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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 3 percent are ever sent back because the cases are resolved in the MDL court, either through dispositive motion or mass settlement. Surprisingly, despite the fact that the MDL court is where all of the action in these cases

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typically happens, that court need not have personal jurisdiction over the plaintiffs or the defendants under the rules that would apply were the cases being litigated one-by-one. 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 how and why MDL has avoided these fundamental questions and suggest a new way of analyzing MDL jurisdiction under the Fifth Amendment's Due Process Clause, focusing on the interests that the doctrine of personal jurisdiction attempts to serve, especially the assurance of a forum that provides a fair opportunity to participate. 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 analysis adequately takes into account the interests of the parties in a convenient forum. In so doing, I hope to focus the discussion of jurisdiction in MDL—and of MDL generally—away from the fiction of "limited transfer" and to the reality of aggregated, unitary litigation.

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"It's not so much a where question, but a who question."
—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 is 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 is because those cases—as of August 2017, some 125,000 of them—are consolidated as part of a multidistrict litigation, or MDL.[6] MDL, once thought to be an obscure, technical device, has now become the centerpiece of nationwide mass tort litigation in the wake of the decline of the tort class action.[7] Under the MDL statute,

1. Elizabeth Cabraser, MDL Problems, Proceedings of the Section on Litigation, Annual Meeting of the Association of American Law Schools (Jan. 6, 2017) (recording on file with the Association of American Law Schools).

2. Pennoyer v. Neff, 95 U.S. 714 (1877).

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

4. *See generally* Walden v. Fiore, 134 S. Ct. 1115 (2014); Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Goodyear Dunlop Tires Operations, S.A. 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. 235 (1958), which Geoffrey Hazard aptly described as containing "a line of analysis that in all charity and after mature reflection is impossible to follow, no less to relate." Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 244.

5. *See* 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 civil caseload"); Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1771 & fig.3 (2017) (describing the "growth in the aegis of MDL").

6. As of August 15, 2017, there are 125,868 cases pending in 230 multidistrict litigations in 51 transferee districts before 180 district judges. *MDL Statistics Report—Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Aug. 15, 2017), http://www.jpml.uscourts.gov/pending-mdls-0 [https://perma.cc/W4BD-V8NU].

7. *See* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 844-45 (2017); Judith Resnik, *Reorienting the Process Due: Using*

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.[8] The judge is chosen by a panel of judges selected by the Chief Justice of the United States called the Judicial Panel on Multidistrict Litigation (JPML).[9] After such pretrial proceedings, the cases are to be remanded to the courts from which they came for trial,[10] but this rarely happens—less than 3 percent of the cases ever exit the MDL court.[11] 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.[12] While the cases are in the MDL court, the MDL judge has all of the powers that the transferor court would have, including the power to decide dispositive motions, and typically, the litigation is resolved by a mass-settlement agreement reached within the MDL.[13]

Surprisingly, despite the fact that 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 under the rules that would apply if the cases were treated as individual litigations. Instead, according to the JPML and the few courts that have analyzed the problem, an MDL can be located anywhere in the

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Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation, 92 N.Y.U. L. REV. 1017, 1046 (2017) ("In earlier decades, when MDL had a smaller footprint, it did not attract the ire leveled against Rule 23"); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1346-47 (2014) ("As reliance on Rule 23 has diminished, MDL has ascended as the most important federal procedural device to aggregate (and settle) mass torts."); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 798 (2010) (noting the "massive increase in MDL aggregate litigation" from 2004 to 2008).

8. 28 U.S.C. § 1407(a) (2012).

9. *Id.* § 1407(b), (d).

10. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998).

11. Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015).

12. *See* Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1270-75 (2017) (describing the scope of pretrial proceedings); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 526 (2012) (noting how in general, "[p]retrial civil procedure has become nontrial civil procedure").

13. *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").

United States, essentially without limitation.[14] As the JPML has held, baldly: "Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue."[15] For their part, federal courts have taken this analysis as a given—those courts that have addressed whether there are any jurisdictional limitations on the MDL forum have characterized such arguments as "frivolous."[16]

In this Article, I hope to demonstrate that questions about the proper jurisdiction of MDL courts are not frivolous with respect to defendants, who usually object, *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 proliferates in 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 the Honorable Joseph R. Goodwin in the Southern District of West Virginia, located in Charleston.[17] Under the Supreme Court's personal jurisdiction cases, this is a strange result.[18] None of the defendants in the litigation is incorporated or

14. *See, e.g.*, *In re* FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (per curiam) (citing *In re* Sugar Indus. Antitrust Litig., 399 F. Supp. 1397, 1400 (J.P.M.L. 1976); *In re* Revenue Props. Co., 309 F. Supp. 1002, 1004 (J.P.M.L. 1970)); *see also* Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 427 (2013) ("The Panel's decision on whether, where, and to whom to transfer these actions is effectively unreviewable and has never been overturned.").

15. *In re FMC Corp.*, 422 F. Supp. at 1165.

16. *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1432 (2d Cir. 1993).

17. *See, e.g.*, *In re* C. R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2187, 2017 WL 2720292 (S.D. W. Va. June 22, 2017); *In re* Am. Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2325, 2017 WL 2609041 (S.D. W. Va. June 15, 2017); *In re* Coloplast Corp. Pelvic Support Sys. Prods. Liab. Litig., MDL No. 2387, 2016 WL 6901776 (S.D. W. Va. Nov. 22, 2016); *In re* Bos. Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2326, 2015 WL 1405493 (S.D. W. Va. Mar. 26, 2015), *aff'd sub nom.* Fleming v. Bos. Sci. Corp., 627 F. App'x 231 (4th Cir. 2015) (per curiam); *In re* Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2327, 2014 WL 186872 (S.D. W. Va. Jan. 15, 2014); *In re* Cook Med., Inc., Pelvic Repair Sys. Prods. Liab. Litig., 949 F. Supp. 2d 1373 (J.P.M.L. 2013).

18. *See infra* Part I.A.

has its principal place of business in West Virginia, meaning there is no general jurisdiction over any of them in the state.[19] And unless a plaintiff is from West Virginia or had the device implanted there, there is likely no specific jurisdiction in West Virginia in any of these cases, especially after the Court's 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of California*.[20]

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.[21] 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 Corporation.[22] Boston Scientific Corporation is based in Massachusetts, where it designed and manufactured the device that caused Kafaty's injuries.[23] Shortly after Kafaty filed her case, in August 2012, it was transferred to the MDL in West Virginia.[24] Because the steering committee of lawyers selected by the district judge prosecutes the case, her lawyer is not involved.[25] Absent the MDL, the case would never have been sent to West Virginia. But, through the magic of MDL, it was, and it was unlikely to ever return to California, except

19. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014) (restricting general jurisdiction to forums in which the defendant is "essentially at home" (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011))).

20. *See* 137 S. Ct. 1773, 1780-82 (2017). Even an expansive view of specific jurisdiction, like the one outlined by Justice Ginsburg in her dissent in *J. McIntyre Co. v. Nicastro*, would likely not cover cases with no connection to West Virginia. *See* 564 U.S. 873, 901 (2011) (Ginsburg, J., dissenting) ("[A] forum can exercise jurisdiction when its contacts with the controversy are sufficient.").

21. Complaint and Jury Demand at 2, 7, Kafaty v. Bos. Sci. Corp., No. 1:12-cv-01290-AWI-BAM (E.D. Cal. Aug. 8, 2012).

22. *Id.* at 1-3.

23. *Id.* at 2-3.

24. Conditional Transfer Order, *In re* Boston Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2326 (J.P.M.L. Aug. 24, 2012).

25. *See* Steering Committee, Lead and Liaison Counsel, *In re* Boston Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2326 (S.D. W. Va. 2014), https://www.wvsd.uscourts.gov/MDL/boston/pdfs/2326Steering%20Committee,%20Lead%20and%20Liaison%20Counsel.pdf [https://perma.cc/T7GV-NUUJ].

in the form of a settlement offer.[26] And indeed the case was settled while within the jurisdiction of the MDL court in West Virginia.[27]

How is this possible? 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.[28] In its view, the power of the transferee court is derivative of the power of the transferor court.[29] 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.[30] The few federal courts that have examined this issue have given a different answer. They say that even though Congress has not provided for nationwide service of process, it has the sovereign territorial power to provide for nationwide jurisdiction anywhere within the borders of the United States over any case, and it did so in the MDL statute.[31] As a result, an MDL can be transferred to any district for pretrial proceedings, regardless of the district's connection to the litigation.

These two explanations are not only facially inconsistent, but 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.[32] For instance,

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26. *See generally* D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2177 (2017) (explaining how closure provisions encourage settlement and discourage litigation).

27. Inactive Docket Order at 1, *In re* Bos. Sci. Corp. Pelvic Support Sys. Prods. Liab. Litig., MDL No. 2326, No. 2:12-cv-04670 (S.D. W. Va. Oct. 6, 2016) (retiring the consolidated cases from the active docket as parties had agreed to a settlement model).

28. *See infra* Part II.C.

29. *See infra* Part II.C.

30. *See 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.").

31. *See, e.g.*, Howard v. Sulzer Orthopedics, Inc., 2010 WL 2545586, at *5 (6th Cir. June 16, 2010) ("The MDL statute is, in fact, legislation 'authorizing the federal courts to exercise nationwide personal jurisdiction.'" (citation omitted) (quoting *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 163 (2d Cir. 1987))).

32. *See, e.g.*, *In re* Zoloft (Sertralinehydrochloride) Prods. Liab. Litig., 176 F. Supp. 3d 483, 501-12 (E.D. Pa. 2016) (granting summary judgment on 333 transferred cases in a single

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.[33]

The courts' explanation is both incomplete—because the MDL statute does not provide for nationwide service of process over any claim, and such claims may not be filed directly in the MDL court unless doing so would be allowed by Federal Rule of Civil Procedure 4—and question-begging.[34] 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,[35] one must then assess whether such a statute is constitutional under the Due Process Clause of the Fifth Amendment[36]—with respect to plaintiffs and 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.[37] Second, unlike every other attempt at nationwide personal jurisdiction, the MDL statute is not mitigated by a more specific venue statute or the opportunity for transfer under 28 U.S.C. § 1404(a).[38] The statute's

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opinion), *aff'd*, 858 F.3d 787 (3d Cir. 2017).

33. *See id.*

34. *See* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1189 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.").

35. Whether Congress may even do so is questionable, particularly in light of the Court's recent statement that "absent consent, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction." BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1556 (2017).

36. *See* U.S. CONST. amend. V.

37. *See* ROBERT C. CASAD & LAURA J. HINES, JURISDICTION AND FORUM SELECTION § 6:2 (2d ed. 2015) (noting that Congress has not attempted to establish nationwide personal jurisdiction over state law claims).

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

provision that a case be transferred to "any district ... for the convenience of parties and witnesses [that] will promote the just and efficient conduct"[39] of the litigation is functionally meaningless when the litigants are scattered throughout the country.[40] Third, there is 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.[41] Ultimately, then, 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 garden-variety, state law tort cases.[42]

In this Article, I argue that we should think differently about personal jurisdiction in MDL, and that MDL provides an opportunity to think differently about personal jurisdiction in general. Functionally, the MDL court *is* exercising a kind of nationwide personal jurisdiction.[43] This expansive jurisdiction cannot, however, be solely justified as a matter of national sovereign territorial power, as the courts suggest,[44] but must be justified as a matter of federal

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harshness of nationwide personal jurisdiction). Indeed, in interpleader, perhaps the most expansive assertion of nationwide personal jurisdiction over claims sounding in state law, transfer is available under § 1404(a). *See, e.g.*, Jackson Nat'l Life Ins. Co. v. Economou, 557 F. Supp. 2d 216, 221 (D.N.H. 2008) (noting that the usual presumption in favor of the plaintiff choice of forum does not apply in interpleader); Prudential Ins. Co. of Am. v. Rodano, 493 F. Supp. 954, 955 (E.D. Pa. 1980) (granting a motion to transfer in an interpleader case). Even in bankruptcy cases, transfer is available, *see, e.g.*, *In re* Bauer, No. 09-32001, 2010 WL 1905087, at *3 (Bankr. E.D. Tenn. May 12, 2010), though apparently denials of motions to transfer outpace grants, *see* Jeffrey T. Ferriell, *The Perils of Nationwide Service of Process in a Bankruptcy Context*, 48 WASH. & LEE L. REV. 1199, 1207-08 (1991); Jackie Gardina, *The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction, and the Bankruptcy Code*, 16 AM. BANKR. INST. L. REV. 37, 58-59 (2008).

39. 28 U.S.C. § 1407(a) (2012).

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

41. 28 U.S.C. § 1407(e); *see also* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1663 (2011) (arguing for the expansion of the right to appeal in MDL proceedings).

42. *See* 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 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.").

43. *See infra* Part III.

44. *See, e.g.*, Howard v. Sulzer Orthopedics, Inc., No. 09-3406, 2010 WL 2545586, at *5

interest. That is, the question should be whether MDL is acceptable because it is consistent with the Fifth Amendment Due Process Clause, because the national interest in efficient dispute resolution justifies any practical inconveniences to the parties in most MDL cases.[45] 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 imposes 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 that MDLs may create are not swept under the rug.[46]

In Part I of this Article, I briefly lay out the current law of personal jurisdiction in the federal courts under the Due Process Clause of the Fifth Amendment, which remains in flux—particularly after the Court's 2017 decision in *Bristol-Myers*, which explicitly left the question open.[47] Although I argue that federal courts are less constricted than state courts in exercising jurisdiction, the extent of those constraints is a subject of some dispute.[48] 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 individual litigants are provided a fair opportunity to be heard.[49] But those limits are more relaxed than those imposed on the states by the Fourteenth Amendment.[50] 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.[51] Here, I also lay out the theoretical basis for adjudicatory jurisdiction that can support MDL.

In Part II, I turn to the MDL statute. There, I examine the origins of the MDL statute, develop the unsatisfying jurisprudence in this

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(6th Cir. June 16, 2010).

45. *See infra* Part III.

46. *See infra* Part III.

47. *See* Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1777, 1783-84 (2017) ("[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.").

