347, 349 (Wash. Ct. App. 1985).

117. Albright, *supra* note 22, at 382.

118. *See generally*, Robert H. Abrams, *Power, Convenience, and the Elimination of Personal Jurisdietion in the Fedsral Courts*, 58 IND. L.J. 1, 18 (1982) (noting that intra-territorial assertions of personal jurisdiction are not necessarily subject to *International Shoe*'s fairness scrutiny); Bernstine, *supra* note 37, at 47-68; Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 752-53 (1988) (criticizing the current justification for transient jurisdiction); Ehrenzweig, *supra* note 110, at 290 (providing examples of the shortcomings of the transient rule); Donald W. Fyr, Shaffer v. Heitner*: The Supreme Court's Latest Last Words on State Court Jurisdiction*, 26 EMORY L.J. 739, 770-73 (1977) (discussing fairness problems inherent in transient jurisdiction); Frank R. Lacy, *Personal Jurisdiction and Service of Summons After* Shaffer v. Heitner, 57 ORE. L. REV. 505, 510 (1978) (examining the jurisdiction issue in the context of service of summons); Maier & McCoy, *supra* note 4, at 272-73; Bruce Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 735 n.30 (1981) (noting how the Court in *International Shoe* utilized a functional approach in examining the appropriate principles underlying personal jurisdiction); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1117 n.35 (1981) (citing Ehrenzweig, *supra* note 110, for the proposition that the "first principle" of *Pennoyer* remains good law although the *Shaffer* Court disregarded it); Robert A. Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031, 1035 (1978) (discussing personal jurisdiction in the context of guest-host immunity); Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 75 (1978) (noting that, if the power theory is rejected as counter to due process, the traditional notion of physical presence as a basis for jurisdiction based on territerial sovereignty becomes "constitutionally suspect"); David H. Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of* Shaffer v. Heitner, 1978 WASH. U. L.Q. 273, 303 (noting that the presence of a defendant's property in a forum contributes little to the forum interest in the outcome); Arthur T. von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 300-07 (1983) (discussing the transition from a power theory to a fairness theory beginning in the second decade of the twentieth century); Donald J. Werner, *Dropping the Other Shoe:* Shaffer v. Heitner *and the Demise of Present-Oricnted Jurisdiction*, 45 BROOKLYN L. REV. 565, 589 (1979) (noting that the proposition that one is within the territorial limits of the states over which he flies on a commercial airline flight can "find no support in the post-*Shaffer* world of jurisdiction"); Joseph P. Zummit, *Reflections on* Shaffer v. Heitner, 5 HASTINGS CONST. L.Q. 15, 24 (1978) (noting that predicating jurisdiction on the presence of the person or property is absurd).

to recognize the importance of forum and provided a mandate for the standard of fundamental fairness as the appropriate test for all types of jurisdiction.[120]

A unified standard for both general and specific jurisdiction not only recognizes that imposition of the appropriate regulatory regime should be the real issue, but it also acknowledges the merging of choice of jurisdiction with choice of law.[121] By recognizing jurisdiction as the imposition of a regulatory regime, mere presence unconnected

---

119. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509-12 (1947) (discussed *infra* Part IV). Albert Ehrenzweig noted in 1956 that forum non conveniens developed to balance the dogmatic rule of personal service. *See* Ehrenzweig, *supra* note 110, at 292.

120. Consider the statement by one commentator before the Supreme Court decided *Burnham*:

> The facts of *Gulf Oil Corp. v. Gilbert* are anything but unique and constitute perhaps the easiest example of a case dismissed on the grounds of forum non conveniens that should have been dismissed for lack of personal jurisdiction. . . . To consider the *Gilbert* facters twice is absurd. To fail to consider them in a jurisdictional analysis is wrong . . . ."

Stewart, *supra* note 19, at 1288, 1294 (footnote omitted). The author cites a number of cases that illustrate situations in which courts should have dismissed on jurisdictional rather than forum non conveniens grounds. *See id.* at 1289 n.108.

121. *See* Maier & McCoy, *supra* note 4, at 251 ("We argue for what may appear to be a radical reconceptualization of the subjects of judicial jurisdiction and choice of law. In fact, we urge merely an appreciation of the legal realists' understanding of the judicial-decision making process and a recognition of the logic already implicit in modern decisions that articulate the law of judicial jurisdiction in terms of minimum significant contacts.") (footnotes omitted). Prior to Professors Maier and McCoy's observation, Professor Inglis wrote that "questions of jurisdiction and choice of law [are not] always separate issues. Many so-called 'choice of law' rules can in fact be regarded fundamentally as rules of jurisdiction." B. D. Inglis, *Jurisdiction, The Doctrine of* Forum Conveniens, *and Choice of Law in Conflict of Laws*, 81 L. Q. REV. 380, 380 (1965). A year later, Professors von Mehren and Trautman observed that modern courts were fostering the evolution of jurisdictional theory beyond traditional conceptions. They illustrated that, in a growing number of cases, courts used dispute-specific relationships between the defendant, the forum state, and the cause of action to justify jurisdiction. *See* von Mehren & Trautman, *supra* note 49, at 1136; *see also* Twitchell, *supra* note 49, at 643-45; Stanley E. Cox, *Choice of Law: How it Ought to Be: Responses to Transcript: The Interested Forum*, 48 MERCER L. REV. 727, 738 n.32, 755 (1997) (espousing a view that personal jurisdiction should be limited in a way that causes an "interested forum, applying its own law," to be "the only forum that should ever adjudicate a case"); Cox, *supra* note 13, at 8; Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 961, 987-93 (1981) (discussing whether the Court's dicta in *International Shoe* that sufficient choice of law contacts may not be sufficient to establish long-arm jurisdiction obscures understanding of both choice of law and long-arm jurisdiction); Earl M. Maltz, *Visions of Fairness—The Relationship Between Jurisdiction and Choice of Law*, 30 ARIZ. L. REV. 751 (1988) (arguing that the Court adequately protects fairness through its restrictions on personal jurisdiction rather than on choice-of-law); James Martin, *Personal Jurisdiction and Choice-of-Law*, 78 MICH. L. REV. 872 (1980) (suggesting that the Supreme Court should require a minimum contacts test for choice of law in addition to jurisdiction); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991) (discussing the problem of an undeveloped doctrine of personal jurisdiction from a philosophical perspective); Courtland H. Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37 (1988) (discussing jurisdiction and choice of law generally); Posnak, *supra* note 4, at 884; Sedler, *supra* note 118, at 1040 (concluding that "*Shaffer* may stimulate rethinking about the interrelationship between judicial jurisdiction and choice of law").

with a cause of action does not justify the imposition of the forum's regulatory regime, nor does it permit that forum to apply its sovereigu's laws to the conduct.[122] In *Burnham v. Superior Court*, the Supreme Court rejected this creation of constitutional jurisdictional jurisprudence to ensure proper forum.[123]

IV. *BURNHAM* AND THE DEATH OF CONSTITUTIONAL JURISDICTIONAL PROTECTION FROM A FORUM'S ASSERTION OF GENERAL JURISDICTION

In *Burnham v. Superior Court of California*,[124] the debate over whether fundamental fairness had become the operable constitutional test for general jurisdiction came to a head.[125] The underlying cause of action concerned a divorce and custody battle.[125] When the defendant temporarily visited the forum, the plaintiff served the defendant with process for divorce.[127] Both the plaintiff and the defendant realized the importance of forum.[128] The defendant sought constitutional protection by arguing that the standard of fundamental fairness applies in cases in which a forum asserts only general jurisdiction. Mere presence, the defendant argued, does not warrant the imposition of a forum's regulatory regime.[129] Such an understanding acknowledges the regulatory nature of forum. The Supreme Court rejected this understanding.

---

122. Under a jurisdiction-as-place understanding, general jurisdiction appears constitutional because jurisdiction is but a place to adjudicate disputes and separate from choice of law.

123. *See* Burnham v. Superior Court, 495 U.S. 604, 616-19 (1990). *See* Cox, *supra* note 13, at 12 n.21 ("Unfortunately, in Burnham v. Superior Court, the United States Supreme Court refused to shut the door to just such unfairness, by approving transient jurisdiction, the quintessential example of a forum taking jurisdiction of a case when it has no legitimate regulatery interest in the underlying litigation.") (citation omitted). *See generally* George B. Reese, *Conflict of Laws*, 44 SYRACUSE L. REV. 167 (1993) (surveying 1993 cases in New York confronting conflict of law issues).

124. *Burnham*, 495 U.S. 604.

125. *See* Maier & McCoy, *supra* note 4, at 276-77 (criticizing *Burnham* for its failure te decide this debate correctly but noting that "[t]he seeds of that decision were sown long ago by the failure of courts and commentators to understand that the assertion of judicial jurisdiction is the assertion of the authority to make law in the case before the court, not solely an assertion that a case can be decided at a given geographical location").

126. *See Burnham*, 495 U.S. at 607-08.

127. *See id.* at 608.

128. Forum in this case included California juries, policies, morals, jury awards, presumptions, etc.

129. He cited *Shaffer* and *Rush* as well as the Restatements, *Gulf Oil*, and the regulatory interests thesis. *See* Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. ILL. L. REV. 593, 594 n.12 (The defendant "challenged the constitutionality of transient jurisdiction on the basis that mere physical presence did not dispense with the requirement that he have 'minimum contacts' with the forum state."). A few lower courts had held so. *See supra* note 116. The

The Court announced that the fundamental fairness standard developed by *International Shoe* and its progeny does not apply to assertions of general jurisdiction.[130] Rather, traditional rules that allow a forum to assert jurisdiction over defendants with continuous and systematic contacts (generally present) or those served while in the forum (transient or "gotcha" jurisdiction) are per se constitutional.[131] Under generally present jurisdiction, a defendant is subject to a forum's jurisdiction when the defendant has continuous and systematic contacts with the forum state, regardless of where the cause of action arose.[132] For example, if the defendant lives in Tennessee and is involved in a car accident in Los Angeles, a Tennessee forum may assert jurisdiction over the defendant because he or she is said to be "generally present" in the state. Under transient jurisdiction, a forum may assert jurisdiction over defendants served with process while (perhaps temporarily) in the state. Fora may thus gain jurisdiction over a cause of action even if they have little or no contact with the underlying facts or the defendant.[133] For example, a forum in California may constitutionally assert jurisdiction over a defendant served in the Los Angeles airport while on a layover, though the defendant had no other contacts with or relations to the forum. Both forms of jurisdiction fail to recognize why forum matters and instead view it merely as a physical location with which the party has voluntarily acquainted itself.

The *Burnham* majority held constitutional a forum's assertion of general jurisdiction because that notion has deep traditional roots.[134]

---

defendant thought that presence could not sustain general jurisdiction. *See* Hay, *supra*, at 594 n. 12.

130. *See Burnham*, 495 U.S. at 621.

131. *See id.* at 612-19. Many, including Justice Brennan in his concurrence, dispute the traditional notion of transient jurisdiction. *See id.* at 635-37 (Brennan, J., concurring in the judgment); Ehrenzweig, *supra* note 110, at 292, 294-95, 298, 300, 302-04, 308; Werner, *supra* note 118, at 568-71; Irwin, *supra* note 4, at 629.

132. *See supra* note 110.

133. *See* Mays, *supra* note 49, at 1272 n.7 (defining transient jurisdiction); *see also Burnham*, 495 U.S. at 612 ("Decisions in the courts of many States in the 19th and early 20th centuries held that personal service upon a physically present defendant sufficed to confer jurisdiction, without regard to whether the defendant was only briefly in the Stato or whether the cause of action was related to his activities there."). The propensity for unfairness resulted in "virtual unanimity among commentators that jurisdiction should not necessarily flow from service on the defendant in the forum. These commentators reached this conclusion primarily because of the unfairness to the defendant that such assertions of jurisdiction might entail." Posnak, *supra* note 118, at 744; *see also* Bernstine, *supra* note 37, at 62 ("[I]t is reasonable to argue that the transient rule is unfair to defendants in light of the holdings of *International Shoe* and *Shaffer*."); Vernon, *supra* note 118, at 303 ("Because it was unfair to assert jurisdiction in *Shaffer*, it is unfair to assert jurisdiction in the transient defendant case.").

134. *See Burnham*, 495 U.S. at 621.

The opinion sparked a fury of criticism.[135] If the opinion turned on tradition, one may ask why *Burnham* did not overrule *Shaffer* and *Rush*, which provided constitutional protection from assertions of special jurisdiction. *Burnham* did not, however, abolish constitutional protection in cases where a forum asserts special jurisdiction.[136] The majority matter-of-factly distinguished these special jurisdiction cases and saw no need to revert to traditional constitutional analysis in them.[137]

Tradition should not allow the improper imposition of a regulatory regime. In other contexts the Court does not pay such unbending heed to tradition.[138] The Court would not uphold the admissibility of coerced confessions based on their traditional constitutional validity in the nineteenth century, just as it rejected the traditional separate but equal understanding of the Fourteenth Amendment.[139] It would be problematic that tradition could override the fundamental fairness standard of the Due Process Clause. This perhaps illustrates that the Court was less concerned with history and more concerned with creating black letter rules that it thought individuals could better follow.[140]

---

135. *See* Hay, *supra* note 129, at 593; Maier & McCoy, *supra* note 4, at 273-77; Irwin, *supra* note 4, at 628-30; Martin Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After* Burnham v. Superior Court, 22 RUTGERS L.J. 675 (1991); Allan R. Stein, Burnham *and the Death of Theory in Personal Jurisdiction*, 22 RUTGERS L.J. 597 (1991); Mary Twitchell, Burnham *and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659 (1991); Armand Paliotta, Note, *Jurisdiction:* Burnham v. Superior Court*: Adding Confusion to Transient Jurisdiction*, 44 OKLA. L. REV. 551 (1991); Robert Taylor-Manning, Note, *An Easy Case Makes Bad Law*—Burnham v. Superior Court of California, 66 WASH. L. REV. 623 (1991); Steven Mathew Wald, Note, *The Left-for-Dead Fiction of Corporate "Presence": Is it Revived by* Burnham?, 54 LA. L. REV. 187 (1993). *See generally* Symposium, *The Future of Personal Jurisdiction: A Symposium on* Burnham v. Superior Court, 22 RUTGERS L.J. 559 (1991) (providing criticism and support from an array of commentators); Borchers, *supra* note 37, at 19 (exploring the illogical and confusing historical roots of *Burnham*); Cox, *supra* note 4, at 497 (criticizing *Burnham* and arguing that transient jurisdiction is unconstitutional).

136. *See Burnham*, 495 U.S. at 621; *see also* Irwin, *supra* note 4, at 613.

137. *See Burnham*, 495 U.S. at 621. It is easy to point out that there is no difference between *Shaffer/Rush* and *Burnham*, thereby undermining the latter case's tradition justification. The earlier cases held that *International Shoe* had supplanted traditional rules for presence and attachment (*Shaffer*) and *Seider*-style (*Rush*) jurisdiction. Under *Burnham*'s return-to-tradition reasoning, the Court should return to the pre-*Shaffer* and *Rush* era, a position it refused to endorse in *Burnham*.

138. *See generally* R. Randall Kelso & Charles D. Kelso, *How the Supreme Court Is Dealing With Precedents in Constitutional Cases*, 62 BROOKLYN L. REV. 973 (1996) (identifying the various views of the Justices concerning following precedent).

139. *See generally* Planned Parenthood v. Casey, 505 U.S. 833, 861-64 (1992) (discussing the significance of tradition in fundamental rights cases, in overturning precedent, and the force of stare decisis).

140. Many cite the confusing nature of jurisdiction as a reason for establishing bright-line rules. However, it is confusing because facts change the circumstances under which it is

If the Court sought justifiable reliance on tradition, it should have delved into the underlying concepts that supported a forum's traditional assertion of general jurisdiction.[141] General jurisdiction exists because once, under a different set of facts and precepts, it struck courts as fundamentally fair.[142] When American jurisdictional jurisprudence first developed, people often lived their entire lives in one place. Individuals would engage in substantially all their activities in that one forum. Under such circumstances, it was almost always reasonable for a forum to assert jurisdiction because that forum supplied the most appropriate regulatory regime. It was where the cause of action arose. Thus, general jurisdiction developed as a conceptual shorthand for fundamental fairness under a set of facts that no longer exists. Today, people are mobile and spend time in many fora. One's "residence" or "domicile" no longer accurately indicates where a cause of action likely arose. In other words, the conceptual shorthand no longer fits the identifiable set of facts that it originally served. This illustrates the tyranny of verbal shorthand.[143] Unfortunately, *Burnham* has reinforced this tyranny. To bypass these legal shorthands, litigants must seek an alternate route to ensure the imposition of the proper regulatory regime.[144] This Note argues that

---

appropriate for a forum to assert jurisdiction. Rather than recognizing an ad hoc scheme of constitutional protection, *Burnham* endorsed a black lettor statement of the law. *See generally* Irwin, *supra* note 4, at 624 (describing the majority opinion as "strong statements of 'black letter' "); Paliotta, *supra* note 135, at 565 ("The advantage of Justice Scalia's [majority] opinion is certainty . . . .").

141. The majority journeyed back to the 15th century to support the proposition that "the judgment of a court lacking jurisdiction is void." *Burnham*, 495 U.S. at 608 (citing Bowser v. Collins, 145 Eng. Rep. 97 (Ex. Ch. 1482)). The opinion then cites a number of cases for support in American jurisprudence. Yet it cited only *Pennoyer v. Neff*, 95 U.S. 714 (1878), to support the statement that "we have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority." *Burnham*, 495 U.S. at 609. *Burnham* cited cases from the 18th and 19th century in support of the argument that transitory jurisdiction is constitutional.

142. Support for this proposition comes from *Burnham* itself: "That standard [of traditional notions of fair play and substantial justice] was developed by analogy to 'physical presence . . . .' " *Id.* at 619.

143. Unfortunately, Western society lives under a system of verbal shorthand. *See generally* McCoy, *supra* note 102. Professor McCoy, in a later article, cites *Allstate Insurance. Co. v. Hague* to illustrate the problem of general jurisdiction and the failure of commentators to realize how it was the Court's attempt to work within the confines of general jurisdiction that led to the much criticized decision. *See* Maier & McCoy, *supra* note 4, at 287.

144. Justice Brennan, concurring in *Burnham*, 495 U.S. at 639 n.13 (1990) (Brennan, J., concurring in the judgment), explained that "a change of venue may be possible" so that "a transient defendant can avoid protracted litigation of a spurious suit." He also explained that "state court[s] . . . [can apply] the doctrine of *forum non conveniens*." *Id.* *See also* Irwin, *supra* note 4, at 641 ("It is ironic that the common law doctrine of forum non conveniens will allow a court to do just what the *Burnham* decision will not; namely, to refuse to exercise personal

forum non conveniens and the federal transfer statute provide that avenue.

V. BUILDING AN ALTERNATIVE AVENUE OF PROTECTION—FORUM NON CONVENIENS

Obtaining jurisdiction takes on increased significance in the absence of constitutional fundamental fairness checks on a forum's assertion of jurisdiction. Litigants must now operate within a world that fails to recognize the importance of forum and the historical and functional reasons for the creation of jurisdiction in the first place. Fortunately, an alternative exists. The search for alternative avenues after *Burnham* has led to increased prominence for forum non conveniens and the federal transfer statute.

