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The Long Arm of Multidistrict Litigation

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ABSTRACT

Nearly 40 percent of the civil cases currently pending in federal court—now over 130,000— are part of a multidistrict litigation, or MDL. In MDL, all cases pending in federal district courts around the country sharing a common question of fact, such as the defectiveness of a product or drug, are transferred to a single district judge for consolidated pretrial proceedings, after which they are supposed to be remanded for trial. But the reality is that less than three percent are ever sent back because the cases are resolved in the MDL court, either through summary judgment or mass settlement. Surprisingly, despite that the MDL court is where all of the action in the litigation typically happens, that court need not have personal jurisdiction over the plaintiffs or the defendants under the rules that would normally apply. Indeed, even as the Supreme Court has clamped down on personal jurisdiction in recent years, the personal jurisdiction exercised in MDL has avoided rigorous analysis, for reasons that do not survive scrutiny. In this Article, I examine why MDL has avoided these fundamental questions, and suggest a new way of analyzing MDL under the Due Process Clause, focusing on the interests that the doctrine of personal jurisdiction attempts to vindicate, especially the assurance of forum that provides a fair opportunity to be heard. In particular, I explore the possibility of justifying MDL on the basis of a national shared interest in efficient dispute resolution, so long as such a justification adequately weighs the interests of the parties in a convenient forum.

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"In MDL, it's not where, but whom." – Elizabeth Cabraser, prominent plaintiffs' lawyer, on the selection of multidistrict litigation judges.[1]

INTRODUCTION

If there is one thing every first-year law student knows a lot about, it's personal jurisdiction, a staple of every introductory Civil Procedure course. But any 1Ls who have survived the journey from *Pennoyer*[2] to *International Shoe*[3] to the Supreme Court's recent flurry of jurisdiction cases[4] might be surprised to learn that in nearly 40 percent of the cases on the federal civil docket, much of what they learned is practically irrelevant.[5]

That's because those cases—as of January 2017, some 132,000 of them—are consolidated as part of a multidistrict litigation, or MDL,[6] which has exploded in the wake of the demise of the mass-tort class action.[7] Under the MDL statute, 28 U.S.C. § 1407, thousands of cases pending around the country that share a common question of fact can be transferred to a single district judge in any district for pretrial proceedings. The judge is chosen by a panel of judges selected by the Chief Justice called the Judicial Panel on Multidistrict Litigation (JPML).[8] After such pretrial

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[1] Elizabeth Cabraser, *MDL Problems*, Podcast of Proceedings of the Section on Litigation, Annual Meeting of the Association of American Law Schools, January 6, 2017.

[2] Pennoyer v. Neff, 95 U.S. 714 (1878).

[3] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[4] Walden v. Fiore 571 U.S. __, 134 S. Ct. 1115 (2014), Daimler A.G. v. Bauman, 571 U.S. __, 134 S. Ct. 736 (2014); Goodyear Dunlop Tires Ops. v. Brown, 564 U.S. 915 (2011); J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873 (2011). And, god forbid *Hanson v. Denckla*, 357 U.S. 236 (1958), which Geoffrey Hazard aptly described as containing a "line of analysis that, in all charity and after nature reflection, is impossible to follow, no less to relate." Geoffrey Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 244.

[5] Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) (noting that "from 2002 to 2015, multidistrict proceedings leapt from sixteen to thirty-nine percent of the federal courts' entire caseload").

[6] Pending MDLs by Actions Pending as of February 15, 2017, available at http://www.jpml.uscourts.gov/pending-mdls-0. As of February 15, 2017, there are 132,016 cases pending in 236 multidistrict litigations in 53 transferee districts before 186 district judges.

[7] Andrew D. Bradt, *A Radical Proposal: The Multidistrict Litigation Act of 1968*, 165 PENN L. REV. (forthcoming 2017); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1346 (2014) ("As reliance on Rule 23 diminished, MDL has ascended as the most important federal procedural device to aggregate (and settle) mass torts."); Thomas E. Willging & Emery E. Lee, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 798 (2011) (noting the "massive increase in MDL aggregate litigation").

[8] 28 U.S.C. § 1407(a).

proceedings, the cases are to be remanded to the courts from which they came for trial,[9] but this rarely happens—less than 3% of the cases ever leave the MDL court.[10] Instead, most of the cases are either settled or resolved in the MDL proceeding, meaning that, as in most federal litigation, pretrial proceedings are the whole ballgame.[11] While the cases are in the MDL court, not only does the MDL judge have all of the powers that the transferor court would have, including the power to decide dispositive motions, in nearly all MDLs of consequence the case is resolved by a mass-settlement agreement reached within the MDL.[12]

Here's the thing: even though the MDL court does everything that matters in the vast majority of cases transferred to it, it does not need to be a court that would have personal jurisdiction to decide the case under the normal rules. To the contrary, according to the JPML and the few courts to have analyzed the problem, an MDL can be located anywhere in the United States, essentially without limitation. Indeed, the JPML has concluded that "transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction or venue."[13] And while federal courts have mostly taken this as a given, those that have addressed whether there are any jurisdictional limitations on the MDL forum have characterized such arguments as "frivolous."[14]

In this Article, I hope to demonstrate that questions about the proper jurisdiction of MDL courts are not frivolous—with respect to defendants *or* plaintiffs. In an era in which the Supreme Court has established significant new limits on personal jurisdiction—particularly when plaintiffs are asserting claims arising under state law—and in which MDL dominates the federal district courts, reexamination of the scope of personal jurisdiction under the MDL statute is both timely and necessary.

Consider the largest MDL currently pending, the litigation involving products-liability and personal-injury claims against six manufacturers of the allegedly defective medical device, transvaginal mesh. The MDL now includes over 60,000 cases and is consolidated before Judge Joseph R.

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[9] Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998).

[10] Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 72, 72-74 (2015).

[11] Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. (forthcoming 2017) (draft on file with author) (describing scope of pretrial proceedings).

[12] *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (describing how MDL "creates the perfect conditions for an aggregate settlement").

[13] In re FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976).

[14] In re Agent Orange Prods. Liab. Litig., 996 F.2d 1425, 1432 (2d Cir. 1993).

Goodwin in the Southern District of West Virginia, located in Charleston.[15] Under current Supreme Court personal-jurisdiction cases, this is a strange result. None of the defendants in the litigation is incorporated or has its principal place of business in West Virginia, meaning there is no general jurisdiction over any of them in the state.[16] And unless a plaintiff is from West Virginia or ingested the drug there, there is likely no specific jurisdiction in West Virginia in any of these cases.[17]

The case of plaintiff Maria Kafaty is instructive. She lives in Hanford, California, and allegedly suffered injuries arising from the implantation of a vaginal-mesh device implanted in a nearby Fresno hospital. She filed a lawsuit—asserting only claims arising under California state law—in the U.S. District Court for the Eastern District of California, in Fresno, against Boston Scientific Corp. Boston Scientific is based in Massachusetts, where it designed and manufactured the device that caused Kafaty's injuries.[18] Shortly after Kafaty filed her case, in August 2012, it was transferred to the MDL in West Virginia, where it remains.[19] Her lawyer is not among those selected to the steering committee of lawyers prosecuting the case.[20] Absent the MDL, the case would never have been sent to West Virginia. But, through the magic of MDL, it was, and it is unlikely to ever return to California, except in the form of a settlement offer.[21] In sum, Kafaty's case is almost certainly going to be litigated entirely in West Virginia.

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[15] In re C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2187 (S.D. W. Va.); In re Am. Med. Sys. Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2325 (S.D. W. Va.); In re Boston Sci. Corp. Pelvic Repair Prods. Liab. Litig., MDL No. 2326 (S.D. W. Va.); In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2327 (S.D. W. Va.); In re Coloplast Corp. Pelvic Support Sys. Prods. Liab. Litig., MDL No. 2387 (S.D. W. Va.); In re Cook Med., Inc., Pelvic Repair Sys. Prods. Liab. Litig (S.D. W. Va.).

[16] *Daimler*, 134 S. Ct. at 762 (restricting general jurisdiction to forums in which the defendant is "essentially at home").

[17] Even under an expansive view of specific jurisdiction like the one outlined by Justice Ginsburg in her dissent in *Nicastro* would likely not cover cases with no connection to West Virginia. 564 U.S. at 901 (Ginsburg, J., dissenting) ("a forum can exercise jurisdiction when its contacts to the controversy are sufficient"). The Supreme Court is indeed taking up this very question this Term in *Bristol Myers Squibb v. Superior Court of California*.

[18] Complaint and Demand for Jury Trial, Kafaty v. Boston Sci. Corp., No. 12-01290 (E.D. Cal. Aug. 8, 2012).

[19] Conditional Transfer Order, Kafaty v. Bos Sci. Corp., MDL No. 2326 (J.P.M.L., Aug. 24. 2012); Kafaty v. Bos. Sci. Corp, No. 12-04670 (S.D. W. Va.).

[20] *See* Lead and Liaison Counsel and Steering Committee, In re Boston Sci. Corp Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2326 (S.D. W. Va.). available at http://www.wvsd.uscourts.gov/MDL/boston/index.html.

[21] D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. (forthcoming 2017).

What explains this? The explanations given by the JPML and the federal courts are insufficient and contradictory. For its part, the JPML essentially disclaims that the transferee court is exercising personal jurisdiction at all. In its view, the power of the transferee court is derivative of the power of the transferor court. That is, the JPML says that what matters is whether there is jurisdiction in the transferor court, because the MDL statute did not purport to change the rules of personal jurisdiction or venue for any individual case.[22] But nobody contends that Kafaty could have filed her case in West Virginia in the first instance; that would require a federal statute providing for nationwide service of process,[23] something the MDL statute clearly does not do.[24] The few federal courts that have examined this issue have given a different answer. They say that Congress has the sovereign territorial power to provide for nationwide jurisdiction anywhere within the borders of the United States over any case and did so when passing MDL, so an MDL can be transferred to any district, regardless of its connection to the litigation.[25]

Setting aside for the moment that the two explanations are facially contradictory, they are also individually unsatisfying. The JPML's explanation, that jurisdiction in the transferor court suffices, ignores the reality of modern MDL practice, in which all of the action, including potentially judgment, occurs in the transferee court. For instance, in the recent nationwide products liability MDL involving the drug Zoloft, the MDL court granted summary judgment against 333 transferred cases in one fell swoop.[26] For its part, the courts' explanation is both factually

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[22] In re Library Editions of Children's Books, 299 F. Supp. 1139, 1142 (J.P.M.L. 1969) ("Congress, possessing nationwide sovereignty and plenary power over the jurisdiction of the federal courts, has given no indication that, in creating § 1407, it intended to expand the territorial limits of effective service. Therefore, proper service must still be made on each defendant pursuant to the rules of the transferor court even after a transfer under § 1407.").

[23] *Nicastro*, 564 U.S. at 885 ("it may be, assuming it were otherwise empowered to legislate on the subject, that Congress could authorize the exercise of jurisdiction in any appropriate courts").

[24] Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1202 n.194 (1998) ("There is no suggestion that 28 U.S.C. § 1407 itself can be read, in effect, to authorize nationwide in personam jurisdiction in the MDL transferee court, even if the transferor court itself lacked personal jurisdiction.").

[25] Howard v. Sulzer Orthopedics, Inc., 382 F. App'x 436, 442, 2010 WL 2545586, at *5 (6th Cir. 2010) ("The MDL statute is, in fact, legislation "authorizing the federal courts to exercise nationwide personal jurisdiction."); In re Agent Orange Prods. Liab. Litig., 818 F.2d 145, 163 (2d Cir. 1987) (holding that MDL statute is "legislation authorizing the federal courts to exercise nationwide personal jurisdiction").

[26] In re Zoloft, 176 F. Supp. 483 (E.D. Pa. 2016) (MDL judge granting summary judgment on 333 transferred cases in a single opinion).

incorrect—the MDL statute does not provide for nationwide service of process over any claim, because such claims may not be filed directly in the MDL court, and the statute does not override Federal Rule of Civil Procedure 4—and question-begging. That is, even if one were to accept that MDL does provide for an innovative kind of nationwide personal jurisdiction (as opposed to service of process) in any court where an MDL is established, one must then assess whether such a statute is acceptable under the due process clause of the *Fifth* Amendment—with respect to plaintiffs or defendants.

For if the MDL statute is in fact a nationwide personal jurisdiction statute, then it is a quite grasping one—for three reasons. First, unlike most such statutes, which are directed at a discrete intractable problem and one substantive area of law, MDL applies to all claims, whether they arise under federal or state law.[27] Second, unlike every other attempt at nationwide personal jurisdiction, it is not mitigated by a more specific venue statute or the opportunity for transfer under 28 U.S.C. § 1404(a).[28] The statute's provision that a case be transferred to "any district . . . for the convenience of parties and witnesses and will promote the just and efficient conduct" of the litigation is functionally meaningless when the litigants are scattered throughout the country.[29] Third, there is only very limited opportunity for appellate review of the choice of MDL court made by the JPML. Review is available only by extraordinary writ, and reversal of the JPML's choice of forum has never been granted.[30] So, if one concludes that the MDL statute *does* authorize a kind of national jurisdiction, then it is one that truly tests the outer limits of due process, particularly with respect to otherwise garden-variety, state-law tort cases.[31]

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[27] ROBERT C. CASAD & LAURA HINES, JURISDICTION AND FORUM SELECTION § 6.2 (2d ed. 2015) (noting that Congress has not attempted nationwide personal jurisdiction over state-law claims).

[28] *Id.* at 62 ("Congress on most occasions has attempted to protect defendants from trial at fundamentally unfair locations by simultaneously enacting restrictive venue provisions"); Mary Ellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 62 (1984); Howard M. Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1149 (1989) (describing "filters" of venue and transfer statutes that typically apply to mitigate harshness of nationwide personal jurisdiction).

[29] Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumer, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 482-83 (1992).

[30] 28 U.S.C. § 1407(e); Andrew S. Pollis, *The Need for Non-Disrectionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1663 (2011) (noting lack of appellate review).

[31] Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1604 (1992) ("In the context of the federal courts and the Fifth Amendment, it may well be a denial of due process to subject a defendant to jurisdiction in an unfair or

In this Article, I argue that we need to think about personal jurisdiction in MDL differently, and that MDL provides an opportunity to think about personal jurisdiction differently, in general. As an initial matter, both sets of explanations currently given for the expansive personal jurisdiction of an MDL court are incomplete. Functionally, the MDL court is exercising a kind of nationwide personal jurisdiction over the parties, at least with respect to pretrial proceedings. This expansive jurisdiction cannot, however, be solely justified as a matter of national sovereign territorial power, as the courts suggest, but must be justified as a matter of federal interest. That is, the question should be whether MDL is acceptable because it is reasonable under the due process clause, due to a national interest in efficient dispute resolution outweighing the practical inconveniences to the parties in most MDL cases. If one agrees that such jurisdiction is typically reasonable, however, that does not mean that MDL's jurisdiction is unlimited—instead, it means that the Fifth Amendment does impose limitations on the JPML in choosing a transferee district, and there are aspects of MDL practice that should be observed to ensure that the inconveniences to parties to MDLs may create are not swept under the rug.

In Part I of this Article, I briefly lay out the current law of personal jurisdiction in the federal courts, which remains unresolved. Although federal courts are less constricted than state courts in exercising jurisdiction, the extent of those constraints is a subject of some dispute. I argue that the Fifth Amendment Due Process Clause creates limits on the jurisdiction of federal courts based on an analysis of reasonableness, limits that must exist to ensure that individuals are provided a fair opportunity to be heard. But those limits more relaxed than those imposed on the states by the Fourteenth Amendment. This is because federal courts are not constrained by state borders, and because federal court action may be justified more easily by a national, federal interest.