48. *See infra* Part I.B.

49. *See infra* Part I.B.

50. *See infra* Part I.B.

51. *See infra* Part I.B.

area by the JPML and the federal courts, and discuss how MDL judges are chosen. As a matter of currently unquestioned doctrine, it is clear: personal jurisdiction just does not 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.[52] The problem, however, is that the reasons why we restrict personal jurisdiction do not disappear because an MDL has been created; they are just ignored. I argue that we cannot sweep aside these problems so easily. The explanations given for why MDL courts have unlimited national jurisdiction are unsatisfying. Closer inquiry is required, both of why personal jurisdiction has been completely ignored, and, if one stops ignoring it, whether and when MDL passes constitutional muster.

That personal jurisdiction gets short shrift in MDL comes as little surprise. Rather, it is an example of how MDL's structure facilitates aggregate litigation by formally adhering to traditional norms of individual autonomy and decentralized trials.[53] As David Shapiro once wrote, sometimes "light from one corner can help to illuminate the whole room."[54] So it is with respect to personal jurisdiction in MDL—the possibility of potential return for local trial makes possible the aggregation of thousands of cases in a single forum that might otherwise be impossible.[55] In that sense, understanding how personal jurisdiction problems are swept aside reveals a great deal about how MDL works generally. One goal of this Article is to explain jurisdiction in MDL without relying on the crutch of limited transfer, but to instead take MDL for what it is, an aggressive aggregation device, and ask whether the jurisdiction exercised is justifiable.

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52. *See infra* Part II.A.

53. *See* Bradt, *supra* note 7, at 846-47; *see also* Martin H. Redish & Julie M. 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) (explaining that MDL litigation's procedure threatens passive claimants' constitutional interests).

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

55. *Cf.* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987) (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE (1985)) (describing complex litigation procedures as "dubious packaging strategies that are supposedly provisional but that in substantive terms may be irremediable").

And indeed, in most cases I think the jurisdiction exercised by MDL courts is constitutional—to conclude otherwise would be a surprising development, to say the least, in light of MDL's acceptance and growing importance in our litigation scheme.[56] 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 court 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.[57] 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.[58] 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 a rethinking of the bases for personal jurisdiction under the MDL statute. To do so requires not only a common sense 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. 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

56. *See supra* note 7 and accompanying text.

57. *See infra* Part II.A.

58. *See, e.g.*, Armstrong v. Manzo, 380 U.S. 545, 552 (1965) ("A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914))).

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 ever more 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.[59] According to the *Restatement (Second) of 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."[60] It is intuitive that there must be some limitations on a court's adjudicatory jurisdiction—every court in the world cannot decide every case, and even if they did, other courts might not recognize or enforce the

59. *See* Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 413 (1981) (noting the tendency for jurisdiction pieces to "'reinvent' the wheel by persistently reciting the history of the subject under study" (quoting Lawrence R. Velvel, *Suggested Improvements in Education*, 29 J. LEGAL EDUC. 194, 201 (1978))).

60. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (AM. LAW INST. 1971).

judgments.[61] There must be some 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 some limitations to their adjudicatory jurisdiction, both statutory and constitutional, but the source of those limitations and the interests they serve are a subject of disagreement and confusion.[62] The main problem, as others have noted, is that the Supreme Court does not seem to have a clear consensus on what its personal jurisdiction doctrine is trying to do, or how it is supposed to operate.[63] 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.[64]

Despite the messiness, it is fair to say that two main theoretical justifications for limitations on jurisdiction persist, in "uneasy coexistence": power and reasonableness.[65] The power theory holds

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61. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966).

62. *See* ARTHUR T. VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY 79 (2007) ("American thinking and practice respecting adjudicatory authority ... [is] convoluted, and not lacking in ambiguity."); Stephen B. Burbank, *All the World His Stage*, 52 AM. J. COMP. L. 741, 743 (2004) (reviewing ARTHUR TAYLOR VON MEHREN, THEORY AND PRACTICE OF ADJUDICATING AUTHORITY IN PRIVATE INTERNATIONAL LAW (2003)) (explaining that American jurisdictional law is "inconsistent if not incoherent"); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 618 (2006) ("[T]he law of personal jurisdiction has blossomed into an incoherent and precarious doctrine.").

63. *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 3 (2010) ("Even basic foundational questions [concerning personal jurisdiction jurisprudence] are hotly contested despite more than two centuries of doctrinal evolution."); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1304 (2014) (noting "the sad state of personal jurisdiction law").

64. *See* Erbsen, *supra* note 63, at 5 ("[T]he Court has unhelpfully 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 is important except when it isn't." (footnotes omitted)).

65. *See* VON MEHREN, *supra* note 62, at 101 (noting that "*International Shoe* announced a new jurisdictional theory without excluding the older, territorially based, power theory," creating "the uneasy coexistence"). *Compare* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) ("[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."), *with* Burnham v. Superior Court of Cal., 495

that there are limitations on a state's territorial sovereignty that define the boundaries on the exercise of jurisdiction.[66] By contrast, the reasonableness theory holds that each exercise of jurisdiction must be measured according to the facts of the particular case, the interests of the parties, and the interests of the forum state.[67] The power theory tends to lay out ex ante rules that permit and restrict jurisdiction for easy adjudication,[68] while the reasonableness theory elevates the need to tailor the doctrine to do justice in the individual case.[69]

Though its roots are deeper,[70] it is reasonable to begin the historical account of American personal jurisdiction doctrine in 1878 with *Pennoyer v. Neff*, the poster child for the "power theory" of jurisdiction.[71] Drawing on international law, Justice Stephen Field presented a doctrine of jurisdiction based on the territorial sovereignty of a state within its borders.[72] Because a state is all-powerful within its borders and powerless without, its courts could exercise in personam jurisdiction on people served with process in the state, in rem or quasi in rem jurisdiction over property located within the state's borders, and none without.[73] Jurisdiction, under *Pennoyer*, is

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U.S. 604, 621 (1990) (plurality opinion) ("The logic of *Shaffer*'s holding ... does not compel the conclusion that physically present defendants must be treated identically to absent ones.").

66. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877); VON MEHREN, *supra* note 62, at 86 (explaining that "*Pennoyer v. Neff* and its progeny gave constitutional standing to territorial approaches to the allocation of adjudicatory authority and the power theory of jurisdiction").

67. *See* VON MEHREN, *supra* note 62, at 95 (characterizing this strand of jurisprudence as based on "intuitively held standards of convenience and fairness"); *cf.* Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1173 (2014) ("[T]he 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.").

68. *See* VON MEHREN, *supra* note 62, at 95 (describing how "American courts asserted adjudicatory authority over legal persons on the basis of ... 'consent' or 'presence'").

69. Burbank, *supra* note 62, at 743-44 (describing how American jurisdictional doctrine struggles in balancing "ease of administration and predictability, on the one hand, and doing justice in the individual case ... on the other").

70. *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 175-76 (1851).

71. 95 U.S. 714 (1877). 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 *Reconsidered*, 62 WASH. L. REV. 479 (1987).

72. Perdue, *supra* note 71, at 502 ("The basic premise of the opinion [in *Pennoyer*] is that there are limitations on state power that are simply inherent in the nature of government.").

73. *See Pennoyer*, 95 U.S. at 722 (describing the "two well-established principles of public

therefore a function of territorial power.[74] Famously, Justice Field considered these limitations on state court jurisdiction a matter of constitutional law under the Due Process Clause of the recently ratified Fourteenth Amendment.[75] As a result, for better or worse, the law of personal jurisdiction has developed as constitutional law expounded by the Supreme Court.[76]

Even charitably interpreted, *Pennoyer* 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.[77] Best ventilated is the fact that the power theory is untenable in a world where multistate cases are common. 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.[78] *Pennoyer* itself contains numerous ad hoc

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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 or property without its territory").

74. *See* VON MEHREN, *supra* note 62, at 86; *see also* McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power.").

75. *See Pennoyer*, 95 U.S. at 733 (holding that 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 71, at 502 (stating that Justice 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").

76. *See* Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111, 114 (1999) (noting American jurisdiction law "imposed substantial costs as a result both of the uncertainty of jurisdictional standards tied to changing (but ever fact-dependent) constitutional norms"); John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "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).

77. 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 a monument to American legal thought." Hazard, *supra* note 4, at 271-72. Nevertheless, *Pennoyer* has its defenders. *See generally, e.g.,* Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249 (2017).

78. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356 (1927); *see also* VON MEHREN, *supra* note 62, 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 that it permitted."); Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts—from* Pennoyer *to* Denckla*: A Review*, 25 U. CHI.

exceptions to a state's power running out at the border based on necessity.[79] 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 rule itself to fit new facts.[80]

The second major problem with *Pennoyer* is that it both conflates and does not realistically protect the two central interests of due process: notice and a meaningful opportunity to be heard. In *Pennoyer* itself, Justice Field seemed to assume 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 is 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.[81] As Geoffrey Hazard explained more than fifty years ago, these two protections are distinct—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.[82] Ultimately, then, elegant though the theory was, *Pennoyer* did not 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 nonresidents 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 Co. v.*

L. REV. 569, 573 (1958) (noting that "[t]he rapid development of transportation and communication ... demanded a revision" of *Pennoyer*).

79. Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 310-11 (1956) (noting that "physical power fails completely as a rationale"); Hazard, *supra* note 4, at 271 (describing the exceptions to the general theory outlined in *Pennoyer* as incoherent).

80. *See* Clermont, *supra* note 59, 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 79, at 309-11 (listing exceptions created by the Court after *Pennoyer* and stating that "[i]n view of these 'exceptions' there seems to be little left of the rule of *Pennoyer v. Neff*").

81. *See* Pennoyer v. Neff, 95 U.S. 714, 726 (1877) (describing how judgments by courts without jurisdiction "would be the constant instruments of fraud and oppression").

82. Hazard, *supra* note 4, at 269 (explaining that the *Pennoyer* system was both incoherent and allowed for unfair judgments); *see also* von Mehren & Trautman, *supra* note 61, at 1134 (noting conflation of issues of power and notice).

Washington[83] in 1945 and *Mullane v. Central Hanover Bank & Trust Co.*[84] 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 into round holes and reformulated the doctrine in *International Shoe*.[85] 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.[86] 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.[87] Although the Court could have decided that the defendant was sufficiently present in Washington under the *Pennoyer*-rooted extant doctrine,[88] 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.[89]

In *International Shoe*, the Court issued its famous pronouncement, still good law today, that

> due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[90]

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83. 326 U.S. 310 (1945).

84. 339 U.S. 306 (1950).

85. *See* VON MEHREN, *supra* note 62, at 95 (describing *International Shoe* as "the decisive step in the emergence in the United States of an alternative theory of jurisdiction instrumental in nature and based on litigational fairness").

86. *Int'l Shoe*, 326 U.S. at 311-13.

87. *See id.* at 313-14.

88. *See id.* at 319-20.

89. *See* Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 806 (1995) ("[T]raditional doctrinal framework easily could have accommodated the facts of *International Shoe*.").

90. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

Chief Justice Harlan Stone's opinion in *International Shoe*, like his contemporaneous opinions in the area of choice of law,[91] 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.[92] *International Shoe* was a watershed.[93] Its "minimum contacts" framework did not entirely do away with the territorial underpinnings of *Pennoyer*,[94] but it did represent a different way of thinking about jurisdiction in terms of reasonableness, based on balancing the interests of the plaintiff, the defendant, and the forum state.[95] In practice, *International Shoe* spawned a significant expansion of state exercises of jurisdiction, as legislated by expansive state long-arm statutes.[96]

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91. *See* Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal., 294 U.S. 532 (1935). For discussions of these cases, see 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"); and Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850-1940*, 62 UCLA L. REV. 1240, 1319-25 (2015).

92. *See Int'l Shoe*, 326 U.S. at 317 ("[T]he demands of due process ... may be met by such contacts of the corporation with the state of the forum as 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." (quoting Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930))).

93. *See, e.g.*, 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, 919 (1995).

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

95. *See id.*; *see also* Clermont, *supra* note 59, at 416 ("With some indulgence, one could read *International Shoe* as reducing the power test to the status of 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 the interests involved."); von Mehren & Trautman, *supra* note 61, 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").

96. *See* Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 210 (2001) ("[T]he greater latitude to assert jurisdiction afforded the states by *International Shoe* and its progeny dramatically enhanced the opportunities for interstate forum shopping." (footnote omitted)). Professor Stephen Burbank has also argued, provocatively, that *International Shoe* may have been

With respect to notice, Justice Robert Jackson struck the critical blow in *Mullane v. Central Hanover Bank & Trust Co*.[97] *Mullane* involved a statutory scheme in which New York allowed pooling of small trusts into one larger trust.[98] 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 three years.[99] 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.[100] 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.[101]

In an opinion remarkable for its candor, Justice Jackson partially rejected the statutory scheme as incompatible with due process.[102] But in so doing, he decoupled the issues of personal jurisdiction and notice.[103] 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.[104] 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.[105] In language that must have been heartening to law students ever since, Justice Jackson swept the problem aside, calling the in personam/in rem

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"animated in part by the desire to *reduce* forum shopping against corporations ... [b]y enabling states to assert activity-based personal jurisdiction without resort to fictions such as corporate presence." *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1478-80 (2008).

97. *See* 339 U.S. 306 (1950).
98. *See id.* at 307-08.
99. *See id.* at 309.
100. *Id.* at 309-10.
101. *See id.* at 306, 311-12.
102. *See id.* at 320.
103. *See id.* at 318-19.
104. *See id.* at 311-12.
105. *See id.*

distinction "elusive and confused generally."[106] 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.[107]

Having bracketed the metaphysical question of power, Justice Jackson turned to whether the notice-by-publication scheme complied with due process.[108] To do so, the Court would need to balance the interest of individuals in being notified, their having the opportunity to participate, and the state's interest in facilitating trusts without "impossible or impractical obstacles in the way."[109] 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 was sufficient.[110]

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.[111] The question in both cases, though they address different problems, is not one of territorial power, but one of reason-

106. *Id.* at 312 ("But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon 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.").

107. *Id.* at 313.

108. *Id.*

109. *Id.* at 313-14.