Forum non conveniens is a common law doctrine that allows a court to dismiss a cause of action even though the forum may constitutionally assert jurisdiction. The doctrine allows courts to decline otherwise sanctioned jurisdiction over a cause of action where the convenience of the parties and witnesses, or the interests of justice, would be better served by allowing the action to proceed in a different forum.[145] This section will trace the doctrine's development, reasoning, and application.

---

jurisdiction based upon inadequate contacts with the forum state."). Of course, the other option is to ignore *Burnham*, which some lower courts have done for jurisdiction over "present" corporations. *See, e.g.*, Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 180-82 (5th Cir. 1992) (rejecting the plaintiff's assertion of jurisdiction based on the in-state service of process on a corporate agent, reasoning that *Burnham* did not involve a corporation and did not decide any issues pertaining to corporations); Demirs v. Plexicraft, Inc., 754 F. Supp. 250, 251-52 (D.R.I. 1990) (applying minimum contacts to an assertion of jurisdiction to a present corporation); MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc., 804 P.2d 627, 629-31 (Wash. Ct. App. 1991) (granting the defendant's motion to dismiss for lack of jurisdiction because jurisdiction relied solely on in-state service of corporate officers). *But see* Allied-Signal, Inc. v. Purex Indus., Inc., 576 A.2d 942, 944-45 (N.J. Super. Ct. App. Div. 1990) (reading *Burnham* to permit jurisdiction on service of a present agent of a nonresident corporation). A recent Second Circuit case imposed an additional reasonableness test in a case in which general jurisdiction through minimum contacts had already been proven and acknowledged by the court. *See* Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573-75 (2d Cir. 1996). The court ruled that the defendant's contacts with the forum satisfied general jurisdictional requirements. *See id.* at 572-73. The court went on, however, to ascertain the reasonableness of jurisdiction under the five *Asahi* factors. *See id.* at 568-69. In applying those factors, the court found that adjudication in the forum served "absolutely no interest" of the forum and did not further the plaintiff's "interests in proceeding in a convenient forum"; the court concluded that "Florida, the locus of the alleged tort, and New York, plaintiff's domicile, have far more significant interests in resolving the dispute." *Id.* at 574-75. *See generally* Wald, *supra* noto 135, at 187 (explaining that presence should not be a basis for jurisdiction over corporations).

145. *See* Jennings v. Boeing Co., 660 F. Supp. 796, 800 (E.D. Pa. 1987).

Although scholars debate its origin, most recognize Scotland as the birthplace of forum non conveniens.[146] In the United States, forum non conveniens first surfaced in admiralty cases.[147] The Supreme Court, in *Gulf Oil Corp. v. Gilbert*, extended from admiralty to a forum's assertion of general jurisdiction the concept that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[148] Shortly after the Court decided *Gulf Oil*, Congress codified and revised the common law doctrine to allow transfers between federal district courts under § 1404(a).[149] Today, in the federal judiciary forum non conveniens applies only to cases where the alternative forum lies in another country.[150] State courts, however, continue to apply the doctrine both in law and in equity.[151] Although this Note concentrates on § 1404(a), the federal transfer statute, its close relationship with forum non conveniens requires a preliminary discussion of that common law doctrine.

---

146. The Supreme Court, in *American Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994), noted that forum non conveniens first developed in Scottish estate cases. *See* Macmaster v. Macmaster, 11 Sess. Cas. 685, 687 (No. 280) (2d Div. Scot.) (1833); McMorine v. Cowie, 7 Sess. Cas. (2d ser.) 270, 272 (No. 48) (1st Div. Scot.) (1845); La Societe du Gaz de Paris v. La Societe Anonyme de Navigation "Les Armateurs Francais," [1926] Sess. Cas. (H.L) 13 (1925); *see also* Edward L. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 387 n.35 (1947) (citing cases); Robert Braucher, Comment, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909 (1947); Harry Litman, Comment, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CAL. L. REV. 565, 567 n.11 (1986) ("The doctrine has its origins in several Scottish cases in the nineteenth century, which used the term 'forum non competens' to dismiss cases 'both where the court lacked jurisdiction and where it was not expedient for the due administration of justice to hear the case.' ") (citations omitted). *But see* Donald J. Carney, *Forum Non Conveniens in the United States and Canada*, 3 BUFF. J. INT'L L. 117, 119 n.9 (1996) (noting that the origins of the doctrine are still murky).

147. *See American Dredging Co.*, 510 U.S. at 449; *see also* The Belgenland, 114 U.S. 355, 365-66 (1885); The Maggie Hammond, 76 U.S. (9 Wall.) 435, 457 (1870). *See generally*, WARREN FREEDMAN, FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS: THE DEFENSE OF FORUM NON CONVENIENS (1988); Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L. Q. 12 (1949); Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Carney, *supra* note 146, at 121 n.16; Stewart, *supra* note 19, at 1270. The American version of the doctrine differed from the English version, which required courts te be "satisfied, as a prerequisite to assuming or taking jurisdiction in a conflict of law action, that the forum which the plaintiff ha[d] chosen is an appropriate one for the determination of the action." Inglis, *supra* note 121, at 382-83. In effect, this Note supports an American embodiment of the English rule through the use of § 1404(a) transfers.

148. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). *See also* Stewart, *supra* note 19, at 1259 n.3.

149. *See infra* note 182-86, and accompanying text.

150. For example, the Supreme Court utilized forum non conveniens and not § 1404(a) in *American Dredging Co.*, 510 U.S. at 453 and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981), because the alternative forum was another country.

151. *See American Dredging*, 510 U.S. at 453; *infra* note 184

A. The "Inconvenient" Forum

Traditionally, forum non conveniens allowed a defendant to petition the trial court to dismiss a cause of action because the plaintiff's chosen forum was either inconvenient or inappropriate.[152] Courts deferred to the plaintiff's choice of forum and required the defendant to show not just mere inconvenience but extreme inconvenience.[153] The Restatement (Second) of Conflict of Laws announced that "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff."[154]

The reasoning behind the doctrine is threefold. First, the doctrine protects defendants from litigating in far-away fora that have little relation either to the parties or the underlying dispute.[155] Second, the doctrine protects state interests in avoiding undue burdens on its citizens, taxpayers, and courts, which would have to bear the costs of litigation unrelated to the forum.[156] Finally, the doctrine pro-

---

152. *See* ALBERT A. EHRENZWEIG, CONFLICTS OF LAW 120-137 (1962); GOODRICH, CONFLICT OF LAWS 16 (Scoles, 4th ed. 1964); Barrett, *supra* note 146, at 380; Braucher, *supra* note 146, at 908. For discussion on the role of forum non conveniens in the enforceability of forum selection clauses in contract law, see Ranjit S. Dhindsa & Michael M. Ostrove, *Forum Selection and Forum Nonconveniens*, 32 INT'L L. 232 (1998).

153. *See infra* note 188; *see also* Stewart, *supra* note 19, at 1268 (footnote omitted):

> The major thrust of the Supreme Court opinion was two-fold: first, that the possibility of a less-favorable body of substantive law governing is not a controlling or even substantial factor in the analysis, which focuses instead upon issues of convenience; and second, that the strong presumption in favor of the plaintiff's choice of forum is less forceful when the real parties in interest are foreign, since the absence of those parties from the forum weakens the presumption that the chosen forum is a convenient one.

154. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971). *See* Ann Alexander, Note, *Forum Non Conveniens in the Absence of an Alternative Forum*, 86 COLUM. L. REV. 1000, 1005 (1986) (stating that the Restatement is an accurate description of the law as it stands in American jurisdictions).

155. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 cmt. a (1971), which explains:

> Some of these forums may have little relation either to the parties or te the cause of action, and suit in them may increase greatly the burden to the defendant of making a defense. On occasion, a plaintiff will bring suit in such a forum in the belief that he may there secure a larger or an easier recovery or in the hope that the inconvenience and burden of making a defense will induce the defendant to enter a compromise, to contest the case less strenuously, or to permit judgment to be entered against him by default. The rule has been developed that a court, even though it has jurisdiction, will not entertain the suit if it believes itself to be a seriously inconvenient forum provided that a more appropriate forum is available te the plaintiff.

"Finally, in the forum non conveniens inquiry, the court focuses on such matters as the location of evidence and of witnesses in order to assess the degree of actual difficulty litigating in the chosen forum will impose." Stewart, *supra* note 19, at 1260.

156. The policies behind forum non conveniens include:

> [T]he state's interest in protecting its citizens and taxpayers from the undue expense and congestion that may flow from burdening its courts with litigation having no connection with the state [, and] the parties' intorest in having litigation between them processed conveniently and in a way most likely to yield a just result.

tects the interests of justice by helping to ensure that the most appropriate forum exerts its regulatory authority by turning away those causes of action not arising within the forum.[157] In other words, the doctrine recognizes why forum matters and provides an avenue to ensure the imposition of the proper regulatory regime. In *Gulf Oil Corp. v. Gilbert*, the United States Supreme Court illustrated how the doctrine may be applied to effectuate these goals.[158]

B. The Inappropriate Forum—Gulf Oil Corp. v. Gilbert

In *Gulf Oil Corp. v. Gilbert*, a Virginia resident brought a cause of action in a New York federal district against a Pennsylvania corporation based on a fire in Virginia.[159] The defendant corporation was "generally present" in both Virginia and New York.[160] The plaintiff sued in New York to take advantage of its favorable disposition towards plaintiffs.[161] The defendant moved to dismiss the case on forum non conveniens grounds. The defendant did not want to litigate in New York for the same reasons that the plaintiff had chosen the forum.[162]

The United States Supreme Court conceded that the New York federal district court could assert jurisdiction over the defendant but held that the court could resist imposition upon its jurisdiction under

---

FLEMING JAMES & GEOFFREY C. HAZARD, CIVIL PROCEDURE § 2.28, at 107 (3d ed. 1985); *see also* Carney, *supra* note 146, at 125-26 (explaining that the U.S. test for forum non conveniens focuses on the interest of the forum and the burden a trial will place on a court and the community).

157. In *World-Wide Volkswagen* and *Shaffer*, Justice Brennan emphasized that venue and forum non conveniens principles could he used by defendants to transfer the litigation to a more appropriate forum. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 312 n.21 (1980); Shaffer v. Heitner, 433 U.S. 186, 228 n.8 (1977).

158. The use of forum non conveniens to cure problems inherent in transient jurisdiction is not new. *Gardner v. Thomas*, 14 Johns. 134 (N.Y. 1817), may be the first instance of a U.S. court using the doctrine to overcome the inappropriateness connected with transient jurisdiction. The court dismissed a case brought by a British citizen for an alleged tort committed on a British vessel on the high seas. *See id.* at 138. The New York court explained that the court must look to the "circumstances of the case" to ascertain the propriety of extending jurisdiction. *Id.* Scholars often cite the case as the earliest application of the forum non conveniens doctrine to correct an early transient jurisdiction rule. *See* Ehrenzweig, *supra* note 110, at 305.

159. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 502-03 (1947).

160. The defendant corporation was organized under Pennsylvania law and qualified to do business in both Virginia and New York. *See id.* at 503.

161. *See id.* at 502.

162. *See generally* Maier & McCoy, *supra* note 4, at 266-67 (explaining that plaintiffs go to "great lengths to obtain a forum likely to select policies that will produce results more favorable than those likely to obtain in other available fora, and defendants regularly resist such a forum for precisely the same reasons that led the plaintiff to seek it").

the doctrine of forum non conveniens.[163] The Court explained that the doctrine provides considerable discretion to a trial court to decide whether it is the appropriate forum to adjudicate the dispute.[164] The Court provided a list of private factors to consider:

> relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial.[165]

The Court explained that a plaintiff may not choose an inconvenient forum to "vex," "harass," or "oppress" the defendant.[166] It held that a court should disturb the plaintiff's choice of forum only when the balance strongly favors the defendant.[167] Although the Court used terms of physical convenience, a closer analysis of the case illustrates that the Court was concerned not with the relative convenience to the parties but rather the appropriateness of the forum attaching its legal consequences to the actions of the parties.[168]

The Court also explained that public interest notions have a place in the application of the doctrine. It stated:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instoad of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local intorest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.[169]

The Supreme Court upheld the district court's dismissal of the case because the cause of action arose in Virginia.[170] The Court held that

---

163. *See Gulf Oil*, 330 U.S. at 504-05. *Gulf Oil* was decided on forum non conveniens grounds because § 1404 was not yet in existence. In response to *Gulf Oil*, Congress passed § 1404 a year later, in 1948. *See* An Act to revise, codify, and enact into law Title 28 of the United States Code entitled "Judicial Code and Judiciary," Pub. L. No. 773, § 1404, 62 Stat. 869, 937 (1948).

164. *See id.* at 508 ("Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.").

165. *Id.*

166. *Id.*

167. *See id.*

168. *See id.* at 509-11.

169. *Id.* at 508-09.

170. *See id.* at 512.

Virginia, not New York, provided the proper regulatory regime.[171] The federal court in New York did not deem its regulation of activities in Virginia appropriate. The Supreme Court's affirmance clearly recognized the importance of forum. It explicitly acknowledged that forum is more than just a physical location—it embodies a state's regulatory machinery.

C. *Using Forum Non Conveniens to Ensure the Appropriate Forum*

Before the Supreme Court's decision in *Burnham*, some commentators believed that the doctrine of forum non conveniens had outlived its usefulness.[172] If a litigant could seek constitutional fundamental fairness protection from all assertions of jurisdiction, the public and private factors articulated in *Gulf Oil* would already have come to bear on the venue question.[173] After *Burnham*, however, forum non conveniens and § 1404(a) surfaced as perhaps the only way to protect litigants from a forum's assertion of general jurisdiction.[174]

---

171. *See id.* at 509-11. The Court concluded that the
> task of the trial court would be simplified by trial in Virginia. If trial was in a state court, it could apply its own law to events occurring there. If in federal court by reason of diversity of citizenship, the court would apply the law of its own state in which it is likely te be experienced. The course of adjudication in New York federal court might be beset with conflict of laws problems all avoided if the case is litigated in Virginia where it arose.

Id. at 511-12.

172. *See* Stewart, *supra* note 19, at 1263-64.

173. *See id.* Stewart wrote that
> [t]he personal jurisdiction inquiry ought te take inte account what courts in the context of forum non conveniens refer to as the 'private factors,' those factors that relate to the burden imposed on the litigants by the plaintiff's choice of forum. Many cases dismissed under the doctrine of forum non conveniens should thus be dismissed for lack of personal jurisdiction over the defendant.

Id. The author also noted that "[i]f the jurisdictional analysis were properly undertaken, use of the common law doctrine would no longer be necessary to assure a convenient forum." *Id.* at 1271. *But see* Litman, *supra* note 146, at 567 n.11 ("The modern law of forum non conveniens has developed in part in response to changes in the law of personal jurisdiction, which have exposed defendants to potential hardship and contributed to an enormous increase in judicial business."). Some commentators have questioned the continued viability of forum non conveniens and the federal transfer statute. "When the forum chosen by the plaintiff lacks personal jurisdiction over the defendant, of course, forum non conveniens is not a relevant issue; the suit will be dismissed for lack of that jurisdiction." Stewart, *supra* note 19, at 1321. After *Burnham*, forum non conveniens and the federal transfer statute are perhaps the only way to temper the injustice of general jurisdiction.

174. *See generally* Alan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985) (pointing out that forum non conveniens doctrine offers a route of judicial escape from the exercise of general jurisdiction when the forum has no relationship to the cause of action). Some lower courts have also made this observation. In *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 344, 347 (8th Cir. 1983), the Eighth Circuit held that the factors used in forum non conveniens analysis already appeared in its public interest analysis and its concern for fairness in its jurisdictional analysis, thus making the forum

In fact, after *Burnham*, many commentators predicted the resurrection of forum non conveniens as a means to avoid the unfairness caused by a forum's assertion of general jurisdiction.[175] Such predictions echoed forty-year-old concerns about the need to temper the dogmatic rule of personal service created by *Pennoyer* and not completely overruled by *International Shoe*.[176] In fact, forum non conveniens helped the Supreme Court shape its test for constitutional fundamental fairness jurisdiction.[177] Through forum non conveniens, courts are able to place cases in those fora that actually have specific jurisdiction.[178] Some even argue that forum non conveniens and § 1404(a) provide better avenues for both the plaintiff and the defendant than the constitutional jurisdictional route.[179]

---

non conveniens motion redundant. Some commentators have concluded that forum non conveniens masks the reality of jurisdictional disease by treating symptoms rather than root causes. *See* Cox, *supra* note 13, at 18 n.32. Others have criticized the doctrine as a waste of judicial resources by clogging the court with worthless motions and protracted litigation. *See* Stewart, *supra* note 19, at 1324. One author explains the overlap between subject matter jurisdiction, personal jurisdiction, venue, and forum non conveniens. *See* Stein, *supra*, at 781. Stein concluded that a doctrine of "forum conveniens" is warranted, either under the rubric of personal jurisdiction or the rubric of subject matter jurisdiction. *See id.*

175. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.10, at 150 (3d ed. 1986) ("To some extont, the evils of utilizing transient presence te confer judicial jurisdiction can be avoided by extension of the doctrine of forum non conveniens."); Albright, *supra* note 22, at 383 n.162 ("[A]ny justification of transient jurisdiction includes a strong doctrine of forum non conveniens to relieve situations of substantial inconvenience."); Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 576 (1991) ("[T]he retention of physical presence makes practical sense, particularly where discretionary doctrines of *forum non conveniens* are available to alleviate serious hardship in situations where there is an alternative forum.") (footnote omitted).

176. *See* Ehrenzweig, *supra* note 110, at 292 (explaining that forum non conveniens developed te constrain the dogmatic rule of personal service created by the *Pennoyer* requirement); *see also* Associated Mills, Inc. v. Rush-Hampton Indus., Inc., 588 F. Supp. 1164, 1165 (N.D. Ill. 1984) ("In the days before enactment of Section 1404(a), the judicially-created doctrine of forum non conveniens was the courts' only vehicle to moderate the sometimes-unfair effects of the expansion of in personam jurisdiction wrought by *International Shoe* and its progeny.") (citation omitted).

177. *See* Weintraub, *supra* note 49, at 539 (explaining that *Asahi* elevated the factors usually associated with forum non conveniens to a constitutional status).

178. *See* WEINTRAUB, *supra* note 175, at § 4.33 ("In view of the great expansion of bases for judicial jurisdiction, in many states to the full constitutional limits, forum non conveniens is an increasingly important tool with which courts can fashion wise decisions on the exercise of jurisdiction."); William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1710-11 (1992) (explaining that forum non conveniens "permits the court to search for a better home for the litigation" and helps the court to "place the case where it really belongs"); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483-85 (1985) (stating that procedural mechanisms other than finding jurisdiction unconstitutional may be employed to render jurisdiction inconvenient).