In Part II, I turn to MDL. There, I examine the origins of the MDL statute and develop the unsatisfying jurisprudence in this area by the JPML and the federal courts and discuss how MDL judges are chosen. As a matter of doctrine, it is clear: personal jurisdiction just doesn't matter in MDL—a result that the creators of the statute, who sought to centralize control of nationwide litigation in the hands of individual federal judges intended. The problem, however, is that the reasons we restrict personal jurisdiction don't disappear because an MDL has been created, they are just swept aside. I argue that we can't sweep aside these problems so easily. The explanations given for why MDL courts have unlimited national

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inconvenient forum without institutional protections against that result. That problem would emerge however only in the unlikely event that Congress actually did repeal the venue and venue transfer statutes.").

jurisdiction are unsatisfying. Closer inquiry is required, both of why personal jurisdiction has been completely ignored, and, if one stops ignoring it, whether MDL passes constitutional muster.

That personal jurisdiction is ignored in MDL comes as little surprise. It is only one of numerous due-process-related issues that get short shrift—rather, it is an example of how MDL's structure facilitates aggregate litigation by paying lip service to traditional norms of individual autonomy and decentralized trials.[32] As David Shapiro once wrote, sometimes "light from one corner can help illuminate the whole room."[33] So it is with respect to personal jurisdiction in MDL—the crutch of potential return for local trial makes possible aggregation of thousands of cases in a single forum that might otherwise be impossible.[34] In that sense, understanding how personal-jurisdiction problems are swept aside explains a great deal about how MDL works generally.

But to say that personal jurisdiction is ignored is not to say MDL is unconstitutional—which would be a surprising development, to say the least, in light of its acceptance and growing importance in our litigation scheme. Instead, perhaps it means MDL should inform the way we think about personal jurisdiction—over both plaintiffs and defendants. MDL is, in a real sense, inconsistent with the way we think about personal jurisdiction over state law claims—to divide the jurisdiction of federal courts up based on state limitations is plainly insufficient to accomplish what MDL needs to do, and what its creators intended it do: centralize nationwide litigation in a single forum. The real question should not be whether we can graft personal jurisdiction case law onto MDL, but whether the MDL scheme fulfills one of the central aims of the due process clause: to provide a meaningful opportunity to be heard. Ultimately, what MDL's dominance shows us is that our usual notions of limitations on personal jurisdiction will almost by necessity take a back seat to the very modern need to resolve the kind of mass litigation spawned by our national economy.

In Part III of the Article, I attempt that inquiry. To do so requires a commonsense analysis of both the benefits and burdens on the parties in MDL, but also the recognition of the national interest underlying the federal MDL statute, the interest in efficient resolution of nationwide mass torts.

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[32] Bradt, *Radical Proposal*, *supra* note 10; Martin H. Redish & Julie Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015).

[33] David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking,* 137 U. PA. L. REV. 1969, 1969 (1989).

[34] *See* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987) (describing MDL one of several "dubious packaging strategies that are supposedly provisional but that in substantive terms may be irredemiable").

Such an interest will, in most cases, render application of the MDL statute constitutionally reasonable, unless the burdens imposed on the parties are substantial. But the JPML cannot avoid doing such analysis based on the incorrect assumption that the constitution does not require it. To do so should not, as I lay it out, be especially onerous, but it does require attention to the differing circumstances of plaintiffs and defendants. It also may require other reforms in MDL practice to ensure that it is a fair deal, and that the inconveniences that the statute imposes do not overwhelm the benefits of nationwide coordination. Finally, I suggest that the leeway in personal jurisdiction provided by the MDL statute demands enhanced respect in diversity cases for state choice-of-law rules. To be included in an MDL may create geographic inconvenience, but it should not eliminate parties' and states' interests in applying the otherwise-applicable substantive law.

In short, as MDL becomes dominant, it becomes necessary to assess it for what it actually is: an aggressive use of federal power. Whether such power is constitutionally justifiable turns not on a set of convenient fictions but on a balancing of the relevant interests. Actually doing that balancing will aid in ensuring that MDL is both effective and fair—and consistent with fundamental principles of due process.

I. PERSONAL JURISDICTION IN THE STATE AND FEDERAL COURTS

A. *Personal Jurisdiction Generally*

The American personal-jurisdiction story is familiar and oft told, but a short retelling is necessary to set the scene for analysis of its relationship with MDL.[35] According to the Restatement (Second) Conflict of Laws, a court exercises personal, or adjudicatory, jurisdiction "whenever action is taken in a judicial proceeding; that is by a duly authorized state official in the settlement of an individual controversy through the application of legal principles. The usual product of an exercise of judicial jurisdiction is a judgment rendered in proceedings at law or in equity."[36] It is intuitive that there must be some limitations on a court's adjudicatory jurisdiction—every court in the world can't decide every case, and even if it did other courts might not recognize or enforce the judgments.[37] But there must be some

[35] Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 413 (1980) (noting the tendency for jurisdiction pieces to "reinvent the wheel by persistently reciting the subject under study").

[36] RESTATEMENT (SECOND) CONFLICT OF LAWS 100 (1982).

[37] Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966).

organizing principle that justifies a court's deciding a case involving parties from other states.

Within the United States, it has always been the case that our various courts have admitted of some limitations to their adjudicatory jurisdiction, both statutory and constitutional, but the source of those limitations and the interests they serve is a subject of disagreement and confusion.[38] The main problem, as others have noted, is that the Supreme Court doesn't seem to have a clear consensus on what its personal-jurisdiction doctrine is trying to do, or how it is supposed to do it.[39] At various points, the Court has emphasized several different goals that limitations on jurisdiction are attempting to achieve, such as protecting defendants from abusively inconvenient forums, ensuring a convenient forum for plaintiffs, vindicating a state's ability to regulate a defendant acting with its borders, and limiting the power of states to infringe upon sister states' sovereignty.[40]

Despite the messiness, it is fair to say that two main theoretical justifications for limitations on jurisdiction persist, in Arthur von Mehren's words, in "uneasy coexistence": power and reasonableness.[41] The power theory holds that there are limitations on a state's territorial sovereignty that define the boundaries on the exercise of jurisdiction. By contrast, the reasonableness theory holds that each exercise of jurisdiction must be measured according to the facts of the particular case and the interests of the

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[38] ARTHUR T. VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW 79 (2007) ("American thinking and practice respecting adjudicatory authority [is] convoluted, and not lacking in ambiguity."); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 618 (2006) ("The law of personal jurisdiction has blossomed into an incoherent and precarious doctrine[.]"); Stephen B. Burbank, *All the World His Stage*, 52 AM. J. COMP. L. 741, 743-744 (2004) (American jurisdictional law is "inconsistent if not incoherent").

[39] Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301 (2014) (noting "the sad state of personal jurisdiction law"); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1 (2010) ("Even basic foundational questions are hotly contested despite more than two centuries of doctrinal evolution.").

[40] Erbsen, *supra* note 40, at 5 ("the Court has helpfully opined that the forum state's interests in providing a forum matter except when they don't, that burdens on nonresident defendants are material except when they aren't, and that the plaintiff's interest in finding a convenient forum matters except when it isn't").

[41] VON MEHREN, *supra* note 38, at 101 (noting the "widely held" view that "*International Shoe* announced a new jurisdictional theory without excluding the older, territorially based, power theory"). *Compare* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (holding that "all assertions of state court jurisdiction must be evaluated according to the standards of *International Shoe* and its progeny") *with* Burnham v. Superior Court of Calif., 495 U.S. 604, 621 (1990) (Scalia, J.) ("The logic of *Shaffer's* holding . . . does not compel the conclusion that physically present defendants must be treated identically to absent ones.).

parties and the forum state.[42] The power theory tends to lay out *ex ante* rules that permit and restrict jurisdiction that admit of easy adjudication, while the reasonableness theory elevates the need to tailor the doctrine to do justice in the individual case.[43]

Though its roots are deeper,[44] it is reasonable to begin the account of American personal-jurisdiction doctrine with 1878 with *Pennoyer v. Neff*, the poster child for the "power theory" of jurisdiction.[45] Drawing on international law, in *Pennoyer*, Justice Field presented a doctrine of jurisdiction based on the territorial sovereignty of a state within its borders.[46] Because a state is all-powerful within its borders and powerless without, it could exercise *in personam* jurisdiction on people served with process in the state and *in rem* or *quasi in rem* jurisdiction over property located within the state's borders, and none without.[47] Jurisdiction, under *Pennoyer*, is therefore a function of territorial power.[48] Famously, Field considered these limitations on state-court jurisdiction a matter of constitutional law under the due-process clause of the recently ratified Fourteenth Amendment.[49] As a result, for better or worse, the law of

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[42] Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1173 (2014) (the "Supreme Court is struggling with two distinct and sometimes competing notions of the due process interest related to personal jurisdiction…notions of fairness to the defendant—protection against being haled into court in a far-off forum…and the permissible scope of sovereign authority").

[43] Stephen B. Burbank, *All the World His Stage*, 52 AM. J. COMP. L. 741, 743-744 (2004) (describing how American jurisdictional doctrine struggles in balancing "ease of administration and predictability on one hand and doing justice in the individual case on the other").

[44] *See, e.g.,* D'Arcy v. Ketchum, 52 U.S. 165 (1850).

[45] 95 U.S. 714 (1878). I will bypass indulging in a recap of the grand tale of Marcus Neff, John Mitchell, and Sylvester Pennoyer, but for a wonderfully detailed telling of the *Pennoyer* story and an analysis of the opinion, see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Revisited*, 62 WASH. L. REV. 479 (1987).

[46] Perdue, *supra* note 45, at 502 ("The basic premise of the opinion is that there are limitations on state power that are simply inherent in the nature of government.").

[47] 95 U.S. at 722 (describing the "two well-established principles of public law respecting the jurisdiction of an independent State over persons and property," namely, that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and that "no State can exercise direct jurisdiction and authority over persons and property without its territory").

[48] VON MEHREN, *supra* note 38, at 86; *see also* McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction in physical power").

[49] 95 U.S. at 733 (holding that under the newly adopted Fourteenth Amendment requires that the defendant "be brought within its jurisdiction by service of process within the state, or his voluntary appearance"); Perdue, *supra* note 45, at 502 (stating that Field "invoke[d] the due process clause as a mechanism to which the federal courts may turn to ensure that states do not exceed the inherent limitations on their power").

personal jurisdiction has developed as constitutional law expounded by the Supreme Court.[50]

I have an abiding fondness for *Pennoyer*, but even I must concede it is a bit of a mess. Here is not the place for a Festivus-esque airing of grievances against Justice Field, but suffice it to say the opinion has its problems.[51] Most well ventilated is the fact that the power theory is untenable and inadequate in a world where multistate cases are common. *Pennoyer* itself contains numerous ad hoc exceptions to a state's power running out at the border based on necessity.[52] Moreover, as cases with multistate elements proliferated as the nation became more interconnected, courts further watered down the *Pennoyer* rule either by creating additional exceptions or finding ways to modify the rules itself to fit new facts.[53] In short, as it became clear that activities by out-of-staters would regularly cause harm to in-staters, the notion of jurisdiction limited by territorial power over the person or property located within the borders was exposed as plainly insufficient.[54]

The second major problem with *Pennoyer* is that it both conflates and

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[50] Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century of the Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111 (1999) (noting American jurisdiction law "imposed substantial costs as a result of both the uncertainty of jurisdictional standards tied to changing (but ever fact-dependent) constitutional norms"); John B. Oakley, *The Perils of Hint and Run History: A Critique of Professor Borchers' Limited View of* Pennoyer v. Neff, 28 U.C. DAVIS L. REV. 591, 644 (1995) (noting that *Pennoyer* made clear that it was "prepared to enforce its view of common-law jurisdictional principles" under the Fourteenth Amendment).

[51] I am likely more willing than most to cut Justice Field a bit of slack, but Geoffrey Hazard's view is representative: "Appraised by contemporary critical standards for assessing logic and policy in judicial decision, *Pennoyer v. Neff* arouses dismay and even despair. . . . That it survives at all is some kind of monument to American legal thought." Hazard, *supra* note 4, at 271. Nevertheless, *Pennoyer* has its defenders. *See* Stephen E. Sachs, Pennoyer *was Right*, 95 TEX. L. REV. (forthcoming 2017).

[52] Hazard, *supra* note 4, at 271. (describing the exceptions to the general theory outlined in *Pennoyer* as incoherent); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 310-311 (1956) (noting that "physical power fails completely as a rationale").

[53] Clermont, *supra* note 35, at 415 (describing how "the courts by constitutional interpretation elaborated and expanded the traditional bases of power for jurisdiction over a defendant"); Ehrenzweig, *supra*, note 52, at 311 ("In view of these 'exceptions' there seems to be little left of *Pennoyer v. Neff*[.]").

[54] *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927); VON MEHREN, *supra* note 38, at 95 ("The emergence in the United States of a jurisdictional theory based on litigational justice was due more to the constraints that the power theory imposed than to the excesses it permitted."); Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the* In Personam *Jurisdiction of State Courts*, 4 U. CHI. L. REV. 569, 573 (1958) (noting that "the rapid development of transportation and communication demanded a revision" of *Pennoyer*).

does not realistically protect the two central interests of due process: notice and a meaningful opportunity to be heard. In *Pennoyer* itself, Justice Field's assumption seemed to be that a limitation on the forum state's jurisdiction to its territory would serve both purposes. That is, limiting a state to jurisdiction over what's within it would serve as protection against an abusive forum, and requiring attachment of land or personal service within the borders of the state would ensure notice.[55] As Geoffrey Hazard explained more than fifty years ago, these two protections are separate—a party can receive adequate notice of a lawsuit in an unconstitutionally unfair forum, just as a party can be sued in a convenient forum without being fairly notified of the lawsuit.[56] Ultimately, then, elegant though the theory was, *Pennoyer* didn't really solve either problem—its approach could allow for binding judgments against defendants who lived or had property within the state without adequate notice, and it potentially allowed for quasi in rem jurisdiction over non-residents whose only contact with the state might be ownership of land there. Eventually, the *Pennoyer* rules needed to be modified, and the Court struck the major blows in two cases: *International Shoe* in 1945 and *Mullane* in 1950.

First, after courts had persisted for nearly seven decades in softening *Pennoyer's* rigid territorial doctrine to suit the needs of increasing interstate activity, the Supreme Court finally stopped trying to fit square pegs in round holes and reformulated the doctrine in *International Shoe Co. v. Washington*.[57] The case involved the State of Washington's attempts to assess unemployment tax against the Missouri-based International Shoe Company for its Washington-based salesmen. The defendant company had engaged in all sorts of machinations to avoid being legally "present" in the state and thus also avoid being subject to the jurisdiction of the Washington court. Although the Court could have decided that the defendant was sufficiently present in Washington under the *Pennoyer*-rooted extant doctrine, instead it made a major shift, holding that International Shoe was subject to the jurisdiction of the Washington courts, not because it was "present," but because it was fair and reasonable.[58]

In *International Shoe*, the Court issued its famous pronouncement, still

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[55] *Pennoyer*, 95 U.S. at 726 (describing how judgments by courts without jurisdiction "would be the constant instruments of fraud and oppression").

[56] Hazard, *supra* note 4, at 269 (the *Pennoyer* system was both incoherent and allowed for unfair judgments); *see also* von Mehren & Trautman, *supra* note 37, at 1134 (noting conflation of issues of power and notice).

[57] 326 U.S. 310 (1945).

[58] Kevin R. Johnson & Christopher D. Cameron, *Death of a Salesman: Forum Shopping and Outcome Determination under* International Shoe, 28 U.C. DAVIS L. REV. 769, 806 (1995) ("traditional doctrine easily could have accommodated the facts of *International Shoe*").

good law today, that "due process requires only that in order to be subject 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 traditional notions of fair play and substantial justice."[59] Chief Justice Stone's opinion in *International Shoe*, like his contemporaneous opinions in the area of choice of law,[60] moved away from territorial considerations to a consideration of the forum state's interest in adjudicating the case, and the nature of the defendant's contacts with the forum state balanced by a practical assessment of the burden on the defendant on litigating away from home.[61] *International Shoe* was a watershed. Its "minimum contacts" framework did not entirely do away with the territorial underpinnings of *Pennoyer*,[62] but it did represent a new way of thinking about jurisdiction in terms of reasonableness, based on balancing the interests of the plaintiff, the defendant, and the forum state.[63] In practice, *International Shoe* spawned a significant expansion of state exercises of jurisdiction, as legislated by expansive state long-arm statutes.[64]

With respect to notice, Justice Jackson struck the critical blow in

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[59] *Id.* at 316.