110. *Id.* at 317-20.

111. *See* Redish & Beste, *supra* note 93, at 936 (describing the analysis in *Mullane* as "hard-nosed, commonsense pragmatism" that "focused on the practical implications of refusing to find jurisdiction in the New York courts"); Resnik, *supra* note 5, at 1779-80 (describing how *Mullane* "enshrined" the state's ability to bind absentees to a lawsuit in service of "vital state interests"); *see also* Clermont, *supra* note 59, at 417 (describing *Mullane* as rendering *Pennoyer* "obsolete and superfluous").

ableness in light of the state's legitimate interest in achieving its goals and the parties' interest in a meaningful ability to participate in the process and protect their interests.[112]

Leaving aside the jurisprudence of effective notice,[113] the Supreme Court has sporadically 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 William Brennan's majority opinion in *Burger King Corp. v. Rudzewicz* in 1985 is illustrative.[114] 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.[115] Nevertheless, Justice Brennan explained, "Once it has been decided that a defendant purposefully established minimum contacts within 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 and substantial justice.'"[116] Then, 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 most efficient resolution of controversies," and the "shared interest of the several [s]tates in furthering fundamental substantive social policies."[117]

Although the emphasis in *Burger King* seemed far more on the reasonableness side of the ledger—and indeed eight Justices unanimously rejected an assertion of jurisdiction on reasonableness grounds shortly thereafter in *Asahi Metal Industry Co. v. Superior*

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112. *See supra* notes 93-96, 107-09 and accompanying text. Judith Resnik has noted in a pair of recent articles how *Mullane* inaugurated the doctrine of "jurisdiction by necessity," which would later be deployed by the drafters of the amendments to Rule 23 to justify broader use of class actions. *See* Resnik, *supra* note 7, at 1022; Resnik, *supra* note 5, at 1791-92.

113. *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 231, 238-39 (2006).

114. 471 U.S. 462 (1985).

115. *See id.* at 474 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

116. *Id.* at 476 (quoting *Int'l Shoe*, 326 U.S. at 320).

117. *Id.* at 477 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

Court of California[118]—at least four Justices on the Court, led by Justice Antonin Scalia, asserted that territorial power was a sufficient basis upon which to uphold the exercise of "tag jurisdiction" in *Burnham v. Superior Court of California*.[119] So the power theory continues to lurk in the background, at least for some Justices.[120]

Also lurking in the background has been the matter of consent, which even in *Pennoyer* was a sufficient basis for jurisdiction.[121] Courts have long held that a plaintiff is subject to the personal jurisdiction of the court in which it has chosen to file,[122] and defendants are subject to jurisdiction through their consent, or waiver of the right to object.[123] 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.[124]

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

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118. *See* 480 U.S. 102, 113-16 (1987).

119. *See* 495 U.S. 604, 618-19 (1990) (plurality opinion).

120. *See* 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." (footnote omitted)).

121. *See* Pennoyer v. Neff, 95 U.S. 714, 726 (1877) (noting that a state could exercise jurisdiction over a defendant through his "voluntary appearance").

122. *See, e.g.*, Adam v. Saenger, 303 U.S. 59, 67-68 (1938) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 34 (AM. LAW. INST. 1971) ("A state has power to exercise judicial jurisdiction over an individual who brings an action in the state.").

123. *See* GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE: CASES AND MATERIALS 213 (11th ed. 2015).

124. *See* Ins. Corp. of Ire. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) ("The restriction on state sovereign power ... must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.... [I]f 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.").

six personal jurisdiction cases since.[125] 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, Ltd. v. Nicastro*[126]—we can draw some conclusions from the Court's jurisprudence in the area.

First, in all six cases the Court reversed lower court assertions of jurisdiction,[127] three times unanimously,[128] 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 and are indeed both occasionally noted.[129] Third, the Court seemed particularly concerned about plaintiff's forum shopping. Underlying the Court's opinions in five of the six cases (*Nicastro* aside) is the prevailing sense that plaintiffs are trying to get away with something by

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125. Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773 (2017); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017); Walden v. Fiore, 134 S. Ct. 1115 (2014); Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (plurality opinion). The Court similarly stayed out of the personal jurisdiction arena between 1958's *Hanson v. Denckla* and 1977's *Shaffer v. Heitner*.

126. *See* 564 U.S. at 877 *id.* at 887 (Bryer, J., concurring in the judgment); *id.* at 893 (Ginsburg, J., dissenting); *see also* John T. Parry, *Rethinking Personal Jurisdiction After* Bauman *and* Walden, 19 LEWIS & CLARK L. REV. 607, 609 (2015) (noting that "by destabilizing personal jurisdiction doctrine, the *Nicastro* opinions made things worse"); Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 729 (2012) ("Personal jurisdiction also seems to inspire foolish remarks and poor opinions, and *Nicastro* may set a new low in that regard.").

127. *Bristol-Myers*, 137 S. Ct. at 1777; *BNSF Ry.*, 137 S. Ct. at 1554; *Walden*, 134 S. Ct. at 1121; *Daimler*, 134 S. Ct. at 763; *Goodyear*, 564 U.S. at 931; *Nicastro*, 564 U.S. at 887 (plurality opinion).

128. *Walden*, 134 S. Ct. at 1118; *Daimler*, 134 S. Ct. at 750; *Goodyear*, 564 U.S. at 917.

129. Justice Anthony Kennedy's opinion in *Nicastro* presented an odd mélange of sovereignty and reasonableness rationales, *see Nicastro*, 564 U.S. at 880-87, a combination reiterated by Justice Samuel Alito in *Bristol-Myers*, *see Bristol-Myers*, 137 S. Ct. at 1780. Moreover, in *Nicastro*, Justice Kennedy presents one of the odd puzzles regarding jurisdiction in MDL. In his plurality opinion highlighting the "unique genius of our Constitution," Justice Kennedy suggests that "Congress could authorize the exercise jurisdiction in appropriate courts" throughout the country over products liability actions. *See Nicastro*, 564 U.S. at 884-85. But so long as Congress has not done so, jurisdiction must be determined "sovereign-by-sovereign," or, for state law claims, state-by-state. *Id.* at 884. MDL presents a challenge to Justice Kennedy's reasoning: if I am correct that MDL effectively authorizes a kind of nationwide jurisdiction over state law claims like the one raised by the plaintiff in *Nicastro*, then Justice Kennedy's analysis is at least incomplete. *See id.* at 884-86.

seeking a friendly forum with few connections to the facts of the cases.[130]

In both the Court's general and specific jurisdiction cases, the Court has been restrictive. With respect to general jurisdiction, it is fair to say that the Court has clamped down. In *Goodyear Dunlop Tires Operations v. Brown*, and then *Daimler AG v. Bauman*, 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 state of incorporation and principal place of business.[131] Although the Court has been a bit gauzy about the reasons for restricting general jurisdiction so rigidly, in so doing Justice Ruth Bader Ginsburg cited "*Pennoyer*'s sway" and the "limits traditionally recognized."[132] Whether she meant that general jurisdiction is moored to territorial borders or simply that general jurisdiction must be narrowly limited is left unsaid. With respect to specific jurisdiction, the Court has also been restrictive. In striking down three 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.[133]

The overall result has been to clamp down on personal jurisdiction with little in the way of theoretical development—the six 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. Indeed, in all three specific jurisdiction cases, the Court does not reach the *Burger King* reasonableness factors.[134] Instead, the Court rejects jurisdiction at

130. *See Bristol-Myers*, 137 S. Ct. at 1779-80; *BNSF Ry.*, 137 S. Ct. at 1558-59; *Walden*, 134 S. Ct. at 1124-26; *Daimler*, 134 S. Ct. at 758-62; *Goodyear*, 564 U.S. at 922-25.

131. *See Daimler*, 134 S. Ct. at 757-58 ("[W]e 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, 678 (2015).

132. *Daimler*, 134 S. Ct. at 757-58 ("Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized.").

133. *See, e.g.*, *Walden*, 134 S. Ct. at 1121 ("For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State.").

134. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

the minimum contacts stage of the analysis,[135] suggesting that the Court is trending toward developing purportedly clear rules rather than engaging in the sort of balancing suggested by *Burger King* and *Asahi*.

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.[136] After *International Shoe*, states began to expand their assertions of jurisdiction,[137] in some cases to the outer limits of constitutional permission. The Fourteenth Amendment, however, does not limit the jurisdiction of the *federal* courts.[138] Instead, the Due Process Clause of the *Fifth* Amendment limits federal courts' assertions of jurisdiction.[139] 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 under Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure.[140] 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 that court sits and its jurisprudence under the Fourteenth Amendment.[141]

These limitations are, however, unnecessarily self-abnegating. There is nothing inevitable about federal courts' jurisdiction having

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135. *See Bristol-Myers*, 137 S. Ct. at 1781-82; *Walden*, 134 S. Ct. at 1124-26; J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 886-87 (2011) (plurality opinion).

136. Fullerton, *supra* note 38, at 3.

137. Burbank, *supra* note 96, at 210-11.

138. Casad, *supra* note 42, at 1599.

139. *Id.*

140. *See* FED. R. CIV. P. 4(k)(1)(A) ("In general[, s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant ... who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."); 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).

141. Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014) ("[A] federal district court's authority to assert personal jurisdiction in most cases is linked to service of process" in a state); Daimler AG v. Bauman, 134 S. Ct. 746, 753 (2014) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.").

anything to do with state borders.[142] For instance, although federal districts have always been organized according to state boundaries, they need not be under Article III, which gives Congress leeway to design a system of inferior courts as it sees fit.[143] 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.[144] Congress typically accomplishes this by providing for "nationwide service of process" under a particular substantive statute.[145]

The Supreme Court has repeatedly affirmed Congress's power to provide for nationwide personal jurisdiction, but always in dictum.[146] Indeed, in 2017, the Court in *Bristol-Myers* again explicitly "le[ft] open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court," as it does on state courts.[147] The Court has never assessed whether the Fifth Amendment provides any limitations on district courts if Congress has purported to give them nationwide jurisdiction.[148] Whether one thinks that there are any such limitations

142. *See* Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 13 (1988) ("Congress could draw its judicial districts anyway it wished, and therefore, federal court jurisdiction [i]s not limited by state boundaries."); Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 CARDOZO L. REV. 2897, 2917-18 (2009).

143. *See* James E. Pfander, Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1519 (2001); Sachs, *supra* note 63, at 1315-19.

144. *See* Sachs, *supra* note 63, at 1315-16.

145. *See* CASAD & HINES, *supra* note 37, § 6.2 (collecting statutes).

146. *See* Fullerton, *supra* note 38, at 29-30 (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 in which the dispositive issue was one of statutory construction); *see also* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. R.R. Labor Bd., 268 U.S. 619, 622 (1925).

147. Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1784 (2017).

148. *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113 n.* (1987) (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 in which the federal court sits"). The Court also dodged the question in *Stafford v. Briggs*, 444 U.S. 527, 529-30 (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, 882-83 (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 purposes for cases pending in federal courts").

depends on one's view of whether power or reasonableness provides the basis for jurisdiction. Under a traditional, power-based view, a federal court may exercise personal jurisdiction throughout the nation because the sovereign power of the United States within its borders is limitless.[149] Just as states' power is limited by their borders, the United States' power is limited by its far more expansive borders. Consequently, on this view, there is nothing wrong with a federal court exercising unlimited jurisdiction within the territorial confines of the United States.[150]

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.[151] 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.[152] A federal district court's assertion of jurisdiction may turn out to be as

149. *See* 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 federal process in federal question cases."); Clermont, *supra* note 59, at 427 (describing the "traditional axiom" allowing nationwide jurisdiction in federal courts).

150. *See* CASAD & HINES, *supra* note 37, § 6.2 (explaining the view that federal courts may exercise nationwide jurisdiction because "[f]ederal sovereignty extends throughout the entire territory of the United States"); John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 584 (1984) ("[T]he Court has recognized no constitutional constraints on the federal courts' jurisdiction over United States citizens.").

151. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985); 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1068.1 (4th ed. 2015) ("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."); Alexander, *supra* note 149, at 439 ("Surely some version of minimum contacts 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."); *see also* Fullerton, *supra* note 38, at 22 (explaining that, post-*International Shoe*, the sovereignty-based analysis is inadequate). The Rules Committee has also nodded in this direction. *See* FED. R. CIV. P. 4(k) advisory committee's note to 1993 amendment ("There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of 'fair play and substantial justice' required by the due process clause, even though the defendant had significant affiliating contacts with the United States.").

152. *See* 4 WRIGHT ET AL., *supra* note 151, § 1068.1.

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.[153]

Although the Supreme Court has indicated on occasion that it subscribes to a more power-centric theory of federal court jurisdiction, many of those assertions were pre-*International Shoe*, which elevated reasonableness as a constitutional touchstone.[154] 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.[155] Courts have generally concluded that assertions of federal court jurisdiction, when authorized by a federal statute, were 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.[156] 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.[157] As a general matter, the consensus approach

153. *See* Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 904 (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.").

154. Allan 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 permit personal jurisdiction 'based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits.'" (quoting Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987))).

155. *See* Erbsen, *supra* note 63, at 51-52.

156. *See, e.g.*, Wallace v. Mathias, 864 F. Supp. 2d 826, 833 (D. Neb. 2012) ("[D]ue 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.").

157. *Compare, e.g.*, Trs. of the Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs., Inc., 791 F.3d 436, 444 (4th Cir. 2015) (requiring the defendant to show that "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" (alteration in original) (quoting Denny's, Inc. v. Cake, 364 F.3d 521, 524 n.2 (4th Cir. 2004))), *with* Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1211 & n.4 (10th Cir. 2000) (requiring the defendant to show grave inconvenience as part of the national-contacts analysis).

seems to me 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 of the inconveniences associated with its geographic location.[158] Federal court jurisdiction by definition, allows for a more flexible analysis than state court jurisdiction because the relevant contacts are not limited by the borders of states, but the analysis is not boundless.[159]

Ultimately, however, the Supreme Court has never defined the limitations on federal court jurisdiction imposed by the Fifth Amendment.[160] This is in part due to the fact that jurisdiction over most claims in federal courts is determined by state law under Rule 4.[161] But it is also because there are numerous statutory mechanisms in the federal system to guard against potentially unreasonable assertions of jurisdiction.[162] There are of course the general venue statutes, which apply in most cases.[163] And there are specific venue statutes that limit the available forums of claims for which Congress has purportedly provided nationwide personal jurisdiction.[164] The venue statutes thus provide for ex ante limitations

158. *See Trs. Of the Plumbers & Pipefitters Nat'l Pension Fund*, 791 F.3d at 444; *Peay*, 205 F.3d at 1211 & n.4.