179. *See, e.g.*, Albright, *supra* note 22, at 396-97. The author concluded that "[t]he forum non conveniens doctrine provides a mechanism for courts to reach a desired result in hard cases without distorting personal jurisdiction doctrine." *Id.* at 399. However, some commentators

In deciding forum non conveniens motions, trial court judges retain broad discretion in applying the private and public factors enumerated in *Gulf Oil*[180] to the facts of a particular case.[181] The common law doctrine, however, has its faults. First, because it requires a showing of extreme inconvenience, defendants might not meet this high burden despite the existence of a more appropriate forum. Second, courts may be reluctant to grant the motion because it requires outright dismissal of the case. In response, Congress, in 1948, codified and revised the doctrine when it created § 1404(a), the federal transfer statute.[182]

VI. THE FEDERAL TRANSFER STATUTE

Section 1404(a)[183] supersedes the doctrine of forum non conveniens in federal courts[184] when the alternative venue is another

---

argue that forum non conveniens and the federal transfer statute are actually responsible for the inadequacies of jurisdictional rules because they allow courts to avoid difficult questions posed by due process. *See* David W. Robertson, *Forum Non Conveniens in American and England: "A Rather Fantastic Fiction,"* 103 L. Q. REV. 398, 430 (1987) (advocating "clear jurisdictional rules, coupled with very limited forum non conveniens . . . discretion"); Stein, *supra* note 174, at 845-46 (arguing that "a transformation of the doctrine of forum non conveniens into a doctrine of forum conveniens would cure many of the defects in the current doctrine and would represent a rational development of the law"); *see also* Hay, *supra* note 129, at 601 n.65, 603 n.76 ("The possibility of a forum-non-conveniens dismissal does not justify retention of transient jurisdiction. . . . The forum-non-conveniens doctrine is an uncertain and unreliable corrective mechanism.").

180. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAW § 84 cmt. C (1971) (incorporating the public and private interests from *Gulf Oil*); *see also* Alexander, *supra* note 154, at 1003 n.20 (explaining that the factors enumerated in comment C are nothing more than a lengthy direct quotation from *Gulf Oil*); Stewart, *supra* note 19, at 1259 n.3 (citing the factors discussed in *Gulf Oil* as those justifying dismissal under forum non conveniens).

181. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 cmt. B (1971) (explaining that application of forum non conveniens "depends largely upon the facts of the particular case and is in the sound discretion of the trial judge").

182. *See Burger King Corp.*, 471 U.S. at 473 (describing § 1404(a) as an expansive embodiment of forum non conveniens); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 cmt. E (1971) ("A transfer under § 1404(a) may be granted in situations which would not justify dismissal of the case under the doctrine of forum non conveniens.").

183. 28 U.S.C. § 1404 (1994) & Supp. III (1997) provides:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action te any other district or division where it might have been brought

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer

(c) A district court may order any civil action te be tried at any place within the division in which it is pending

federal court.[185] Congress "drafted [§ 1404(a)] in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper."[186] Congress attempted to eliminate the inequities of common law forum non conveniens[187] by requiring a lesser showing of "inconvenience" and providing for transfer to an alternative forum instead of dismissal.[188]

(d) As used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

Section 1404(a) is not the first instance of a transfer statute designed te counteract the flaws of general jurisdiction. For example, originally, in English law, all actions had to be brought in a forum connected with the cause of action "because the *Jury* was te come from where the *fact* was committed." R. BOOTE, AN HISTORICAL TREATISE OF AN ACTION OR SUIT AT LAW 97 (4th ed. 1805); *see also* Ehrenzweig, *supra* noto 110, at 300-01. As practices changed, the plaintiff was permitted to sue in places other than where the events giving rise to the cause of action occurred. This led to a 1382 statuto that forced plaintiffs to commence writs of account and debt in the county where the contract had been made. 6 RICH. 2., c.2 (1382); Ehrenzweig, *supra* note 110, at 301. Later, and in response to a statute of 1705 that allowed plaintiffs te lay transitory actions in any county, "courts began to grant motions for such changes of venue to the place of the cause of action as 'motions of course.' " Ehrenzweig, *supra* note 110, at 301; *see* BOOTE, *supra*, at 154.

184. States still use forum non conveniens. *See* David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 444 n.6 (1990) (collecting state cases). The American Law Institute/Commissioners on Uniform State Law has attempted to draft a state-level statute that mirrors the federal transfer statute. *See* UNIFORM TRANSFER OF LITIG. ACT (Proposed Official Draft 1991) (allowing transfer between the courts of different states and nations that have adopted the act). Some states have enacted statutes along the lines of § 1404(a) that require the existence of an alternative forum before a court may dismiss a suit. *See* Alexander, *supra* note 154, at 1004; *see also* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950-51 (1990) (noting that thirty-two states and the District of Columbia have adopted the federal doctrine of forum non conveniens).

185. *See* Quackenbush v. Allstate Ins. Co., 571 U.S. 706, 722 (1996); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981); *see also* Albright, *supra* note 22, at 358.

186. H.R. REP. NO. 80-308, at 8 (1947). The House Report also explained that "[t]he new subsection requires the court to determine that the transfer is necessary for convenience of the parties and wituesses, and further, that it is in the interest of justice to do so." *Id.*; *see* Norwood v. Kirkpatrick, 349 U.S. 29, 34-35 (1954) (Clark, J., dissenting) (explaining that courts may look to forum non conveniens to interpret the statute); Parette v. Lockhart, 927 F.2d 366, 367 n.2 (8th Cir. 1991) (noting that the magistrate judge "could have transferred the petition to a district court in Louisiana on forum non conveniens grounds"); Brockman v. Sun Valley Resorts, Inc., 923 F. Supp. 1176, 1178 (D. Minn. 1996) (explaining that courts consider 1404(a) motions as forum non conveniens motions); O'Brien v. Goldstar Tech., Inc., 812 F. Supp. 383, 385 (W.D.N.Y. 1993) (explaining that § 1404(a) is a statutory recognition of the common law doctrine of forum non conveniens); *see also Norwood*, 349 U.S. at 32; Fine v. McGuire, 433 F.2d 499, 501 (D.C. Cir. 1970). *But see* All States Freight, Inc. v. Modarelli, 196 F.2d 1010, 1011 (3d Cir. 1952) (arguing that courts improperly limit § 1404(a) with Supreme Court forum non conveniens jurisprudence: "Like many another well-intentioned procedural improvement, this one is in a fair way to be defeated by judicial construction").

187. *See* Michael B. Rodden, *Is 28 U.S.C. § 1404(a) a Federal Forum-Shopping Statute?*, 66 WASH. L. REV. 851, 854 (1991).

188. *See Norwood*, 349 U.S. at 32 ("Congress, by the term 'for convenience of parties and wituesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser

The defendant must show that a "transfer is in the best interests of the litigation."[189] The statute provides greater discretion to trial judges in making this determination[190] and increases the number of judicial districts to which litigants can legitimately seek transfer.[191]

A. Determining Appropriate Fora

Section 1404(a) provides four factors to guide district courts in ruling on transfer motions: (1) convenience of the parties, (2) convenience of the witnesses, (3) interests of justice, and (4) whether the case could have been brought in the proposed transferee forum.[192] Although mentioned last, courts usually resolve the question of "where the case might have been brought" first, as it can be dispositive. The Supreme Court explained that this inquiry concentrates on whether the plain-

---

showing of inconvenience."); *O'Brien*, 812 F. Supp. at 385 (observing that the statutory burden on the defendant is less stringent than forum non conveniens since it results in transfer not dismissal); Paragon-Revolute Corp. v. C. F. Pease Co., 120 F. Supp. 488, 490 (D. Del. 1954) ("[D]isturbing [a] plaintiff's choice of forum is no longer a rarity because of [Section] 1404(a)—defendant's mandatery margin for victory, then, need not be an overwhelming one."); *see also* Stewart, *supra* note 19, at 1279 n.77. However, many district courts apply factors and language identical to those used at common law. *See, e.g.*, American Tel. & Tel. Co. v. MCI Communications Corp., 736 F. Supp. 1294, 1305-13 (D.N.J. 1990) (employing the public and private interests announced in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 235 (1947), in ruling on a § 1404(a) transfer motion); Sandvik v. Continental Ins. Co., 724 F. Supp. 303, 307 (D.N.J. 1989) (same); National Union Fire Ins. Co. v. Lichtenberger, No. 88-6623, 1989 U.S. Dist. LEXIS 8724, at *11 (S.D.N.Y. July 28, 1989) (borrowing the notion of judicial economy from forum non conveniens for its § 1404(a) analysis); National Union Fire Ins. Co. v. Landry, 677 F. Supp. 704, 709-10 (S.D.N.Y. 1988) (applying common law forum non conveniens principles to a § 1404(a) motion). *See also* Stein, *supra* note 174, at 807 (noting that "annotations to § 1404 refer to it as a codification of the forum non conveniens doctrine").

189. Eskofot A/S v. E.I. du Pont de Nemours & Co., 872 F. Supp. 81, 95 (S.D.N.Y. 1995) (quoting Schieffelin & Co. v. Jack Co., 725 F. Supp. 1314, 1321 (S.D.N.Y. 1989)). *See* Linzer v. EMI Blackwood Music, Inc., 904 F. Supp. 207, 216 (S.D.N.Y. 1995) (to the same effect); Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth., 442 F. Supp. 1201, 1207 (S.D.N.Y. 1978) (same); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 218 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (same); *see also* American Littoral Society v. EPA, 943 F. Supp. 548, 550 (E.D. Pa. 1996) (balancing public and private interests); *O'Brien*, 812 F. Supp. at 385 (explaining that the court considers both the intorest of the litigants and the public interest); Lisa Reuchell, Comment, *Federal Question Jurisdiction: Must a Defendant Have Minimum Contacts with the State Whose Long-Arm Statute Is Used to Serve Process?*, 54 LA. L. REV. 407, 432 n.182 (1993) (collecting cases).

190. *See Norwood*, 349 U.S. at 31-32 (observing that § 1404(a) was more than just a codification of forum non conveniens, rather, Congress intended to grant broad power to district court judges); Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991) (explaining that § 1404(a) revised forum non conveniens and granted more discretion to trial court judges); *see also Piper Aircraft*, 454 U.S. at 253; Howe v. Goldcorp Inv., Ltd., 946 F.2d 944, 947 (1st Cir. 1991), *cert denied*, 502 U.S. 1095 (1992).

191. *See* Kelner, *supra* note 19, at 613.

192. *See* 28 U.S.C. § 1404(a) (1994); *American Littoral Soc'y*, 943 F. Supp. at 550.

tiff, independent of the defendant's wishes, might have brought the suit in that forum.[193] According to the Court, this inquiry should not narrow the range of permissible federal fora beyond those permitted by federal venue statutes.[194] Lower courts have elaborated on this requirement.[195] For example, the Third Circuit interpreted the fourth factor as: "where [the suit] might have been brought by all remaining non-settling parties,"[196] while the Ninth Circuit held that transfer to a given forum is appropriate if the defendant could have filed suit there and the plaintiff's claim could have been raised as a permissive counterclaim.[197]

That courts first look to whether the cause of action might have been brought in the proposed transferee forum illustrates that the statute—and a court applying it—is concerned with something other than physical convenience. It shows that, at some level, both Congress and the courts fear the imposition of an improper regulatory regime; for, regardless of how convenient a forum may be, if it lacks the proper regulatory authority to adjudicate the underlying dispute, then the case may not be transferred to it.

B. Finding the Most Appropriate Forum

After determining whether the cause of action might have been brought in the proposed transferee forum, courts turn their attention to the remaining three statutory requirements. The application of these apparently simple factors has spawned a tremendous amount of litigation.[198] Despite the large number of cases, neither the Supreme

---

193. *See* Hoffman v. Blaski, 363 U.S. 335, 343-44 (1960).

194. *See* Van Dusen v. Barrack, 376 U.S. 612, 622 (1964).

195. *See generally In re* Warrick, 70 F.3d 736, 739 (2d Cir. 1995); United States v. Copley, 25 F.3d 660, 662 (8th Cir. 1994); Sunbelt Corp. v. Noble, Denton & Assocs., Inc., 5 F.3d 28, 33 (3d Cir. 1993); Landmark Land Co., Inc. v. OTS, 948 F.2d 910, 913 (5th Cir. 1991).

196. *In re* Fine Paper Antitrust Litig., 685 F.2d 810, 819 (3d Cir. 1982), *cert denied*, 459 U.S. 1156 (1983).

197. *See* A. J. Indus., Inc. v. United States Dist. Court for the Cent. Dist. of Cal., 503 F.2d 384, 387-88 (9th Cir. 1974).

198. See CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 44, at 165 (2d ed. 1970) ("Section 1404(a) has given rise to a veritable flood of litigation. Probably no issue of civil procedure gives rise te so many reported decisions, year after year, as does this seemingly simple statute."); Steinberg, *supra* note 31, at 1481 n.6 ("Defendant transfer motions occur in almost one of every twenty federal cases."); Clermont & Eisenberg, *supra* note 22, at 1526-29 (illustrating the growing number of transfer motions; speculating that as many as ten thousand transfer motions may be made each year); Steinberg, *supra* note 184, at 446 n.11 (citing evidence that "[t]he roughly 3,700 § 1404 transfers ordered in 1988-89 represent a more than 100% increase from the roughly 1,700 annual transfers ordered ten years earl[ier]"); *see also* Steinberg, *supra* note 31, at 1515-50 (collecting and summarizing published transfer motion decisions between 1992 and 1994); Kelner, *supra* note 19, at 614 (collecting cases). Some have commented that this increase

Court nor the legal community has paid the statute much attention.[199] District courts, therefore, have been almost solely responsible[200] for the development of the factors and standards for § 1404(a) transfers.[201] While many commentators view this situation as a weakness of § 1404(a),[202] ad hoc, "appropriateness" analysis developed by those closest to the case best effectuates the purpose and policy of § 1404(a).

Section 1404(a) attempts to prevent the waste of time and protect the various interests of the parties.[203] Congress designed § 1404(a) to provide trial judges with discretion "to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' "[204] A court may transfer a case at any time during its pendency.[205] Although federal courts do not liberally grant

---

of motions "[p]erhaps . . . reflects a growing need for the transfer device." Clermont & Eisenberg, *supra* note 22, at 1526. In any event, the widespread litigation of transfer motions offers conclusive proof that forum matters, at least to the parties with a stake in the matter.

199. *See* Stoinberg, *supra* note 184, at 446 ("The Supreme Court rarely has addressed section 1404 transfers, and . . . [l]egal scholars have ignored the motion to transfer.").

200. This fact should not suggest that district courts alone have power to issue transfers. The United States Supreme Court, in *Koehring Co. v. Hyde Contruction Co.*, 382 U.S. 362, 365 (1966), held that § 1404(a) does not preclude appellate courts from issuing transfer orders. Appellate courts may order transfer *sua sponte*. *See infra* note 207; Jumara v. State Farm Ins. Co., 55 F.3d 873, 884 (3d Cir. 1995) (Garth, J., dissenting).

201. *See, e.g.*, Steinberg, *supra* noto 184, at 446 ("[T]he development of proper standards to govern the transfer of cases has been left to the lower federal courts, and almost exclusively to the district courts."). The author explained, however, that the lower courts have "not provided any meaningful standards to govern the section 1404 transfer." *Id.* at 487.

202. *See, e.g., id.* at 446 (concluding that as a result of the "ad hoc balancing employed by the district courts," this body of law is in chaos).

203. *See* Willoughby v. Potomac Elec. Power Co., 853 F. Supp. 174, 175 (D. Md. 1994); *see also* Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (explaining that "the purpose of the section is to prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense' ") (quoting Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26, 27 (1960).

204. Stewart Org., v. Ricoh Corp., 487 U.S. 22, 29 (1988) (quoting *Van Dusen*, 376 U.S. 622); *see In re* Cuyahoga Equip. Corp., 980 F.2d 110, 117 (2d Cir. 1992) ("[M]otions for transfer lie within the broad discretion of the district court[s] and are determined upon notions of convenience and fairness on a case-by-case basis."); *see also* Jumara v. State Farm Ins. Co., 55 F.3d 873, 883 (3d Cir. 1995); Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993); Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 628, 632 (3d Cir. 1989); Jarvis Christian College v. Exxon Corp., 845 F.2d 523, 528 & n.22 (5th Cir. 1988); Hubbard v. White, 755 F.2d 692, 694 (8th Cir. 1985), *cert. denied*, 474 U.S. 834 (1985); Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 567 (10th Cir. 1978); Ashmore v. Northeast Petroleum Div. of Cargill, Inc., 925 F. Supp. 36, 38 (D. Me. 1996); Wine Mkts. Int'l, Inc. v. Bass, 939 F. Supp. 178, 181 (E.D.N.Y. 1996); Linzer v. EMI Blackwood Music, Inc., 904 F. Supp. 207, 216 (S.D.N.Y. 1995); American Cynamid Co. v. Eli Lilly & Co., 903 F. Supp. 781, 786 (D.N.J. 1995); Hill's Pet Prod. v. A.S.U., Inc., 808 F. Supp. 774, 776 (D. Kan. 1992); Midwest Motor Supply Co. v. Kimball, 761 F. Supp. 1316, 1318 (S.D. Ohio 1991).

205. *See* Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1516 (10th Cir. 1991).

transfers,[206] they have on occasion issued § 1404(a) transfer orders sua sponte when the interests of justice so demanded.[207]

Courts evaluate the merits of § 1404(a) transfer motions on a flexible and individualized basis that balances a number of case-specific factors.[208] It is notably similar to the process by which courts determine special jurisdiction. Although some generalizations may be made based on transfer determinations,[209] courts have not catalogued the circumstances that justify or require grant or denial of transfer.[210] Rather, such decisions are left to the sound discretion of trial judges.[211] The case-by-case nature of transfer determinations, however, can make predictions about the success of such motions difficult.[212]

Reviewing reported decisions illuminates a number of frequently-considered factors that can help courts reach sound resolutions of these case-by-case inquiries. The number of factors grows each year, as judges use the verbal short-hand developed by their predecessors to describe the reasons why, in their ad hoc value judg-

---

206. *See, e.g., American Cynamid Co.*, 903 F. Supp. at 786; Kielcynski v. Consolidated Rail Corp., 837 F. Supp. 687 (E.D. Pa. 1993).

207. *See, e.g.*, I-T-E Circuit Breaker Co. v. Becher, 343 F.2d 361, 363 (8th Cir. 1965) (arguing the validity of sua sponte transfer even though "[n]o reported case has been found in which it has been specifically declared that [§ 1404(a)] authorizes a court to transfer a case to another district on its own motion"); Kearney v. Trecker Corp. v. Cincinnati Milling Mach. Co., 254 F. Supp. 130, 133-34 (N.D. Ill. 1966) (issuing transfer sua sponte).

208. *See Stewart Org., Inc.*, 487 U.S. at 29 (quoting *Van Dusen*, 376 U.S. at 622); Patel v. Howard Johnson Franchise Syss., Inc., 928 F. Supp. 1099, 1101 (M.D. Ala. 1996); O'Brien v. Goldstar Tech., Inc., 812 F. Supp. 383, 385 (W.D.N.Y. 1993); Red Bull Assocs. v. Best Western Int'l, Inc., 862 F.2d 963, 967 (2d Cir. 1988); Terra Int'l, Inc. v. Mississippi Chem. Corp., 922 F. Supp. 1334, 1357 (N.D. Iowa 1996); *Chrysler Credit Corp.*, 928 F.2d at 1516; *see also* Koster v. American Lumbermens Mut. Cas. Co., 330 U.S. 518, 528 (1947) ("Each case turns on its facts."); FTC v. MacArthur, 532 F.2d 1135, 1143 (7th Cir. 1976) (same); *American Cynamid Co.*, 903 F. Supp. at 786; Willoughby v. Potomac Elec. Power Co., 853 F. Supp. 174, 175 (D. Md. 1994).

209. *See* Albright, *supra* note 22, at 359 (explaining that despite "an ad hoc collection of result-oriented decisions, some generalizations can be made"); Robertson, *supra* note 179, at 415 (noting that "seemingly indistinguishable cases have far too often yielded diametrically opposite results"); Stein, *supra* note 174, at 785 (describing the state of the law as "a crazy quilt of ad hoc, capricious, and inconsistent decisions").