[60] Alaska Packers Ass'n v. Indus. Accident Comm. of California, 294 U.S. 532 (1935); Pac. Employers Ins. Co. v. Indus. Accident Comm., 306 U.S. 493 (1939). For an excellent discussion of these cases, *see* Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850-1940*, 62 UCLA L. REV. 1240, 1311-1325 (2015); Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 768 (2012) (describing Stone's "more flexible approach to constitutional limits on choice of law").

[61] *Id.* at 316-318 ("[t]he demands of due process . . . may be met by such contacts of the corporation with the state of the forum as to make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection.").

[62] VON MEHREN, *supra* note 38, at 100 (noting that "Chief Justice Stone's 'minimum contacts' language and his use of the 'presence' metaphor do have territorial undertones").

[63] *Id.*; von Mehren & Trautman, *supra* note 37, at 1147 (describing *International Shoe* as "a new analytical approach which permits the assumption of jurisdiction over any matter that bears a reasonable and substantial connection to the forum community"); Clermont, *supra* note 35, at 416 ("With some indulgence, one could read *International Shoe* as reducing the power test to a rough rule of thumb, with its outcome always subject to revision under the ultimate test of reasonableness. So to get to the basics, instead of asking whether the target of the action was subject to the state's power, one should ask whether jurisdiction was reasonable in view of all of the interests involved.").

[64] Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention, and Progress in National Law*, 49 AM. J. COMP. L. 203, 210 (2001) ("the greater latitude to assert jurisdiction afforded to the states by *International Shoe* and its progeny dramatically enhanced the opportunities for interstate forum shopping").

Mullane v. Central Hanover Bank.[65] *Mullane* involved a statutory scheme in which New York allowed pooling of small trusts into one larger trust. In order to both give an opportunity for beneficiaries to challenge any self dealing and to allow the trustee to move forward without looming clouds of litigation, the statute provided for an accounting proceeding every two years. Beneficiaries would be notified only by publication of their opportunity to appear in the accounting, a special guardian would be appointed to protect the interests of the beneficiaries who did not appear or were not notified, and a finding that everything was on the up and up would be binding on all involved. The special guardian for the beneficiaries, Kenneth Mullane, challenged this setup under the due process clause, claiming both that the notice by publication was insufficient and that the New York court did not have personal jurisdiction over the out-of-state beneficiaries.[66]

In an opinion remarkable for its candor, Justice Jackson rejected the statutory scheme as incompatible with due process.[67] But in so doing, he decoupled the issues of personal jurisdiction and notice. With respect to the former, the parties were fighting over whether the jurisdiction asserted by the New York court was in personam or in rem under the *Pennoyer* scheme. If the jurisdiction were based on the trust's presence in New York, it would be in rem and there would be jurisdiction over the out-of-staters, but if the jurisdiction were in personam then in theory the out-of-staters might be beyond the reach of the New York courts. In language that must have been heartening to law students ever since, Justice Jackson swept the problem aside, calling the in personam/in rem distinction "elusive and confused generally."[68] Instead, what mattered was a practical assessment:

> It is sufficient to observe that whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.[69]

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[65] 339 U.S. 306 (1950).

[66] *Id.* at 306-312.

[67] *Id.* at 320.

[68] *Id.* at 312 ("But in any event we think the requirements of the Fourteenth Amendment to the Federal Constitution do not depend on a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.").

[69] *Id*. at 313.

Having separated out the metaphysical question of power, Jackson turned to whether the notice-by-publication scheme complied with due process. To do so, the Court would need to balance the interest of individuals in being notified and having the opportunity to participate and the state's interest in facilitating trusts without "impossible or impractical obstacles in the way."[70] Ultimately, the Court concluded that with respect to beneficiaries whose addresses were known, the scheme was inadequate, but with respect to those whose location was not readily ascertainable notice by publication along with representation by a guardian would be sufficient.[71]

Together, *International Shoe* and *Mullane* are very much of a piece—both eschew old rigid rules in favor of balancing tests that make a practical assessment of both the parties' and the states' interests.[72] The question in both cases, though they address different problems, is not one of territorial power, but one of reasonableness in light of the state's legitimate interest in effectuating its goals and the parties' interest in a meaningful ability to participate and protect their interests.[73]

Leaving aside the jurisprudence of effective notice,[74] the Supreme Court has regularly attempted to clarify *International Shoe* with varying degrees of success. Throughout, both the power and reasonableness theories have persisted, and both play a role in the prevailing doctrine. Justice Brennan's majority opinion in 1985's *Burger King v. Rudzewicz* is illustrative.[75] In that case, the Court explained that "the constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum State," suggesting that the defendant's connection with the sovereign remains a necessary condition for the exercise of jurisdiction.[76] Nevertheless, Justice Brennan explained, "Once it has been decided that a defendant purposefully established minimum contacts with the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play

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[70] *Id*. at 314.

[71] *Id.* at 317-320.

[72] Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 936 (1995) (describing *Mullane* as "hard-nosed commonsense pragmatism"); Clermont, *supra* note 35, at 417-418 (describing balancing required under *Mullane*).

[73] *Id.* at 936 (noting that Mullane "focused on the practical implications of refusing to find jurisdiction in the New York state courts").

[74] *See, e.g.,* Jones v. Flowers, 547 U.S. 220 (2006).

[75] 47 U.S. 462 (1985).

[76] *Id.* at 474.

and substantial justice.'"[77] There, Justice Brennan lists a series of considerations that "serve to establish the reasonableness of jurisdiction": the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in a convenient forum, the "interstate judicial system's interest in obtaining the efficient resolution of controversies," and the "shared interest of the several States in furthering substantive social policies."[78]

Although the emphasis in *Burger King* seems far more on the reasonableness side of the ledger—and indeed the Court unanimously rejected an assertion of jurisdiction on reasonableness grounds shortly thereafter in *Asahi Metal Industry Co. v. Superior Court*[79]--at least four justices on the Court, led by Justice Scalia, asserted that territorial power was a sufficient basis upon which to uphold the exercise of "tag jurisdiction" in 1990's *Burnham v. Superior Court of California*.[80] So the power theory continues to lurk in the background, at least for some justices.[81]

Also lurking in the background has been the matter of consent, which even in *Pennoyer* was a sufficient basis for jurisdiction.[82] Courts have long held that a plaintiff is subject to the personal jurisdiction of the court in which it has chosen to file,[83] and defendants are subject to jurisdiction through their consent, or waiver of the right to object.[84] Consent's place in the jurisdictional scheme has always been somewhat confusing, particularly if one thinks of jurisdiction as a function of state power, but nevertheless the Court has held that because personal jurisdiction protects a party's personal liberty interest objections can be waived.[85]

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[77] *Id.* at 476-77.

[78] *Id.* at 477.

[79] 480 U.S. 102 (1987).

[80] 495 U.S. 604 (1990).

[81] Patrick J. Borchers, J McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1272 (2011) ("At least three times in the minimum contacts era, the Court has buried the notion that the Due Process Clause imports state sovereignty, but each time—as in a badly produced sequel to a horror movie—it pulls itself from the grave, and in increasingly grotesque forms terrorizes the neighborhood.").

[82] 95 U.S. at 726 (noting that a state could exercise jurisdiction over a defendant through his "voluntary appearance").

[83] *See* Adam v. Saenger, 303 U.S. 59, 67-68 (1938) ("The plaintiff having, by his voluntary act of demanding justice from the defendants submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as there for all purposes for which justice to the defendant requires his presence."); RESTATEMENT (SECOND) CONFLICT OF LAWS § 34 (1969) ("A state has power to exercise judicial jurisdiction over an individual who brings an action in the state[.]").

[84] GEOFFREY C. HAZARD, *ET AL*, PLEADING & PROCEDURE 213 (11th ed. 2015).

[85] Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 700

In any event, after *Burnham*, the Court, evidently split on the topic of personal jurisdiction, left the scene for two decades. It returned, however, with renewed vigor in 2011, and it has decided four personal-jurisdiction cases since.[86] Although the Court's performance in these cases has come in for justifiable criticism—particularly in the split opinions in the stream-of-commerce case, *J. McIntyre Machinery v. Nicastro*[87]—we can draw some conclusions from the Court's jurisprudence in the area.

First, in all four cases the Court reversed lower-court assertions of jurisdiction, three times unanimously, suggesting that the Court is attentive both to defendants' interests and to aggressive assertions of jurisdiction under state law. Second, as has been the case since *International Shoe*, the power and reasonableness theories of jurisdiction continue to coexist. This is perhaps best exemplified by the Court's continued embrace of the distinction between two categories of personal jurisdiction: general and specific. This division, derived from the Court's opinion in *International Shoe*, and first developed by Professors Arthur von Mehren and Donald Trautman in 1966 in the Harvard Law Review,[88] was first adopted by the Supreme Court in its 1984 opinion in *Helicopteros Nacionales v. Colombia v. Hall*.[89] If a defendant is subject to general jurisdiction in a state, then it can be sued for anything there, regardless of whether the case has any relationship to the state.[90] Specific jurisdiction is more finely tuned—it is based on the relationship between the forum state and the litigation. That is, while a defendant may not be amenable to jurisdiction for *any* lawsuit in the forum state, it may be subject to jurisdiction for particular lawsuits based on its activities within the state.[91] Justice Ginsburg has helpfully distinguished between general and specific jurisdiction as "all-purpose" and "case-linked," respectively.[92]

The Court's recent cases have been fairly restrictive when it comes to *both* general and specific jurisdiction. With respect to general jurisdiction, it is fair to say that the Court has clamped down. In *Goodyear* and then

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n.10 (1982) ("if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement").

[86] Walden v. Fiore 571 U.S. __, 134 S. Ct. 1115 (2014), Daimler A.G. v. Bauman, 571 U.S. __, 134 S. Ct. 736 (2014); Goodyear Dunlop Tires Ops. v. Brown, 564 U.S. 915 (2011); J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873 (2011).

[87] 564 U.S. 873 (2011).

[88] von Mehren & Trautman, *supra* note 37, at 1127.

[89] 466 U.S. 408 (1984).

[90] *Daimler*, 134 S. Ct. at 754.

[91] *Id.*

[92] *Goodyear*, 564 U.S. at 919 ("Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction").

Daimler, the Court made clear that in all but exceptional cases, general jurisdiction is limited to where the defendant is "essentially at home," for an individual, where she is domiciled, and for a corporation, the states of incorporation and the principal place of business.[93] With respect to specific jurisdiction, the Court also has been restrictive. In striking down two exercises of specific jurisdiction, the Court has made clear that the defendant must create contacts with the forum state that are linked to the underlying facts of the litigation. The overall result has been to clamp down on personal jurisdiction with little in the way of theoretical development—the four cases (*Nicastro* aside) have induced readily applicable holdings, but not much development of the ultimate aims of the doctrine or the relative roles of power and reasonableness.

B. *Personal Jurisdiction in the Federal Courts*

Since *Pennoyer*, the Court's personal-jurisdiction jurisprudence has centered on limitations on state courts imposed by the Due Process Clause of the Fourteenth Amendment.[94] After *International Shoe*, states began to expand their assertions of jurisdiction, in some cases to the outer limits of Constitutional permission, so the Court's cases in the seven decades since have patrolled those limits.[95] The Fourteenth Amendment, however, does not limit the jurisdiction of the *federal* courts. Instead, it is the Due Process Clause of the *Fifth* Amendment that limits federal courts' assertions of jurisdiction.[96] As a practical matter, the limitations of the Fourteenth Amendment loom much larger in most cases because most federal-court jurisdiction is defined by the law of the states in which federal courts sit. That is because, under Rule 4(k) of the Federal Rules of Civil Procedure, a federal court's jurisdiction is tied to state law.[97] As a result, even in cases in which the Supreme Court is reviewing a challenge to the personal jurisdiction of a federal court, it is looking to the law of the state in which

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[93] *Daimler*, 134 S. Ct. at 757 ("we have declined to stretch general jurisdiction beyond limits traditionally recognized"); Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 681 (2015).

[94] Fullerton, *supra* note 28, at 4.

[95] Burbank, *supra* note 64, at 210.

[96] Casad, *supra* note 31, at 1589.

[97] FED. R. CIV. P. 4(k)(1)(A) ("In general, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of federal jurisdiction in the state where the district court is located."); Daniel Klerman, Walden v. Fiore, *and the Federal Courts: Rethinking FRCP 4(k)(1)(A) and* Stafford v. Briggs, 19 LEWIS & CLARK L. REV. 713, 715 (2015).

that court sits, and its jurisprudence under the Fourteenth Amendment.[98]

These limitations are, however, unnecessarily self-abnegating. There is nothing inevitable about federal courts' jurisdiction having anything to do with the states.[99] For instance, although federal districts have always been organized according to state boundaries, they need not be under Article III, which gives the Congress leeway to design a system of inferior courts as it sees fit.[100] And in numerous instances Congress has passed statutes providing for nationwide personal jurisdiction, disconnecting the jurisdiction of a federal district court from the state that surrounds it. Congress typically accomplishes this by providing for "nationwide service of process" under a particular substantive statute. [101]

The Supreme Court has repeatedly affirmed Congress's power to provide for nationwide personal jurisdiction, albeit always in dictum.[102] But the Court has never assessed whether the Fifth Amendment provides any limitations on jurisdiction of the district courts if Congress has purported to give them nationwide power.[103] Whether one thinks that there are any such limitations depends on how one views whether power or reasonableness provides the basis for jurisdiction. Under a traditional, power-based view, a federal court may exercise personal jurisdiction

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[98] *Daimler*, 134 S. Ct. at 753 ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons."); *Walden*, 134 S. Ct. at 1121 ("a federal district court's authority to assert personal jurisdiction in most cases is linked to service of process" in a state).

[99] Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 CARDOZO L. REV. 2897, 2917 (2009); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988) ("Congress could draw its judicial districts anyway it wished, and therefore, federal court jurisdiction was not limited by state boundaries.").

[100] Sachs, *supra* note 39, at 1315; James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1612 (2001).

[101] *See* Casad & Hines, *supra* note 27, § 6.2 (collecting statutes).

[102] Fullerton, *supra* note 28, at 30 (collecting cases and noting that all statements about scope of federal-court personal jurisdiction were in dicta, did not interpret the Fifth Amendment, and were in cases the defendant won on statutory grounds); *see, e.g.,* Miss. Pub. Corp. v. Murphree, 326 U.S. 438, 446 (1946); Robertson v. R.R. Labor Board, 268 U.S. 619, 627 (1925).

[103] *Asahi*, 102 U.S at 113 (reserving question of "whether Congress could, consistent with the Due Process Clause of the Fifth Amendment authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts rather than on the contacts between the defendant and the State where the federal court sits"). The Court also dodged the question in *Stafford v. Briggs*, 44 U.S. 527 (1980). *See also* Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 882-883 (2012) (noting that in *Nicastro*, Justice Kennedy "carefully reserved the question of whether it would be constitutional for the Congress, if it so chose, to designate the United States as a forum for personal jurisdiction for cases pending in the federal courts").

throughout the nation because the sovereign power of the United States within its borders is limitless. Just as states' power is limited by their borders, the United States' power is limited by its far more expansive borders.[104] Consequently, on this view, there is nothing wrong with a federal court exercising unlimited jurisdiction within the territorial confines of the United States.[105]

But if reasonableness provides the basis for assertions of jurisdiction, then a federal court's assertion of power must be assessed in terms of fairness, convenience, and the interests of the parties and the forum.[106] As a result, a federal district court's power is not limitless throughout the entire United States, but must be justified in terms of the circumstances of the particular case.[107] A federal district court's assertion of jurisdiction may turn out to be as unjustifiable as that of a state court across the street if it is so geographically inconvenient as to prevent a party from fairly being heard.[108]

Although the Supreme Court has indicated on occasion that it subscribes to a more power-centric theory of federal-court jurisdiction, many of those

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[104] Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 437 (1992) ("If presence within the territory of the sovereign is sufficient to confer jurisdiction on its courts, then due process is no barrier to nationwide service of process in federal question cases."); Clermont, *supra* note 35, at 427 (describing the "traditional axiom" allowing nationwide jurisdiction in federal courts).