159. *See* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE. L.J. 1, 30-31 (1986) ("[E]ven 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.").

160. *See supra* note 147 and accompanying text.

161. *See supra* note 140 and accompanying text. It has long been settled, however, that 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, 222-24 (2d Cir. 1963) (en banc) (Friendly, J.).

162. *See* Sharpe, *supra* note 142, at 2917 (explaining how venue restrictions mitigate the harshness of nationwide personal jurisdiction); Erichson, *supra* note 38, at 1149 (describing such mechanisms as "filters").

163. *See* 28 U.S.C. § 1391 (2012).

164. *See* Fullerton, *supra* note 38, at 62 (noting that when Congress has authorized nationwide jurisdiction, "Congress on most occasions has attempted to protect defendants from trial at fundamentally unfair locations by simultaneously enacting restrictive venue provisions"); *see also* Clayton Antitrust Act of 1914 § 12, 15 U.S.C. § 22 (2012) ("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

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.[165] As a result, even when Congress has provided for nationwide personal jurisdiction without a limiting venue statute, as with interpleader, the transfer statute is waiting in the wings to ensure that the forum is not so geographically inconvenient that it raises constitutional questions.[166] The combined effect of these statutory 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.[167] In other words, to the extent that an assignment of nationwide personal jurisdiction by Congress could produce troubling results in particular cases, 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.[168] Ultimately, the question remains unresolved: What if a federal statute provided for nationwide personal jurisdiction with no applicable statutory limitations on venue?[169] As a purely descriptive

found or transacts business."); Racketeer Influenced and Corrupt Organizations Act of 1970 § 901, 18 U.S.C. § 1965(d) (2012) ("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."); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 113, 42 U.S.C. § 9613(b) (2012) ("Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office.").

165. *See* 28 U.S.C. § 1404(a); *see also* Purcell, *supra* note 40, at 482 (arguing that Congress's purpose in enacting the transfer statute was to "limit[ ] 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.").

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

167. Burbank, *supra* note 96, at 205.

168. *See* Erbsen, *supra* note 154, at 779; Markowitz & Nash, *supra* note 67, at 1173.

169. Casad, *supra* note 42, 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

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."[170] 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.[171]

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 congressional assertions of nationwide jurisdiction.[172]

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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.").

170. Clermont, *supra* note 59, at 438.

171. *Id.*

172. As a general matter, I agree with Professor Martin Redish, who has advocated a "revised structure" for assessing reasonableness, 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 a plaintiff 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, 1115 (1981).

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

So where are we in 2018 when it comes to the law of personal jurisdiction? Much remains in flux. It appears clear that the Court is engaged in a project of policing plaintiff forum shopping through the due process restrictions on state court jurisdiction, whether those restrictions apply in state or federal court, via Rule 4.[173] As the Court reminded us in 2017, it is serious about the "essentially at home" test for general jurisdiction, and it is equally serious about preventing expansive notions of specific jurisdiction to permit claims without a factual connection to the forum state.[174] The overall result is a more rule-based vision of jurisdiction that avoids balancing the particular circumstances of the parties and the interests of the forum state.

Despite the clarity of this general trend, what remains unclear is the theoretical basis for the Court's decisions. Despite its many opportunities in the last six years, the Court has not developed the basis for its restrictive approach.[175] Perhaps this is because, as *Nicastro* indicated, there is simply not sufficient agreement among the Justices on such fundamental questions.[176] What is clear is that the Court is perfectly willing to continue to muddle through. There is no better example than 2017's *Bristol-Myers* opinion.[177] Although the tally of votes, eight-to-one in favor of reversing,[178] suggested consensus on the result, the opinion clarifies almost nothing about the underpinnings of jurisdictional law. In rejecting California's assertion of jurisdiction over a nationwide set of claims arising from the defendant's allegedly defective drug, the Court cited both concerns about burdens on the defendant and interstate federalism.[179]

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173. *See supra* Part I.A.
174. *See supra* Part I.A.
175. *See supra* Part I.A.
176. *See supra* note 126 and accompanying text.
177. Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773 (2017).
178. *See id.* at 1777.
179. *See id.* at 1780-81.

Yet nowhere in the opinion does the Court actually analyze how these concerns apply to the facts of the case. Rather, as in the other post-2011 cases, the reader is left wondering exactly what personal jurisdiction doctrine amounts to, other than an opportunity to police on an ad hoc basis what the Court considers to be inappropriate forum shopping.

As a result, despite the flurry of recent activity, we remain in the dark on the critical questions that have bedeviled jurisdictional doctrine since the beginning. Do limitations on a state's jurisdiction flow from concerns about territorial sovereignty, interstate federalism, fundamental fairness, or some combination of all three? And what of federal court jurisdiction? Justice Samuel Alito proclaimed that the limitations on federal court jurisdiction remained open after *Bristol-Myers*.[180]

II. PERSONAL JURISDICTION IN MULTIDISTRICT LITIGATION

A. The Roots of the Multidistrict Litigation Statute

MDL intentionally skirts limitations on personal jurisdiction, but to understand how it does that, 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.[181] It was invented by an academic, Dean Phil C. Neal of the University of Chicago, and United States District Judge William H. Becker of the Western District of Missouri.[182] Neal and Judge 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.[183] The electrical equipment scandal spawned over 1900 lawsuits around the country—a

180. *See id.* at 1783-84.

181. *See* Bradt, *supra* note 7, at 837-38.

182. *See id.* at 854-63.

183. *See* Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 623 (1964); Press Release, Admin. Office of the U.S. Courts (Feb. 7, 1962) (on file with author) (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 judicial districts but with common witnesses and exhibits").

tidal wave of litigation that threatened to overwhelm the federal courts.[184] 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.[185] Because the Coordinating Committee had no real power to enter enforceable orders, the success of its actions relied on the voluntary cooperation of the judges and lawyers involved in the cases in the courts scattered around the country.[186] Although defendants felt railroaded to settlement by the relentless pace of discovery,[187] 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.[188] By 1966, the electrical equipment cases were over.[189]

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184. *See* 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 Annual Judicial Conference, *The Impact of the Electrical Anti-Trust Cases upon Federal Civil Procedure*, 39 F.R.D. 375, 497 (1965) (Chief Judge Thomas Clary of the Eastern District of Pennsylvania noting that "[t]here were actually 25,632 claims ... involved in these 1912 cases").

185. *See generally* Bradt, *supra* note 7, at 854-63; Neal & Goldberg, *supra* note 183, at 622-26.

186. Phil C. Neal, *Multi-District Coordination—The Antecedents of § 1407*, 13 ANTITRUST BULL. 99, 101 (1968) ("The Committee was of course operating without statutory or other formal authority. The success of its effort depended entirely upon the willingness of all the judges responsible for the cases to follow the lead of the Committee.").

187. *See* Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1733 (2017) (describing defendants' displeasure, including a memorandum by Cravath, Swaine & Moore, which represented defendant Westinghouse, to the Director of the Administrative Office of the U.S. Courts, complaining that the "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-Introduction*, *in* N.Y. STATE BAR ASS'N, 1966 ANTITRUST LAW SYMPOSIUM 46, 51 ("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.").

188. *See* Bradt, *supra* note 7, at 859.

189. *See* MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION 5-6 (1969) ("If it had not been for the monumental effort of the nine judges on [the Coordinating Committee] ... the district court calendars throughout the country could well have broken down." (quoting Chief

The judges on the Coordinating Committee—particularly Judge Becker and Chief Judge Alfred Murrah of the Tenth Circuit—did not believe that the electrical equipment cases would be a one-off.[190] 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.[191] 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.[192] 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, Judge Becker and Neal (the Coordinating Committee's Reporter) began to develop a permanent statutory solution.[193]

The core of the drafters' mission was two-fold: to reconceive 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.[194] The drafters believed that the traditional decentralization of the federal district courts and the notion of the passive judge allowing litigants to dictate the

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Justice Earl Warren, Address to the Annual Meeting of the American Law Institute (May 16, 1967))); Judith Resnik, *From "Cases" to "Litigation*," LAW & CONTEMP. PROBS., Summer 1991, at 5, 31-32 ("Much legal commentary describes the work of the Committee as successful.").

190. Bradt, *supra* note 187, at 1724.

191. *To Provide for the Temporary Transfer to a Single District for Coordinated or Consolidated Pretrial Proceedings of Civil Actions Pending in Different Districts Which Involve One or More Common Questions of Fact, and for Other Purposes: Hearings on H.R. 8276 Before the Fifth Subcomm. of the H. Comm. on the Judiciary*, 89th Cong. 26-27 (1966) (statement of C.J. William H. Becker, Western District of Missouri) ("We feel that 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 that some new tools are needed by the judges in order to process the litigation.").

192. *See* Bradt, *supra* note 7, at 857.

193. *See* Bradt, *supra* note 187, at 1727, 1729 (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").

194. *See* Bradt, *supra* note 7, at 839.

pace of litigation were outworn concepts ill-equipped for the future of mass tort litigation.[195]

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.[196] 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.[197] The more modest measure the drafters settled on was "limited transfer" for pretrial proceedings with remand to the transferor court for trial.[198] 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.[199] 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.[200]

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.[201] Under the proposed scheme, the district judge would be granted significant discretion to consolidate and control discovery.[202] Without such strong control, Judge

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195. *See id.* (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 William Howard 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.* at 849 (quoting Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1617 (2006)); *see also* JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 199-212 (2012) (summarizing Chief Justice Taft's efforts facilitating judicial reforms).

196. Bradt, *supra* note 187, at 1724-25.

197. Bradt, *supra* note 7, at 871, 874.

198. *Id.* at 839.

199. *See id.* at 878.

200. *Id.*

201. *See A Proposal to Provide Pretrial Consolidation of Multidistrict Litigation: Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 89th Cong. 13 (1966) [hereinafter *Hearings on S. 3815*] (statement of Phil C. Neal, Dean, University of Chicago Law School); Bradt, *supra* note 7, at 883.

202. *See Hearings on S. 3815*, *supra* note 201, at 48 (statement of Ronald W. Olsen,

Becker worried that "litigants would run cases," creating backlog and delays.[203] 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.[204] Finally, the judges responsible for the MDL statute considered it crucial that, unlike under the 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.[205]

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 the lack of personal jurisdiction over the defendant or a violation of the venue statutes.[206] 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.[207] 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.[208] 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

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Esquire).

203. *See* Bradt, *supra* note 7, at 878.

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

205. *See* Bradt, *supra* note 187, at 1727-31 (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).

206. *See id.* at 1724-25.

207. *See* Hoffman v. Blaski, 363 U.S. 335, 342-44 (1960) (holding that the language, "might have been brought," in 28 U.S.C. § 1404(a) refers to the plaintiff's right, independent of the defendant's wishes, to sue in a particular district).

208. *See* Bradt, *supra* note 187, at 1733-34 (describing the transfer of all cases involving defendant I-T-E Circuit Breaker to a federal court in Chicago). *See generally* 28 U.S.C. § 1404(a) (2012).

trying all of the cases.[209] The solution was transfer for pretrial proceedings in a single district with eventual remand for trial.[210]

Substantively, there was no discussion among the drafters—or the Congress—about 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.[211] There was no substantive debate over whether the proposal presented constitutional problems—rather, the drafters 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.[212] 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 they 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 who attended the hearings on the bill, which finally passed in 1968.[213]

209. *See Hearings on S. 3815*, *supra* note 201, at 13 (statement of Phil C. Neal, Dean, University of Chicago Law School).

210. *See* Bradt, *supra* note 7, at 871.

211. *See id.* at 870-72 (describing the drafters' concerns that their proposal was beyond the rulemaking powers granted under the Rules Enabling Act).

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

213. *See* Bradt, *supra* note 7, at 891-92 (describing the dynamic of the Senate hearings and noting that Tydings was the only Senator in attendance); *id.* at 906 (noting the passage of the bill).

B. How Multidistrict Litigation 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.[214] 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."[215] The only limitation on the power to transfer is that it be "for the convenience of parties and witnesses and ... promote the just and efficient conduct of such actions."[216] After the MDL has been established, later-filed cases involving the same subject matter are rather seamlessly transferred to the MDL as tagalong cases.[217]

Once pretrial proceedings conclude, the cases must be remanded to the districts from which they were transferred.[218] The statute provides that the decision to transfer—and the determination of the transferee judge—be made by the Judicial Panel on Multidistrict Litigation, a group of seven judges appointed by the Chief Justice of the United States.[219] Decisions by the Panel to transfer may be reviewed only by extraordinary writ; decisions to deny transfer may not be reviewed at all.[220] In my research, I have not turned up a single instance of a reversal of a decision by the JPML to create an MDL.[221]

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214. *See, e.g.*, Burch, *supra* note 11, at 78 (describing the complexity of modern MDL practice); Myriam Gilles, Comment, *Tribal Rituals of the MDL: A Comment on Williams, Lee, and Borden, Repeat Players in Multidistrict Litigation*, 5 J. TORT L. 173, 176-77 (2012).

215. 28 U.S.C. § 1407(a) (2012).

216. *Id.*

217. *See* Bradt, *supra* note 91, at 787.

218. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 34-35 (1998) (discussing mandatory remand at the close of pretrial proceedings).

219. 28 U.S.C. § 1407(b), (d). For further background on the Panel, see generally John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008).

220. 28 U.S.C. § 1407(e).

221. 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, 532-33, 532 n.10 (4th Cir. 1996); *see also* 2 LAURA E. ELLSWORTH ET AL., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 14.26 (4th ed. 2016); Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue*, 32 REV. LITIGATION 497, 512 (2013) (noting the rarity of mandamus against the Panel).