210. *See* Brown v. Woodring, 174 F. Supp. 640, 644 (D.C. Pa. 1959); Ashmore v. Northeast Petroleum Div. of Cargill, Inc., 925 F. Supp. 36, 38 (D. Me. 1996) (quoting 15 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER ET AL., FEDERAL PRACTICE AND PROCEDURE § 3827, at 368 (2d ed. 1986)).

211. *See, e.g.*, Kasey v. Molybdenum Corp., 408 F.2d 16, 20 (9th Cir. 1969); *Brown*, 174 F. Supp. at 644.

212. *See* American Dredging Co. v. Miller, 510 U.S. 443, 455 (1994) ("[*F*]*orum non conveniens* cannot really be *relied* upon in making decisions about secondary conduct—in deciding, for example, where to sue or where one is subject to being sued. The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible.") (citations omitted). However, this "flexible and multifaceted analysis [conforms with how] Congress intended to govern motions to transfer within the federal system." *Stewart Org., Inc.*, 487 U.S. at 31.

ment, the facts warrant transfer to a more appropriate forum.[213] Many courts begin their transfer analysis by listing those factors applicable to the particular set of facts before them.[214] To understand and evaluate how § 1404(a) can provide protection to litigants against a forum's assertion of general jurisdiction, a brief glance at these factors is necessary.

---

213. *See* American Tel. & Tel. Co. v. MCI Communications Corp., 736 F. Supp. 1294, 1305 (D.N.J. 1990) (noting the flexibility of § 1404(a) factors); Sandvik v. Continental Ins. Co., 724 F. Supp. 303, 307 (D.N.J. 1989) ("There appears to be no limit to the number of factors a federal court may consider in connection with a motion to transfer venue under section 1404(a)."); Eastern Scientific Mktg., Inc. v. Tekna-Seal, Inc., 696 F. Supp. 173, 180 n.13 (E.D. Va. 1988) (identifying twenty different factors that may be relevant to a transfer motion); *see also* JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 10.345[5], at 4362-63 (2d ed. 1991) ("The combination and weight of factors . . . cannot be catalogued."); Kelner, *supra* note 19, at 614-15 ("The already large number of factors used to gauge the appropriateness of a transfer grows each year, keeping pace with the ever increasing number of transfer motions filed by litigants."); Annotation, *Questions as to Convenience and Justice of Transfer Under Forum Non Conveniens Provision of Judicial Code (28 U.S.C. § 1404(a))*, 1 A.L.R. FED. 15, 37-38 (1969) (identifying 16 different factors relevant to a transfer motion).

214. *See, e.g.*, Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1516 (10th Cir. 1991) (listing: plaintiff's choice of forum; accessibility of witnesses and other sources of proof, including the availability of compulsory process to ensure attendance of witnesses; the cost of making the necessary proof; the enforceability of a judgment, if obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of conflict of laws questions arising; the advantage of having a local court determine questions of local law; and all other considerations of a practical nature that make a trial easy, expeditious and economical); Wine Mkts. Int'l, Inc. v. Bass, 939 F. Supp. 178, 181 (E.D.N.Y. 1996) (considering: (1) convenience of the parties, (2) convenience of the witnesses, (3) relative means of the parties, (4) locus of operative facts and relative ease of access to sources of proof, (5) attendance of witnesses, (6) the weight accorded the plaintiff's choice of forum, (7) calendar congestion, (8) the desirability of having the case tried by the forum familiar with the substantive law to be applied, (9) practical difficulties, and (10) how best to serve the interest of justice, based on an assessment of the totality of material circumstances); Hill's Pet Prods. v. A.S.U., Inc., 808 F. Supp. 774, 776 (D. Kan. 1992) (citing Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir. 1967)) (evaluating plaintiff's choice of forum, the accessibility of witnesses and other sources of proof including the availability of compulsory process to ensure attendance of witnesses, the cost of making the necessary proof, the enforceability of a judgment if obtained, relative advantages and obstacles to a fair trial, difficulties that may arise from congested dockets, the possibility of conflict of laws issues, the advantage of having a local court determine questions of local law, and all other considerations of a practical nature); Don King Prods., Inc. v. Douglas, 735 F. Supp. 522, 533-37 (S.D.N.Y. 1990)) (reviewing: (1) the place where the operative facts occurred, (2) convenience of the parties, (3) convenience of witnesses, (4) relative ease of access to sources of proof, (5) availability of process to compel attendance of unwilling witnesses, (6) plaintiff's choice of forum, (7) the forum's familiarity with governing law, and (8) trial efficiency and the interests of justice); United Sonics, Inc. v. Shock, 661 F. Supp. 681, 682-83 (W.D. Tex. 1986) (considering availability and convenience of witnesses and parties, location of counsel, location of books and records, cost of obtaining attendance of witnesses and other trial expenses, place of the alleged wrong, possibility of delay and prejudice if transfer is granted, and the plaintiff's choice of forum).

After Congress passed the federal transfer statute in 1948, district courts looked to the factors[215] enumerated by the Supreme Court in *Gulf Oil Corp. v. Gilbert* for guidance in making transfer determinations. In fact, many courts still use only those factors in making § 1404(a) determinations.[216] However, most courts, while borrowing from *Gulf Oil*, have categorized the factors according to the three-prong statutory standard: convenience to parties, convenience to witnesses, and the interests of justice.

1. Convenience to the Parties

Courts look to a number of different factors in evaluating the convenience to the parties. The plaintiff's choice of forum usually comes first, but courts often afford differing weight to this choice.[217] Many trial judges will not disturb a plaintiff's choice unless the defendant offers clear proof that weighs in the defendant's favor.[218] Courts

---

215. The court, in *O'Brien v. Goldstar Technology, Inc.*, 812 F. Supp. 383, 385 (W.D.N.Y. 1993), provided a summary of these interests. Private interests include: (1) plaintiff's initial choice of forum, (2) convenience of the parties and the witnesses, (3) relative ease of access to sources of proof, (4) availability of compulsory process for the attendance of witnesses, (5) the location of relevant documents and other tangible evidence, (6) the enforceability of a judgment, if obtained, and (7) "all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Id.* (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); *see also* Calavo v. Generali Belgium, 632 F.2d 963, 966-67 (2d Cir. 1980)). The public interests include: "administrative difficulties that follow from court congestion, a local interest in having localized controversies decided at home, and the appropriateness of having the trial of a diversity case in a forum that is at home with the state law that must govern the action." *Id.*; *see also* American Cynamid Co. v. Eli Lilly & Co., 903 F. Supp. 781, 787 (D.N.J. 1995) (citing the private and public interests from *Gulf Oil*).

216. *See* CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 962 F.2d 77, 80 (1st Cir. 1992) (using factors from *Gulf Oil*); Moore v. Telfon Communications Corp., 589 F.2d 959, 968 (9th Cir. 1978) (same); Technitrol, Inc. v. McManus, 405 F.2d 84, 86 (8th Cir. 1968) (same); Brockman v. Sun Valley Resorts, Inc., 923 F. Supp. 1176, 1179 (D. Minn. 1996) (same); *American Cynamid Co.*, 903 F. Supp. at 786 ("[T]he court must look to the factors enumerated by the Supreme Court in *Gulf Oil v. Gilbert.*"); Ricoh Co. v. Honeywell, Inc., 817 F. Supp. 473, 479-80 (D.N.J. 1993) (same); *see also* Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 132 (1965) ("Apparently the district courts have followed the lead of Moore's FEDERAL PRACTICE, which lists the factors discussed in *Gulf Oil* as controlling 'Grounds for Transfer under § 1404(a).' ").

217. *See generally* 15 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3848 (1982) (explaining that "courts have developed a bewildering variety of formulations on how much weight is to be given to plaintiff's choice of forum"); Kelner, *supra* note 19, at 619-21 & nn.33-40 (collecting numerous cases illustrating the range of cases from those that afford very little weight to those that afford substantial weight to the plaintiff's choice of forum).

218. *See* Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 521 (2d Cir. 1989); Howell v. Tanner, 650 F.2d 610, 616 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 918 (1982); William A. Smith Contracting Co. v. Travelers Indem. Co., 467 F.2d 662, 664 (10th Cir. 1972); Linzer v. EMI Blackwood Music, Inc., 904 F. Supp. 207, 216 (S.D.N.Y. 1995); Hubbell Inc. v. Pass & Seymour, Inc., 883 F. Supp. 955, 962 (S.D.N.Y. 1995).

frequently look to the underlying reasons for both the plaintiff's and the defendant's preference.[219] If the plaintiff resides in the forum or the cause of action arose in the forum, courts regularly afford greater deference to the plaintiff's choice than if the plaintiff's chosen forum bears no relationship to the cause of action.[220] Some courts examine the convenience of the parties as indicated by their relative physical and financial condition[221] and rarely order transfer if it merely shifts inconvenience from one party to the other.[222] Still others attempt to balance all convenience factors[223] or to maximize the convenience of all parties and witnesses involved.[224] Others consider which party filed first[225] or the parties' contractual choice of forum.[226] Courts balance some or all of these factors in determining convenience to the parties.

2. Convenience of the Witnesses and Access to Evidence

After considering the convenience of the parties, courts look to the convenience of the witnesses. They assign considerable weight to the location of material witnesses.[227] In determining the convenience

219. *See, e.g.*, Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995) (weighing plaintiff's preference and defendant's preference).

220. *See infra* notes 298-301, and accompanying text.

221. *See Jumara*, 55 F.3d at 879.

222. *See* O'Brien v. Goldstar Tech., Inc., 812 F. Supp. 383, 386 (W.D.N.Y. 1993); De Luxe Game Corp. v. Wonder Prods. Co., 166 F. Supp. 56, 61 (S.D.N.Y. 1958).

223. The Tenth Circuit, in *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992), described this balance of "convenience" as (1) location of the majority of witnesses, (2) location of pertinent documentary evidence, (3) place in which conduct complained of occurred, (4) which forum's substantive law applies to the conduct complained of, and (5) whether the balance of factors indicates that the proposed transferee district is the less expensive and more convenient forum for litigation. Thus, convenience does not mean simply physical convenience of the parties but includes any notion of convenience that an ad hoc value judgment as to the more appropriate forum might involve.

224. *See, e.g.*, Kirschner Bros. Oil, Inc. v. Pannill, 697 F. Supp. 804, 807 (D. Del. 1988).

225. *See* Terra Int'l, Inc. v. Mississippi Chem. Corp., 922 F. Supp. 1334, 1357 (N.D. Iowa 1996).

226. Many courts recognize the contractual choice of forum as a "significant" factor. *See, e.g.*, Sunshine Beauty Supplies, Inc. v. United States Dist. Court, 872 F.2d 310, 311 (9th Cir. 1989). However, others, including the Supreme Court, observe that forum selection clauses should not receive "dispositive consideration." Stewart Org., v. Ricoh Corp., 487 U.S. 22, 30-31 (1988); *Jumara*, 55 F.3d at 880; Brock v. Entre Computer Ctrs., Inc., 933 F.2d 1253, 1257-58 (4th Cir. 1991); Moses v. Business Card Express, Inc., 929 F.2d 1131, 1136 (6th Cir. 1991).

227. *See Jumara*, 55 F.3d at 879; Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 988 (E.D.N.Y. 1991) (stating that the location of wituesses is a major facter in considering transfer motions); Arrow Elecs., Inc. v. Ducommun, Inc., 724 F. Supp. 264, 265 (S.D.N.Y. 1989) ("In most cases, the convenience of the party and non-party wituesses is the most important factor in the decision whether to grant a motion for transfer."); Cambridge Filter Corp. v. International Filter Co., 548 F. Supp. 1308, 1311 (D. Nev. 1982) (explaining that the convenience of witnesses is the primary concern in deciding transfer motions); Supco Automotive Parts, Inc. v. Triangle Auto

to the witnesses, courts weigh the nature and materiality of testimony expected from witnesses who must travel to the forum.[228] In addition to looking at the location of witnesses, most, if not all, courts inquire about access to evidence in both fora.[229] They assess the relative ease of access to sources of proof,[230] which frequently inquires whether the jury must view evidence.[231] At this point, most courts balance the overall conveniences of the parties and witnesses (and access to evidence), and then concentrate on the interests of justice.

3. Interests of Justice

Although some question whether the "interests of justice" constitutes a distinct factor or merely modifies "convenience of parties and witnesses," the legislative history and caselaw confirm that it constitutes a separate factor.[232] In determining "the interests of

---

Spring Co., 538 F. Supp. 1187, 1191 (E.D. Pa. 1982) (same); Affymetrix, Inc. v. Synteni, Inc., 28 F. Supp. 2d 192, 203 (D. Del. 1998) (explaining that courts traditionally weigh heavily the location of material witnesses); Jahncke Serv., Inc. v. OKC Corp., 301 F. Supp. 866, 868 (D. Del. 1969) (same); *see also* Kelner, *supra* note 19, at 623 nn.54-58 (collecting cases where location of witnesses was key to the determination of the § 1404(a) transfer motion).

228. *See* Midwest Motor Supply Co. v. Kimball, 761 F. Supp. 1316, 1318 (S.D. Ohio 1991).

229. *See, e.g., Jumara*, 55 F.3d at 879 (noting the importance of "location of books and records"); Jewelmasters, Inc. v. May Dept. Stores Co., 840 F. Supp. 893, 896 (S.D. Fla. 1993) (finding that the location of relevant documents was a significant factor favoring transfer); Polin v. Conduction Corp., 340 F. Supp. 602, 606 (E.D. Pa. 1972) (same); Radio Santa Fe, Inc. v. Sena, 687 F. Supp. 284, 287 (E.D. Tex. 1988); Curtin v. Litton Sys., Inc., 365 F. Supp. 489, 490 (E.D. Pa. 1973). *But see* O'Brien v. Goldstar Tech., Inc., 812 F. Supp. 383, 386 (W.D.N.Y. 1993) (finding that "[d]ocumentary evidence can readily be transported to Western New York, if necessary" and denying transfer motion); Bianco v. Texas Instruments, Inc., 627 F. Supp. 154, 165 (N.D. Ill. 1985) (concluding that location of documents did not favor motion te transfer "given the ready availability of photocopying and the relative ease with which documents may be selectively shipped around the country").

230. *See Midwest Motor Supply Co.*, 761 F. Supp. at 1318; Datasouth Computer Corp. v. Three Dimensional Techs., Inc., 719 F. Supp. 446, 452 (W.D.N.C. 1989); Johnson v. Mississippi, 78 F.R.D. 37, 41 (N.D. Miss. 1977).

231. *See Datasouth Computer*, 719 F. Supp. at 452 (considering the jury's access to an evidentiary site); Jurgelis v. Southern Motors Express, Inc., 169 F. Supp. 345, 346 (E.D. Pa. 1959) (same). *But see* Hess Oil V. I. Corp. v. UOP, Inc., 447 F. Supp. 381, 384 (N.D. Okla. 1978) (limiting consideration of jury access to a site to unusual circumstances).

232. Both case law and legislative history confirm the factor's independence. *See* 28 U.S.C. § 1404(a), reviser's notes (1994) ("The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice te do so."); Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) ("[Section 1404(a)] empowers a district court te transfer . . . if the transfer is warranted by the convenience of parties and witnesses and promotes the interest of justice."); *see, e.g., Terra Int'l, Inc.*, 922 F. Supp. at 1362; Kelner, *supra* note 19, at 627. Despite the consensus that it is a separate factor, no such agreement exists as to the appropriate criteria for evaluating the interests of justice. *See* Letter-Rite, Inc. v. Computer Talk, Inc., 605 F. Supp. 717, 721 (N.D. Ill. 1985) (describing "interests of justice" as "a grab-bag of sorts that has come largely te encompass the factors

justice," courts consider as many as twenty different factors. For example, many courts review where the cause of action arose[233] and the location of the events involved in the dispute.[234] Others look to the locus of operative facts.[235] To similar effect, some courts examine the "order in which jurisdiction was obtained" by the district court[236] or the "nature of the suit."[237]

Courts consider "location" under an "interest of justice" analysis in other ways, such as by factoring in the enforceability of the judgment[238] or the existence of related litigation.[239] Many courts weigh the comparative docket congestion of the two fora.[240] Some look to the efficient functioning of the courts.[241] Others balance prejudice to the plaintiff against the conservation of judicial resources and the possibility of inconsistent judgments.[242]

Courts also consider the burden on the local court system and the adverse effects to local economies as well as the fear of becoming a

---

enumerated in *Gulf Oil*"); *see also* Terra Int'l, Inc. v. Mississippi Chem. Corp., 922 F. Supp. 1334, 1363-64 (N.D. Iowa 1996).

233. *See, e.g.*, Grossman v. Schwarz, 678 F. Supp. 440, 443 (S.D.N.Y. 1988); *Jumara*, 55 F.3d at 879.

234. *See* Midwest Motor Supply Co. v. Kimball, 761 F. Supp. 1316, 1318 (S.D. Ohio 1991).

235. *See, e.g.*, Wine Mkts Int'l, Inc. v. Bass, 939 F. Supp. 178, 182 (E.D.N.Y. 1996) (describing the locus of operative facts as an obvious factor to consider); Fischer v. Enterprise Rent-A-Car Co., No. CV-95-4876, 1996 WL 251426, at *4 (E.D.N.Y. Apr. 24, 1996); Mobile Video Servs., Ltd. v. National Ass'n of Broad. Employees & Technicians, 574 F. Supp. 668, 670-71 (S.D.N.Y. 1983).

236. Ashmore v. Northeast Petroleum Div. of Cargill, Inc., 925 F. Supp. 36, 38 (D. Me. 1996) (citing Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 11 (1st Cir. 1987)).

237. *Midwest Motor Supply*, 761 F. Supp. at 1318.

238. *See, e.g.*, *Jumara*, 55 F.3d at 879.

239. *See, e.g.*, Ferens v. John Deere Co., 494 U.S. 516, 531 (1990) ("[T]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed te prevent.") (quoting Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960)); Lee v. Ohio Casualty Ins. Co., 445 F. Supp. 189, 192 (D. Del. 1978) ("The interest of justice is served by the elimination of an unnecessary additional trial."); American Cynamid Co. v. Eli Lilly & Co., 903 F. Supp. 781, 787 (D.N.J. 1995); *Continental Grain Corp.*, 364 U.S. at 26; *see also* Kelner, *supra* note 19, at 626 & nn.67-70 (collecting cases).

240. *See, e.g.*, *Jumara*, 55 F.3d at 879; *Midwest Motor Supply Co.*, 761 F. Supp. at 1318; Motown Record Corp. v. Mary Jane Girls, Inc., 660 F. Supp. 174, 175 (S.D.N.Y. 1987); Letter-Rite, Inc. v. Computer Talk, Inc., 605 F. Supp. 717, 722 (N.D. Ill. 1985); Neff Athletic Lettering Co. v. Walters, 524 F. Supp. 268, 274 (S.D. Ohio 1981); Berkshire Int'l Corp. v. Alba-Waldensian, Inc., 352 F. Supp. 831, 834-35 (S.D.N.Y. 1972) (transferring the case in part because it would be heard seventeen months sooner in the transferee court). Some courts examine the average time required for disposition of cases in the two fora. *See* Kelner, *supra* note 19, at 625 & nn.63-64 (collecting cases). *But see* O'Brien v. Goldstar Tech., Inc., 812 F. Supp. 383, 387 (W.D.N.Y. 1993) (discounting the comparison of docket congestion as a substantial factor).