[105] Casad & Hines, *supra* note 27, at § 6.2 (explaining that under power theory "federal sovereignty extends through the entire process of the United States"); John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 584 (1984) (noting that "the Court has recognized no constitutional constraints on the federal courts' jurisdiction over United States citizens").

[106] *See* Fullerton, *supra* note 28, at 22 (explaining that post-*International Shoe* the sovereignty-based analysis is inadequate); The Rules Committee also has nodded in this direction, *see* FED. R. CIV. P. 4 advisory committee note (1993) (taking position that "there also may be a further Fifth Amendment constraint").

[107] CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 1068.1 (4th ed.) ("Despite the relative dearth of case law on this point, it seems fair to generalize that an inquiry into fairness under the Due Process Clause of the Fifth Amendment tends to focus on the same factors considered under the minimum contacts test, but often are applied with more flexibility than under the Fourteenth Amendment analysis."); Roger Trangsrud, *Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849 (1989) ("In unusual cases where the burden of litigating in the distant forum is so great that the noncitizen cannot present a fair defense Congress is and should be barred from conferring jurisdiction upon either state or federal courts.").

[108] *See* Alexander, *supra* note 104, at 439 ("Surely some version of minimum contact analysis should be applied to federal court assertions of jurisdiction. Since *International Shoe*, we have viewed the constitutionality of exercises of personal jurisdiction as a question of fundamental fairness that turns on an individualized evaluation of the burdens and inconvenience to the defendant in light of the relationship of the defendant and the litigation to the forum.").

assertions were pre-*International Shoe*, which elevated reasonableness as a Constitutional touchstone.[109] The lower courts, for their part, remain somewhat split on the particulars of the analysis, but they have all more or less gone down the same hybrid path, fusing elements of the power and reasonableness theories as the Supreme Court has.[110] Courts have generally concluded that assertions of federal court jurisdiction, when authorized by a federal statute, are to be measured according to the familiar minimum-contacts analysis, but the contacts to be considered are not those with any particular state but with the United States as a whole.[111] However, while there is a consensus that a "national contacts" method of analysis is appropriate, the circuits differ in the extent to which they are willing to entertain arguments that a federal forum is unfair.[112] As a general matter, the consensus approach seems to be the right one—while presumptively there is power to assert jurisdiction based on national contacts, the assertion of jurisdiction of a particular district court may be constitutionally unreasonable because the inconveniences associated with its geographic location. Federal-court jurisdiction by definition admits of more flexible analysis than state-court jurisdiction because the relevant contacts are not limited by the borders of states, but it is not boundless.[113]

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[109] Allen Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather Than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769, 776 (2015) ("The Supreme Court has explicitly declined to decide whether federal statutes authorizing nationwide service of process permit personal jurisdiction 'based on aggregation of the defendant's contacts with the Nation as a whole, rather than on contacts with the State in which the federal court sits.").

[110] Erbsen, *supra* note 39at 51.

[111] *See, e.g.,* Wallace v. Mathias, 864 F. Supp. 2d 826, 833 (D. Neb. 2012) (quoting In re Federal Fountain, Inc., 165 F.3d 600 (8th Cir.1999)) ("due process of law relates to the fairness of the exercise of power by a particular sovereign, and individual liberty interests are not threatened when a federal district court sitting pursuant to federal question jurisdiction exercises personal jurisdiction over a defendant who has minimum contacts with the United States").

[112] *Compare, e.g.,* Trustees of the Plumbers & Pipefitters Nat. Pension Fund v. Plumbing Servs., Inc., 791 F.3d 436, 444 (4th Cir. 2015) (requiring that defendant "the district court's assertion of personal jurisdiction over [them] would result in such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy evidenced by a nationwide service of process provision.") *with* Peay v. BellSouth Medical Assistance Plan, 205 F.3d 1206, 1211 (10th Cir.2000) (requiring five-factor reasonableness inquiry as part of national-contacts analysis).

[113] Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Cases After* Phillips Petroleum Co. v. Shutts, 96 YALE. L.J. 1 (1986) ("even if distinctions might be drawn between the territorial reach of state and federal courts in some contexts, it seems difficult to justify due process differences affecting notice and opt-out protection provided by Shutts when the alternative is to bind nonconsenting litigants by adjudication in forums with which they have no affiliation. The disadvantages of distant forum abuse are not mitigated by the forum's federal rather than state character").

Ultimately, however, the Supreme Court has never defined the limitations on federal-court jurisdiction imposed by the Fifth Amendment. This in part due to the fact that jurisdiction over most claims in federal court are determined by state law under Rule 4.[114] But it is also because there are numerous statutory mechanisms in the federal system to guard against potentially unreasonable assertions of jurisdiction.[115] There are of course the general venue statutes, which apply in most cases.[116] And there are specific venue statutes that limit the available forums for claims in which the Congress has purportedly provided for nationwide personal jurisdiction.[117] The venue statutes provide for *ex ante* limitations on the federal districts available in order to ensure a convenient forum. But even if the venue statutes allow for a relatively inconvenient forum, the transfer statute is available to ensure that a federal court can send a case to a more convenient district based on a particularized assessment of the circumstances of an individual case.[118] As a result, even when the Congress has provided for nationwide personal jurisdiction without a limiting venue statute, as in interpleader, the transfer statute is waiting in the wings to ensure that the forum is not so geographically inconvenient that it raises constitutional questions.[119] The combined effect of these statutory

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[114] It has long been settled, however, that the Congress could go beyond Rule 4 in providing for federal jurisdiction over state-law claims. The leading case is *Arrowsmith v. UPI*, 320 F.2d 219 (2d Cir. 1963 (en banc) (opinion of Friendly, J.).

[115] Howard M. Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. Rev. 1117, 1149 (1989) (describing such mechanisms as "filters"); Sharpe, *supra* note 99, at 2917 (explaining how venue restrictions mitigate harshness of nationwide personal jurisdiction).

[116] 28 U.S.C. § 1391.

[117] Fullerton, *supra* note 28, at 62 ("Congress on most occasions has attempted to protect defendants from trial at fundamentally unfair locations by simultaneously enacting restrictive venue provisions"). *See, e.g.,* Clayton Act, 15 U.S.C. § 22 ("Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business"); RICO Act, 18 U.S.C. § 1965(d) ("All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs."); CERCLA 42 U.S.C. § 9613(b) ("any such district or in the district wherein the defendant is found or is an inhabitant or transacts business").

[118] 28 U.S.C. § 1404(a); *see* Purcell, *supra* note 29, at 482 (Congress's purpose in enacting the transfer statute was "limiting the ability of parties to exploit geography as a litigation weapon. It sought, in particular, to restrict those who selected forums with little or no substantial connection to either the parties or the claim, and to block organized classes of litigants who attempted systematically to use the weapon of geography.").

[119] *See* Jackson Nat. Life Ins. Co. v. Economou, 557 F. Supp. 2d 216, 221-224 (D.N.H. 2008) (noting that in interpleader there is no presumption in favor of the plaintiff's choice of forum and transferring to more convenient district); Prudential Ins. Co. of Am. v. Rodano, 493 F. Supp. 954, 955 (E.D. Pa. 1980) (granting defendant's motion to transfer to

mechanisms is one that Stephen Burbank describes as "jurisdictional equilibration" in that the potentially troubling effects of broad personal jurisdiction are mitigated through other means.[120] In other words, to the extent that an assignment of nationwide personal jurisdiction by the Congress could produce troubling results in particular, there are mechanisms to prevent them.

The line where the constitutional protections of jurisdiction end and those provided by venue statutes begin is a subject of persistent debate.[121] Ultimately, the question remains unresolved: what if a federal statute provided for nationwide personal jurisdiction with no applicable statutory limitations on venue?[122] As a purely descriptive matter of Constitutional law, this is an open question, at least with respect to a statute that provides for nationwide service of process and a defendant "tagged" anywhere in the United States. As a normative matter, I tend to agree with Kevin Clermont that ultimately the Constitution demands some degree of "forum reasonableness."[123] That is, "the permissiveness of pure jurisdiction and the malleability of mere venue do not mean a federal action may lie anywhere—the constitutional requirement of forum-reasonableness demands that the particular district be fundamentally fair in light of all of the interests of the public and the parties concerning the litigation."[124]

The twin strands of power and reasonableness will likely remain with us in our jurisdictional doctrine, but we have gone too far down the reasonableness road to return to a jurisdictional doctrine based purely on power. Instead, if the Court's recent cases are any guide, we are likely to continue muddling through, with territorial power as a baseline justification for jurisdiction that requires an assessment of reasonableness to protect against a forum that is so inconvenient that a party does not have a real opportunity to be heard, or one which has no legitimate interest in deciding the case before it. If that remains the case, then a reasonableness assessment—determined in light of national contacts—must limit

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a more convenient forum).

[120] Burbank, *supra* note 64, at 205 .

[121] Markowitz & Nash, *supra* note 42, at 1173; Erbsen, *supra* note 109, at 779.

[122] Casad, supra note 31, at 1604 ("In the context of the federal courts and the Fifth Amendment, it may well be a denial of due process to subject a defendant to jurisdiction in an unfair or inconvenient forum without institutional protections against that result. That problem would emerge however only in the unlikely event that Congress actually did repeal the venue and venue transfer statutes. The denial of due process then would be in the repeal itself, that is, in taking away the institutional protections that provide reasonable assurance of a fair forum.").

[123] Clermont, *supra* note 35, at 438.

[124] *Id*.

Congressional assertions of nationwide jurisdiction.[125]

No statute has yet been put to that test in the Supreme Court—but perhaps the one most likely to do it has been hiding in plain sight for fifty years: the multidistrict litigation statute.

C. *Summary*

In sum, then, as of 2017, there are some things we know about personal jurisdiction of the federal courts and some things we don't. The underlying theory of personal jurisdiction remains a muddle because there remain disagreements both about the purposes and underlying theory of limitations on courts' power. But the rough outlines of the doctrine are sufficiently defined for our purposes. In virtually all cases arising under state law in federal court under the diversity jurisdiction, the federal court's personal jurisdiction is, by rule, limited to that of the state in which it sits. Subject to the state's jurisdictional statute, defendant who is incorporated or has its principal place of business in that state is subject to general jurisdiction in that state's courts, whether state or federal. If the defendant is not "essentially at home" in a state, then it can only be subject to jurisdiction in a court located in that state if its purposeful connections with the state justify specific jurisdiction over the case at bar.

In some cases, Congress has chosen not to define a federal court's jurisdiction in terms of the state in which it sits. It has instead provided for nationwide personal jurisdiction, through the mechanism of nationwide service of process, and limited by specific venue provisions. Most courts have concluded that such statutes are proper in individual cases so long as there are minimum contacts with the United States as a whole such that the exercise of jurisdiction is reasonable and consistent with "traditional notions of fair play and substantial justice." In most cases, however, the outer limits of reasonableness are not put to the test because there are statutory devices in the federal system that avoid seriously inconvenient forums.

We now turn to the multidistrict jurisdiction statute, which is an anomaly in this scheme and presents a series of conceptual problems that require further analysis.

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[125] As a general matter, I agree with Professor Redish, who has advocated a "revised structure" taking into account "the degree of inconvenience that a defendant would suffer in being forced to litigate in a distant forum, the degree of inconvenience that a defendant would suffer in being forced to proceed in a different forum, and the state's interest in having its own law resolve the controversy." *See* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981).

II. PERSONAL JURISDICTION IN MULTIDISTRICT LITIGATION

A. *The Roots of the MDL Statute*

MDL intentionally skirts limitations on personal jurisdiction, but to understand how it does it, one has to return to the statute's roots. In 1968, when the statute was passed, the concept of limited transfer for pretrial proceedings was novel. It was invented by an academic, Dean Phil C. Neal of the University of Chicago, and U.S. District Judge William H. Becker, of the Western District of Missouri.[126] Neal and Becker had served on the Coordinating Committee on Multiple Litigation, an ad hoc group of judges assembled by Chief Justice Earl Warren in 1962 to handle the unprecedented federal antitrust litigation arising out of price fixing in the electrical-equipment industry.[127] The electrical-equipment scandal spawned over 1,900 lawsuits around the country: a tidal wave of litigation that threatened to overwhelm the federal courts.[128] The judges on the Coordinating Committee—all of whom were devoted adherents to the burgeoning philosophy of active case management by trial judges, particularly in complex cases—invented a series of measures to handle the deluge, including coordinated depositions of key witnesses, national document depositories, fast-tracking cases against the major defendants, and uniform pretrial orders entered by the district judges around the country assigned to each of the cases.[129] Because the Coordinating Committee had no real power to enter enforceable orders, the success of their actions relied on the voluntary cooperation of the judges and lawyers involved in the cases in the courts scattered around the country.[130] Although defendants

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[126] Bradt, *Radical Proposal*, *supra* note 7, Part I.B.

[127] Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 622 (1964); Press Release, Administrative Office of the United States Courts, February 7, 1962 (statement of Chief Justice Warren noting creation of the committee "for the purpose of considering the problems arising from discovery procedures in multiple litigation filed in different districts but with common witnesses and exhibits").

[128] CHARLES A. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS 81 (1973) (describing how, by 1962, "the filings for treble damages had swollen to a torrent"); Proceedings of the Twenty-Eighth Judicial Conference of the Third Judicial Circuit of the United States, *The Impact of the Electrical Antitrust Cases Upon Federal Civil Procedure*, 39 F.R.D. 375, 497 (1965) (statement of Chief Judge Thomas Clary, Eastern District of Pennsylvania) (noting that "[t]here were actually 25,632 claims…involved in these 1,912 cases).

[129] *See generally*, Bradt, *Radical Proposal*, *supra* note 7, at Part I.B; Neal & Goldberg, *supra* note 127, at 622-626.

[130] Phil C. Neal, *Multi-district Coordination—The Antecedents of Sec. 1407*, 14 ANTITRUST BULL. 99, 101 (1969) ("The Committee was of course operating without

felt railroaded to settlement by the relentless pace of discovery,[131] the Coordinating Committee's efforts were tremendously successful at resolving the litigation, in part due to the judges' willingness to broker agreements in cases themselves. By 1966, the electrical-equipment cases were over.[132]

The judges on the Coordinating Committee—particularly Becker and Chief Judge Alfred Murrah of the Tenth Circuit—did not believe that the electrical-equipment cases would be a one-off.[133] Rather, electrical equipment was just the beginning of a "litigation explosion" that would engulf the federal courts as technology developed, the population expanded, and causes of action proliferated.[134] Moreover, although the electrical-equipment cases were marked by extraordinary cooperation by the parties and the courts, it was unlikely that such voluntary coordination would recur. Defense counsel were aggrieved by the speed of the litigation, and some of the involved district judges chafed at the Committee's demands of uniformity. In the Committee's view, a permanent mechanism was needed to handle this influx of litigation, so even as the electrical equipment litigation was pending, Becker and Neal (the Coordinating Committee's

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statutory authority or other formal authority. The success of its effort depended entirely on the willingness of all the judges responsible for the cases to follow the lead of the Committee.").