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, and sanction parties.[222] 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.[223]

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 percent of the time—resolved in the MDL court, either by dispositive motion or through mass-settlement agreement.[224]

The animating feature of MDL is that it is a procedural hybrid, combining aspects of individual and group litigation.[225] 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 theory, the cases within the MDL retain their individual identities.[226] 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.[227] And each plaintiff ultimately retains the right to decide whether to

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222. *See* 15 WRIGHT ET AL., *supra* note 151, § 3866 ("The transferee judge inherits the entire pretrial jurisdiction that the transferor court could have exercised.").

223. *Lexecon*, 523 U.S. at 28, 40.

224. *See* Burch, *supra* note 5, at 72 ("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." (footnote omitted)).

225. *Cf.* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 215 (characterizing a "quasi-class action," such as an MDL, as a combination of public and private ordering); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1113-14 (2010) (describing "*hybridization*" as a "combination of individual actions with some manner of centralizing mechanism").

226. *See In re* Korean Air Lines Co., 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.").

227. Bradt, *supra* note 91, 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").

accept a proposed settlement agreement or go to trial in the district in which he filed his case.[228]

But in other practical ways, MDL is really an aggressively consolidated 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.[229] 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.[230] The ultimate success of plaintiffs' cases—or the value of their settlements—is mostly determined by the conduct of these lawyers, over whom any individual plaintiff has little control.[231] As practice has developed, settlements in MDL cases now include numerous provisions that incentivize individual plaintiffs to accept them—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.[232]

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 that in a damages class action, there are rule-based requirements to ensure class members are adequately represented and have the right to opt out.[233] In an MDL, those requirements do not exist because plaintiffs are thought to have opted in to litigating by filing their cases and to be adequately represented because they chose their own lawyers.[234] 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

228. *See* Bradt & Rave, *supra* note 12, at 1271.

229. *See* 28 U.S.C. § 1407(a) (2012).

230. *See* Burch, *supra* note 11, at 73 ("[J]udges 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, 525.

231. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131-35 (2010).

232. *See* Rave, *supra* note 26, at 2196 & n.102.

233. *See* FED. R. CIV. P. 23(a)(4), (b)(3).

234. *See* Linda S. Mullenix, *Dubious 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).

patina of modesty as a ruse, little more than an end run around the protections thought to be necessary in class actions, and potentially as a violation of due process.[235]

While it is difficult to paint with a broad brush to determine 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: its split personality as a temporary collection of individual cases and a tightly consolidated unitary proceeding are the key to its success. The formal nature of MDL insulates it from the kinds of due process attacks that doomed the mass tort class action.[236] 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 Multidistrict Litigation

It was not long after the creation of the MDL statute that the JPML had to deal with personal jurisdiction problems and 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 showed 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.[237] Some nineteen cases were transferred by the JPML to the Eastern District of Illinois.[238] Among the cases to be transferred was an

235. *See* Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013); Redish & Karaba, *supra* note 53, at 111 (describing MDL as "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies").

236. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627-28 (1997) (concluding that the class did not satisfy the adequacy of representation requirement).

237. *In re* Library Editions of Children's Books, 299 F. Supp. 1139, 1140 (J.P.M.L. 1969).

238. In fact, the schoolbook cases were among those informally consolidated by the Coord-

action brought in California federal court by the County of Los Angeles against numerous publishers.[239] The County resisted the transfer on the ground that several of the defendants had not yet been served with process.[240] 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.[241] The Panel concluded that it could do so, relying on the Supreme Court's 1962 opinion in *Goldlawr, Inc. v. Heiman*.[242] *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).[243] This statute provides that a district court "in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."[244] The Court concluded that the legislative scheme required transfer under such circumstances to ensure that plaintiffs were not prejudiced by erroneously suing in the wrong district and potentially losing their claims due to the running of the statute of limitations.[245]

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inating Committee on Multidistrict Litigation—without any statutory authority—before the MDL statute was passed. *See* Bradt, *supra* note 7, at 863, 899 (noting that the schoolbook cases were among those informally supervised by the Coordinating Committee, without any express authorization); Neal, *supra* note 186, at 104 (noting that "the Committee had taken under its wing several other sets of cases").

239. *See In re Library Editions*, 299 F. Supp. at 1140.

240. *Id.* at 1140-41.

241. *Id.* at 1141.

242. *Id.* at 1141-42 (citing Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962)).

243. *See* Goldlwar, Inc. v. Heiman, 369 U.S. 463, 465-67 (1962).

244. *Id.* at 465 (quoting 28 U.S.C. § 1406(a)).

245. *See id.* at 466. In his brief, breezy opinion for a five-to-two Court, over a dissent by Justice John Marshall Harlan (always a bad sign), Justice Hugo 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 465-66. Justice 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.* at 467. Justice Harlan was skeptical, correctly noting that the legislative history did not support this conclusion. *See id.* at 468 (Harlan, J., dissenting).

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 a defendant."[246] But the JPML's decision emphatically does *not* stand for the proposition that proper jurisdiction in the transferor court is unnecessary. It in fact goes no further than *Goldlawr*: although the defendants need not have been served before a transfer, the defendant still had to 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 transfer.[247]

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.[248] 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 is no prejudice to the defendant in ordering transfer prior to effective service.[249]

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246. *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 § 1406(a) required a court without jurisdiction to dismiss or transfer the case to a court with jurisdiction, *see Goldlawr*, 369 U.S. at 465-67—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 *Goldlawr* mitigates personal jurisdiction concerns, MDL exacerbates them. To say that *Goldlawr* authorizes MDL is an extraordinary leap.

247. *In re Library Editions*, 299 F. Supp. at 1142.

248. *See id.*

249. *See id.* ("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) (per curiam) ("Motions to quash service or dismiss for lack of jurisdiction are being routinely considered by courts to

In re 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 creates nationwide jurisdiction or overrides limitations on jurisdiction that would otherwise apply. Despite 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 process.[250] And *Goldlawr*, on which *Library Editions* solely relies, does not stand for the proposition that a federal court may transfer a case, even under 28 U.S.C. § 1406, 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 considered the question of whether the MDL transferee court must have personal jurisdiction over the defendants. In both cases, it baldly stated, without explanation or citation, that there were no jurisdiction-based limitations on transfer. 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."[251] Four years later, in 1976, the Panel returned to the question in *In re Sugar Industry Antitrust Litigation*.[252] In *Sugar Industry*, several East Coast based defendants in a case filed in the Eastern District of Pennsylvania objected on personal jurisdiction grounds to transfer

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which multidistrict litigation has previously been transferred and we see no good reason why [the defendant] can not [sic] pursue its remedies following transfer." (footnote omitted)); *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.").

250. *See* Monaghan, *supra* note 34, at 1189 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.").

251. 337 F. Supp. 1337, 1339 (J.P.M.L. 1972) (per curiam).

252. 399 F. Supp. 1397 (J.P.M.L. 1975) (per curiam).

for pretrial proceedings across the country in the Northern District of California, where they allegedly had no contacts.[253] The Panel rejected the defendants' argument, stating only, and again without citation, that "[w]e have considered this constitutional argument and find it without merit."[254]

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.[255] In *FMC*, a defendant, Jenkins Equipment Corp., resisted pretrial transfer to the District of Kansas on the ground that he was not subject to personal jurisdiction there.[256] 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.[257] Again, the JPML rejected the argument, holding that "Jenkins's 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 and venue."[258] The Panel continued: "A transfer under Section 1407 is, in essence, a change of venue for pretrial purposes. Following a 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."[259] *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.[260] The jurisdiction of the MDL court is irrelevant

253. *See id.* at 1398-1400.
254. *Id.* at 1400.
255. 422 F. Supp. 1163 (J.P.M.L. 1976) (per curiam).
256. *Id.* at 1165.
257. *Id.*
258. *Id.*
259. *Id.* (citing *In re* Plumbing Fixture Cases, 298 F. Supp. 483, 495-96 (J.P.M.L. 1968)).
260. *See In re* Pharm. Indus. Average Wholesale Price Litig., 321 F. Supp. 2d 187, 208 (D.

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.[261] Challenges to the jurisdiction of the MDL court are therefore unavailable. In short, the JPML has uniformly held that "[t]he 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."[262]

Federal courts have only added to the confusion. Perhaps the best example is a Second Circuit opinion in the *Agent Orange* litigation.[263] In that case, several members of the plaintiff class contended that the MDL court could not assert personal jurisdiction over them due to a lack of minimum contacts.[264] Citing *Sugar Industry* and *FMC*, the Second Circuit dismissed the argument.[265] But its analysis was at least curious. Ignoring *Library Editions*, the Second Circuit asserted that the MDL statute *did* provide for nationwide personal jurisdiction, stating that "Congress may, 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."[266] In related litigation, when asked to reconsider, the Second Circuit again rejected personal jurisdiction arguments in MDL as "frivolous."[267] The Sixth Circuit

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Mass. 2004) ("Service must be valid under the law of the transferor states."); *In re* Telectronics Pacing Sys., Inc., 953 F. Supp. 909, 914 (S.D. Ohio 1997) ("[T]his Court can only exercise jurisdiction over the Australian Defendants in individual cases where the transferor court could exercise jurisdiction over the Australian Defendants."); Maricopa County v. Am. Petrofina, Inc., 322 F. Supp. 467, 469 (N.D. Cal. 1971) ("[T]he transferee court may by its process obtain jurisdiction over persons to the same extent as could the court of original jurisdiction. I do not intimate that the jurisdiction of the court where the case is originally filed could be expanded by the use of the present multidistrict litigation statute." (citation omitted)).

261. *See* 15 WRIGHT ET AL., *supra* note 151, § 3866. ("A party who is not subject to personal jurisdiction in the original court cannot be validly served in the transferee district.").

262. *In re* Falstaff Brewing Corp. Antitrust Litig., 434 F. Supp. 1225, 1229 (J.P.M.L. 1977) (per curiam) (citing *In re* Kauffman Mut. Fund Actions, 337 F. Supp. 1337, 1339 (J.P.M.L. 1972)).

263. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987).

264. *See id.* at 163.

265. *See id.*

266. *Id.* (citation omitted).

267. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1432 (2d Cir. 1993) (citing *In re "Agent Orange,"* 818 F.2d at 163).

recently echoed this conclusion in an unpublished opinion, calling the argument that there are limitations on the MDL court's jurisdiction "meritless."[268]

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.[269] 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, even though it does effectively expand the jurisdiction of the federal courts far beyond what would be available absent MDL.[270]

The opinions of the Second and Sixth Circuit are imprecise, but they are not implausible. They may actually be more realistic than those by the JPML. But the circuit courts have it wrong because Congress did not authorize nationwide personal jurisdiction in MDL—it only authorized limited transfer *from* a court with personal jurisdiction.[271] One cannot file a case directly in an MDL court if it does not possess a valid basis for jurisdiction; the case has to be filed in a proper forum and then transferred.[272] And, as the Supreme Court has stated on multiple occasions—including as recently as last term—service of a summons is a prerequisite for the exercise of personal jurisdiction.[273] But the Second and Sixth Circuits, despite being wrong, are more honest about what MDL actually does. The

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268. Howard v. Sulzer Orthopedics, Inc., 2010 WL 2545586, at *5 (6th Cir. June 16, 2010) (referring to the MDL statute as providing "nationwide personal jurisdiction" (quoting *In re "Agent Orange,"* 818 F.2d at 163)).

269. *See In re* Library Editions of Children's Books, 299 F. Supp. 1139, 1142 (J.P.M.L. 1969).

270. *See Howard*, 2010 WL 2545586, at *5; *see also In re "Agent Orange,"* 818 F.2d at 163.

271. *See generally* 28 U.S.C. § 1407(a) (2012).

272. *See* Bradt, *supra* note 91, at 763.

273. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1555-56 (2017) ("Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process. Congress uses this terminology because, absent consent, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction." (citations omitted)); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.").

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, albeit an unusual one, does not end the inquiry, though, as the Second Circuit assumed that it did.[274] It merely poses 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 no: it does not consider personal jurisdiction a factor when deciding where to transfer a case.[275]

When assigning cases to a transferee judge, the JPML gives a variety of reasons.[276] 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.[277] 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,[278] while in other cases it does not.[279] And in some cases, the experience of the MDL judge is

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274. *See In re* "*Agent Orange*," 818 F.2d at 163.

275. *In re* Truck Accident Near Alamagordo, N.M. on June 18, 1969, 387 F. Supp. 732, 734 (J.P.M.L. 1975) (per curiam) ("[T]he 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.").

276. For a well-done summary, see Daniel A. Richards, Note, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311 (2009); *see also* Heyburn, *supra* note 219, at 2239-40 (summarizing criteria for transferee district).

277. *See* Heyburn, *supra* note 219, at 2239-40.

278. *See, e.g.*, *In re* Rust-oleum Restore Mktg., Sales Practices & Prods. Liab. Litig., 84 F. Supp. 3d 1383, 1384 (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).

279. *See, e.g.*, *In re* Ashley Madison Customer Data Sec. Breach Litig., 148 F. Supp. 3d 1378, 1380 (J.P.M.L. 2015) (assigning MDL to the Eastern District of Missouri because it "is relatively convenient for defendants, which are located in Toronto, Canada"); *In re* Anthem, Inc., Customer Data Sec. Breach Litig., 109 F. Supp. 3d 1364, 1365 (J.P.M.L. 2015) (noting

a critical factor,[280] while in other cases the JPML embraces the opportunity to send the case to a judge who has never overseen an MDL.[281] In some cases, the fact that the transferee judge is already presiding over some of the component cases is important,[282] while in others the JPML assigns the MDL to a judge who is not hearing any pending cases.[283] In some cases it matters that the parties have agreed to an MDL district,[284] while in others the JPML chooses a judge that no party has proposed.[285] And sometimes the JPML chooses the busiest federal districts, citing their significant resources,[286] while other times it chooses a less busy district whose favorable docket conditions give it the bandwidth to take on an MDL case.[287] You get the picture.