241. *See* Coffey v. Van Dorn Iron Works, 796 F.2d 217, 221 (7th Cir. 1986); Heinz v. Frank Lloyd Wright Found., 773 F. Supp. 1219, 1225 (W.D. Wis. 1991).

242. *See Jumara*, 55 F.3d at 879; Amoco Prod. Co. v. United States Dep't of Energy, 469 F. Supp. 236, 244 (D. Del. 1979).

dumping ground for the nation's (and the world's) tort litigation.[243] Other tribunals review the relative advantages and obstacles to a fair trial in the prospective transferee fora.[244] Many courts look to the transferee judge's familiarity with the applicable law.[245] Still others heed questions arising in the area of conflict of laws.[246]

Following the lead of *Gulf Oil*, most courts weigh the local interest in deciding local controversies at home.[247] They also look to the public policies of the respective fora[248] as well as the public interests involved.[249] Finally, courts account for "any special circumstances present in the case"[250] as well as "all other considerations of a practical nature that make a trial easy, expeditious and economical."[251]

District courts may choose from literally dozens of factors when ruling on transfer motions. While fleshing out these factors helps to understand the statute, listing alone does not provide an accurate picture of § 1404(a)'s role in jurisdictional jurisprudence. Only by moving beyond the rhetoric to discover how and why courts transfer cases may one appreciate the ability of § 1404(a) to ensure the imposition of the most appropriate regulatory regime.

VII. DETOURING AROUND *BURNHAM*'S ROADBLOCK: USING § 1404 TO INSERT FUNDAMENTAL FAIRNESS INTO FORUM SELECTION

A. Moving Beyond the Rhetoric

In looking beyond the rhetoric of convenience and concentrating on the many factors district courts use to determine the appropriateness of § 1404(a) motions, the caselaw reveals that trial judges are actually concerned with the imposition of a regulatory regime and

243. *See* Albright, *supra* note 22, at 363 (explaining that courts fear overburdening particular local courts and adversely affecting local economies).

244. *See, e.g.*, Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1516 (10th Cir. 1991).

245. *See Jumara*, 55 F.3d at 879; *Midwest Motor Supply Co.*, 761 F. Supp. at 1318; Lafayette Coal Co. v. Gilman Paper Co., 640 F. Supp. 1, 2 (N.D. Ill. 1986) (transferring to the District Court for the Southern District of Georgia because Georgia law applied); Lozano v. Civiletti, 89 F.R.D. 475, 480 (D.D.C. 1980). *But see* Houk v. Kimberly-Clark Corp., 613 F. Supp. 923, 932 (W.D. Mo. 1985) (denying transfer motion based on application of applicable Georgia law because the law was neither complex nor unsettled).

246. *See Chrysler Credit Corp.*, 928 F.2d at 1516.

247. *See, e.g.*, *Jumara*, 55 F.3d at 879; *infra* note 279, and accompanying text.

248. *See, e.g.*, *Jumara*, 55 F.3d at 879.

249. *See* FTC v. MacArthur, 532 F.2d 1135, 1143 (7th Cir. 1976).

250. *Id.*

251. Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir. 1967).

notions of fundamental fairness.[252] Although some courts continue to describe § 1404(a) as merely a federal judicial housekeeping measure,[253] a closer analysis reveals that § 1404(a) stands for much more than a "convenience" doctrine. The notion that § 1404(a) relates merely to convenience springs from its roots in the common law doctrine of forum non conveniens. Though many associate "conveniens" with the word "convenient," conveniens actually derives from the Latin verb "convenio," meaning appropriate or suitable.[254] In fact, when the Supreme Court ushered the forum non conveniens doctrine into modern American jurisprudence in *Gulf Oil*, it chose the most appropriate forum rather than the most physically convenient one.[255]

In the very opinion the Supreme Court chose to describe § 1404(a) as a housekeeping measure, it also explained that "[s]ection 1404(a) directs a district court to take account of factors other than those that bear solely on the parties' private ordering of their affairs."[256] The Reviser's Notes to § 1404(a) further reveal the purpose behind the statute, as the Notes refer litigants to *Baltimore & Ohio R.R. Co. v. Kepner*.[257] In *Kepner*, the plaintiff brought a claim in New York under the Federal Employers' Liability Act, even though the accident occurred and the employee resided in Ohio. The Notes explain that § 1404(a) requires courts to determine whether a transfer is necessary "for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."[258] The Notes' choice of examples provides insight into the purpose of § 1404(a). It illustrates that the term "convenience" means more than physical location. The

252. *See* Cox, *supra* note 121, at 744 n.54 ("I re-emphasize my own 'take' on fairness considerations has little to do with the physical convenience or inconvenience to a defendant of being sued in a particular forum and has much more to do with the likelihood that the defendant will be disadvantaged on the merits by suit in that forum.").

253. *See* Stewart Org., v. Ricoh Corp., 487 U.S. 22, 31 (1988).

254. *See* CASSELL'S LATIN DICTIONARY 150 (D.P. Simpson ed., 5th ed. 1968); *see also* Albright, *supra* note 22, at 357 n.30 (explaining the distinction); *id.* at 360 n.48 (noting that "inappropriateness" is "the real issue in the forum non conveniens motion"); *id.* at 361 n.52 ("Even proponents of forum non conveniens dismissals admit that private convenience is often of little importance in today's world of electronic communication and jet travel.").

255. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947) (developing private and public interest factors to determine appropriateness); *see also* Young Lee, Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663, 689 (1997) (explaining that *Gulf Oil Corp.* focuses on finding a forum closely connected to the dispute).

256. *Stewart Org.*, 487 U.S. at 30.

257. For an explanation of the Revisor's Notes and its treatment of *Kepner*, see Norwood v. Kirkpatrick, 349 U.S. 29, 34 (1955) (Clark, J., dissenting).

258. *See Norwood*, 349 U.S. at 34 (Clark, J., dissenting) (quoting Reviser's Notes) (citations omitted).

term portends a search for the appropriate regulatory regime as determined by where the cause of action arose.

Some courts explicitly acknowledge that convenience is really not the issue. One court explained that when courts use the phrase "convenience of parties and witnesses," it really describes something else.[259] Other courts have used the fourth factor, "where it might have been brought," to perform a fundamental fairness jurisdictional analysis.[260] In *Koster v. American Lumbermens Mutual Casualty Co.*,[261] the Supreme Court observed that the books, records, and witnesses were all located in Illinois. In rejecting the plaintiff's choice of a forum other than Illinois, the Court explained that, in derivative actions, "it is more likely that only the corporation's books, records and transactions will be important and only the defendant will be affected by the choice of the place of production of records."[262] In essence, the Court used the physical location of witnesses and evidence to describe where the cause of action arose and, not coincidentally, the proper regulatory regime to be imposed.[263] The Supreme Court discovered what many district courts already knew: the most physically convenient forum is often also the forum where the cause of action arose.

This close association based on the existence of readily identifiable facts has led many to confuse convenience for where the cause of action arose.[264] Consider the analysis of one district court:

> If the "claim arose elsewhere," then it seems most likely the parties, the witnesses, the documents, and all of the other evidence will also be located "elsewhere." As a result, a defendant should have some strong arguments supporting its motion to transfer. In this light, all other things being equal, the "balance of convenience" should tip in favor of the forum which is located "elsewhere."[265]

---

259. *See* Construction Aggregates Corp. v. S.S. Azalea City, 399 F. Supp. 662, 664 (D.N.J. 1975) (finding a forum in Puerto Rico more appropriate because the conduct that gave rise to the action occurred there).

260. *See* Wine Mkts. Int'l, Inc. v. Bass, 939 F. Supp. 178, 179-81 (E.D.N.Y. 1996); Midwest Motor Supply Co. v. Kimball, 761 F. Supp. 1316, 1317-18 (S.D. Ohio 1991).

261. Koster v. American Lumbermens Mut. Cas. Co., 330 U.S. 518, 531 (1947) ("Petitioner shows not a single witness or source of evidence available to him in New York and does not deny that his complaint will require exhaustive examination of the transactions of these Illinois corporations, all of which occurred in Illinois and are to be tested by its laws.").

262. *Id.* at 526.

263. *See id.* at 527 (explaining that "the ultimato inquiry is where trial will best serve the convenience of the parties and the ends of justice").

264. Properly understood, convenience is nothing more than verbal shorthand used to describe where the cause of action arose. *See* Norwood, *supra* note 16, at 325 (arguing for a system that focuses on convenience but providing examples of this focus that identified the forum where the cause of action arose as the convenient forum).

265. Affymetrix, Inc. v. Synteni, Inc, 28 F. Supp. 2d 192, 201 (D. Del. 1998).

The Supreme Court in *Van Dusen v. Barrack* explained the correlation between convenience and appropriateness: "the most convenient forum is frequently the place where the cause of action arose and [thus] the conflict-of-laws rules of other States may often refer to the substantive rules of the more convenient forum."[266]

B. The Proof is in the Practice

Examining district court transfer decisions reveals that many turn on not physical convenience but rather the imposition of the most appropriate regulatory regime.[267]

In *Linzer v. EMI Blackwood Music, Inc.*, the District Court for the Southern District of New York found that despite the physical inconvenience of a New York forum to the defendant, the totality of the circumstances did not warrant transfer.[268] The court observed a connection between the plaintiffs' contract and copyright-renewal claims and the New York forum.[269] It found that New York, therefore, provided the most efficient access to the relevant documents and witnesses.[270] According to the court, these factors strongly militated in favor of litigating the case in New York.[271] Such reasoning indicates that the court was really determining where the cause of action arose and seeking the imposition of the most appropriate regulatory regime. The court's explanation, that the proper choice of venue was New York because New York law may govern many of the claims, offers further evidence of a fundamental fairness rationale. It held that trying the case in the forum at home with the governing law best served the interests of justice.[272]

Similar reasoning can be found in *Brockman v. Sun Valley Resorts, Inc.*[273] The defendant argued that the cause of action arose outside the forum but couched his motion in convenience terms.[274] The court then performed, in effect, an appropriateness analysis.[275] It

---

266. Van Dusen v. Barrack, 376 U.S. 612, 628 (1964) (footnote omitted).

267. *See, e.g.*, American Cynamid Co. v. Eli Lilly & Co., 903 F. Supp. 781, 787-88 (D.N.J. 1995) (granting transfer motion based on the interests of justice without explaining its logic); Jacobson v. Gereau, No. 87-C-7429, 1987 WL 28276, at *1 (N.D. Ill. Dec. 11, 1987) (using a transfer motion to perform a fundamental fairness analysis of jurisdiction).

268. Linzer v. EMI Blackwood Music, Inc., 904 F. Supp. 207, 216 (S.D.N.Y. 1995).

269. *See id.*

270. *See id.* at 216-17.

271. *See id.*

272. *See id.* at 217.

273. Brockman v. Sun Valley Resorts, Inc., 923 F. Supp. 1176, 1182-83 (D. Minn. 1996).

274. *See id.* at 1180-81.

275. *See id.* at 1182-83.

explained that the burden of jury duty should not be imposed on the people of a community that has no relation to the litigation.[276] The court looked to the relative interests in regulating the underlying dispute. The cause of action involved indoor arena air quality and ventilation.[277] The arena was located in Idaho, but the plaintiffs brought suit in Minnesota.[278] The court found that a federal court sitting in Idaho could better determine the standard of care in Idaho, given the novel issues presented for Idaho law.[279] The court validated the defendant's concern that if the case went to trial in Minnesota, "the standard of reasonable arena safety applied to them will be higher than the standard an Idaho court and jury would apply, particularly since Minnesota's experience imposing air quality standards is more exhaustive than Idaho's experience."[280] The court concluded that physical convenience alone did not justify transfer; however, the novelty of the controlling legal issue tipped the scales in favor of transfer.[281]

These examples illustrate that at least some district courts recognize the importance of forum and realize that the judicial branch represents part of a sovereign's overall regulatory regime. Although courts are rarely so explicit in their reasoning, the following "convenience" reasons frequently offered by courts in justifying transfers are really masquerades for regulatory interests.

1. Familiarity with the Applicable Law

In determining the "interests of justice," trial courts often look to the applicable law. In other words, they determine which regulatory regime should attach its legal consequences to the particular set of facts in the case. When courts find that the law of another state governs the suit, they transfer the case almost without exception, so that the appropriate sovereign's judicial procedures and other influences govern the suit.[282] For example, in *Letter-Rite Inc. v. Computer*

---

276. *See id.* at 1182.
277. *See id.*
278. *See id.* at 1177-78.
279. *See id.* at 1183.
280. *Id.*
281. *See id.*
282. *See, e.g.*, Dunn v. Soo Line R.R. Co., 864 F. Supp. 64, 67 (N.D. Ill. 1994) ("[O]ne of the most important issues to be considered is the familiarity of the trial court with the law to be applied in the case."); Kepler v. ITT Sheraton Corp., 860 F. Supp. 393, 399 (E.D. Mich. 1994) (transferring the case to Florida because, inter alia, Florida law governed); Gundle Lining Const. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994) (concluding that the applicability of the transferee's law "weighs heavily in favor of transferring venue"); Steinberg,

Talk, Inc., the District Court for the Northern District of Illinois found that the cause of action arose in Colorado and Colorado law applied.[283] It explained, "[u]nder such circumstances, *Gulf Oil* teaches [that] it makes sense to hold the trial 'in a forum that is at home with the state law that must govern the case.' "[284] District courts are especially sensitive to the regulatory policy of other states. They will routinely transfer cases that present complex and novel issues for the transferee's forum.[285] Courts make such decisions not for convenience's sake but through recognition of and respect for the transferee's power to impose its regulatory regime on causes of action that arise within its forum and the high likelihood that a federal court in that forum will be intimately familiar with the particular regulatory regime.

2. Method of Asserting Jurisdiction

The strongest evidence in support of the argument that courts use § 1404(a) not for convenience but as a mechanism to perform an appropriateness analysis comes from cases transferred between courthouses in close physical proximity.[286] The Third Circuit, in *Jumara v. State Farm Insurance Co.*, upheld the transfer of a case from the Eastern District of Pennsylvania to the Middle District of Pennsylvania.[287] Unable to explain its decision on convenience grounds, the court justified the transfer as achieving the imposition of the proper

---

supra note 31, at 1489 n.35 ("Most transfer opinions agree that where the law of another state governs a suit, this fact supports a transfer."); *see also* Steinberg, *supra* note 31, at 1504 n.97 ("Most decisions have concluded that the applicability of a foreign state's law favors a transfer, because federal judges sitting in the foreign state will be most familiar with the relevant law, and thus better able to apply it."). *But see* Ayers v. Arabian Am. Oil Co., 571 F. Supp. 707, 710 (S.D.N.Y. 1983) (observing that "applying the law of another jurisdiction within the United States poses no particular problem to any federal forum" and thus should not factor into the defendant's motion to transfer).

283. Letter-Rite, Inc. v. Computer Talk, Inc., 605 F. Supp. 717, 722 (N.D. Ill. 1985).

284. *Id.* (citation omitted).

285. *See, e.g.*, Clisham Management, Inc. v. American Steel Bldg. Co., 792 F. Supp. 150, 158 (D. Conn. 1992) (transferring the case te Texas, where "the complexity and novel nature of Texas law in this dispute is particularly significant"); Environmental Serv., Inc. v. Bell Lumber & Pole Co., 607 F. Supp. 851, 855 (N.D. Ill. 1984) (concluding the same "because issues of local law are best construed by courts most familiar with them").

286. Some courts fail to recognize the importance of transfers between neighboring jurisdictions. In *Ashmore v. Northeast Petroleum Division of Cargill, Inc.*, 925 F. Supp. 36, 39-40 (D. Me. 1996), the court observed that, because the District Court in Maine was only two hours away from the District of Massachusetts, the facts did not warrant transfer, even though Massachusetts law applied to the cause of action. The court stated that "[c]hoice of law is a separate consideration that should not be confused with a venue analysis." *Id.* at 39.

287. Jumara v. State Farm Ins. Co., 55 F.3d 873, 883 (3d Cir. 1995).

regulatory regime.[288] The court determined that the Middle District of Pennsylvania had specific jurisdiction over the cause of action while the Eastern District of Pennsylvania had only general jurisdiction.[289] Thus, the Middle District was the most appropriate forum to adjudicate the underlying dispute. After considering all relevant factors,[290] the Third Circuit upheld the district court's transfer of the suit from the Eastern to the Middle District even though the difference in physical convenience was negligible. The real reason for the transfer was the regulatory interest of the Middle District.[291] The transferring court explicitly performed a special jurisdiction analysis based on where the cause of action arose.[292] The court's holding thus illustrates that the use of the word "convenience" stands for much more than physical convenience. In fact, it often has nothing to do with convenience.

3. Local Interests Decided at Home

Many courts describe the notion of having local interests decided at home as convenience to the court.[293] "Convenience," in this context, however, serves as legal shorthand for appropriateness and fundamental fairness. At least one court acknowledged that the notion of deciding local questions at home "involves a balancing of the original forum's interest in the litigation against that of the alternative forum."[294] In *Willoughby v. Potomac Electric Power Co.*, the court made this point explicit. Its balancing focused on where the case arose. The court found that the defendant maintained its principal offices in the District of Columbia, the plaintiff was employed and terminated there, and every management employee involved in the decision to terminate the plaintiff worked in the District. The court observed that, when the defendant resides in another forum, the

---

288. *See id.* at 879. The court first noted that the burden of establishing the need for transfer rests with the movant, in this case the defendant, and that the plaintiff's choice of forum "should not be lightly disturbed." *Id.* at 879. (citing Schexnider v. McDermott Int'l, Inc., 817 F.2d 1159 (5th Cir. 1987); Miracle Stretch Underwear Corp. v. Alba Hosiery Mills, Inc., 136 F. Supp. 508 (D. Del. 1955)).

289. *See id.* at 878-79.

290. *See id.* at 879.

291. *See id.* at 880.

292. *See id.* at 882.

293. *See* Litman, *supra* note 146, at 569.

294. Jennings v. Boeing Co., 660 F. Supp. 796, 807 (E.D. Pa. 1987). Although the court engaged in forum non conveniens analysis, it used the same factors as those employed in § 1404(a) analysis. The court undertook an interest analysis to determine which regulatory regime was most appropriate for the underlying cause of action. *See id.* at 804-07. The court also looked to the regulatory interests of the two fora, determining which forum had a larger interest in regulating the underlying dispute. *See id.* at 807-08.

claims giving rise to litigation arose in that other forum, and most, if not all, of the witnesses reside or work in the other forum, courts routinely order transfer.[295] The court held that, because the cause of action arose in the District of Columbia, that forum had a stronger regulatory interest in adjudicating the dispute and transferred the case.[296]

Other courts have also based decisions to transfer on the notion that local interests should be decided at home. The court in *Terra International, Inc. v. Mississippi Chemical Corp.* remarked that it would not transfer merely to shift inconveniences.[297] It ordered transfer because the cause of action arose in Mississippi, "where the local effects of the [dispute] would be a part of the general experience of any members of the jury panel."[298]

As these decisions illustrate, the notion of having local disputes decided at home does not relate to physical convenience. It shows that courts are concerned with the imposition of the proper regulatory regime.[299]

4. Plaintiff's Choice of Forum

The most revealing factor that convenience is not the real issue is the varying weight afforded to the plaintiff's choice of forum. Courts give great deference to the plaintiff's choice of forum if the forum is in the district in which the cause of action arose.[300] However, the plaintiff's choice of forum garners little deference if the cause of action did not arise there or the plaintiff does not reside there.[301] Consider the words of one district court: " '[H]ome turf rule' is merely a short-hand way of saying that, under the balancing test inherent in any transfer

---

295. Willoughby v. Potomac Elec. Power Co., 853 F. Supp. 174, 176 (D. Md. 1994); *see also* Wellons v. Numerica Sav. Bank, 749 F. Supp. 336 (D. Mass. 1990); Stanley v. Numero Uno Franchise Corp., 741 F. Supp. 1237 (M.D. La. 1990); Edwards v. Texaco, Inc., 702 F. Supp. 101 (E.D. Pa. 1988); Record Dato Int'l, Inc. v. Record Date, Inc., 677 F. Supp. 915 (N.D. Ohio 1988).