[131] *See* Andrew D. Bradt, *Something Less and Something More: MDL as a Class Action Alternative*, 165 U. PA. L. REV. (forthcoming 2017) (describing defendants' displeasure, including a memorandum by Cravath, Swaine & Moore, which represented defendant Westinghouse Electric Corp., to the Director of the Administrative Office of the U.S. Courts, complaining that "compression of defendants' discovery and the resulting diminution of their opportunity to prepare for trial has reached a point in our view where due process is endangered"); *see also, e.g.,* William M. Sayre, *Developments in Multiple Treble Damage Act Litigation*, 1966 CCH N.Y. State Bar Ass'n Antritrust Law Symposium, 51-52 (contended that the "defendants litigated, but it was all uphill. The courts had little sympathy for their plight, and it must have been obvious to the courts that their burden would be relieved if enough pressure were put upon the defendants to force them to settle. And pressure there was.").

[132] Earl Warren, Address to the Annual Meeting of the American Law Institute, May 16, 1967, *quoted in* Manual for Complex and Multi-district Litigation, at 6 (1969) ("If it had not been for the monumental effort of the nine judges on [the CCML]…the district court calendars throughout the country could well have broken down."). *See* Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. 5, 32 (1991) (noting that "much legal commentary describes the work of the Committee as successful").

[133] Neal, *supra* note 130, at 99 (describing the genesis of statute).

[134] *Judicial Administration: Hearing Before the H. Comm. on the Judiciary*, 89th Cong. 22 (1966) (statement of Hon. William H. Becker) ("We feel there is a litigation explosion occurring in the federal courts along with the population explosion and the technological revolution; that even with the addition of many new judges the caseload, the backlog of cases pending, is growing, and some new tools are needed by the judges in order to process the litigation.").

Reporter) began to develop a permanent statutory solution.[135]

The core of the drafters' mission was twofold: to reconceive of the federal courts as a single national instrument that could cope with controversies of nationwide scope, and to centralize power over large, complex cases in the hands of individual judges who would actively manage the cases to a conclusion. The drafters believed that the traditional decentralization of the federal district courts and the notion of the passive judge allowing litigants to dictate the pace of litigation were outworn concepts ill-equipped for the future of mass-tort litigation.[136]

The judges' first idea was a "radical *forum non conveniens* statute" that would transfer cases involving a common question of fact filed in multiple districts to a single federal district judge. But they quickly moved away from that idea for a political reason: the fear that such a proposal would spawn "massive resistance" from plaintiffs' lawyers outside major cities fearful of losing their business. The more modest measure the drafters settled on was "limited transfer" for pretrial proceedings with remand to the transferor court for trial. The plaintiffs' bar, when solicited for comment, was enthusiastic about this proposal—and understandably so, given the potential for leveling of the playing field with better-resourced defense counsel that consolidated litigation would provide. Indeed, the biggest concern plaintiffs' lawyers expressed was the fear that the limited transfer would change the choice-of-law rules applicable to their cases, a fear later allayed by the drafters.[137]

Although the concept of limited transfer for pretrial proceedings was more modest than the drafters' original concept, which included complete transfer for trial, the power granted to the transferee judge was intended to be substantial.[138] Under the proposed scheme, the district judge would be granted significant discretion to consolidate and control discovery. Without such strong control, Judge Becker worried that "litigants would run cases,"

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[135] *See* Bradt, *Something Less and Something More*, *supra* note 131 (noting that the Committee "believed that a mandatory MDL statute would be necessary because the voluntary cooperation and good will of the parties that facilitated the resolution of the electrical-equipment cases was not likely to recur").

[136] Bradt, *Radical Proposal*, *supra* note 7, at Part II.A (describing the drafters' twin aims of unification of the federal courts and centralization of power to manage cases). As I have detailed, the drafters' goals in this area mirrored those of Chief Justice Taft, who organized the precursor to the Judicial Conference and sought Congressional approval of an ad hoc "flying squadron" of judges who could hear cases anywhere in the country. *See id.*; *see also* Justin Crowe, Building the Judiciary: Law, Courts, and the Politics of Institutional Development 198-212 (2012) (summarizing Taft's efforts).

[137] Bradt, *Radical Proposal*, *supra* note 7, Part IV (describing the development of the statute and the reaction of the bar).

[138] *Id.*; *Multidistrict Litigation Hearing Before the S. Comm. On the Judiciary*, 89th Cong. 13 (1967) (statement of Phil C. Neal).

creating backlog and delays.[139] Moreover, the drafters intended that the MDL judge would possess all the powers that the judge would have if the case had not been transferred, including the power to decide dispositive motions.[140] Finally, the judges responsible for the MDL statute considered it crucial that, unlike proposed Rule 23(b)(3), the tort class action rule being considered by the Civil Rules Advisory Committee, there could be no right for any party to opt out of consolidated proceedings.[141]

One problem the drafters faced in developing the statute was that the transferee forum might not be an acceptable forum for many of the cases transferred there for pretrial proceedings, whether due to lack of personal jurisdiction over the defendant or violation of the venue statutes. Indeed, one reason the drafters believed that a new statute was necessary was because the general transfer statute, 28 U.S.C. 1404(a), limited transfers to districts in which the case might have been brought—meaning that transfer could not be to an otherwise improper venue. During the electrical-equipment litigation, the judges employed normal 1404(a) transfers in order to place all matters involving a single defendant before a single district judge, but the choices were limited because that judge had to be one who had jurisdiction in all of the transferred cases.[142] One goal of the drafters of the MDL statute was to ensure that in cases of national scope, *pretrial* proceedings could be centralized before a single judge without foisting on that judge the potential burden of trying all of the cases. The solution was transfer for pretrial proceedings in a single district with eventual remand for trial.[143]

Substantively, there was no discussion among the drafters—or the Congress—of whether there were due-process-based limitations on the location of the transferee district. Instead, discussions focused primarily on venue, and the need for Congress to create the transfer mechanism due to its traditional control of that subject.[144] There was no substantive debate over whether the proposal presented constitutional problems—rather, the drafters

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[139] *Id.*

[140] *Id.*

[141] Bradt, *Something Less and Something More*, *supra* note 131 (describing the attempts by the Coordinating Committee to convince the Reporters of the Civil Rules Committee to excise the opt-out right from proposed Rule 23).

[142] *Id.* (describing the transfer of all cases involving defendant I-T-E Circuit Breaker to federal court in Chicago).

[143] *Multidistrict Litigation Hearing Before the S. Comm. On the Judiciary*, 89th Cong. 13 (1967) (statement of Phil C. Neal).

[143] *Id.*

[144] Bradt, *Something Less and Something More*, *supra* note 131 (describing the drafters' concerns that their proposal was beyond the rulemaking powers granted under the Rules Enabling Act).

seemed to simply assume that Congress controlled venue in the federal courts and could legislate as it pleased. In context, the drafters' lack of concern with personal jurisdiction may have been unremarkable in the mid-1960s, when "doing business" jurisdiction was thought to be expansive.[145] In cases of nationwide scope involving defendants operating throughout the country, personal jurisdiction may have been thought to be a smaller problem than venue statutes, which could impose stricter requirements. Moreover, the drafters apparently believed that the provision for trial in the district in which the case was filed—a district that *would* have to have proper jurisdiction over the defendant—would be sufficient to address jurisdictional concerns, as the would explain in their case law, outlined below. In any event, the jurisdictional issue appears not to have troubled anyone, particularly the statute's primary Congressional advocate, Senator Joseph Tydings of Maryland, the only Senator, incidentally, who attended the hearings on the bill, which finally passed in 1968.[146]

B. *How MDL Works—In Theory and In Practice*

The MDL statute is deceptively simple, but practice under the statute, as it has developed over the last fifty years, is specialized and complicated.[147] The animating mechanism in the statute is the provision for transfer of cases "involving one or more common questions of fact . . . pending in different districts" to "any district for coordinated or consolidated pretrial proceedings."[148] The only limitation on the power to transfer is that it be "for the convenience of parties and witnesses and [that it] will promote the just and efficient conduct of such actions."[149] After the MDL has been established, later-filed cases involving the same subject matter are rather seamlessly transferred to the MDL as tagalong cases.[150]

Once pretrial proceedings conclude, the cases must be remanded to the districts from which they were transferred.[151] The statute provides that the decision to transfer—and the determination of the transferee judge—be

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[145] Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S. CAR. L. REV. 671, 675 (2012) (lower courts widely embraced the notion that any corporation 'doing business' in a state was subject to general jurisdiction there").

[146] Bradt, *Radical Proposal*, *supra* note 7 (describing the dynamic of the Senate hearings and noting that Tydings was the only Senator in attendance); *id.* (noting passage of the bill).

[147] *See, e.g.,* Burch, *supra* note 10, at 73 (describing complexity of modern MDL practice); Myriam Gilles, *Tribal Rituals of the MDL*, 5 J. TORT L. 173, 176 (2012).

[148] 28 U.S.C. § 1407(a).

[149] *Id.*

[150] Bradt, *Direct Filing*, *supra* note 60, at 787.

[151] *Lexecon* 523 U.S. at 32 (mandating remand at the close of pretrial proceedings).

made by the Judicial Panel on Multidistrict Litigation, a group of seven judges appointed by the Chief Justice.[152] Decisions by the panel to transfer may be reviewed only by extraordinary writ; decisions to deny transfer may not be reviewed at all.[153] In my research, I have not turned up a single instance of a reversal of a decision by the JPML to create an MDL.[154]

During pretrial proceedings, the MDL judge possesses plenary power over the litigation—including the power to manage discovery, dismiss cases, exclude evidence, grant summary judgment, certify a class action, or sanction parties. Pretty much the only thing the MDL judge may *not* do is transfer a case to herself for trial, a formerly accepted practice rejected in 1998 by the Supreme Court.[155]

In theory, then, the MDL scheme is straightforward: related cases around the country are transferred temporarily to a single court, which conducts coordinated pretrial proceedings, and then transfers them home for trial. The reality of MDL practice, as everyone understands, is that the cases almost never exit the MDL proceeding. They are almost always—in fact, over 97% of the time—resolved in the MDL court, either by dispositive motion or through mass-settlement agreement.[156]

The animating feature of MDL is that it is a procedural hybrid, combining aspects of individual and group litigation.[157] But, to be more specific, what is special about MDL is that the purported individuality of the cases within the group provides cover to treating them as a mass. In

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[152] 28 U.S.C. § 1407(b). For further background on the Panel, see John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008).

[153] 28 U.S.C. § 1407(e).

[154] The only known instance of mandamus being granted against the panel involved its decision to remand cases prematurely. *See* In re Food Lion, Inc., Fair Labor Standards Act Effective Scheduling Litig., 73 F.3d 528, 535 (4th Cir. 1996). *See also* Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now A Strengthened Traffic Cop for Patent Venue*, 32 REV. LITIG. 497 (2013) (noting the rarity of mandamus against the panel); Laura E. Ellsworth and Charles H. Moellenberg, *Multidistrict Litigation: Appeal from Panel Decisions*, 2 BUS. & COM. LITIG. FED. CTS. § 14:26 (3d ed.) ("The chances of a court granting such extraordinary relief are extremely low").

[155] *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866 (3d ed. 2007) ("The transferee judge inherits the entire pretrial jurisdiction that the transferor judge would have exercised.")

[156] Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) ("Even though the Judicial Panel on Multidistrict Litigation centralizes factually related cases to promote efficient *pretrial* handling only, the reality is that just 2.9 percent of cases return to their original districts.").

[157] *See* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 Sup. Ct. L. Rev. 183, 215 (characterizing a hybrid as a combination of individual and aggregate litigation); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1150 2011) (describing "hybridization" as a "combination of individual actions with some mannter of centralizing technique").

theory, the cases within the MDL retain their individual identities.[158] Individual plaintiffs file their own cases and hire their own lawyers. Transfer into an MDL is not supposed to change the choice-of-law rules applicable to a state-law claim.[159] And each plaintiff ultimately retains the right to decide whether to accept a proposed settlement agreement or go to trial in the district in which he filed his case. [160]

But in other practical ways, MDL is really an aggressively consolidated aggregate litigation. Plaintiffs of course have no choice as to whether their case will be included in an MDL, and they have no opportunity to opt out. And once an MDL is established, the cases are prosecuted by a "steering committee" of lead lawyers selected by the MDL judge—often lawyers who have served in such a role in other MDL cases, perhaps before that judge.[161] The ultimate success of a plaintiffs' case—or the value of its settlement—is mostly determined by the conduct of these lawyers, over whom any individual plaintiff has little control.[162] As practice has developed, settlements in MDL cases now include numerous provisions that incentivize individual plaintiffs to accept—such as the provision in the settlement of the *Vioxx* cases requiring lawyers to inform plaintiffs that they would have to get a new lawyer if they declined the settlement.[163]

Altogether, MDL is a tightly packaged set of individual cases that are really litigated as a group. But the doctrine underlying MDL often underplays the aggregate nature of the proceeding. Consider: in a damages class action, there are constitutional and rule-based requirements to ensure that class members are adequately represented and have the right to opt out.[164] In an MDL, those requirements don't exist because plaintiffs are

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[158] *See* In re Korean Air Lines Co., Ltd., 642 F.3d 685, 700 (9th Cir. 2011) ("Within the context of MDL proceedings, individual cases that are consolidated or coordinated for pretrial purposes remain fundamentally separate actions, intended to resume their independent status once the pretrial stage of litigation is over.").

[159] Bradt, *Direct Filing*, *supra* note 60, at 794 (explaining that in MDL "each case retains its choice-of-law identity, and plaintiffs are not faced with the choice of trading the law to which they would otherwise be entitled for the benefits of aggregation").

[160] Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. (forthcoming 2017).

[161] Burch, *Judging Multidistrict Litigation*, *supra* note 10, at 73 ("judges appoint steering committees and other lead lawyers to conduct discovery, disseminate information, draft motions, negotiate settlements, and try bellwether cases"); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (2003).

[162] Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131-135 (2010).

[163] D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. (forthcoming 2017) (draft on file with author).

[164] *See*, *e.g.,* Fed. R. Civ. P. 23(a)(4); (b)(3); *see also* Linda S. Mullenix, *Dubious*

thought to have opted in to litigating by filing their cases and to be adequately represented because they chose their own lawyers. Moreover, because plaintiffs retain the ultimate choice to go to trial in the forum of their choice, the MDL process is thought to be modest and limited. Critics of MDL see this patina of modesty as a ruse, little more than an end run around the protections thought to be necessary in class actions—and potentially a violation of due process.[165]

While it is difficult to paint with a broad brush when it comes to whether individual litigants are better or worse off in an MDL, there is one aspect of MDL that is clear, and which its creators understood well. That is that its split personality as a temporary collection of individual cases and a tightly consolidated unitary proceeding is the key to its success. The formal nature of MDL insulates it from the kinds of due-process attack that doomed the mass-tort class action.[166] Instead, MDL's ability to characterize itself as modest and limited facilitates the aggressiveness of the transfer. The fact that remand for trial is a formally guaranteed possibility makes the power consolidated in the hands of the MDL judge salable. Personal jurisdiction is a prime example of how MDL does this, and how courts oscillate between individual and group treatment of cases. I will now turn to a discussion of the remarkably cursory and underdeveloped law of personal jurisdiction in both the JPML and the federal courts.

C. *Personal Jurisdiction in MDL*

It was not long after the creation of the passage of the MDL statute that the JPML had to deal with personal-jurisdiction problems, and how it did set the stage for courts' cursory treatment of all jurisdiction-related matters thereafter. It is worth lingering over the opinions in the cases because they sowed the seeds of current confusion and show how MDL has its cake and eats it, too, when it comes to jurisdiction.

In 1969, one of the first MDLs involved antitrust claims arising out of alleged price fixing in the children's schoolbook industry. Some nineteen cases were transferred by other of the JPML to the Eastern District of Illinois.[167] Among the cases to be transferred was an action brought in

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Doctrines: The Quasi-Class Action, 80 U. CIN. L. REV. 389, 391 (2011) (describing MDL as having "stripped away" the protections of the class action rules).

[165] *See, e.g,* Redish & Karaba, *supra* note 32, at 111 (describing MDL as "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013).