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that although defendant was headquartered in Indiana it had "significant ties" to the MDL forum in California); *In re* Natrol, Inc., Glucosamine/Chondroitin Mktg. & 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 the experience of the MDL judge).

280. *See In re* Coca-Cola Prods. Mktg. & Sales Practices Litig., 37 F. Supp. 3d 1386, 1388 (J.P.M.L. 2014) (noting that the chosen judge was "well-versed in the nuances of multidistrict litigation").

281. *See 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").

282. *See In re* Caterpillar, Inc., C13 & C15 Engine Prods. Liab. Litig., 26 F. Supp. 3d 1394, 1395 (J.P.M.L. 2014) (assigning MDL to the District of New Jersey because "[t]he action pending [there] is also relatively advanced, with discovery already begun").

283. *See In re* Bard IVC Filters Prods. Liab. Litig., 122 F. Supp. 3d 1375, 1377 (J.P.M.L. 2015) (assigning to the District of Arizona, where no action was currently pending).

284. *In re* Lipitor (Atorvastatin Calcium) Mktg., Salespractices & Prods. Liab. Litig. (No. III), 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" the defendant headquartered in New York).

285. *See In re* Subway Footlong Sandwich Mktg. & Sales Practices Litig., 949 F. Supp. 2d 1369, 1370 (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 Implant Prods. Liab. Litig., 896 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) (assigning MDL to the Northern District of Indiana "even though no party suggested it and no plaintiff has yet filed a case there").

286. *See In re* Kind LLC "All Natural" Litig., 118 F. Supp. 3d 1380, 1381 (J.P.M.L. 2015) (citing the "judicial resourses and expertise" of the Southern District of New York); *In re Caterpillar*, 26 F. Supp. 3d at 1395 (the District of New Jersey has "the resources to devote to this litigation").

287. *See In re* Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & 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-3

My point here is not to say that the JPML's decisions are arbitrary, or even that the Panel 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.[288] 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, what matters is not where, but whom—is undoubtedly right. The JPML has a menu of justifications it can use when choosing a transferee district. It is not readily apparent which ones will be dispositive in any given case, and geography is not always a central factor.

In MDLs 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.[289] 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."[290]

Mktg. & Sales Practices Litig., 844 F. Supp. 2d 1380, 1381 (J.P.M.L. 2012) (ordering centralization in the Southern District of Florida that "is presiding over fewer MDL dockets than other proposed districts"); *In re* Groupon, Inc., Mktg. & Sales Practices Litig., 787 F. Supp. 2d 1362, 1364 (J.P.M.L. 2011) (noting the Southern District of California as "a relatively underutilized transferee district ... [with] caseload conditions conducive to steering this litigation on a prudent course"); *In re* DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig., 787 F. Supp. 2d 1358, 1360 (J.P.M.L. 2011) (choosing the Northern District of Texas because of its "favorable docket conditions").

288. *In re* Dial Complete Mktg. & Sales Practices Litig., 804 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011) (transferring to the District Court of New Hampshire on grounds that the judge "is willing and able to accept the assignment"); *see also* 28 U.S.C. § 1407(b) (2012) (requiring "consent of the transferee district court"); Heyburn, *supra* note 219, 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.").

289. *See* Heyburn, *supra* note 219, at 2239 & n.73 ("[L]ocation may be less of an overriding consideration, particularly where the litigation lacks a singular geographical focal point.").

290. *In re* Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & 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. Liab. Litig., 84 F. Supp. 3d 1371, 1372 (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. Liab. Litig., 840 F. Supp. 2d 1356, 1356-57 (J.P.M.L. 2011) (choosing the Western District of Louisiana 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").

While sometimes the JPML chooses a district in the defendant's home state, or near it,[291] this is not always the case. In such cases, the Panel will often choose based on the judge's experience, docket conditions, and accessibility of the court.[292] 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 to the parties ranging from California to Florida."[293] 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

291. *See In re* McCormick & Co., Inc. Pepper Prods. Mktg. & Sales Practices Litig., 148 F. Supp. 3d 1364, 1366 (J.P.M.L. 2015) (choosing District of Columbia as the transferee forum in part because the defendant "is based near Baltimore, Maryland, so relevant documents and witnesses likely will be found there").

292. *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., 65 F. Supp. 3d 1402, 1405 (J.P.M.L. 2014) (noting the Eastern District of Louisiana as a "geographically central forum" and Judge Eldon E. Fallon as "an experienced transferee judge with the willingness and ability to manage this litigation efficiently"); *In re Actos*, 840 F. Supp. 2d at 1357 ("[C]entralization 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.").

293. *In re* Simply Orange Orange Juice Mktg. & Sales Practices Litig., 867 F. Supp. 2d 1344, 1345 (J.P.M.L. 2012).

the middle of the country due to its central location,[294] and other times a metropolitan coastal location due to its accessibility.[295]

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294. Among the districts referred to as geographically central for nationwide tort litigation are: the Northern District of Illinois, *see, e.g.*, *In re* Walgreens Herbal Supplements Mktg. & Sales Practices Litig., 109 F. Supp. 3d 1373, 1376 (J.P.M.L. 2015) ("This district provides a convenient and accessible forum for actions filed throughout the country."); the Northern District of Indiana, *see, e.g.*, *In re* Med. Informatics Eng'g, Inc., Customer Data Sec. Breach Litig., 148 F. Supp. 3d 1381, 1382 (J.P.M.L. 2015) ("[This district] presents a convenient and accessible forum."); the District of Kansas, *see, e.g.*, *In re* Power Morcellator Prods. Liab. Litig., 140 F. Supp. 3d 1351, 1354 (J.P.M.L. 2015) ("This district is centrally located and easily accessible."); the Eastern District of Kentucky, *see, e.g.*, *In re* Darvocet, Darvon & Propoxyphene Prods. Liab. Litig., 780 F. Supp. 2d 1379, 1381 (J.P.M.L. 2011) ("The Covington division is accessible to parties outside Kentucky."); the Eastern District of Louisiana, *see, e.g.*, *In re Xarelto*, 65 F. Supp. 3d at 1405 ("This district provides a geographically central forum."); the District of Minnesota, *see, e.g.*, *In re* Nat'l Hockey League Players' Concussion Injury Litig., 49 F. Supp. 3d 1350, 1350 (J.P.M.L. 2014) ("[T]his district provides a geographically central location."); the Eastern District of Missouri, *see, e.g.*, *In re* Ashley Madison Customer Data Sec. Breach Litig., 148 F. Supp. 3d 1378, 1380 (J.P.M.L. 2015) ("This district is a geographically central and accessible forum for this nationwide litigation."); the Northern District of Ohio, *see, e.g.*, *In re* Anheuser-Busch Beer Labeling Mktg. & Sales Practices Litig., 949 F. Supp. 2d 1371, 1372 (J.P.M.L. 2013) ("This district provides a geographically central forum."); the Southern District of Ohio, *see, e.g.*, *In re* Porsche Cars N.A., Inc., Plastic Coolant Tubes Prods. Liab. Litig., 787 F. Supp. 2d 1349, 1349 (J.P.M.L. 2011) ("[T]his district is geographically centrally located."); the Northern District of Texas, *see, e.g.*, *In re* DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig., 787 F. Supp. 2d 1358, 1360 (J.P.M.L. 2011) ("[This district is] geographically central and accessible."); and the Eastern District of Wisconsin, *see, e.g.*, *In re* Subway Footlong Sandwich Mktg. & Sales Practices Litig., 949 F. Supp. 2d 1369, 1370 (J.P.M.L. 2013) ("This district provides a geographically central forum.").

295. Among the coastal locations chosen have been: the Central District of California, *see, e.g.*, *In re* Nexium (Esomeprazole) Prods. Liab. Litig., 908 F. Supp. 2d 1362, 1364 (J.P.M.L. 2012) ("The Central District of California is ... accessible."); the Southern District of California, *see, e.g.*, *In re* Groupon, Inc., Mktg. & Sales Practices Litig., 787 F. Supp. 2d 1362, 1364 (J.P.M.L. 2011) ("[This district] is located in an accessible metropolitan area."); the District of Columbia, *see, e.g.*, *In re McCormick*, 148 F. Supp. 3d at 1366 ("The ... District of Columbia ... offers a relatively convenient and accessible transferee forum for all parties."); the Southern District of Florida, *see, e.g.*, *In re* Enfamil Lipil Mktg. & Sales Practices Litig., 764 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) ("[T]his district offers a readily accessible transferee forum."); the Northern District of Georgia, *see, e.g.*, *In re* Home Depot, Inc., Customer Data Sec. Breach Litig., 65 F. Supp. 3d 1398, 1400 (J.P.M.L. 2014) ("[This] district is easily accessible for the parties in this litigation, which is nationwide in scope."); the District of Massachusetts, *see, e.g.*, *In re* Zofran (Ondansetron) Prods. Liab. Litig., 138 F. Supp. 3d 1381, 1382 (J.P.M.L. 2015) ("Boston, Massachusetts, provides an easily accessible district for the parties."); the District of New Jersey, *see, e.g.*, *In re* Caterpillar, Inc., C13 & C15 Engine Prods. Liab. Litig., 26 F. Supp. 3d 1394, 1395 (J.P.M.L. 2014) ("This district ... is a convenient and accessible forum."); and the Southern District of New York, *see, e.g.*, *In re* Mirena IUD Prods. Liab. Litig., 938 F. Supp. 2d 1355, 1358 (J.P.M.L. 2013) ("This district ... will be easily accessible for this nationwide litigation.").

What emerges from the transfer orders is that the JPML is acting pragmatically. The normal concerns of the underlying limitations on personal jurisdiction rarely loom large. Plaintiffs are likely to be scattered around the country. And often, particularly in MDLs that confront an entire industry, there are multiple defendants headquartered 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.[296] For instance, during this period, the JPML created MDLs in sixty-six products liability or personal injury cases. Products liability cases represent the largest amount of MDL cases.[297] To wit, the fifty-nine products liability MDLs created during this time period eventually included 157,685 transferred cases. Moreover, because products liability cases are based on state law and in federal court under the diversity statute,[298] by rule, jurisdiction of the district courts is limited to the states in which they sit.[299] That is, a federal district court in, say, Florida, is limited to the jurisdiction of the State of Florida. For

296. Data on file with author.

297. *See* Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, app. at 231 tbl.A1 (2015). I have chosen to look only at 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. *See* FED. R. CIV. P. 4(k). 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 example. *See id.*

298. *See* 28 U.S.C. § 1332(a) (2012).

299. *See* FED. R. CIV. P. 4(k)(1)(A).

these reasons, products liability 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 the power to hear them. Of the products liability MDLs created between 2011 and 2015, only twelve were located in districts in which all of the defendant corporations were domiciled or incorporated. That is, if one takes the strict readings of *Goodyear*, *Daimler*, and *BNSF*, only twelve of these MDLs were located in courts that had general jurisdiction over the defendants.[300] After *Bristol-Myers*, it appears increasingly unlikely that these states would have specific jurisdiction over all of the cases within the MDL as well.[301]

Separate issues arise when one shifts focus to plaintiffs. Most personal jurisdiction cases focus on protecting defendants.[302] The practical reason is obvious: plaintiffs choose the forum in the first instance. As a result, it is typically defendants who object, either through a motion to dismiss or a motion to transfer.[303] When plaintiffs do object to personal 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.[304]

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300. Of the 157,685 cases transferred into these MDLs, at most 12,241, or 7.8 percent, 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. Though deeper analysis is warranted, 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.

301. *See* Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1779-81 (2017). *Bristol-Myers* made clear that there must be a connection between each plaintiff's claim and the forum state. *See id.* at 1781-82. Although the question of what type of contact qualifies remains unclear, it seems straightforward that unless the plaintiff ingested a drug or was injured in the forum state, the defendant must be engaged in some sort of activity related to the plaintiff's claims within the state, such as manufacturing or designing the offending the product. *See id.*

302. *See* Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 873 (1995) (noting that the courts have been "unconcerned with plaintiffs' due process").

303. *See* VON MEHREN, *supra* note 62, at 194.

304. *See id.* Note however that the *Restatement of Judgments* softens this rule considerably. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 9 cmt. a (AM. LAW INST. 1982).

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 Co. v. Shutts*, in which it held that the plaintiff's chosen action is a property right that cannot be taken without due process of law.[305] *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.[306] 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.[307] Unlike a defendant, if the class action failed, these plaintiffs would not be subject to coercive action, such as 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.[308] Consequently, the Court determined that the plaintiffs were entitled to some due process protections.[309] But the Court did not conclude that the plaintiffs could not be bound due to their lack of minimum contacts with Kansas.[310] 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.[311] In particular, the Court cited the requirements that it assure all absentees were adequately represented, and that class members have the opportunity to opt out of the class and go it alone in the forum of their choice.[312] Citing *Mullane*, the Court concluded that these protections were sufficient even though Kansas may be geographically inconvenient.[313] The fiduciary nature of representation, supervision of the judge, and the tacit consent attributed to the decision not to opt out sufficed.[314]

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305. *See* 472 U.S. 797, 807 (1985).
306. *See id.* at 800-01.
307. *See id.* at 801.
308. *See id.*
309. *See id.* at 811-13.
310. *See id.* at 811.
311. *See id.* at 812-14.
312. *See id.* at 811-12.
313. *See id.*
314. *See id.* at 808-13; *see also* Mullenix, *supra* note 302, at 885 (explaining *Shutts*'s holding that "the due process rights of absent class members are protected by the opportunity to opt out of the class and, thereby, preserve the subsequent right to litigate individual damage

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 exist in MDL, despite the fact 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.[315] 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.[316] Nor is there a requirement—or even the ability—in an MDL for the judge to reject or approve a nonclass settlement.[317] And, finally, there is of course no right to opt out of an MDL.[318] Indeed, this was a central element of the MDL 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.[319] This inability to opt out, combined with the statistical unlikelihood that a case will ever return to a plaintiff's chosen forum for trial, makes consent a very thin reed on which to base the jurisdiction of the MDL court.[320]

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,[321] MDL can be in a patently inconvenient forum for the plaintiff, one

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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, 730 (2006).

315. *See* Burch, *supra* note 11, at 73.