296. *See Willoughby*, 853 F. Supp. at 176.

297. Terra Int'l, Inc. v. Mississippi Chem. Corp., 922 F. Supp. 1334, 1358 (N.D. Iowa 1996).

298. *Id.* at 1343 n.7.

299. *See* Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A., 712 F.2d 11, 14 (2d Cir. 1983) (explaining that while United States courts have the power to apply the contract laws of foreign countries, an action should be dismissed when it must " 'untangle problems in conflict of laws, and in law foreign to itself' " (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947))).

300. *See In re* Ricoh Corp., 870 F.2d 570, 573 (11th Cir. 1989); Patel v. Howard Johnson Franchise Sys., Inc., 928 F. Supp. 1099, 1101 (M.D. Ala. 1996).

301. *See* Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc. 707 F. Supp. 1429, 1436 (D. Del. 1989); Derry Fin. N.V. v. Christiana Cos., 555 F. Supp. 1043, 1045 (D. Del. 1983). Courts almost always inquire into the residences of the parties. *See, e.g.*, Midwest Motor Supply Co. v. Kimball, 761 F. Supp. 1316, 1318 (S.D. Ohio 1991).

analysis, the weaker the connection between the forum and *either* the plaintiff *or* the lawsuit, the greater ability of a defendant to show sufficient inconvenience to warrant transfer."[302] As a general rule, the plaintiff's choice carries little or no weight when the cause of action arose in a different forum.[303]

This practice begins to illustrate how § 1404(a) provides an alternative to the jurisdictional regulatory interest test foreclosed by *Burnham*. For example, in *Kotlicky v. Sea Ranch*, the plaintiff filed suit in the Northern District of Illinois.[304] The court rejected the plaintiff's choice and transferred the suit because the cause of action arose in Florida and Florida had a stronger interest in regulating the underlying dispute.[305] The court explained that the plaintiff's choice of forum receives less deference when "the forum he [or she] chooses lacks any significant contact to the issues or the property or the transactions which are basic to and underlie [sic] the cause of action that has been pleaded."[305] In essence, the court weighed regulatory interests as well as interests of basic and fundamental fairness.[307]

Others courts have taken a similar approach. When a plaintiff's choice of forum asserts only general jurisdiction, courts do not give much weight to the plaintiff's choice.[308] Such rulings demonstrate that courts are really concerned with determining where the cause of action arose and the proper regulatory regime to impose.[309] The decisions also illustrate the nature of the legal shorthand of "plaintiff's choice of forum." When courts declare that they usually defer to the plaintiff's choice, it is because that choice usually bears a relationship to where the cause of action arose. When the underlying dispute does not arise in the chosen forum, courts explain that the plaintiff's choice is entitled to little or no weight at all. In effect, courts are couching their decisions in convenience terms but really deciding them on

---

302. Affymetrix, Inc. v. Synteni, Inc., 28 F. Supp. 2d 192, 199 (D. Del. 1998).

303. *See Patel*, 928 F. Supp. at 1101; *Midwest Motor Supply*, 761 F. Supp. at 1320 n.7; Neff Athletic Lettering Co. v. Walters, 524 F. Supp. 268, 272-73 (S.D. Ohio 1981).

304. Kotlicky v. Sea Ranch, No. 86-C-8166, 1987 U.S. Dist. LEXIS 10159, at *2 (N.D. Ill. Oct. 27, 1987).

305. *See id.* at *2-4.

306. *Id.* at *4.

307. *See id.*

308. *See* Associated Mills, Inc. v. Rush-Hampton Indus., Inc., 588 F. Supp. 1164, 1165 (N.D. Ill. 1984).

309. *See* Wine Mkts. Int'l, Inc. v. Bass, 939 F. Supp. 178, 183 (E.D.N.Y. 1996) ("[W]here the transactions or facts giving rise to the action have no material relation or significant connection to the plaintiff's chosen forum, then the plaintiff's choice is not accorded the same 'great weight' and in fact is given reduced significance.").

regulatory appropriateness grounds.[310] Thus, this system is not so much an analytical framework as a rule that appropriate forum choices receive great deference and inappropriate forum choices receive almost none.

5. Location of Witnesses

The "location of witnesses" is yet another example of legal shorthand used to signify where the cause of action arose, i.e. the proper regulatory regime. The vast majority of courts explain that the location of witnesses is a primary, if not the most important, factor in determining whether to transfer a case.[311] Asking why further supports the thesis that appropriateness, not convenience, is the real issue. Courts gravitate toward the convenience of witnesses because although couched in physical convenience terms, this factor helps courts determine where a cause of action arose. The location of witnesses and evidence will usually be the location where the cause of action arose.[312] For example, in *Midwest Motor Supply Co. v. Kimball*, the court found that most, if not all, material witnesses were located in the transferee forum.[313] The court further observed, presumably not by coincidence, that the cause of action arose from the defendant's conduct that occurred in the transferee forum.[314] The court then deduced that the pertinent witnesses to the underlying dispute would likely be found in that jurisdiction.[315] Thus, while couching its decision in terms of the physical convenience of witnesses, the court really decided where the cause of action arose, and transferred it there.

In a similar vein, some courts look directly to the location of the underlying dispute in evaluating convenience. Although they explain that they consider this factor in the name of convenience, courts are

---

310. Prather v. Raymond Constr. Co., 570 F. Supp. 278, 284 (N.D. Ga. 1983) ("Where the forum selected by the plaintiff is not connected with the parties or the subject matter of the lawsuit, it is generally less difficult tban otherwise for the defendant, seeking a change of venue, 'te meet the burden of showing sufficient inconvenience to tip the balance of convenience strongly in the defendant's favor.' ") (quoting Burroughs Wellcome Co. v. Giant Food, Inc., 392 F. Supp. 761, 763 (D. Del. 1975)).

311. *See supra* note 227, and accompanying text. See also *Wine Mkts. Int'l*, 939 F. Supp. at 183, which found the location of material witnesses and other evidence a major factor in determining the most appropriate forum. Evaluating these factors, the court decided against transfer. *See id.* at 185.

312. Courts afford this factor so much weight not because they are concerned with the physical convenience of the witnesses but rather because it is best able to identify where a cause of action arose and the proper regulatory regime to adjudicate the underlying dispute.

313. Midwest Motor Supply Co. v. Kimball, 761 F. Supp. 1316, 1319 (S.D. Ohio 1991).

314. *See id.*

315. *See id.*

really attempting to determine the most appropriate forum. For example, in *Patel v. Howard Johnson Franchise Systems, Inc.*, the defendants argued that the facts underlying the dispute took place in the Eastern District of Tennessee.[316] The court found that the contract in question involved property in eastern Tennessee, where the defendants and plaintiffs resided.[317] After ruling that it would be "too unduly burdensome and expensive in terms of time and expenses" if the defendant filed a counterclaim in the transferor forum, the court granted the transfer based on the location of the underlying dispute, implicitly acknowledging that the transferee forum constituted the proper regulatory regime.[318] Other courts have arrived at similar results by explaining that the decision to transfer "can be reduced to the relative convenience of the witnesses."[319] Although courts couch their decisions in terms of convenience, they are really ascertaining where the cause of action arose and the regulatory interests of that forum in resolving the underlying dispute. In this way, they build an avenue to the most appropriate forum.

6. Balancing Regulatory Interests

Many courts explicitly evaluate the regulatory interests of the two fora based on the location of the underlying dispute. They use the location of the underlying dispute to assist them in determining whether the convenience of the parties warrants transfer. In *Affymetrix, Inc. v. Synteni, Inc.*, the court started its analysis of the transfer motion by balancing the contacts and regulatory interests of the two fora in question, Delaware and California.[320] The court determined that the overwhelming majority of the witnesses and the relevant documents were located in the Northern District of California.[321] Although it couched its analysis in terms of convenience and physical location, the court was really concentrating on where the events giving rise to the lawsuit occurred.[322] The court compared the relative regulatory interests of the two fora, finding that the Northern District of California had a stronger regulatory interest in the dispute.[323] Despite this almost explicit fundamental fairness analysis, the court stated

316. Patel v. Howard Johnson Franchise Sys., Inc., 928 F. Supp. 1099, 1101 (M.D. Ala. 1996).
317. *See id.* at 1102.
318. *Id.*
319. O'Brien v. Goldstar Tech., Inc., 812 F. Supp. 383, 386 (W.D.N.Y. 1993).
320. Affymetrix, Inc. v. Synteni, Inc., 28 F. Supp. 2d 192, 196 (D. Del. 1998).
321. *See id.* at 194.
322. *See id.* at 201-02.
323. *See id.* at 207.

that, in a transfer analysis, it considers convenience, not the traditional notions of fair play and substantial justice that inform constitutional jurisdiction determinations.[324] The reasoning and outcome make clear that the court is saying one thing but doing something very different.[325]

The *Affymetrix* court followed Third Circuit precedent, which required courts to examine "all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice [would] be better served by transfer to a different forum."[326] These factors include a wide variety of public and private interests used to determine on a case-by-case basis whether considerations of convenience and fairness weigh in favor of transfer.[327] Taking a step back allows one to realize what really happens when courts order § 1404(a) transfers. They are actually using the same factors from *Gulf Oil* [328] that many thought formed part of the movement to extend fundamental fairness into general jurisdiction.[329] When courts look to these various factors they are really investigating where the cause of action arose despite couching their decisions in the rhetoric of convenience. Through § 1404(a), courts can circumvent the confines of general jurisdiction (and *Burnham*) and transfer the case to a more appropriate forum, which by definition has special jurisdiction.[330]

---

324. *See id.* at 208.

325. By using recognition of the proper regulatory regime to ascertain physical convenience of witnesses, courts presume the latter provides legitimate grounds for transfer when, in fact, seeking the proper regulatory regime offers the best reason to transfer "in the interests of justice."

326. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995) (quoting 15 WRIGHT ET AL., *supra* note 217, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3847.

327. *See id.* at 883 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30-31 (1988)); *Affymetrix, Inc.*, 28 F. Supp. 2d at 197.

328. *See Affymetrix*, 28 F. Supp. 2d at 197 n.4; All States Freight, Inc. v. Modarelli, 196 F.2d 1010, 1011 (3d Cir. 1952); Paragon-Revolute Corp. v. C. F. Pease Co., 120 F. Supp. 488, 489 (D. Del. 1954); General Felt Prods. Co. v. Allen Indus., Inc., 120 F. Supp. 491, 493 (D. Del. 1954); *see also Affymetrix*, 28 F. Supp. 2d. at 197 (listing eleven factors based on the private and public interests from *Gulf Oil Corp.* but noting that these lists are "merely illustrative and by no means exhaustive").

329. *See supra* note 110 and accompanying text.

330. The use of § 1404(a) to insert fundamental fairness into a type of jurisdiction that does not require such analysis is not new. When *Seider*-style jurisdiction was thought constitutional, at least one court utilized § 1404(a) to insert fundamental fairness into that jurisdictional device. In *Ladson v. Kibble*, 307 F. Supp. 11, 15 (S.D.N.Y. 1969), the court condoned the use of a transfer motion for a *Seider*-style action. In determining the interests of justice and convenience of the witnesses, the court examined where the cause of action arose and those events giving rise to the underlying dispute. *See id.* It found that the state in which the cause of action arose had a stronger regulatory interest and thus concluded that "[i]t is therefore clear to this court [that], in

Some courts explicitly declare that transfer is warranted not for the convenience of the parties but rather to ensure the imposition of the proper regulatory regime.[331] In *American Littoral Society v. EPA*, the court resolved the transfer issue by looking at the regulatory interests of the two fora.[332] The court explained that two citizen groups brought the suit to improve the quality of water in Delaware.[333] The court observed that "this case is focussed [sic] on the interests of the state of Delaware and its citizens, and having the trial in Delaware best fosters the interests of persons who, although not parties to the case, are most directly affected by its outcome."[334] The court explained that the public interests of Delaware and its citizens formed the basis of the court's decision to transfer.[335] The court used § 1404(a) to transfer the case to a forum that had a strong regulatory interest in adjudicating the dispute.[336]

The rule that courts may only transfer an entire action, not individualized claims, provides further evidence that fundamental fairness and regulatory interests are the central concerns, and convenience serves merely as legal shorthand developed to accomplish such results.[337] Once transferred, the transferor court loses all jurisdiction over the case, including the power to review the transfer.[338] The rationale is simple: when transferring, the transferor forum relinquishes all regulatory authority over the cause of action because the very act of transfer admits that the transferor court is not the proper forum to regulate the underlying dispute.[339] This also explains why

---

the interests of justice and for the convenience of the witnesses and parties, this action should be transferred . . . ." *Id.* at 16-17. This illustrates that before *Seider*-style jurisdiction was rendered unconstitutional, § 1404(a) provided a vehicle for considering fundamental fairness. In the wake of *Burnham* and the per se constitutional status of general jurisdiction, courts and litigants must again turn to § 1404(a).

331. See, for example, *Torres v. Steamship Rosario*, 125 F. Supp. 496 (S.D.N.Y. 1954), which transferred the case to Puerto Rico, where the cause of action arose and both witnesses and the plaintiffs resided. *But see* Hill's Pet Prods. v. A.S.U., Inc., 808 F. Supp. 774, 778 & n.8 (D. Kan. 1992) (performing an ad hoc analysis but stating that "the relative interests of the respective states is not a relevant factor in the analysis under § 1404(a)").

332. *See* American Littoral Soc'y v. EPA, 943 F. Supp. 548, 549-50 (E.D. Pa. 1996).

333. *See id.* at 550.

334. *Id.*

335. *See id.* at 551.

336. *See id.*

337. *See* Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1518 (10th Cir. 1991); Wyndham Assocs. v. Bintliff, 398 F.2d 614, 618 (2d Cir. 1968); Cain v. New York State Bd. of Elections, 630 F. Supp. 221, 226 (E.D.N.Y. 1986).

338. *See Chrysler Credit Corp.*, 928 F.2d at 1516-17; Roofing & Sheet Metal Servs. v. La Quinta Motor Inns, 689 F.2d 982, 988-89 n.10 (11th Cir. 1982).

339. *See In re* Flight Trans. Corp. Sec. Litig., 764 F.2d 515, 516 (8th Cir. 1985); *In re* Nine Mile Ltd., 673 F.2d 242, 243 (8th Cir. 1982) (per curiam).

courts do not allow the partition of pre-trial processes among several geographically convenient fora.[340] The inevitable conclusion is that only the proper regulatory machinery should impose its mass of legal consequences on the particular cause of action.

By moving beyond the rhetoric, it is possible to understand that § 1404(a) is much more than a statute concerned with physical convenience. In the wake of *Burnham*, it becomes the best tool for courts to use in protecting defendants from assertions of general jurisdiction by improper regulatory regimes.

C. The Critics Provide Credence

Using § 1404(a) to provide an avenue to the appropriate forum is not without its critics. Ironically, on the whole, criticism of § 1404(a) actually supports the thesis of this Note. For example, most commentators view the ever-expanding list of factors employed by district courts as evidence of confusion, disillusionment, dissatisfaction, and the need for reform.[341] They explain that, as the number of factors increases, the defendant's ability to annul the plaintiff's choice of forum expands.[342] In addition, commentators cringe at the supposed unpredictability that the courts' ad hoc approach produces.[343] They posit that unpredictability costs money and will lead to more transfer orders for less than worthy reasons.[344]

---

340. *See* FTC v. MacArthur, 532 F.2d 1135, 1143 (7th Cir. 1976).

341. *See, e.g.*, Kelner, *supra* note 19, at 615 ("The lack of consistency among the district courts as to which factors they should apply and how te weigh each facter compounds the problem of increased ligitation."); *id.* at 615-16 (describing the "several problems" caused by "[t]his unchecked district court discretion . . . [b]ecause § 1404(a) embraces so many different factors" and "because district courts weight the many applicable factors inconsistently"). Kelner explained that, while the present system "enhance[s] the likelihood of a fair result in a particular case," the need for black letter rules outweighs this fairness. *Id.* at 617. Thus the author suggests a steadfast rule that restricts the use of § 1404(a) te motions involving "extreme inconvenience." *Id.*

342. *See, e.g., id.* at 615.

343. *See* Steinberg, *supra* note 184, at 447; Kelner, *supra* note 19, at 632 (explaining that the many factors "make the outcome of transfer motions rather unpredictable"). *But see* Kitch, *supra* noto 216, at 99 (noting that § 1404(a) "has received nearly unanimous praise from the commentaters and the courts in light of its unexceptionable objectives of convenience and justice"). Professor Kitch, however, concluded "that the cure is itself a serious disease." *Id.* at 101. Kitch reasoned that the costs of handling numerous, difficult transfer motions are too high. *See id.* at 131. *Accord* David P. Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268, 307 (1969) (explaining that it "costs altogether too much time and money" to handle transfer motions); Steinberg, *supra* note 184, at 523 (concluding that transfer motions are in practice "a cumbersome and costly procedure with few real beneficiaries").

344. *See* Steinberg, *supra* note 184, at 447; Kelner, *supra* note 19, at 632. Professors Clermont and Eisenberg, however, note that

These scholars fail to realize that § 1404(a) accomplishes what the Supreme Court's decision in *Burnham* attempted to stifle: the use of ad hoc value judgments under the criteria of fundamental fairness to select the appropriate forum for a cause of action. Consider the words of the Supreme Court in *Stewart Organization, Inc. v. Ricoh Corp.*:

> Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer [on a consideration of fairness and convenience.] . . . Congress has directed that multiple considerations govern transfer within the federal court system, and . . . focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command. Its application would impoverish the flexible and multifacetod analysis that Congress intended to govern motions to transfer within the federal system.[345]

When commentators criticize the ad hoc nature of § 1404(a) determinations, they are, in effect, criticizing the very foundation of special jurisdiction and fundamental fairness analysis. Despite American courts' familiarity with flexible tests in jurisdictional jurisprudence,[346] criticism of the fact-intensive § 1404(a) inquiry should not come as a surprise. Critics who thought that "[c]ourts cannot agree on how specific facts should influence [a] result,"[347] abounded prior to *Burnham* and ultimately carried the day in that decision. Just as the *Burnham* Court opined that litigants need black letter rules so they can understand the law, many critics of § 1404(a) demand black letter rules.[348] In fact, some maintain that the lack of black letter rules encourages extensive forum-shopping by defendants.[349]

> [o]ddly, while faulting the costs of transfer, Professor Steinberg principally attacked the courts' transfer opinions for considering many varied factors that seemed to get different weights in different situations, although one would expect and even desire such decisionmaking under a discretionary, individualized, all-things-considered standard such as 1404(a)'s transfer 'in the interest of justice.'