[166] *See, e.g.,* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[167] *In re Multidistrict Litig. Involving Library Editions of Childrens Books*, (JPML 1969). In fact, the schoolbooks cases were among those informally consolidated by the

California federal court by the County of Los Angeles against numerous publishers. The County resisted the transfer on the ground that several of the defendants had not yet been served with process. Although those defendants ultimately were served, it created a question of first impression for the Panel: whether it could order a transfer of a case in which at least some of the defendants had not yet been served.[168] The Panel concluded that it could do so, relying on the Supreme Court's 1962 opinion in *Goldlawr, Inc. v. Heiman*.[169] *Goldlawr*—rather cursorily, in its own right—held that a federal district court without personal jurisdiction over the defendant could effect a transfer to a district *with* personal jurisdiction under 28 U.S.C. § 1406(a), which provides that a district court "in which is filed a case laying venue in the wrong district shall dismiss, or if it may be in the interest of justice, transfer such case to any district or division in which it could have been brought."[170] The Court concluded that the legislative scheme required transfer under such circumstances to ensure that plaintiffs not be prejudiced by erroneously suing in the wrong district and potentially losing their claims due to the running of the statute of limitations.[171]

The JPML extrapolated from *Goldlawr* the principle that "the power of the Panel and the courts to effectuate a transfer under § 1407 is not vitiated by the transferor court's lack of personal jurisdiction over the defendant."[172]

Coordinating Committee on Multiple Litigation—without any statutory authority—before the MDL statute was passed. *See* Neal, *supra* note 130, at 99 (noting that "the Committee had taken under its wing several other sets of cases" including the schoolbook cases).

[168] In re Library Editions of Children's Books, 299 F. Supp. 1139, 1141 (J.P.M.L. 1969).

[169] *Id.* (citing *Goldlawr*, 369 U.S. 463 (1963)).

[170] *Goldlawr*, 369 U.S. at 465-466.

[171] *Id.* In his brief, breezy opinion for a 5-2 Court, over a dissent by Justice Harlan (always a bad sign), Justice Black contended that the transferring court need not have personal jurisdiction over the defendant because the Congress sought to avoid "the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn." *Id.* at 466. Black concluded that filing in a district not only should be no bar to transfer but should also toll the statute of limitations, on the ground that "filing shows a desire on the part of the plaintiff to begin his case and thereby…shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure." *Id.* Justice Harlan was skeptical, correctly noting that the legislative history did not support this conclusion. *Id.* at 468 (Harlan, J., dissenting).

[172] *In re Library Editions*, 299 F. Supp. at 1142. The exercise of power by a federal court lacking personal jurisdiction in *Goldlawr* is a far cry from what is authorized by the MDL statute. In *Goldlawr*, the Court held that Sec. 1406(a) required a court without jurisdiction to dismiss or transfer the case to a court with jurisdiction—action far different from an MDL court without jurisdiction, which can take control of the litigation of a case and enter a final judgment against a plaintiff or a defendant. In a sense, then, while

But the decision emphatically does *not* stand for that proposition. It in fact stands for the opposite result: although the defendants need not have been served before a transfer, the defendant still must be *amenable* to process in the transferor court. The Panel explained:

> A § 1407 transfer will *not* deprive an unserved defendant of any right which is entitled to judicial protection. Congress, possessing nationwide sovereignty and plenary power over the jurisdiction of the federal courts, has given no indication that, in creating § 1407, it intended to expand the territorial limits of effective service. Therefore, proper service must still be made on each defendant pursuant to the rules of the transferor court even after a transfer under § 1407. Additionally, any party served with process after such a transfer may raise any and all motions available to a defendant properly served before the transfer.[173]

The basis for the Court's holding is straightforward: if lack of service prevented a transfer it would create delays in the consolidation sought by the MDL statute. Because the statute provides that the defendant will be notified of the transfer and have the opportunity to challenge the personal jurisdiction of the transferor court in the MDL court, there's no prejudice to the defendant in ordering transfer prior to effective service.[174]

Library Editions therefore stands only for the proposition that the MDL statute allows for transfer prior to effective service, but not for the proposition that the MDL statute overrides limitations on personal jurisdiction that would otherwise apply. Despite its regularly being cited as such, it emphatically does *not* stand for the proposition that the MDL statute authorizes nationwide personal jurisdiction. Nor could it. There is no "long-arm" provision of the MDL statute authorizing nationwide service of

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Goldlawr mitigates personal-jurisdiction concerns, MDL exacerbates them. To say that *Goldlawr* authorizes MDL is an extraordinary leap.

[173] *Id.* (emphasis in original).

[174] *Id.* at 1142 ("An unserved defendant will have ample opportunity to object to the transfer."); In re Gypsum Wallboard, 302 F. Supp. 794, 794 (J.P.M.L. 1969) ("Motions to quash service or dismiss for lack of jurisdiction are routinely being considered by courts to which multidistrict litigation has previously been transferred and we see no good reason why [defendant] cannot pursue its remedies following transfer."). *See also* Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 576 (1978) ("Lack of personal jurisdiction, however, is not grounds for opposing transfer because any party contesting personal jurisdiction can make the appropriate motion before the transferee court.").

process.[175] And *Goldlawr*, on which *Library Editions* solely relies, does not stand for the proposition that a federal court may transfer a case from a district court without personal jurisdiction to another district court without personal jurisdiction. *Library Editions* therefore does not provide any cover for a conclusion that the MDL court can exercise any jurisdiction that the transferor court could not.

Twice in its early years of existence, the JPML actually considered the question of whether the MDL court must have personal jurisdiction over the defendants. In both cases, it baldly stated that there were no jurisdiction-based limitations on transfer, without explanation or citation. For instance, in *In re Kauffman Mutual Fund Actions*, the Panel responded to defendants' contention that the MDL court did not possess jurisdiction over the defendants by stating only that "the fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent their transfer to a single district for pretrial proceedings."[176] Four years later, in 1976, the Panel returned to the question in *In re Sugar Industry Antitrust Litigation*.[177] In *Sugar*, several east-coast-based defendants in a case filed in the Eastern District of Pennsylvania objected on personal-jurisdiction grounds to transfer for pretrial proceedings across the country in the Northern District of California, where they allegedly had no contacts.[178] The Panel rejected the defendants' argument stating only, and again without citation, that, "We have considered this constitutional argument and find it without merit."[179]

The JPML's last word on personal jurisdiction—and its most cited opinion on the subject—is *In re FMC Corp Patent Litigation*, decided in 1976.[180] In *FMC*, a defendant, Jenkins, resisted pretrial transfer to the District of Kansas on the ground it was not subject to personal jurisdiction there. Jenkins reasoned that this would render the District of Kansas an inappropriate MDL forum because, lacking jurisdiction, the court could not enforce discovery orders against it. Again, the JPML rejected the argument, holding that Jenkins' "contentions regarding jurisdiction and venue are based on a total misconception of Section 1407. Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction or venue."[181] The Panel continued: "A transfer under Section 1407 is, in essence, a change of venue for pretrial purposes. Following a

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[175] Monaghan, *supra* note 24, at 1202 n.194 ("There is no suggestion that 28 U.S.C. § 1407 itself can be read, in effect, to authorize nationwide in personam jurisdiction in the MDL transferee court, even if the transferor court itself lacked personal jurisdiction.").

[176] In re Kauffman Mut. Fund Actions, 337 F. Supp. 1337, 1339 (J.P.M.L. 1972).

[177] 399 F. Supp. 1397 (J.P.M.L. 1975).

[178] *Id.* at 1400.

[179] *Id.*

[180] 422 F. Supp. 1163 (J.P.M.L. 1976).

[181] *Id.* at 1165.

transfer, the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have in the absence of transfer."[182] *FMC*, of course, only begs the question. Saying that the orders are enforceable presumes that jurisdiction exists; to say that the orders are enforceable and therefore jurisdiction is available gets it precisely backwards.

Overall, despite the Panel's lack of analysis on jurisdictional questions, *Library Editions*, *Sugar Industry*, and *FMC* remain the fonts of wisdom on the jurisdictional scheme of MDL. Together, they stand for the following propositions. The MDL statute does not expand the jurisdiction of the federal district courts because any challenge to the jurisdiction of the transferor court is available in the MDL court.[183] The jurisdiction of the MDL court is irrelevant because it is only a change of venue for pretrial purposes, and the MDL court's jurisdiction is only derivative of the transferor court's jurisdiction.[184] Challenges to the jurisdiction of the MDL court are therefore unavailable. In short, the JPML has uniformly held that "The fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent transfer of the actions against them to a single district for pretrial proceedings where the prerequisites of Section 1407 are otherwise satisfied."[185]

The federal courts have only added to the confusion by conflating the two principles. Perhaps the best example is the Second Circuit's opinions in the *Agent Orange* litigation. In that case, several members of the plaintiff class contended that the MDL court could not assert personal jurisdiction over them due to lack of minimum contacts. Citing *Sugar Industry* and *FMC*, the Second Circuit dismissed the argument. But its analysis was at least curious. Ignoring the precedents of the JPML and all other courts to consider the matter, the Second Circuit asserted that the MDL statute *did* provide for nationwide personal jurisdiction, stating that "Congress may,

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[182] *Id.*

[183] *See* In re Telectronics Pacing Sys., Inc., 953 F. Supp. 909, 914 (S.D. Ohio 1997) ("this Court can only exercise jurisdiction over the Australian Defendants in individual cases where the transferor court could exercise jurisdiction over the Australian Defendants); In re Pharm. Indus. Average Wholesale Price Litig., 321 F. Supp. 2d 187, 208 (D. Mass. 2004) ("Service must be valid under the law of the transferor states."); Maricopa County v. Am. Petrofina, Inc., 322 F. Supp. 467, 469 (N.D. Cal. 1971) ("the transferee court may by its process obtain jurisdiction over persons to the same extent as could the court of original jurisdiction . . . the jurisdiction of the court where the case is originally filed could be expanded by the use of the present multidistrict litigation statute").

[184] *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866 (3d ed. 2007) ("A party who is not subject to personal jurisdiction in the original court cannot be validly served in the transferee district.").

[185] In re Falstaff Brewing Corp. Antitrust Litig., 434 F. Supp. 1225, 1229 (J.P.M.L. 1977).

consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction. . . . One such piece of legislation is the multidistrict litigation statute."[186] In related litigation, when asked to reconsider, the Second Circuit again rejected personal-jurisdiction arguments in MDL as "frivolous."[187] The Sixth Circuit recently echoed this conclusion in an unpublished opinion, calling the argument that there are limitations on the MDL court's jurisdiction "meritless".[188]

In sum, the JPML and the federal courts have essentially allowed MDL to have its cake and eat it, too. The JPML proclaims that MDL does *not* provide for nationwide personal jurisdiction or expand the scope of service of process in federal cases because temporary transfer to an MDL does not affect any party's substantive rights. But the Second and Sixth Circuits have held that MDL is insulated from any due-process attack on the ground that the MDL statute *does* provide for nationwide personal jurisdiction, and therefore is unlimited.

The opinions by the Second and Sixth Circuit's are imprecise, but they are not entirely wrong, and they may actually be more realistic than those by the JPML. The circuit courts have it wrong because the Congress did not authorize nationwide personal jurisdiction in MDL—it only authorized limited transfer *from* a court with personal jurisdiction. One cannot file a case directly in an MDL court if it doesn't possess a valid basis for jurisdiction; the case has to be filed in a proper forum and then transferred.[189] But the Second and Sixth Circuits, despite being wrong, are being more honest about what MDL actually does. The JPML's insistence that the parties' rights are not affected by limited transfer is hard to maintain once one understands that all of the real action in the litigation occurs in the MDL court and that cases are rarely remanded for trial. Pegging the power of the MDL court to act as it does—including the power to grant dispositive motions—on the jurisdiction of the transferor court ignores reality.

Recognizing that the MDL statute really does effectuate a kind of nationwide jurisdiction does not end the inquiry, though, as the Second Circuit assumed that it did. It merely puts the next question: whether the MDL statute is constitutional, or, at least whether the due process clause of the Fifth Amendment demands any limitations on how the MDL statute works. From the JPML's perspective, the answer is none: it does not consider personal jurisdiction a factor when deciding where to transfer a

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[186] In re Agent Orange Prods. Liab. Litig., 818 F. 2d 145, 163 (2d Cir. 1987).

[187] In re Agent Orange Prods. Liab. Litig., 996 F.2d 1425, 1432 (2d Cir. 1993).

[188] Howard v. Sulzer Orthopedics, Inc., 382 F. App'x 436, 442 (6th Cir. 2010) (referring to the MDL statute as providing "nationwide service of process").

[189] Bradt, *Direct Filing*, *supra* note 60, at 763.

case.[190]

When assigning cases to a transferee judge, the JPML gives a variety of reasons.[191] What matters in one case may not matter in another. What one can say about JPML transfer orders is that they seem to give decent, practical reasons for choosing the transferee court and judge. But it is also fair to say that those reasons vary considerably. For instance, sometimes the location of the defendant's headquarters matters a great deal,[192] while in other cases it doesn't.[193] And in some cases, the experience of the MDL judge is a critical factor,[194] while in other cases the JPML cites the opportunity to send the case to a judge who has never overseen an MDL.[195] In some cases, the fact that the transferee judge is already presiding over some of the component cases is important,[196] while in others the JPML assigns the MDL to a judge who is not hearing any pending cases.[197] In

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[190] In re Truck Acc. Near Alamagordo, N.M., on June 18, 1969, 387 F. Supp. 732, 734 (J.P.M.L. 1975) ("the propriety of in personam jurisdiction in a proposed transferee district is not a criterion in considering transfer of actions to that district under Section 1407").

[191] For a well-done summary, *see* Daniel A. Richards, *An Analysis of the Judicial Panel on MDL's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311 (2009). *See also* John G. Heyburn II, *A View From the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008) (summarizing criteria for transferee district).

[192] *See, e.g.,* In re Rust-o-leum Restore Marketing, Sales Practices, and Prods. Liability Litig., 84 F. Supp. 3d 1383, 1383 (J.P.M.L. 2015) (noting that defendant "has its corporate headquarters [in the MDL district], indicating that relevant documents and witnesses likely will be located there"); In re Polyurethane Foam Antitrust Litig., 753 F. Supp. 2d 1376 1377 (J.P.M.L. 2010) (describing "nexus" of litigation to the state of defendant's headquarters).

[193] *See, e.g.*, In re Ashley Madison Customer Data Security Breach Litig., 148 F. Supp. 3d 1378, 1380 (J.P.M.L. 2015) (assigning MDL to E.D. Mo. because "it is relatively convenient for defendants, which are located in Toronto, Canada"); In re Anthem, Inc. Customer Data Security Breach Litig., 109 F. Supp. 3d 1364, 1365 (J.P.M.L. 2015) (noting that although defendant is headquartered in Indiana it has "substantial ties" to the MDL forum in California); In re Natrol, Inc. Glucosamine/Chrondroitin Marketing and Sales Practices Litig., 26 F. Supp. 3d 1392, 1394 (J.P.M.L. 2014) (transferring MDL involving California-based defendant to District of Maryland because of experience of MDL judge).

[194] In re Coca-Cola Prods. Marketing and Sales Practices Litig., 37 F. Supp. 3d 1386, 1388 (J.P.M.L. 2014) (noting that the chosen judge is "well-versed in the nuances of multidistrict litigation").

[195] In re TD Bank, N.A., Debit Card Overdraft Fee Litig., 96 F. Supp. 3d 1378, 1379 (J.P.M.L. 2015) (selecting District of South Carolina in part because "centralization in this district provides us the opportunity to assign the litigation to a capable jurist who has not presided over an MDL yet").

[196] In re Caterpillar, Inc., C13 & C15 Engine Prods. Liability Litig., 26 F. Supp. 3d 1394, 1395 (J.P.M.L. 2014) (assigning MDL to D.N.J. because "the action pending . . . is relatively advanced, with discovery already begun").