316. *See id.* at 73-74.

317. *See* Bradt & Rave, *supra* note 12, at 1262-63.

318. *See id.* at 1270.

319. *See id.*; Bradt, *supra* note 187, at 1729 (noting the judges' view "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").

320. *See* Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 515 (2015) (arguing that "[t]he consent approach to litigation is a poor fit in mass cases" in part because "it leads judges to acquiesce to a thin, nominal definition of consent").

321. *See* 28 U.S.C. § 1404(a) (2012).

chosen without any regard to its convenience in any individual case.[322] 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.[323] 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.[324]

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 participate 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.

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322. *See supra* notes 276-87 and accompanying text; *see also* 28 U.S.C. § 1404(a) (requiring courts to consider "convenience of parties and witnesses" and "the interest of justice"). One interesting subsidiary question that may deserve additional attention is whether personal jurisdiction doctrine creates any limitations on transfer under § 1404(a) based on the plaintiff's minimum contacts with the proposed transferee forum. Some scholars have taken the view that there ought to be such limitations. *See* David E. Steinberg, *The Motion to Transfer and the Interest of Justice*, 66 NOTRE DAME L. REV. 443, 516-17 (1990); Michael J. Waggoner, *Section 1404(a), "Where It Might Have Been Brought": Brought by Whom?*, 1988 B.Y.U. L. REV. 67, 87-88. Courts, by and large, have taken the view that there need not be minimum contacts between the plaintiff and the transferee court, on the grounds that the statutory language requires an assessment of convenience and that the transferee forum need only be a forum where the case "might have been brought" against the defendant and that plaintiff consented to possible transfer by filing in a federal forum. *See* Murray v. Scott, 176 F. Supp. 2d 1249, 1255 (M.D. Ala. 2001); *see also, e.g.*, *In re* Genentech, Inc., 566 F.3d 1338, 1346 (Fed. Cir. 2009) ("There is no requirement under § 1404(a) that a transferee court have jurisdiction over the plaintiff or that there be sufficient minimum contacts with the plaintiff; there is only a requirement that the transferee court have jurisdiction over the defendants in the transferred complaint."); ESCO Corp. v. Cashman Equip. Co., No. 2:12-cv-01545-RJK-NJK, 2013 WL 4710258, at *3 (D. Nev. Aug. 30, 2013); MyKey Tech., Inc. v. Intelligent Computer Sols., Civil No. JFM-12-2719, 2012 WL 6698654, at *1 n.1 (D. Md. Dec. 21, 2012). Other courts, however, have concluded that the transferee court must have personal jurisdiction over the plaintiff under *International Shoe*, but these are a minority of cases. *See* Erickson Beamon Ltd. v. CMG Worldwide, Inc., No. 12 Civ. 5105(NRB), 2013 WL 5355010, at *7-8 (S.D.N.Y. Sept. 25, 2013); Nilon v. Nat.-Immunogenics Corp., Civil No. 12-cv-00930-BGS, 2012 WL 2871658, at *3 (S.D. Cal. July 12, 2012).

323. *See* Redish & Karaba, *supra* note 53, at 145.

324. *See* Bradt & Rave, *supra* note 12, at 1263.

III. ASSESSING PERSONAL JURISDICTION IN MULTIDISTRICT LITIGATION

In sum, there are significant questions about MDL's fit with current jurisdictional doctrine. Although the Court's recent decisions are not intellectually nourishing, they do establish that limitations on jurisdiction are becoming more strict.[325] As MDL continues to expand while the scope of jurisdiction over state law claims shrinks, the problem will become more difficult to ignore. And, the Supreme Court's recent statement that the jurisdiction of the federal courts is an open question may push the issue even closer to the forefront.[326]

That the issue of personal jurisdiction in MDL has managed to avoid rigorous examination for the last fifty years is not surprising to those who have long focused on the statute's power.[327] MDL's surface-level 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.[328] In other words, MDL's purported modesty compounds its power.[329] Personal jurisdiction is one example of this broader phenomenon. Under the JPML's case law, the purportedly temporary and limited nature of the transfer gives the MDL court cover, allowing it to avoid a rigorous analysis

325. *See supra* Part I.A.

326. *See* Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1783-84 (2017) ("[W]e leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." (citing Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987))).

327. *See, e.g.*, Burbank, *supra* note 55, at 1471 (characterizing MDL as among "dubious packaging strategies that are supposedly provisional but that in substantive terms may be irremediable").

328. *See* Bradt, *supra* note 7, at 841.

329. *See id.* at 841-42; *see also* Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010) (describing MDL as proceeding in a "procedural no man's land"); Redish & Karaba, *supra* note 53, at 154 ("MDL stealthily transforms fundamental characteristics of numerous claims so that they are unrecognizable as distinct actions filed by individual plaintiffs.").

of whether it has jurisdiction to adjudicate the claims before it.[330] MDL has also managed to avoid serious scrutiny because the doctrine of personal jurisdiction remains so unclear. So long as the fundamental underpinnings of personal jurisdiction remain a moving target, MDL can dodge and weave, relying simultaneously on different explanations for why it does not run afoul of the Fifth Amendment.

But MDL's ability to avoid serious scrutiny does not mean that such scrutiny is unwarranted. As MDL has evolved, it has become clear that the transferee forum is where all of the action occurs nearly all of the time.[331] For defendants, this means that they may wind up effectively litigating all of the claims against them in a single federal district located potentially anywhere in the country.[332] For plaintiffs, this may mean that their cases are transferred far away, to a district with no meaningful connection to them or the facts of their cases.[333] Combined with the practical reality that MDL cases are governed by a court-appointed steering committee, the transfer may effectively deprive plaintiffs of any control over their cases until a settlement agreement is proposed.[334] Given plaintiffs' lack of control over whether their cases will wind up in an MDL, consent is a weak ground on which to base the MDL court's power.[335] Whatever one's conception of the limits of personal jurisdiction, these concerns should give pause. And as the Court has become increasingly stingy, it would appear that MDL and personal jurisdiction may be on a collision course. As a practical matter, one could certainly imagine a defendant unhappy with the JPML's choice of transferee court, or a plaintiff's (or her lawyer's) dismay at being drawn into a distant MDL, mounting a challenge. In light of the

330. *Cf.* Redish & Karaba, *supra* note 53, at 145.

331. *See id.*

332. In a sense, this replicates the "loose and spurious form of general jurisdiction" endorsed by the California Supreme Court and rejected by the U.S. Supreme Court in *Bristol Myers*. Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1781 (2017).

333. *See* Lahav, *supra* note 320, at 514 (noting that in MDLs, "cases are transferred to districts far away from the place where they were originally filed and are run by a plaintiffs' management committee").

334. *See* Bradt & Rave, *supra* note 12, at 1271-72; Burch, *supra* note 11, at 71 (noting that "competitive checks" by other lawyers on the steering committee's control of the litigation may be "absent").

335. *See* Lahav, *supra* note 320, at 514-15 (describing the "thin, nominal definition of consent ... in mass cases").

Court's recent array of opinions, it may be challenging to reconcile the current trend with the expansiveness of MDL's jurisdictional power, though that task may confront the Court soon enough.

Though challenging, the task is not impossible. But it does require thinking about MDL jurisdiction differently, and it requires returning to the combination of power and reasonableness underlying the Court's opinion in *International Shoe* and *Mullane*, developed in Part I of this Article. To begin with, it is time to discard the current rationales employed by the JPML and the courts to justify MDL jurisdiction. The JPML's rationale, that all that matters is the jurisdiction of the transferor court, is based on the sort of legal fiction that reek of those once used to shoehorn new jurisdictional imperatives into old doctrine.[336] The reality is that the transferee court does exercise jurisdiction—if for no other reason than its power to grant summary judgment—and that jurisdiction must pass constitutional muster.[337] The courts' rationale, that the MDL statute is an exercise of nationwide jurisdiction, is closer to the truth but is still insufficient because it suggests that there are no limits to protect a litigant's due process rights.[338] Moreover, current doctrine demands both a clear statement that Congress intends nationwide jurisdiction and a service-of-process regime to support it.[339]

But to say that current rationales are insufficient is not to say that MDL is irredeemable. Despite the challenges I have laid out, I believe MDL, with certain limitations, is consistent with personal jurisdiction principles, properly understood. That is, if one conceives of jurisdiction as balancing the state's adjudicatory interest with the individual's right to a meaningful opportunity to participate, MDL can be redeemed.[340]

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336. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) (describing "legal fiction[s]" employed to justify jurisdiction in prior cases).

337. *See* Redish & Karaba, *supra* note 53, at 145.

338. *See supra* Part II.C.

339. *See* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1556 (2017) ("Congress uses this terminology because, absent consent, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction." (citing Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987))); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987) (rejecting "an implied provision for nationwide service of process in a private cause of action").

340. *See* Redish & Beste, *supra* note 93, at 923; Resnik, *supra* note 5, at 1804 ("In sum, both *Mullane* and Rule 23 altered the landscape of litigation by reconceptualizing the capacity of courts to generate decisions binding individuals—which is to say, changing the meaning

In my view, the Court should require that there be proper jurisdiction in both the transferor court and the transferee court, but measured under different criteria. There must be jurisdiction in the transferor court under the state long-arm statute, imported into the federal court under Rule 4. Requiring this serves several purposes. It eliminates the need for separate service of process under the MDL statute, and it ensures a convenient location for trial. Ensuring a home district that has jurisdiction under the normal rules also provides a reasonable, if imperfect, mechanism for ensuring that appropriate state law will apply to each case—a necessary component to my framework for reasons I will describe below.[341]

There must also, however, be jurisdiction in the transferee court, but measured under a different standard. One need not go so far as to say that jurisdiction in any federal district court is justified by the nationwide territorial sovereignty of the federal government to recognize that the jurisdiction of the federal courts need not be limited by state boundaries.[342] But to say that jurisdiction in a federal court in one state is acceptable does not necessarily imply that jurisdiction in the federal courts of any state is acceptable. The limits, rather, should be based on an assessment of reasonableness under the circumstances, and those limits vary somewhat depending on whether one takes the perspective of the plaintiff or the defendant.[343]

In sum, what this solution attempts to accomplish is an appropriate balance of interests; that is, a balance between the national interest in efficient resolution of nationwide controversies and the individual's interest in meaningful participation. To begin with, one might reasonably ask: What is the national interest in dispute resolution? I believe such an interest may be found in the MDL

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of what constituted 'due process' in courts."); *cf.* 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).

341. Such a reading is also consistent with the text and history of the statute. There is no evidence to suggest that the drafters of the MDL statute or Congress intended that the statute provide for nationwide service of process.

342. *See* Burbank, *supra* note 76, at 116.

343. *See* Clermont, *supra* note 59, 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 the interests involved.").

statute itself,[344] the purpose of which was to enable private enforcement of the law through efficient management of litigation in a single federal forum.[345] Indeed, this was the entire point of MDL from the perspective of the judges who fought for the statute's passage—they believed that the litigation explosion that they correctly predicted would threaten to overwhelm the federal courts.[346] Such a deluge, without machinery to manage it, would both threaten the legitimacy of the federal courts and make perpetual backlog a weapon for better-resourced defendants.[347] What was necessary was a reconception of the federal courts as a unitary institution capable of deploying its power through centralized organization of litigation.[348] Congress again invoked this interest when it passed the Class Action Fairness Act (CAFA) of 2005.[349] The difference, of course, was that MDL was designed to facilitate aggregate litigation, while CAFA was intended to crush it.[350] Nevertheless, both

344. 28 U.S.C. § 1407(a) (2012).

345. Tobias Barrington Wolff has suggested such a possibility in connection with case-management and settlement-review functions of MDL judges, writing that "the MDL statute in particular has received inadequate attention as a source of federal law on important matters of litigation policy." *See* Tobias Barrington Wolff, Commentary, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1058 (2013).

346. *See supra* Part II.A.

347. *See* Bradt, *supra* note 7, at 839 (noting that these judges believed that "defendants, for whom delay was a weapon—would only perpetuate backlogs").

348. *See id.* ("The drafters believed that their creation would reshape federal litigation and become the primary mechanism for processing the wave of nationwide mass-tort litigation they predicted was headed the federal courts' way.").

349. *See* 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 "federal-iz[e]" cases "with broad national roots"); *see also* Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765 (2008). MDL, too, plays this role, and its modification of otherwise applicable restrictions on diversity jurisdiction can be seen in service of this goal.

350. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 140 (2017) ("[T]he strategy of those proponents of CAFA whose actual agenda, in vastly expanding the jurisdiction of federal courts to hear state law claims brought as class actions, was to ensure that the cases were not certified and went away."); Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1942 (2006) ("[It] is apparent to any sentient reader of the statute's statement of findings and purposes ... [that they] are, at best, window dressing. Less charitably, they meet the philosopher Harry Frankfurt's definition of 'bullshit,' because they are made with apparent indifference to their truth content." (footnote omitted)).

statutes recognize a national interest in resolving cases of national scope.[351] MDL serves that interest through centralization.

This legitimate national interest must, however, be balanced against the individual interest in meaningful participation that limitations on personal jurisdiction serve, while also recognizing the benefits of aggregation in MDL that accrue to both plaintiffs and defendants.[352] The structure I have proposed—which demands jurisdiction in the transferor court under traditional rules and jurisdiction in the transferee court using a more flexible interest assessment—attempts that balance.[353] Ensuring meaningful participation requires that the JPML admit some limitations on its power that it currently denies[354]—in theory, if not in practice. The first step, then, in applying the analysis is to recognize that not just any district will do for all MDL cases.

When it comes to MDLs that are not of nationwide scope, the district chosen should be one that is relatively central to the parties. For instance, it would not have been reasonable to locate the MDL dealing with the British Petroleum Oil Spill in the Gulf of Mexico in a federal court in the Pacific Northwest. Establishing the MDL in reasonable proximity to the accident best facilitates meaningful participation by the plaintiffs in a location to which defendants could hardly object, because specific jurisdiction would be available even without MDL consolidation.[355] As a practical matter, this has

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351. *See* Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1921 (2008) ("CAFA accelerated the growing centralization of American law."); *see also* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1358, 1416 (2006).