Clermont & Eisenberg, *supra* note 22, at 1511 n.13. For Professor Steinberg's response to this and other contentions advanced by Professors Clermont and Eisenberg, see Steinberg, *supra* note 31, at 1479. For example, Professor Steinberg notes that, "[w]hen combined with the open-ended standard employed in transfer litigation, this sort of fact-specific analysis is certain to encourage litigation about the proper location for a suit." *Id.* at 1512. This Note argues that, after *Burnham*, litigating the proper location of a suit over which a forum has only general jurisdiction serves the interests of justice by seeking the full weight of the proper regulatory regime. Such concerns do not seem to faze Professor Steinberg.

345. Stewart Org., v. Ricoh Corp., 487 U.S. 22, 29-31 (1988).

346. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 30 (1971) ("A state has power to exercise judicial jurisdiction over an individual who is a resident of the state unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable."); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987).

347. Weintraub, *supra* note 49, at 545. This has led some to advocato a system permitting transfer to a more appropriate forum upon a defendant's showing of unfairness. *See id.*

348. *See, e.g.*, Steinberg, *supra* note 184, at 510-12 (concluding that the current body of law is in chaos and proposing black letter rules); Kelner, *supra* note 19, at 642-43. But black letter rules can sometimes be more inconsistent and manipulative. For example, in a span of five years,

These critics fail to realize that, in the wake of *Burnham*, § 1404(a) is essential to impute any semblance of fundamental fairness into the determination of the appropriate forum. It prevents a forum from asserting general jurisdiction in order to inappropriately impose its regulatory regime.[350] The critics fail to realize that § 1404(a) is accomplishing exactly this task by allowing ad hoc value judgments.[351] The similarity between critics of § 1404(a) and critics of special jurisdiction tends to illustrate the similarity of the two doctrines.[352]

Taking a closer look at § 1404(a) illustrates the true nature of the statute.[353] Section 1404(a) provides an alternative route to the special jurisdiction avenue closed by the Supreme Court's decision in *Burnham*. The explosion of factors utilized by district courts is really not an explosion but rather an accumulation of identifiable facts that courts found appropriate under certain circumstances to warrant a transfer to a more appropriate regulatory regime. Unfortunately, § 1404(a) still faces certain obstacles in its attempt to provide an alternative avenue for protection against assertions of general jurisdiction.

---

eight Arkansas telegraph cases on basically similar facts were characterized differently as either in tort or contract. *See, e.g.*, Western Union Tel. Co. v. Flannagan, 167 S.W. 701, 702 (Ark. 1914) (action characterized as contract); Western Union Tel. Co. v. Chilton, 140 S.W. 26, 26 (Ark. 1911) (action characterized as tert). By characterizing the same actions differently, the courts were able to trigger different black lettor rules. Thus "so-called black letter rules" are easily manipulated by simply characterizing the underlying dispute as either contract or tert.

349. *See* Terra Int'l, Inc. v. Mississippi Chem. Corp., 922 F. Supp. 1334, 1356 (N.D. Iowa 1996); Steinberg, *supra* note 31, at 1487.

350. *See, e.g.*, Kelner, *supra* note 19, at 633 ("The personal jurisdiction question is better suitod for an analysis that concentrates on fairness—where it is fair and reasonable for a defendant to be sued."). The author continued: "Because fairness concerns of constitutional proportions have already been addressed at the personal jurisdiction level, the transfer of venue decision need not duplicate these fairness issues." *Id.* Obviously, this is not an author familiar with *Burnham*.

351. *See, e.g.*, Kitch, *supra* note 216, at 141 ("Section 1404(a) suffers from an irremedial defect.... [M}ost transfers serve no significant purpose and the courts become burdened with consideration of § 1404(a) motions."). Some commentators, however, foresaw the role § 1404(a) would play after the Court announced its decision in *Burnham*. *See* Silberman, *supra* note 175, at 583-90; *see also* Irwin, *supra* noto 4, at 624 ("[I]t is probable that the doctrine of forum non conveniens will assume the position once held by *International Shoe* and *Shaffer* among the critics of transient jurisdiction.... [T]he factors utilized by courts with respect to forum non conveniens balancing are remarkably similar to the factors relevant to 'minimum contacts' analysis.").

352. *See, e.g.*, Posnak, *supra* note 4, at 887-98 (criticizing specific jurisdiction). The similarity in criticism leveled at both § 1404(a) and specific jurisdiction illustrates the similarity in the two concepts and implicitly acknowledges the ability of § 1404(a) to achieve results similar to specific jurisdiction.

353. Consider the comments of Professor Steinberg, *supra* note 184, at 509, who "concluded that these factors actually demonstrate little about the relative convenience of different districts."

VIII. OVERCOMING POTHOLES ALONG THE WAY

Although the federal transfer statute goes a long way in re-inserting fundamental fairness into general jurisdiction, it suffers certain shortfalls that prevent it from delivering the same results a constitutional jurisdictional analysis would provide. The most obvious shortcoming: its lack of constitutional foundation. Prior to *Burnham*, litigants could assert a constitutional due process claim against a forum's assertion of general jurisdiction when that forum lacked special jurisdiction. The Supreme Court in *Burger King v. Rudzewicz* explained that "the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' "[354] Although § 1404(a) attempts to effectuate this very goal, it does not rise to the level of constitutional protection.[355]

Placing aside the constitutional shortcomings of § 1404(a), the statute still faces two other perceived roadblocks in its pursuit of constructing an alternative avenue for obtaining protection from unfair general jurisdiction assertions. These obstacles include: (1) the lack of appellate review of transfer motion decisions; and (2) the possibly intractible perception that § 1404(a) accomplishes merely a change of courthouses and not a change of regulatory regimes.

A. Transferring Without Review

Appellate review[356] of forum non conveniens and transfer orders is generally not available until the trial court issues a final judgment on the merits of the case.[357] In addition, the majority of circuits have

---

354. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

355. Arguments can be made for its constitutional status. Recall that § 1404(a) operates as a mechanism to ensure that the proper regulatory regime within the federal system adjudicates the dispute. One could argue that when one forum improperly asserts its regulatory machinery to the detriment of another, it violates the constitutional principles of federalism and state sovereiguty. Development of such arguments will await another day.

356. Reviewable decisions are those that will be eventually reviewed by an appellate court upon ultimate disposition on the merits while appealable decisions may be reviewed immediatoly by an appellate court.

357. *See* 28 U.S.C. § 1291 (1994) (allowing appeals only upon final judgment); Unitod States Fire Ins. Co. v. American Family Life Assurance Co., 787 F.2d 438, 439 (8th Cir. 1986); Macon Uplands Venture v. Metropolitan Life Ins. Co., 624 F.2d 26, 27 (5th Cir. 1980); 15 WRIGHT ET. AL., *supra* note 217, § 3855, at 472-94; Kelner, *supra* note 19, at 614-15 (citing sources that hold such); Christina Melady Morin, Note, *Review and Appeal of Forum Non Conveniens and Venue Transfer Orders*, 59 GEO. WASH. L. REV. 715, 715, 719-21 (1991).

ruled that neither forum non conveniens orders[358] nor transfer orders[359] are immediately appealable as of right under the collateral order doctrine.[360] Furthermore, mandamus is used sparingly and only when a trial court has usurped its judicial power, such as by acting beyond its jurisdiction.[361] In fact, transfer orders are unreviewable as of the date the papers in the transferred case are docketed in the transferee court.[362] The circuits have split over whether a transferee circuit has jurisdiction to review the decisions of a transferor district court.[363] Moreover, when § 1404(a) transfer orders finally come up for review, appellate courts apply the abuse of discretion standard,[364] and rarely reverse.[365] In response, many commentators have criticized the motion as one that runs unchecked,[366] while others have proposed legislation to allow for immediate review.[367]

While these concerns are understandable, they are rooted in appeals to black letter rules and undervalue the need for discretion in

---

358. *See* Carlenstolpe v. Merck & Co., 819 F.2d 33, 36 (2d Cir. 1987); Partrederiet Treasure Saga v. Joy Mfg. Co., 804 F.2d 308, 310 (5th Cir. 1986); Rosenstein v. Merrell Dow Pharm., Inc., 769 F.2d 352, 354 (6th Cir. 1985); Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 195 (3d Cir. 1983). *But see* Kontoulas v. A.H. Robins Co., 745 F.2d 312, 316 (4th Cir. 1984).

359. *See, e.g.*, Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F.2d 360, 362 (4th Cir. 1949).

360. The collateral order doctrine "allow[s] appeal from an interlocutory order that conclusively determines an issue wholly separate from the merits of the action and is effectively unreviewable on appeal from a final judgment" BLACK'S LAW DICTIONARY 256 (7th ed. 1999).

361. *See* Morin, *supra* note 357, at 726 n.81 (1991); *see also* All States Freight, Inc. v. Modarelli, 196 F.2d 1010, 1011 (3d Cir. 1952) (expressing concern over review of transfer orders through mandamus); Note, *Appealability of 1404(a) Orders: Mandamus Misapplied*, 67 YALE L.J. 122, 133-34 (1967).

362. *See* Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1517 (10th Cir. 1991); *In re* Sosa, 712 F.2d 1479, 1480 (D.C. Cir. 1983); Starnes v. McGuire, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc).

363. *See Chrysler Credit Corp.*, 928 F.2d at 1517 (collecting and analyzing sources on the split).

364. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) ("[A transfer order] may be reversed only when there has been a clear abuse of discretion. Where the court has considered all relevant public and private interest factors and where its balancing of these factors is reasonable, its decision deserves substantial deference."); Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A., 712 F.2d 11, 14 (2d Cir. 1983); *see also* Morin, *supra* note 357, at 719-20 (1991) (explaining that § 1404(a) decisions are rarely disturbed upon review).

365. *See, e.g.*, Kasey v. Molybdenum Corp. of Am., 408 F.2d 16, 20 (9th Cir. 1969) (explaining that appellate courts afford trial judges great deference; decisions will not be overturned if they include a "well-reasoned holding" that considers the issues listed in § 1404(a)); Rouchell, *supra* note 189, at 432 (noting that appellants have little chance of winning reversal, as the appellate court must find abuse of discretion).

366. *See* Steinberg, *supra* note 184, at 472 (explaining that § 1404(a) transfer orders are "uniquely insulated from any form of appellate review").

367. *See* Morin, *supra* note 357, at 733-34 (1991) (proposing legislation that specifically addresses clear abuses of discretion by trial courts modeled after a Florida statute, FLA. R. APP. P. 9.125).

trial judges to make determinations on a case-by-case basis. While some fears are not unreasonable, at some level the federal judicial system must trust district courts to make proper ad hoc value judgments. In fact, the more scrutiny district court decisions receive, the less they will rely on the particular circumstances of the individual case and the more they will contain mystical appeals to black letter rhetoric. Such decisions do not further the interests of justice nor do they allow the flexibility required to ensure the imposition of the proper regulatory regime.[368]

B. Transfers Are "Merely a Change of Courthouses"

The perception that a transfer merely changes location, rather than regulatory regimes, presents the second obstacle. This perception ignores the intersection of choice of law and choice of jurisdiction. This section illustrates why this is a problem and how district courts may overcome it in their application of § 1404(a).

In *Van Dusen v. Barrack*, the Supreme Court asked what effect a change in the applicable law would have on "the interest of justice."[369] The Court observed that lower federal courts were strongly inclined to protect plaintiffs against prejudicial changes in applicable state laws.[370] The Court concluded that a § 1404(a) transfer did not mandate a change of law to accompany the change in venue.[371] The Court explained that such a rule would frustrate the remedial purposes of § 1404(a) by dissuading district courts from granting transfers due to the fear that it would prejudice the plaintiff's claim.[372] *Van Dusen* thus established the rule that § 1404(a) is a "federal judicial housekeeping measure" and simply "authorize[s] a change of courtrooms" not a change of law.[373] The Court explained that this rule supports the policy underlying *Erie Railroad Co. v. Tompkins* and *Klaxon Co. v. Stentor Electric Manufacturing Co.*: it ensures the principle of uniformity of result within a state and makes sure that federal

368. Additionally, fears that judges will refuse to transfer cases may be assuaged by recognizing that docket backlogs likely create an incentive to transfer cases only when the facts warrant. *But see* Lee, *supra* note 255, at 688 (noting that judicial tendency to renounce one's jurisdiction is not very strong).

369. Van Dusen v. Barrack, 376 U.S. 612, 625-26 (1964).

370. *See id.* at 630. For the reasons discussed in this Note, such concerns of judicial possessiveness are not well founded. *See supra* Part III.

371. *See Van Dusen*, 376 U.S. at 636.

372. *See id.*

373. *Id.* at 636-37.

courts in diversity of citizenship cases apply the laws of the states in which they sit.[374]

The Supreme Court extended this reasoning in *Ferens v. John Deere Co.* to include plaintiff-initiated § 1404(a) transfer motions.[375] In that case, the plaintiff lost his right hand while working on a farm in Pennsylvania due to an allegedly defective product manufactured by Deere & Company.[376] After waiting three years, the plaintiff sued Deere in the District Court for the Western District of Pennsylvania, raising only contract and warranty claims, as Pennsylvania's two-year statute of limitations for tort actions had expired.[377] Not to be deprived of a tort action, the plaintiff filed a second diversity action against Deere in the District Court for the Southern District of Mississippi, alleging negligence and products liability.[378] The plaintiff knew that *Klaxon Co.* required the Mississippi District Court, in the exercise of diversity jurisdiction, to apply the same choice-of-law rules that a Mississippi state court would apply if it decided the case.[379] Under Mississippi's choice of law rules as interpreted by its highest court, the District Court had to apply Mississippi's six year statute of limitations to the Pennsylvania law tort claim.[380] Immediately after filing suit, the plaintiff moved for a § 1404(a) transfer to federal court in Pennsylvania on the ground that Pennsylvania offered a more convenient forum.[381]

The question before the Supreme Court on appeal was whether, under *Van Dusen*, Pennsylvania (the transferee forum) must apply Mississippi (the transferor forum) law, including its choice-of-law rules. *Van Dusen* had left this question open. The Supreme Court held that *Van Dusen* applied and obligated Pennsylvania to apply Mississippi's statute of limitations because Mississippi's choice-of-law rules required such. The Court opined that the three reasons underlying *Van Dusen* also pertained to this situation. It explained that: (1) § 1404(a) should not deprive parties of state-law advantages that exist absent diversity jurisdiction; (2) the transfer statute should not create or multiply opportunities for forum shopping; and (3) the decision on transfer should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a

374. *See id.* at 637.
375. Ferens v. John Deere Co., 494 U.S. 516, 532 (1990).
376. *See id.* at 519.
377. *See id.*
378. *See id.*
379. *See id.*
380. *See id.* at 519-20.
381. *See id.* at 520.

change of law.[382] The Court again cited *Erie Railroad Co. v. Tompkins* in support of its decision.[383]

Given the facts of the case, the Court's explanation that the "rule would not create opportunities for forum shopping"[384] seems ironic. The Court regarded § 1404(a) as merely a housekeeping provision and worried that, if district courts spent time making an "elaborate survey of the law" they "would turn what is supposed to be a statute for convenience of the courts into one expending extensive judicial time and resources."[385] Rather than allowing district courts to perform the proper ad hoc value determination, the Court permitted plaintiffs to have both their choice of law and their choice of forum—even rewarding the plaintiff for manipulative conduct.[386] In response to this argument, the Court restated its interests in providing an acceptable black letter rule.[387]

The result worked by this black letter rule proved too much for the Justice who would later write for the Court in *Burnham*. Criticizing the holding, Justice Scalia stated that it is "unlikely that Congress meant to provide the *plaintiff* with a vehicle by which to appropriate the law of a distant and inconvenient forum in which he does not intend to litigate, and to carry that prize back to the State in which he wishes to try the case."[388] Justice Scalia explained that the decision would encourage forum shopping between federal and state courts in the same state on the basis of different substantive law.[389] Justice Scalia further observed that the plaintiff achieved exactly what *Klaxon* was designed to prevent, namely the use of a Pennsylvania federal court instead of a Pennsylvania state court to obtain application of a different substantive law—Mississippi's.[390] Many scholars echo Justice Scalia's fear that *Ferens* threatens to convert § 1404(a) into a plaintiff forum shopping tool that will ultimately undermine *Erie*'s objective of the uniform application of law within a state.[391] Such a result runs contrary to the Court's rationale in *Van*

382. *See id.* at 523.
383. *See id.*
384. *Id.* at 527.
385. *Id.* at 529.
386. *See id.* at 531.
387. *See id.*
388. *Id.* at 535 (Scalia, J., dissenting).
389. *See id.*
390. *See id.*
391. *See* Rodden, *supra* note 187, at 860. The author also discusses the implications of the *Ferens* decision and different variants of a rule that would prevent plaintiff forum shopping. *See id.* at 860-67.

Dusen. Although many criticize[392] the *Ferens* decision and even support it being overruled outright,[393] § 1404(a) provides the necessary tools for district courts to overcome the Supreme Court's decision in *Ferens*.[394]

1. Overcoming *Van Dusen* and *Ferens*

The rules developed in *Van Dusen* and *Ferens* restrain the usefulness of § 1404(a) because they attempt to separate forum as a physical location from forum as a regulatory regime. Fortunately, district courts have discovered four methods of bypassing these restraints.

The first exception to the *Van Dusen/Ferens* rule allows the transferee forum to apply its law when the transferor forum never determined whether it had jurisdiction. The Supreme Court actually provided this exception in *Leroy v. Great Western United Corp.*[395] There the Court expressly permitted the consideration of transfers prior to a finding of personal jurisdiction.[396] District courts have latched onto this practice. If a district court intuitively suspects that it does not represent the proper regulatory regime, it may decline to make an explicit ruling on personal jurisdiction and simply transfer the case. Thus, the transferee court must make a jurisdiction determination de novo, thereby allowing it to apply its own law.[397] Some courts have expanded this rationale to "preclude rigid application of

---

392. *See* Norwood, *supra* note 16, at 305 ("Virtually all plaintiff atterneys vigorously defended the law-shopping in *Ferens*, while defense attorneys generally deplore it. Virtually every layperson, however—even law students—could not believe that the Supreme Court allowed the attorney in *Ferens* to 'get away with' the law-shopping depicted there."); Cox, *supra* note 13, at 26 n.57 (discussing the illogic of *Ferens* because Mississippi's statute of limitations should not have transferred to Pennsylvania since Mississippi could not apply its law to the underlying controversy); *see also* David E. Seidelson, *1 (*Wortman*) + 1 (*Ferens*) = 6 (years): That Can't Be Right—Can it? Statutes of Limitations and Supreme Court Inconsistency*, 57 BROOK. L. REV. 787, 797-98 (1991); Louise Weinberg, *Choosing Law: The Limitations Debate*, 1991 U. ILL. L. REV. 683, 692-93.

393. *See* Norwood, *supra* note 16, at 320 n.259 (supporting overruling *Ferens*).

394. Some protections are already "built into" the statute from a practical standpoint. For example, in plaintiff-initiated transfers, judges are very wary about granting transfers that only enhance forum shopping. *See* Rodden, *supra* note 187, at 868. While this may dissuade some plaintiffs from filing a suit in a more favorable forum to take advantage of its statute of limitations and then transferring back to another favorable forum to take advantage of its juries, etc., it still allows an inappropriate regulatory regime to apply its law to a cause of action. To overcome this problem, other exceptions te *Ferens* must be found.

395. Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

396. *See id.* at 180.

397. *Cf.* Commercial Agency v. Loe, 667 F. Supp. 359, 365 (S.D. Miss. 1987) (using § 1404(a) te cure lack of jurisdiction, reasoning that the transferee state's law applies).

law of the case of the [transferor's law]" when the transferee court finds new evidence or clear error by the transferor court.[398]

Other courts have used this exception to re-examine the basis by which the transferor court allegedly asserted jurisdiction. In *Follette v. Clairol, Inc.*,[399] the District Court for the Western District of Louisiana found that it could re-open the jurisdictional question to determine whether the transferor forum had jurisdiction. The court found that the plaintiff filed suit in Texas to secure the benefits of Texas's longer statute of limitations.[400] It explained that if Texas could constitutionally exercise in personam jurisdiction over the defendants, then *Ferens* required Louisiana to apply Texas's statute of limitations.[401] The Texas judge had previously concluded that Texas courts could exert general jurisdiction over the defendants. Nevertheless, the Louisiana district court deemed it "appropriate . . . to re-examine the jurisdictional issue."[402] The court used a subsequent decision handed down by the Fifth Circuit to overrule the Texas district court's determination that the defendants' qualifying to do business in Texas provided sufficient grounds to confer jurisdiction over the defendants.[403] The court then deliberated about the requirements for general jurisdiction and found such jurisdiction unreasonable and fundamentally unfair under the circumstances presented in the case.[404] The court examined the relative interests of the two fora, finding Texas's interest tenuous at best.[405] After weighing regulatory interests and finding any assertion of jurisdiction by Texas fundamentally unfair, the court held that Louisiana's statute of limitations applied to the case.[406]

The second exception to *Van Dusen* and *Ferens* builds on the first. It explains that when venue is not proper in a forum for jurisdic-

---

398. Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1520 (10th Cir. 1991).

399. Follette v. Clairol, Inc., 829 F. Supp. 840 (W.D. La. 1993) (noting that Texas has a two-year statute of limitations as opposed to Louisiana's one-year statute).

400. *See id.*

401. *See id.*

402. *Id.* at 843.

403. *See id.*

404. *See id.* at 846.

405. *See id.* at 846-47. The court explained:

> The forum state may have some general interest in the defendant's affairs because it is, te some extent, a participant in the state's economy and, possibly, the state's political process. But this interest is so slight and so inferior to the interests of other states that it lends little support te an argument that the exercise of general personal jurisdiction is fair and reasonable.

Id. at 847. The court concluded that the "[p]laintiffs' interest in obtaining fair and effective relief is served by the availability of forums in states with specific personal jurisdiction . . . ." *Id.*

406. *See id.* at 847-48.

tional reasons, § 1406(a),[407] instead of § 1404(a), applies. While § 1406(a) allows dismissal or transfer, most courts choose to transfer the action.[408] Under § 1406(a) transfers, the transferee court applies its own law because the transferor court never had personal jurisdiction to apply its law in the first place.[409] A New York federal district court explained that if venue was improper under § 1406(a) and the suit was transferred, the transferee court's state law applies.[410] Other courts have similarly held that, if the case is transferred under § 1404(a) or § 1406(a) to "cure a lack of personal jurisdiction," the law of the transferee state applies.[411] Despite its conceptual problems, district courts appear to regularly transfer cases even though they lack personal jurisdiction. In *McTyre v. Broward General Medical Center*, the court explained that such cases are distinguishable from *Ferens* because the plaintiff lacks personal jurisdiction.[412] The court concluded that "*Ferens* cannot be read to allow plaintiffs to bootstrap an otherwise defeated claim by selecting the most favorable law from *any* of the fifty states and [then] transfer[ing] it to a federal court in which jurisdiction can be maintained."[413]

Though effective, the first two exceptions are somewhat problematic because they allow a forum to transfer a case that it had no business regulating in the first place. In order to overcome the problems associated with a forum's assertion of general jurisdiction, a different exception is necessary. The third exception allows the trans-

---

407. 28 U.S.C. § 1406(a) (1994) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."). Section 1406 allows the court the option to either dismiss a case for lack of jurisdiction or transfer the case to a forum able to assert jurisdiction.

408. *See, e.g.*, Nation v. United States, 512 F. Supp. 121, 126 (S.D. Ohio 1981) (finding transfer rather than dismissal "more in the 'interest of justice' "); Philip Gall & Son v. Garcia Corp., 340 F. Supp. 1255, 1257 (E.D. Ky. 1972) (electing to transfer rather than dismiss the case even though the court lacked jurisdiction).

409. *See* 15 WRIGHT ET AL, *supra* note 217, § 3827, at 267.

410. *See* Caribbean Wholesales & Serv. Corp. v. US JVC Corp., 855 F. Supp. 627, 629 (S.D.N.Y. 1994) (citing Martin v. Stokes, 623 F.2d 469, 472 (6th Cir. 1980)); *see also* Geehan v. Monahan, 382 F.2d 111, 114 (7th Cir. 1967) (explaining that a § 1404(a) transfer necessitates application of the transferor's state law).

411. *See* Nelson v. International Paint Co., 716 F.2d 640, 643 (9th Cir. 1983) (finding that Texas did not have jurisdiction over one of the defendants; thus, the laws of California, the transferee state, governed the case); Reyno v. Piper Aircraft Co., 630 F.2d 149, 165 (3d Cir. 1980) (holding that "where there has been an interstate transfer without personal jurisdiction, the transferor state's choice of law does not apply to that defendant"); *see also* Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 991-93 (11th Cir. 1982); Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1103-11 (5th Cir. 1981); Martin v. Stokes, 623 F.2d 469, 472-73 (6th Cir. 1980).

412. McTyre v. Broward Gen. Med. Ctr., 749 F. Supp. 102, 108 (D.N.J. 1990).

413. *Id.*

feree forum to apply its own law if a state trial court in the transferor forum would have dismissed the cause of action under the transferor state's forum non conveniens doctrine. This exception may be the most powerful one. In *Van Dusen*, the Supreme Court explicitly reserved the question of whether the state law of the transferor would apply when a state court in the forum would have granted a forum non conveniens motion under state law.[414] Conferring its approval on this exception, the Supreme Court, in *Piper Aircraft Co. v. Reyno*, overruled a Third Circuit interpretation of *Van Dusen* that required no change in applicable law for forum non conveniens "transfers."[415] The Court went so far as to note that a plaintiff's choosing a particular forum solely in order to take advantage of favorable law may warrant outright dismissal.[416] District courts that recognize why forum matters have readily embraced this exception.

In *Caribbean Wholesales & Services Corp. v. US JVC Corp.*, the court applied this exception to a contract dispute involving a forum selection clause.[417] In deciding whose law to apply, the court observed that, at first glance, *Ferens* appears to necessitate application of the transferor state's law.[418] The court explained, however, that fidelity to *Erie* served as the underlying principle in both *Ferens* and *Van Dusen*.[419] It posited that the Supreme Court viewed § 1404(a) as a threat to *Erie* because courts in the federal judiciary may transfer cases whereas state courts can only use forum non conveniens to rid themselves of cases in which imposing its regulatory regime would be improper.[420] It held that, if the transfer involved no change of law, it would result in the application of different law than if the case had been brought in state court.[421] The district court noted that parties in state courts may move to dismiss based on forum non conveniens, and

---

414. *See* Van Dusen v. Barrack, 376 U.S. 612, 640 (1964); *see also* Litman, *supra* note 146, at 594 n.165 ("The implication is that forum non conveniens dismissals normally entail a change in applicable choice of law rules. In a transferred case in which the state court would dismiss on forum non conveniens grounds, it therefore might be necessary to apply the law of the transferee forum in order to preserve parallelism between the federal and state systems."). In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981), the Court held that, in forum non conveniens determinations, a change in the substantive law that is less favorable to the plaintiff is not given substantial weight in the forum non conveniens inquiry.

415. *See Piper Aircraft Co.*,. 454 U.S. at 253.

416. *See id.* at 249 n.15; *see also* Jennings v. Boeing Co., 660 F. Supp. 796, 799 (E.D. Pa. 1987).

417. Caribbean Wholesales & Serv. Corp. v. US JVC Corp., 855 F. Supp. 627, 630-32 (S.D.N.Y. 1994). The court explained that in cases involving forum selection clauses, state courts will routinely grant motions based on forum non conveniens. *See id.*

418. *See id.* at 630.

419. *See id.*

420. *See id.* at 631.

421. *See id.*

any subsequent "transfer" (dismissal and re-filing in a more appropriate forum) would carry with it a change in applicable law.[422] In order to replicate such a result in the federal judiciary and be faithful to *Erie*, the district court found that "applying *Van Dusen* to forum selection clause transfers would achieve precisely the opposite result: the application of the transferor state's law rather than [the law] of the contractually specified state."[423] Such a result would produce an opportunity for forum shopping because the applicable law would depend upon whether a party filed its case in federal or state court.[424]

The court observed that *Van Dusen* aimed to observe *Erie*. It explained that by applying the transferor state's law to cases that "state courts would have dismissed would be to apply law that state courts would therefore not have applied."[425] The court reasoned that "[t]his would violate *Van Dusen*'s goal of ensuring that the parties cannot 'achieve a result in federal court which could not have been achieved in the courts of the State where the [plaintiff filed the cause of action].'"[426] The Court in *Van Dusen* explained that its holding might not apply if the transferor forum would have simply dismissed the cause of action on forum non conveniens grounds.[427] The Court, however, did not explicate this possible situation, even though it suggested an exception of considerable appeal.[428] This exception is also faithful to the principles in *Erie*.[429] It means that the applicable law will depend not on whether the case is transferred but whether the state court would have dismissed the case on state-based forum non conveniens grounds.[430] This creates a logistical nightmare for the courts and is susceptible to easy manipulation since the transferee court will have to apply the forum non conveniens rules of the transferor forum. As more states model their forum non conveniens rules after § 1404(a) (and even develop their own uniform transfer provi-

422. *See id.*

423. *Id.*

424. *See id.*

425. *Id.*

426. *Id.* (quoting Van Dusen v. Barrack, 376 U.S. 612, 638 (1964)). This reasoning is similar to the reasoning behind the second exception to *Van Dusen*, which holds that when the transferor court does not have personal jurisdiction over the defendant, the transferor state's law should not apply. *See id.* at 631; *see also* Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1108 (5th Cir. 1981); Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, 689 F.2d 982, 992 (11th Cir. 1982).

427. *See Van Dusen*, 376 U.S. at 640.

428. *See id.*

429. *See Caribbean Wholesalers*, 855 F. Supp. at 632. In fact, the exception is consistent with *Van Dusen*. *See id.* (characterizing the exception as simply an extension of *Van Dusen*).

430. *See id.*

sions), a § 1404(a) transfer will represent a holding by the transferor court that the transferee's laws should apply to the action.[431]

The fourth exception to *Van Dusen* and *Ferens* concerns changes in circuit interpretations of federal law. A well-established rule holds that a transferee forum in one federal circuit need not follow the interpretation of federal law followed in the transferor's jurisdiction.[432] The court in *Center Cadillac, Inc. v. Bank Leumi Trust Co.* explained that *Van Dusen* held only that a transferee court must apply the substantive state law, not that it must apply the federal law interpretation of the transferor court.[433] The court in *Center Cadillac* found the principle underlying *Van Dusen*—fidelity to *Erie*—inapplicable in the federal law context.[434]

The D.C. Circuit, in *In re Korean Air Lines Disaster*, upheld a district court's application of its own law, instead of the law of the Second Circuit, from which the case had been transferred.[435] The court explained that applying *Van Dusen* to federal questions would not produce uniformity of interpretations but would force a federal court to apply contrary federal precedents to similar cases based on the mere circumstance of where the plaintiff initially filed the case.[436] Such reasoning seems to whittle away the rule of *Van Dusen*.

---

431. *See supra* note 184 and accompanying text. Additionally, an understanding of forum non conveniens becomes necessary to understand the exception to *Van Dusen*. *See generally, e.g.*, William F. Harvey, *Personal Jurisdiction and Forum Nonconveniens*, 27 RES GESTAE 223 (1993) (discussing the interplay between forum non conveniens and personal jurisdiction).

432. *See* Burke v. Northwest Airlines, Inc., 819 F. Supp. 1352, 1370 (E.D. Mich. 1993) (explaining that federal law questions are not bound by the constraints of *Van Dusen* and *Erie*); Wegbreit v. Marley Orchards Corp., 793 F. Supp. 965, 968-69 (E.D. Wash. 1992) (explaining the acceptance of the rule); Bradley v. Spectrum Emergency Care, Inc., No. 96-2569, 1998 U.S. App. LEXIS 30445, at *16 n.4 (4th Cir. Nov. 30, 1998) (citing authority for the federal law exception to *Ferens*); Henry J. Friendly, *The 'Law of the Circuit' and All That*, 46 ST. JOHN'S L. REV. 406, 412 (1972) (interpreting *Van Dusen* as limited to state law questions); Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 692-709 (1984). *But see* Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975) (stating that *Van Dusen* applies to federal law questions); Rouchell, *supra* note 189, at 432-34 (collecting and analyzing cases). Many courts, however, have criticized *Berry Petroleum*. *See* Center Cadillac, Inc. v. Bank Leumi Trust Co., 808 F. Supp. 213, 224 (S.D.N.Y. 1992), *aff'd*, 99 F.3d 401 (2d Cir. 1995) (table); Isaac v. Life Investers Ins. Co., 749 F. Supp. 855, 863 (E.D. Teun. 1990) ("[W]hile the law of the transferor forum on federal issues merits close consideration, it is not binding upon the transferee forum.").

433. *Center Cadillac, Inc.*, 808 F. Supp. at 223.

434. *See id.* at 224; *see also In re* Korean Air Lines Disaster, 829 F.2d 1171, 1177 n.2 (D.C. Cir. 1987) (Ginsburg, J., concurring); *In re* Pittsburgh & L.E.R. Co. Secur. & Antitrust Litig., 543 F.2d 1058, 1065 n.19 (3d Cir. 1976) (holding that *Van Dusen* does not apply to federal law since federal law "is assumed to be nationally uniform, whether or not it is in fact.").

435. *In re Korean Air Lines Disaster*, 829 F.2d at 1175-76.

436. *See id.* at 1175.

These four exceptions provide district courts with certain tools to overcome the hurdles presented by *Van Dusen* and *Ferens*. Even without these exceptions to *Van Dusen* and *Ferens*, § 1404(a) still provides great protection because forum involves much more than substantive law.[437]

2. Protection Without Exceptions

Some have suggested that district courts could limit *Ferens* to its facts and take a case-by-case approach that achieves both fairness and uniformity.[438] However, other avenues of protection from *Ferens* are available.

First, one must remember that forum includes an entire mass of regulatory interests. Even though § 1404(a) requires no change in the applicable law, transfers obviously result in a change of jury pools, judges, procedural law, etc.[439] The Court in *Van Dusen* acknowledged such changes: "Of course, the transferee District Court may apply its own rules governing the conduct and dispatch of cases in its court. We are only concerned here with those state laws of the transferor State which would significantly affect the outcome of the case."[440] Forum implicates the imposition of an entire mass of regulatory influences, only one of which is substantive law. Thus, while *Van Dusen* may require the transferee forum to apply the law of the transferor forum, it allows for the transferee forum's imposition of all its other regulatory strictures.

Second, protection is evident by looking to the reality of how transferee courts apply the "applicable" law. The general rule from *Van Dusen* and *Ferens* states that transferee courts apply the law of the transferor forum, including that forum's choice of law rules.[441] Courts seem to emphasize this rule when the choice of law rules of the transferor point toward the transferee. In *Bouchard v. King*, the court found that Wisconsin's choice of law rules deferred to the "interests of a State that has a substantial concern with the litigation."[442] Not surprisingly, the transferee court found that the interests of its state had a substantial concern with the litigants and that its law should

---

437. *See supra* note 21 and accompanying text.

438. *See* Rodden, *supra* note 187, at 867-68.

439. *See* Norwood, *supra* note 16, at 318-19.

440. Van Dusen v. Barrack, 376 U.S. 612, 639 n.40 (1964).

441. *See* Sheldon v. PHH Corp., 135 F.3d 848, 852 (2d Cir. 1998) (citing Ferens v. John Deere Co., 494 U.S. 516, 523 (1990)); Bouchard v. King, 870 F. Supp. 269, 272 (D. Minn. 1994) (citing *Ferens*, 494 U.S. at 523, as well).

442. *Bouchard*, 870 F. Supp. at 272.

apply.[443] This practice illustrates that when actions are transferred to the more appropriate forum, the transferor's choice-of-law rules often[444] point towards the transferee, such that the transferee court will ultimately apply both the substantive and procedural laws of its sovereign.

By allowing the transferee forum to apply the transferor's choice-of-law rules, there are inevitable opportunities for the transferee forum to ensure that its laws apply to the case. While some state choice of law rules are mandatory, most require some weighing of regnlatory interests.[445] If a given case were transferred to the transferee forum for regulatory interest reasons, then it only makes sense that the transferee forum would have no difficulty in tipping the scales towards application of its substantive law under a regulatory interest analysis. The caselaw provides examples of such balancing. In *Sheldon v. PHH Corp.*, the court determined that New York law applied because Michigan's only connection to the cause of action was the place of the collision.[446] It also found that a Michigan court would likely hold that New York's strong regulatory interests and need to discourage forum shopping establish "rational reasons" to apply New York substantive law.[447] Recall that once a transferor court transfers a case, it loses all control over the action.[448]

Van Dusen and *Ferens* do not conform to a regulatory understanding of § 1404(a). In fact, they ignore the importance of forum and relegate forum to merely locational status. This Note illustrates that forum is much more. Through the exceptions and other protections available to district courts, the rules of *Van Dusen* and *Ferens* may be successfully diluted to ensure that a forum may apply its own law to those actions that it has a strong interest in regulating.

---

443. *See id.*

444. This assumes, of course, that those rules provide deference to the state with the most substantial interest in regulating the underlying dispute.

445. For example, the Restatement (Second) Conflict of Laws explains that when there is no controlling state choice of law rule, courts should consider a number of relevant factors that include regulatory interests and ease in the detormination of the law to be applied. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (choice-of-law principles); *id.* § 145 (general principle).

446. Sheldon v. PHH Corp., 135 F.3d 848, 855 (2d Cir. 1998).

447. *See id.* The court's argument is almost reminiscent of renvoi.

448. *See supra* notes 337-39.

IX. CONCLUSION

This Note started with an examination of why forum matters. It is also where this Note ends. A forum is not just a physical location. Rather, it is the embodiment of a state's regulatory regime. Recognizing this fact requires law to protect litigants from improper assertions of jurisdiction over causes of action in which the forum has no regulatory interest. Prior to *Burnham*, defendants could seek constitutional protection against fundamentally unfair assertions of general jurisdiction. Today, common law forum non conveniens and § 1404(a) must provide that protection. This Note illustrates how § 1404(a) offers protection against the very real detriments of forum shopping and improper assertions of jurisdiction.

Phillip F. Cramer[*]

* I wish to thank Anna Cramer for her help and encouragement throughout the publication process. I also want to thank the *Vanderbilt Law Review*, and in particular, Brant Brown, Jessica Wilson, Tonya Gray, and James Zimmerman for their and invaluable editorial assistance. Colin Delaney deserves special recognition for his adept and indefatigable editing. The topic and ideas of this Note were inspired by the teachings of Professor Thomas McCoy.