[197] In re Bard IVC Filters Prods. Liab. Litig., 122 F. Supp. 3d 1375, 1376 (J.P.M.L. 2015) (assigning to District of Arizona, where no action was currently pending).

some cases it matters that the parties have agreed to an MDL district,[198] while in others the JPML chooses a judge that no party has proposed.[199] And sometimes the JPML chooses the busiest federal districts, citing their significant resources,[200] while other times it chooses a less busy district whose favorable docket conditions give it the bandwidth to take on an MDL case.[201] You get the picture.

My point here is not to say that the JPML's decisions are arbitrary, or even that it is doing a poor job. Its decisions typically make rough-and-ready sense. And, undoubtedly, their task is complicated by the fact that no district or judge can have an MDL foisted on it—the judge must, in the Panel's words, be "willing and able" to take on the assignment.[202] What one can take away from the JPML's activities is that Elizabeth Cabraser's quote that opens this Article—that when the MDL judge is chosen, it's not where, but whom—is undoubtedly right. The JPML has a menu of justifications it can use when choosing a transferee district and it is not readily apparent which ones will be dispositive in any given case, and geography is not always a central factor.

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[198] In re Lipitor Marketing, Sales Practices, and Prods. Liability Litig., 997 F. Supp. 2d 1354, 1357 (J.P.M.L. 2014) (noting that the District of South Carolina is "the first choice of most plaintiffs, and is also agreeable to [defendant headquartered in New York]").

[199] In re Subway Footlong Sandwich Marketing and Sales Practices Litig., 949 F. Supp. 2d 1369 (J.P.M.L. 2013) (selecting Eastern District of Wisconsin even though all parties supported transfer to Northern District of Illinois); In re Biomet M2A Magnum Hip Implan Prods. Liability Litig., 896 F. Supp. 2d 1339, (J.P.M.L. 2012) (assigning MDL to N.D. Ind. "even though no party suggested it and no plaintiff has yet filed a case there").

[200] In re Kind LLC Prods. Liab. Litig., 118 F. Supp. 3d 1380, 1381 (J.P.M.L. 2015) (citing the S.D.N.Y.'s "judicial resourses and expertise"); *In re Caterpillar*, 26 F. Supp. 3d at 1395 (D.N.J. has "the resources to devote to this litigation").

[201] In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Marketing, Sales Practices, and Prods. Liab. Litig., 109 F. Supp. 3d 1382, 1383 (J.P.M.L. 2015) ("Centralization in the Eastern District of Virginia allows us to assign this litigation to a district to which we have transferred relatively few MDLs."); In re Horizon Organic Milk Plus DHA Omega-3Marketing and Sales Practices Litig., 844 F. Supp. 2d 1380, 1381 (J.P.M.L. 2012) (citing that S.D. Fla. "is presiding over fewer MDL dockets than other proposed districts"), In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prods. Liability Litig., 787 F. Supp. 2d 1358, 1360 (J.P.M.L. 2011) (choosing N.D. Tex. because of its "favorable docket conditions"); In re Groupon, Inc., Marketing and Sales Practices Litig., 787 F. Supp. 2d 1362, 1364 (J.P.M.L. 2011) (noting San Diego as "a relatively underutilized transferee district [with] caseload conditions conducive to steering this litigation on a prudent course").

[202] 28 U.S.C. § 1407(b) (requiring "consent of the transferee district court"); Heyburn, *supra* note 191, at 2240 ("The willingness and motivation of a particular judge to handle an MDL docket are ultimately the true keys to whether centralization will benefit the parties and the judicial system."); In re Dial Complete Marketing and Sales Practices Litig., 804 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011) (transferring to D.N.H. on grounds that the judge "is willing and able to accept the assignment").

In MDL's that are destined to be the sort of nationwide mass torts that now dominate the docket, the JPML will often readily admit that no single district has a particularly strong connection.[203] When products are marketed and sold nationwide, there is not an obvious choice for transferee district. For instance, the Panel has candidly admitted, in a case eventually destined for the District of South Carolina, that "almost any district would be an appropriate forum."[204] While sometimes the JPML chooses a district in the defendant's home state, or near it, this is not always the case.[205] In such cases, the Panel will often choose based on the judge's experience, docket conditions, and accessibility of the court.[206] Indeed it is difficult to argue with the JPML's reasoning in placing an MDL in the Western District of Missouri, a "geographically central location accessible for parties ranging from California to Florida."[207] Ultimately, when it comes to a nationwide tort case, the JPML is catholic in its views on the accessibility of a forum, sometimes preferring a spot toward the middle of the country due to its central location,[208] and other times a metropolitan coastal location due to its

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[203] Heyburn, *supra* note 191, at 2240 (noting that "location may be less of an overriding consideration, particularly where the litigation lacks a singular geographical focal point").

[204] In re Pella Corp. Architect and Designer Series Windows Marketing, Sales Practices, and Prods. Liab. Litig., 996 F. Supp. 2d 1380, 1383 (J.P.M.L. 2014) ("This litigation is nationwide in scope and thus almost any district would be an appropriate forum."); *see also* In re Takata Airbag Prods. Liability Litig., 84 F. Supp. 3d 1371, 1373 (J.P.M.L. 2015) ("The litigation is nationwide in scope. . . . No one district stands out as the geographic focal point."); In re Actos Prods. Liability Litig., 840 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) (choosing W.D. La. when "allegations in this nationwide litigation do not have a strong connection to any particular district, and related actions are pending in numerous districts across the country").

[205] *Compare* In McCormick & Co., Inc., Pepper Prods. Marketing and Sales Litig., 148 F. Supp. 3d 1364, 1366 (J.P.M.L. 2015) (choosing D.D.C. as transferee forum in part because defendant "is based near Baltimore, Maryland, so relevant documents and witnesses will be found there") *with*

[206] In re Xarelto (Rivaroxaban) Prods. Liab. Litig., 65 F. Supp. 3d 1402, 1405 (J.P.M.L. 2014) (noting selection of Judge Eldon Fallon of the Eastern District of Louisiana, "an experienced transferee judge with the willingness and ability to manage this litigation efficiently" and the accessibility of New Orleans); In re Actos Prods. Liability Litig., 840 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) ("centralization in the Western District of Louisiana permits the Panel to assign the litigation to an experienced judge who sits in a district in which no other multidistrict litigation is pending").

[207] In re Simply Orange Juice Marketing and Sales Practices Litig., 867 F. Supp. 2d 1344, 1346 (J.P.M.L. 2012);

[208] Among the districts referred to as geographically central for nationwide tort litigation are: the N.D. Ill. (In re Walgreens Herbal Supp. Marketing and Sales Practices Litig., 109 F. Supp. 3d 1373, 1376 ("a convenient and accessible forum for actions filed throughout the country")); N.D. Ind. (In re Med. Info. Eng'g, Inc., Customer Data Security Breach Litig., 148 F. Supp. 3d 1381, 1382 ("convenient and accessible forum")); D. Kan.

accessibility.[209]

What emerges from the transfer orders is that the JPML is acting pragmatically. The normal concerns the underlay limitations on personal jurisdiction often do not loom large. The fact is that it would be difficult to do so simply because of the multiparty nature of the litigation. Plaintiffs are likely to be scattered around the country. And often, particularly in MDLs that confront an entire industry, there are multiple defendants located in different states and acting in multiple states. The reality is that in order to bring all of these parties into a single forum for centralized management—as the drafters of the statute intended—considerations of convenience for any single party must take a backseat. But to recognize that the typical considerations of jurisdiction are underemphasized does not mean they disappear. The question instead is whether the departure from the norm is justified and acceptable under the Due Process Clause.

Examination of case assignments in MDL from 2011 through 2015 gives one a sense of the extent to which traditional limitations on personal jurisdiction are ignored in MDL. For instance, during this period, the JPML created MDLs in 66 products-liability or personal-injury cases. Products

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(In re Power Morecellator Prods. Liab. Litig., 140 F. Supp. 3d 1351, 1354 (J.P.M.L. 2015) ("centrally located and easily accessible")); E.D. Ky. (In re Darvocet, Darvon, and Propoxyphene Prods. Liability Litig., 780 F. Supp. 2d 1379, 1381 (J.P.M.L. 2011) ("The Covington division is accessible to parties outside Kentucky.")); E.D. La. (*In re Xarelto*, 65 F. Supp. 3d at 1405 (New Orleans "geographically central")); D. Minn. (In re Nat'l Hockey League Players Concussion Injury Litig., 49 F. Supp. 3d 1350, 1350 (J.P.M.L. 2014) ("a geographically central location")); E.D. Mo. (*In re Ashley Madison*, 148 F. Supp. 3d at 1380 ("geographically central and accessible forum for this nationwide litigation")); N.D. Ohio (In re Anheuser-Busch Beer Labeling Marketing and Sales Practices Litig., 949 F. Supp. 2d 1371 (J.P.M.L. 2013) ("geographically central")); S.D. Ohio (In re Porsche Cars N.A., Inc., Plastic Coolant Tubes Prods. Liab. Litig., 787 F. Supp. 2d 1349, 1349 (J.P.M.L. 2011) ("district is geographically centrally located")); N.D. Tex. (*In re Depuy Orthopedics*, 787 F. Supp. 2d at 1359 (Dallas "geographically central and accessible"); E.D. Wis. (*In re Subway Footlong*, 949 F. Supp. 2d at 1370 (("geographically central forum")).

[209] Among the non-midwestern locations chosen have been: C.D. Cal. (In re Nexium Prods. Liability Litig., 908 F. Supp. 2d 1362, 1363 (J.P.M.L. 2012) (Los Angeles "accessible"); S.D. Cal. (In re Groupon, Inc., Marketing and Sales Practices Litig., 787 F. Supp. 2d 1362, 1364 (J.P.M.L. 2011) (San Diego "an accessible metropolitan area"); D.D.C (*In re Mccormick*, 148 F. Supp. 3d at 1365 ("Relatively convenient and accessible for all parties")); S.D. Fla. (In re Enfamil Lipil Marketing and Sales Practices Litig., 764 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) (Miami "readily accessible"); N.D. Ga. (In re Home Depot, Inc., Customer Data Security Breach Litig., 65 F. Supp. 3d 1398, 1400 (J.P.M.L. 2014) ("easily accessible for parties in this litigation, which is nationwide in scope")); D. Mass. (In re Zofran Prods. Liability Litig., 138 F. Supp. 3d 1381, 1382 (J.P.M.L. 2015) (Boston an "easily accessible district for the parties")); D.N.J. (*In re Caterpillar*, 26 F. Supp. 3d at 1395 ("convenient and accessible")); S.D.N.Y. (In re Mirena IUD Prods. Liability Litig., 938 F. Supp. 2d 1355, 1358 (J.P.M.L. 2013) (New York "easily accessible for nationwide litigation").

liability cases represent by far the largest amount of MDL cases.[210] To wit, the 59 products MDLs created during this time period eventually included 157,685 transferred cases. Moreover, because products cases are based on state law and in federal court under the diversity statute,[211] by rule, jurisdiction of the district courts is limited to the states in which they sit.[212] That is, a federal district court in, say, Florida, is limited to the jurisdiction of the state of Florida. For these reasons, products cases are a particularly apt example of how jurisdiction is altered by the creation of an MDL because cases are routinely transferred to courts that would otherwise not have to power to hear them. Of the 68 products-liability MDLs created between 2011 and 2015, only 12 were located in districts in which all of the defendant corporations were domiciled or incorporated. That is, if one takes the strict reading of *Goodyear* and *Daimler*, only 12 of the 68 MDLs created were located in courts that had general jurisdiction over the defendants.[213]

Separate issues arise when one shifts focus to plaintiffs. Most personal-jurisdiction cases focus on protections to defendants.[214] The practical reason is obvious: plaintiffs choose the forum in the first instance. As a result, it's typically defendants who object either through a motion to dismiss or a motion to transfer.[215] When plaintiffs do object to personal

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[210] Emery G. Lee, et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211 (2015 ; I have chosen to limit the sample to MDLs involving state-law claims because it is in those cases where the jurisdictional issues are likely to be most important. Because these are cases based on state law, Federal Rule of Civil Procedure 4(k) applies, and the personal jurisdiction of the federal courts is limited to that of the states in which the cases were filed. Absent the existence of an MDL, such cases could not be transferred to a federal district court in a state lacking personal jurisdiction under the current statutory scheme. Because many of the federal claims involved in MDLs—such as claims under the antitrust or securities statutes—are subject to specific long-arm provisions, it can be difficult to generalize. Because the jurisdiction of the federal courts over state-law claims in federal court under the diversity statute are all governed by the same federal jurisdictional provision, Rule 4, they provide a useful sample.

[211] 28 U.S.C. § 1332(a).

[212] FED. R. CIV. P. 4(k)(1)(A).

[213] Of the 157,685 cases transferred into these MDLs, at most 12,241, or 7.8%, were located in jurisdictions with general jurisdiction over all of the defendants. This number may be somewhat understated because there are several such MDLs with multiple defendants, one of which is domiciled in the state of the MDL. Within those MDLs, there may be some cases against only the defendant domiciled in the MDL state, which would increase these numbers. The sort of digging into the complaints in those cases is unnecessary to make the larger point that many cases are transferred into MDL courts that would otherwise not have general jurisdiction over the defendant.

[214] Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 971. 873 (1995) (noting that the court is "unconcerned with plaintiffs' due process").

[215] Von Mehren, *supra* note 38, at 194-195.

jurisdiction of the forum they have initially selected, it is usually because a counterclaim has been leveled against them. But in these cases, courts have typically held that by filing suit in a jurisdiction, the plaintiff has consented to its power to decide claims against him.[216]

That is not to say, however, that plaintiffs are totally unprotected by due-process based limitations on personal jurisdiction. The Supreme Court confirmed as much in *Phillips Petroleum v. Shutts*, in which it held that the plaintiff's chose in action is a property right that cannot be taken without due process of law.[217] *Shutts* was a hard case because it stretched the limits of the consent-based rationale for jurisdiction over plaintiffs. The case involved a nationwide damages class action filed in Kansas. The vast majority of the class members, however, had no connection with Kansas, and, if they had been defendants, would certainly not have been subject to the Court's jurisdiction. Unlike a defendant if the class action failed these plaintiffs would not be subject to coercive action, like a damages award or an injunction, but they would have lost the opportunity to pursue their claims because they would have been bound by the result. Consequently, the Court determined that the plaintiffs were entitled to some due process protections. But the Court did not conclude that the plaintiffs could not be bound due to their lack of minimum contacts with Kansas. Conceding that most class members lacked those contacts, the Court instead concluded that the procedural protections of Kansas's class-action rules provided sufficient due-process protections. In particular, the Court cited the requirements that the court assure that all absentees were adequately represented, that any settlement be approved by the court, and that class members have the opportunity to opt out of the class and go it alone in the forum of their choice. Citing *Mullane*, the Court concluded that these protections were sufficient even though Kansas may be geographically inconvenient. The fiduciary nature of representation, supervision of the judge, and the tacit consent atributted to the decision not to opt out sufficed.[218]

When one looks closely at the basis of the Court's holding in *Shutts*, it becomes apparent why that case does not on its own mean that personal jurisdiction over plaintiffs is not a problem for MDL. None of the three protections that effectively stand in for the minimum contacts requirement

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[216] *Id.* at 196-197. Note however that the Restatement of Judgments softens this rule considerably, *see* § 9.

[217] *Id.*

[218] *Id*; *see also* Mullenix, *supra* note 214, at 885 (*Shutts* held that "the due process rights of absent plaintiffs are protected by the opportunity to opt out if the class and thereby preserve the subsequent right to litigate individual damage claims without being bound by the class judgment"); Brian Wolfman & Alan B. Morrison, *What the* Shutts *Opt-Out Right is and What it Ought to Be*, 74 UMKC L. REV. 729 (2006).

exist in MDL, despite that the MDL court can grant judgment against the plaintiffs. There is no requirement that the court ensure adequate representation, even though the case is typically litigated by a "steering committee" not of the plaintiff's choosing. It is true that the Court has discretion to exercise oversight over the steering committee, but not all courts do, and when they do they do not employ the exacting criteria of a class action. Nor is there a requirement—or even the ability—in an MDL for the judge to reject or approve a non-class settlement.[219] And, finally, there is of course no right to opt out of an MDL. Indeed, this was a central element of the scheme from the beginning because the drafters believed that if plaintiffs could opt out, it would eliminate the ability to centralize national control over all of the cases. This inability to opt out, combined with the statistical unlikelihood that a case will ever return to a plaintiff's chosen forum for trial make consent a very thin reed on which to base the jurisdiction of the MDL court.