352. *See* Resnik, *supra* note 7, at 1044 (describing how aggregation devices, such as the class action, have "transformed our understanding of what lawsuits can do"); *see also* Bradt & Rave, *supra* note 12, at 1266-67.

353. *See* Resnik, *supra* note 5, at 1806 ("Federal rules and statutes need to enable aggregation because neither judges, litigants, nor the public fare well in a lawyer-less world, where economic disparities among disputants vitiate the potential for access to a fair process—or access to any process at all. What the current federal docket illustrates is that federal courts themselves benefit from class and aggregate proceedings. But the individuals affected and the public at large have too attenuated a relationship with the resulting remedies. Constitutional reinvention is again in order to enable, constrain, and legitimate the distributional decisions made." (footnote omitted)).

354. *See In re* FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (per curiam).

355. Or, if jurisdiction over all claims were not available in a single state, locating the MDL within the same region would not be so onerously inconvenient or unfairly surprising.

not been a problem when it comes to geographically centralized events. The MDL statute demands convenience,[356] and the JPML has followed common sense.[357]

The harder cases are those of nationwide scope, which, as the JPML has recognized on several occasions, have no natural geographic focal point.[358] These cases—typically involving products liability or consumer fraud claims—also make up the lion's share of MDLs.[359] In these cases, because the products are distributed on a national scale, there is no single district that is going to be convenient for all parties. It is in these cases, however, that the national interest in dispute resolution is likely to be most urgently felt. These are cases with enormous numbers of victims, spread all around the country. In cases like these, which transferee districts make sense?

One possibility might be to require that such cases be located in a district court in the state where the defendant is subject to general jurisdiction. If nothing else, such a conclusion would seem to be consistent with the concerns underlying the Court's decisions in *Goodyear*,[360] *Daimler*,[361] and *BNSF*,[362] if only because they would provide the defendant with a measure of predictability. But there are significant problems with this approach. First, in many MDLs it is impracticable because there are multiple defendants hailing from different states or the defendant is neither incorporated nor has its principal place of business in the United States, meaning that there is no federal district in a state with general jurisdiction.[363] Second, this arguably tilts the scales too far in favor of the defendant, which would find itself able to ensure that nearly all

356. *See* 28 U.S.C. § 1407(a) (2012).

357. *See supra* Part II.C. A glance at the pending MDL docket reveals that this is the case. *See, e.g.*, *In re* Air Crash at S.F., Cal., on July 6, 2013, 987 F. Supp. 2d 1378, 1378 (J.P.M.L. 2013) (granting the defendant's motion for centralization in the Northern District of California); *In re* Air Crash Near Rio Grande, P.R., on December 3, 2008, 787 F. Supp. 2d 1361, 1361 (J.P.M.L. 2011) (granting the plaintiffs' motion for centralization in the Southern District of Florida).

358. *See supra* note 289 and accompanying text.

359. *See* Lee et al., *supra* note 297, app. at 231 tbl.A1.

360. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011).

361. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014).

362. *See* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558 (2017).

363. *See* William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. (forthcoming 2018) (manuscript at 22) (draft on file with author) (describing difficulties created by the restrictive rule in *Goodyear*, *Daimler*, and *BNSF*).

litigation against it will go forward on its home turf, without regard to the interests of the plaintiff. At least in individual litigation, the plaintiff may choose her home state, which almost certainly has specific jurisdiction.[364] But once an MDL is established, the cases will be transferred, not to return for a long time, if at all.[365] One might also imagine that the MDL should be established in a state with specific jurisdiction over all of the claims against the defendant. But *Bristol-Myers* teaches that such jurisdictions will be rare, unless there is a single state in which the defendant engaged in conduct that caused the full set of claims.[366] Even under that circumstance, though, the defendant might be accused of a sort of preemptive forum shopping by engaging in such conduct only in friendly forums.[367]

What, then, is the JPML to do in MDLs of nationwide scope? In a real sense, these MDLs are too big to fail; that is, it would be ironic for MDL to be hamstrung in the circumstances in which it is most needed. I have several suggestions.

First, the MDL must be located in a major metropolitan area, reasonably accessible by attorneys on both sides. Recognizing that no district will be ideal for plaintiffs scattered around the country or defendants forced to litigate far from their headquarters, at least locating the MDL in a place that can be reached relatively easily will mitigate the problem. With respect to defendants, the analysis is familiar: Is the location of the forum an example of what Professors Arthur Miller and David Crump call "distant forum abuse"?[368]

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364. *See* Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1780 (2017).

365. *See* Lahav, *supra* note 320, at 513-14 ("Many of these cases are transferred to districts far away from the place where they were originally filed and are run by a plaintiffs' management committee.... These realities challenge the idea that every person is entitled to his or her day in court because the system is not structured to offer that experience to each and every litigant.").

366. *See* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation* 59 B.C. L. REV. (forthcoming 2018) (manuscript at 3-4) (on file with author) (describing restrictions on specific jurisdiction in mass tort cases created by *Bristol-Myers*).

367. *See id.* (manuscript at 39) ("The defendant has still had the opportunity to preemptively designate the forum as a potential one where it might be sued. That is, going forward, defendants can choose to engage in conduct directed nationwide in states where they deem the risk of suit on claims relating to that conduct acceptable—a sort of ex ante forum shopping.").

368. *See* Miller & Crump, *supra* note 159, at 54.

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?[369] The answer will likely 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 real 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.[370] 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)[371] and when the MDL forum is selected by the JPML and not the plaintiff, as in a nationwide class action.[372]

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.[373] Even an MDL in a somewhat inconvenient forum may be preferable for a defendant to litigating piecemeal around the country.[374] A clear-eyed assessment, then, suggests that unless

369. *See Bristol-Myers*, 137 S. Ct. at 1780 ("[T]he 'primary concern' is the 'burden on the defendant.'" (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1982))).

370. *See* Bradt & Rave, *supra* note 373 (manuscript at 2) (describing the candid admission by attorneys in *Bristol-Myers* that California was simply too friendly a forum for plaintiffs).

371. 1 THE U.S. JUSTICE SYSTEM: AN ENCYCLOPEDIA 75 (Steven Harmon Wilson ed., 2012).

372. *Cf.* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. REV. 1313, 1374, 1379-80 (2005) (describing the application of the Fifth Amendment to defendants in federal class actions).

373. *See* Bradt, *supra* note 7, at 834-36. This is not to say that defendants do not believe that there are deficiencies in MDL practice, which they are currently seeking to solve through statutory means. *See* Resnik, *supra* note 7, at 1052 (noting efforts to amend the MDL statute via the Fairness in Class Action Litigation Act of 2017).

374. *See* D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND.

the forum is especially inconvenient, MDL will in most cases be constitutionally reasonable for well-resourced defendants, and the MDL need not be located in the defendant's home state. One could imagine an MDL located so far away from the defendant's home that it would raise constitutional concerns, but so long as the JPML continues to favor major cities,[375] however, defendants will usually have few complaints.

Second, there must be additional safeguards to ensure that plaintiffs have the ability to participate in MDL proceedings. Understanding that no location will be geographically convenient for a nationwide set of plaintiffs, measures must be taken to mitigate the difficulties of distance. The idea that accommodations must be made to protect the plaintiff is somewhat unusual in the jurisdictional analysis. Typically, jurisdiction over the plaintiff is a given because she has consented by filing her case.[376] But the consent rationale is a thin reed on which to entirely justify the jurisdiction of the MDL transferee court.[377] As noted above, unlike class actions, plaintiffs do not have the right to opt out of an MDL, nor is there any required determination of adequacy of representation by the district court, even though steering committee lawyers will control the litigation.[378] And while it is true that the plaintiff has filed a case, often the plaintiff has filed her case in state court only to see it removed and transferred to the MDL. Even for plaintiffs who have filed cases in federal court, consent to an MDL across the country borders on the fictional.[379] At the same time, it is important to recognize the benefits to plaintiffs of MDL: as was intended by its creators, MDL

L. REV. 1183, 1193-95 (2013).

375. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2016, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-FY-2016_0.pdf [https://perma.cc/QUC5-AB5Z].

376. *See supra* note 130 and accompanying text.

377. *See* Lahav, *supra* note 320, at 515 (describing the "thin, nominal definition of consent ... in mass cases").

378. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985); Miller & Crump, *supra* note 159, at 16.

379. It is of course true that plaintiffs do not "consent" whenever a case is transferred. But there are at least some protections when a defendant makes a motion under 28 U.S.C. § 1404(a) (2012). Not only must the court engage in analysis to ensure that the transferee court is specifically convenient for the parties, but also the transferee court must be one where the case might have been brought, bringing into play the restrictions of the venue statute, which go some distance in ensuring convenience.

facilitates economies of scale that level the playing field with typically better-resourced defendants.[380] But to say that MDL offers benefits to plaintiffs does not extinguish plaintiffs' due process rights to participate meaningfully in the proceedings.[381]

Courts, therefore, should take advantage of the benefits of modern communications technology.[382] As many MDL judges have already done, every MDL should have a user-friendly website, from which all orders, transcripts, and schedules can be retrieved.[383] In addition, all MDL hearings, depositions, and trials should be webcast, with the recordings made available on the case website. While every plaintiff may not be able to physically attend proceedings, modern technology makes observation a relatively straightforward task. Once the case reaches a settlement stage, the settlement agreement should be available to view, and it should be explained in plain English.[384] Alongside the settlement agreement should also be a notice of the right to return for trial, as required by the MDL statute.[385]

Third, and to return full circle, it is important to preserve the right to remand to the transferor court[386]—one which has jurisdiction under Rule 4. Other scholars have written about the importance of the right to remand in influencing a fair settlement.[387] I agree that the remand potential demanded by the statute plays an important role throughout the litigation—indeed, it may be the judge's most potent tool to ensure fair negotiations.[388] Beyond that, however, the possibility to return home for trial is a necessary com-

380. *See* Bradt & Rave, *supra* note 12, at 1267, 1307.

381. *See* Mullenix, *supra* note 302, 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.")

382. *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 850-53 (2017); Redish & Karaba, *supra* note 53, at 152-53 (suggesting the increased use of modern technology as a means of reducing due process concerns, though still rejecting MDL).

383. *See, e.g.*, *Multicircuit Petitions*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., http://www.jpml.uscourts.gov/multicircuit-petitions [https://perma.cc/Y6LK-AFXP].

384. *See* Bradt & Rave, *supra* note 12, at 1287-88 (collecting websites and other examples of similar technology).

385. *See* 28 U.S.C. § 1407(c)(ii) (2012).

386. *Id.* § 1407(a).

387. *See, e.g.*, Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 690, 692-93 (2013).

388. *See* Bradt & Rave, *supra* note 12, at 1304-06.

ponent in making the MDL scheme fit with the demands of personal jurisdiction. This is in part because it ensures that there will be a convenient forum in which the plaintiff may have a day in court, should she want one. To be clear, I am neither unrealistic nor romantic when it comes to plaintiffs' returning home for trial. Such trials should only occur when plaintiffs decide that a proposed settlement is unacceptable, or a settlement cannot be reached in the MDL court. When MDL works well, such trials will typically be unnecessary.

But there is a separate reason why there needs to be a home forum with proper jurisdiction: choice of law. Most MDLs of nationwide scope are made up of cases asserting state law torts; that is, there is no federal substantive law governing the cases. In MDL, the cases are governed by the state law that would control had the cases not been transferred into the MDL.[389] As I have argued before, the MDL statute does not create any power to depart from the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[390] which prohibits the federal courts from following a federal common law choice of law when sitting in diversity.[391] Indeed, one of the main benefits of MDL is that it can facilitate aggregation without depriving plaintiffs of the law that would otherwise properly govern their claims.[392]

More broadly, to say that there is a federal adjudicatory interest in efficient resolution of nationwide torts justifies a relaxed notion of personal jurisdiction. But this adjudicatory interest does not displace the states' regulatory interest in cases with which it has a connection, or the plaintiffs' interest in receiving the benefit of the law that would otherwise apply. To hold otherwise would functionally undermine *Erie* and *Klaxon* by altering the law that would otherwise apply based on only the "accident of diversity" jurisdic-

389. *See, e.g.*, *In re* Volkswagen & Audi Warranty Extension Litig., 692 F.3d 4, 17 (1st Cir. 2012).

390. *See* 313 U.S. 487, 496-97 (1941).

391. Bradt, *supra* note 91, at 816-20 (positing a rule of "choice-of-law neutrality" for mass tort litigation).

392. *See id.*; *see also* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 565-74 (1996) (arguing against the principle that applicable law should change to accommodate mass-litigation procedure); 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.

tion.[393] Ensuring that there is a home district—which applies that district's law—for the case to return to, if necessary, also mitigates the problems of nationwide jurisdiction in the MDL transferee court from the perspective of the plaintiffs.

Fourth, and finally, this framework suggests a need for some 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 plausible check on egregious JPML action.[394] 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, particularly if the Panel begins to pursue an agenda different from the status quo.

Together, these proposals aim to provide a starting point for a conversation about how to think about personal jurisdiction in MDL. Different circumstances may warrant different approaches. Overall, though, the goal is to shift the thinking about personal jurisdiction away from the formalistic explanations by courts and the Panel to a more functional balancing of interests. MDL cannot work effectively if it lets the perfect be the enemy of the good; at the same time, MDL need not hide behind fictions to survive constitutional scrutiny so long as appropriate attention is paid to the interests underlying jurisdictional limitations.

CONCLUSION

Two of the most significant developments in American civil litigation in the last decade have been the rapid ascendance of MDL as the preferred 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

393. *See Klaxon*, 313 U.S. at 496-97.

394. *See* Pollis, *supra* note 41, at 1647 (suggesting interlocutory review in MDL).

many questions of due process salient in individual cases are diminished in the name of efficient resolution of mass controversies. But to say that current explanations of MDL's expansive jurisdictional reach are wrong or incomplete does not make MDL unconstitutional. Rather, they require us to look at MDL in a more realistic way and take seriously whether the power it concentrates in a single federal judge is constitutionally justified. In an era of MDL ascendancy, a clear-eyed approach to such issues is long overdue.