Consider a plaintiff who has filed a case in state court under state law. If there is diversity jurisdiction the defendant may remove, and upon removal the case may be sent to an MDL in any district. Unlike the general transfer statute, in which a particularized assessment of the convenience of the alternative forum is required, MDL can be in a patently inconvenient forum for the plaintiff, one chosen without any regard to its convenience in any individual case. Once the case is in the MDL forum, the plaintiff exercises functionally very little control over the litigation, and it may, in fact be decided against her, due to the MDL court's undoubted authority to grant dispositive motions. In most large MDLs, what actually happens is that a settlement agreement is eventually negotiated by the lead lawyers, and it is likely to be one that leaves the plaintiff little practical choice but to accept.

If one believes, as I do, that the primary function of limitations on personal jurisdiction is to ensure that parties have a real opportunity to be heard in litigation, then the problems of MDL cannot be wished away by saying that what counts is the personal jurisdiction of the transferor court—the exercise of power by the MDL court must be reasonable.

III. ASSESSING PERSONAL JURISDICTION IN MDL

A. The Analysis Required in Light of the National Interest

Although there are significant questions about personal jurisdiction in MDL, to one who is a close observer, it is not entirely surprising that they

[219] *See* Bradt & Rave, *supra* note 11.

have gone unanswered. MDL's surface modesty has permitted the avoidance of such questions, while its tremendous power of aggregation makes them highly important. Unlike a class action, whose power of aggregation has nowhere to hide, when the aggregate nature of MDL causes departures from the norms of individual litigation, MDL can take shelter in its structure as a device of temporary transfer and the technical availability of trial in the original forum. In other words, MDL's purported modesty compounds its power.[220] Personal jurisdiction is an example. The ability to take the case to trial in the original forum, while rare in the wild, gives the MDL court cover, allowing it to avoid a constitutional analysis of whether it has jurisdiction to adjudicate the claims before it.

Instead of relying on the JPML's fiction that all that matters is the jurisdiction of the transferor court, or the Second Circuit's assertion that MDL is justified by a naked assertion of territorial power, we should take MDL for what it is: a hybrid statute in which the district court overseeing pretrial proceedings and the district court where the trial would be held must *both* have jurisdiction over the parties. And that jurisdiction should be measured not by an outmoded and unrealistic conception of physical power, but an assessment of reasonableness in light of the parties' contacts with the United States and the national interest in dispute resolution, as mandated by *International Shoe* and *Mullane*.[221]

Such an assessment would not render the MDL statute—or the selections of MDL courts by the JPML in most cases—unconstitutional. But taking the Fifth Amendment seriously in this context does mean that the JPML's discretion is not unlimited.[222] The location of the MDL court is subject to a check for severe inconvenience, and there are supplemental measures that MDL courts should take in order to ensure that MDL provides a constitutionally fair opportunity to be heard for both plaintiffs and defendants.

An assessment of the reasonableness of the MDL statute need not be confined to the limits of state borders—because the question here involves the limits on federal and not state power, concerns about federalism do not loom large, although federalism does counsel a conclusion on choice of law, as I discuss below. Moreover, because MDL is an exercise of national

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[220] Bradt, *Radical Proposal supra* note 7; Redish & Beste, *supra* note 72, at 154 ("MDL stealthily transforms fundamental characteristics of numerous claims so that they are unrecognizable as distinct actions filed by individual plaintiffs"); Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010) (describing MDL as a "procedural no man's land").

[221] Redish & Beste, *supra* note 72, at 923; Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 468 (2004).

[222] Alexander, *supra* note 104, at 439; Fullerton, *supra* note 28, at 6.

power, the parties need not be subject to general jurisdiction in the state where the MDL court is located under *Goodyear* and *Daimler*.[223]

Perhaps most importantly, any examination of the MDL statute for constitutional reasonableness must take proper account of the national interest in efficient dispute resolution. Congress passed the MDL statute to deal with exactly the sorts of cases that currently dominate the docket: nationwide mass torts, and ultimately, expanded the availability of personal jurisdiction and venue in the federal courts to accommodate a "litigation explosion" that the drafters feared would engulf the federal courts and render them unable to dispense justice. Specifically, the solution the drafters devised in MDL was to centralize control of cases filed nationwide in the hands of a single judge, at least for pretrial proceedings. Although the drafters were careful to ensure that the cases would be remanded for trial, they also knew that trials were relatively rare and that these cases would be more likely to settle if a single judge managed pretrial actively—this was the lesson of the electrical-equipment cases that spawned the MDL idea. And a primary reason why the drafters of the statute went to the Congress rather than the Rules Committee to implement their idea was that they understood that expanding the availability of personal jurisdiction and venue in the federal courts likely required statutory enactment under the Rules Enabling Act.

In sum, in passing the MDL statute, Congress expanded personal jurisdiction in federal courts in the service of an increasingly urgent national interest in efficiently resolving these disputes. Consequently, any measure of reasonableness of MDL jurisdiction must place a heavy thumb on the scale in favor of the interest of the nation in consolidated treatment. The particular interest analysis of the Court in *Burger King* has renewed relevance here, as it is possible to think of this expanded jurisdiction as emerging from the interstate judicial system's interest in obtaining the efficient resolution of controversies, and the shared interest of the several states in furthering substantive social policies. The MDL system animates these more systemic interests.

Although the national interest in efficient dispute resolution looms large, it does not justify putting the MDL court in any location.[224] And while the JPML's analysis is minimal, it has acted responsibly in most

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[223] Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century of the Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111, 119 (1999).

[224] *Cf.* Stephen C. Yeazell, *Overhearing Part of a Conversation:* Shutts *as a Moment in a Long Dialogue*, 74 UMKC L. REV. 779, 780 (2006) (describing the Class Action Fairness Act as "a small step toward the more intelligent deployment of diversity jurisdiction" to "federalize" cases "with broad national roots—MDL, too, plays this role, and its modification of otherwise applicable restrictions on diversity jurisdiction can be seen in service of this goal).

cases. But that may not always be the case, and the JPML's actions must be checked by protecting the interests that underlay limitations on personal jurisdiction. Such an analysis will, however differ for defendants and plaintiffs.

B. The Interests of the Defendants

With respect to defendants, the analysis is familiar: Is the location of the forum an example of what Professors Miller and Crump call "distant forum abuse"?[225] That is, has the MDL been placed in a location where it is unconstitutionally inconvenient for a defendant to essentially defend the entire universe of claims against it? The answer will typically be no if the defendant is a large corporation doing business nationwide, and the defendant does a substantial business in or around the MDL forum. Such a defendant will typically have the resources available to ensure sufficient representation in a metropolitan area. Of course, the honest concern for defendants may not be the inconvenience of the forum but the risk that the forum chosen will be more plaintiff friendly for different reasons--such as the identity of the MDL judge or the local jury pool likely to hear possible influential bellwether trials. For instance, a defendant may prefer another state to California regardless of where its principal place of business is located, because of concerns about California judges and juries. But these concerns, however, are not cognizable in the personal-jurisdiction analysis, particularly in the federal-court context, and especially in diversity jurisdiction (where there is a presumptive neutrality) and when the MDL forum is selected by the JPML and not the plaintiff, as in a nationwide class action.[226]

Any such analysis must also, of course, take into account the benefits to defendants of aggregation. Although defendants fought the statute vigorously in the 1960s, in the intervening decades they have come to recognize the benefits of aggregation, particularly when it comes to the possibility of resolving liability in a nationwide litigation in one shot, perhaps through summary judgment or a mass settlement. Even an MDL in a somewhat inconvenient forum may be preferable for a defendant to litigating piecemeal around the country.[227] A clear-eyed assessment, then, suggests that unless the forum is especially inconvenient, MDL will in most

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[225] Miller & Crump, *supra* note 113, at 54.

[226] *Cf.* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About Class Action Fairness*, 58 S.M.U. L. REV. 1313, 1377 (2005) (describing application of Fifth Amendment to defendants in federal class actions).

[227] D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192-1198 (2013).

cases be constitutionally reasonable for well-resourced defendants, and the MDL need not be located in the defendant's home state. But one could imagine an MDL located so far away from the defendant's home that it would raise constitutional concerns. So long as the JPML continues to favor major cities, however, defendants will usually have few complaints.

C. The Plaintiffs' Interests, and Some Needed Safeguards

For plaintiffs, the analysis is different. Mass-tort plaintiffs are scattered around the country, meaning that no single forum will be convenient for all of them. Plus, as a structural matter, plaintiffs in MDL may find themselves less protected than even absent class members under *Shutts*, because an MDL court need not make an adequacy determination or provide the right to opt-out of the litigation. As was intended by the drafters of the MDL statute, plaintiffs in these cases cannot opt out until the end of pretrial proceedings, and again, historically the number of cases going back for trial is small. Of course, unlike absent class members, in an MDL, a plaintiff has chosen to file a case and retains the ultimate right to go to trial if her case has survived pretrial proceedings. However, consent is a thin reed on which to base jurisdiction over an MDL plaintiff, particularly one who filed initially in state court and, after a defendant's successful removal motion, finds her case transferred to an MDL across the country. A plaintiff of course retains the choice to voluntarily dismiss the case, but unless she refiles it in the defendant's home state, she will wind up back in the MDL with no exit. Despite the complexity of the analysis, it is clear that there must be an assessment of the MDL plaintiffs' interests that is robust enough to allow individual plaintiff's a meaningful opportunity to be heard.

Although one could argue that consent is unnecessary to exercise jurisdiction over a plaintiff in any federal district court, this argument does not reduce the need for a reasonableness analysis based on plaintiffs' interests. If a personal-jurisdiction theory based exclusively on territorial power should be rejected for defendants, so should it be for plaintiffs.[228] The better conclusion is that jurisdiction over plaintiffs in the MDL court must be reasonable in light of the plaintiffs' national contacts. And although plaintiffs benefit from aggregating their resources, any individual plaintiff may lack the resources to effectively participate in litigation that has been transferred across the country. It is one thing to say it is reasonable for General Motors to be haled into most federal districts, but quite another to say that a plaintiff can be—particularly when there is no presumption in

[228] *See* Mullenix, *supra* note 214, at 911 ("There are few sound reasons why plaintiffs' due process rights ought not be symmetrical with those of a defendant with regard to a state's assertion of personal jurisdiction.")

favor of the plaintiff's original choice of forum, as there would be under the federal transfer statute in a normal litigation.

As is the case with defendants, it is again important to note the overlap between plaintiff's interests and the national interest with respect to aggregation in general. Again, any court that receives the MDL will impart the benefits of consolidation upon individual plaintiffs. And these benefits could be significant. After all, as the Court recognized in *Shutts*,[229] plaintiffs litigating as a group benefit significantly from the pooling of resources and consolidated litigation that aggregate litigation provides. And plaintiffs do ultimately retain the right to decide to go to trial, should their claims manage to make it to the end of the long road of pretrial proceedings.

As a practical matter, though, any national MDL scheme will demand that litigation be sent far away from some of the plaintiffs' homes, resulting in inconveniences. Such inconvenience must, however, be balanced against the benefits of MDL, and there are ways that the MDL court should mitigate the burdens on far-flung plaintiffs.

First, MDL courts should be encouraged to take advantage of modern communications technology to ensure that plaintiffs around the country, and their lawyers, can participate and keep apprised of developments in the litigation.[230] Every MDL should have a well-designed website that provides easy access to orders and proceedings, and activities in the MDL, like depositions and hearings should be webcast, so parties around the country can keep abreast.[231] Although some MDL judges and districts have embraced this approach, more can and should be done.[232]

Second, beyond ensuring that a plaintiff have the ability to keep abreast of the litigation when it is in a far-flung forum, the MDL court should engage in other activities to protect plaintiffs, including overseeing settlement proposals and negotiations and providing for fair representation by a wide variety of lawyers on the plaintiffs' steering committee.[233] All of these efforts would serve to mitigate the disadvantages of MDL for individual plaintiffs while preserving the advantages of aggregation.

Third, it is important that MDL courts ensure that inclusion in an MDL proceeding does not change the choice of law applicable to any individual case. In earlier work, I have argued that this is mandated by the *Erie*

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[229] 105 S. Ct. at 2974; Miller & Crump, *supra* note 113, at 16.

[230] *See* Elizabeth Cabraser & Samuel Issacharoff, *The Participatory Class Action,* 92 N.Y.U. L. REV. (forthcoming 2017), *available at* http://ssrn.com/abstract=2906890.

[231] *See, e.g.,* Perry Cooper, *How Judge Fallon Works His MDL Magic*, Bloomberg News, April 27, 2016 (describing use of online depositions to allow all attorneys to "be in the room").

[232] Redish & Karaba, *supra* note 32, at 152-153 (suggesting increased use of modern technology as a means of reducing due-process concerns, though still rejecting MDL)

[233] *E.g.,* Burch, *supra* note 5, at 12-28; Bradt & Rave, *supra* note 11, at 43-45.

doctrine, but choice of law also has important implications for personal jurisdiction for both plaintiffs and defendants.[234] For plaintiffs, the effect of having a case sent to an inconvenient forum is reduced if the case will still be decided under the same law that the transferor court would apply. And for defendants, the risks of all of the cases against it being aggregated in a single forum are reduced if those cases will be decided according to the law that would apply absent the aggregation. Although the federal interest in efficient dispute resolution figures prominently in the personal-jurisdiction analysis, when the cases within the MDL are governed under state law there is no regulatory interest by the federal government in vindicating its substantive law.[235] As a result, the state laws that would otherwise apply should continue to govern in these cases.[236]

And fourth, there may be a need for more effective oversight of the JPML. While the current JPML does a fine job, and cases that are unconstitutionally transferred may ultimately be few, there still needs to be a check on egregious JPML action.[237] Departing from the current mandamus remedy may not be necessary—and constant litigation of the JPML's decisions may not be desirable—but the courts of appeal should remain attentive to the JPML's actions and be prepared to act as more than a rubber stamp.

CONCLUSION

Two of the most significant developments in American civil litigation in the last decade have been the rapid ascendance of MDL as the central mechanism for litigating mass torts and the Supreme Court's vigorous reclamation of its role in restricting personal jurisdiction. These two developments are, however, at odds with one another. MDL essentially admits of no restrictions on personal jurisdiction, but to do so the JPML and federal courts have had to rely on fictions and inaccuracies. That MDL has been able to skate on questions of jurisdiction is typical of MDL generally in that many otherwise salient questions of due process are diminished in the name of efficient resolution of mass controversies. But to say that current explanations of MDL's expansive jurisdictional reach are

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[234] Bradt, *Direct Filing*, *supra* note 60, at 816-820 (positing a rule of "choice-of-law neutrality" for mass-tort litigation).

[235] *Id.* at 802-804 (describing requirement of regulatory interest in choice of law).

[236] *See, e.g.,* Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b(3)*, 2004 MICH. ST. L. REV. 799, 801; Larry Kramer, *Choice of Law in Complex Litigation*, 74 N.Y.U. L. Rev. 547, 565-573 (2006) (arguing against principle that applicable law should change to accommodate mass-litigation procedure).

[237] *See* Pollis, *supra* note 30, at 1646 (suggesting interlocutory review in MDL).

wrong does not make MDL unconstitutional. Rather it requires us to look at MDL in a more realistic way and take seriously whether the power is concentrates in single federal judges is constitutionally justified. In an era of MDL ascendancy, a clear-eyed approach to such issues is long overdue.