December 2000

Principles of Forum Selection

Antony L. Ryan

*Cravath, Swaine & Moore*

Follow this and additional works at: [https://researchrepository.wvu.edu/wvlr](https://researchrepository.wvu.edu/wvlr)

Part of the Conflict of Laws Commons, and the Jurisdiction Commons

**Recommended Citation**


Available at: [https://researchrepository.wvu.edu/wvlr/vol103/iss2/5](https://researchrepository.wvu.edu/wvlr/vol103/iss2/5)

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
# PRINCIPLES OF FORUM SELECTION

*Antony L. Ryan*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>167</td>
</tr>
<tr>
<td>II. VENUE</td>
<td>170</td>
</tr>
<tr>
<td>A. Venue Statutes</td>
<td>170</td>
</tr>
<tr>
<td>B. Forum Non Conveniens</td>
<td>172</td>
</tr>
<tr>
<td>C. Transfer of Venue</td>
<td>175</td>
</tr>
<tr>
<td>D. Personal Jurisdiction</td>
<td>178</td>
</tr>
<tr>
<td>III. FEDERAL JURISDICTION</td>
<td>180</td>
</tr>
<tr>
<td>A. Federal-Question Jurisdiction</td>
<td>181</td>
</tr>
<tr>
<td>B. Diversity-of-Citizenship Jurisdiction</td>
<td>183</td>
</tr>
<tr>
<td>IV. DUPLICATIVE LITIGATION</td>
<td>185</td>
</tr>
<tr>
<td>A. Anti-Suit Injunctions</td>
<td>185</td>
</tr>
<tr>
<td>B. Federal-Court Abstention</td>
<td>187</td>
</tr>
<tr>
<td>C. Declaratory Judgment Actions</td>
<td>189</td>
</tr>
<tr>
<td>V. CHOICE OF LAW</td>
<td>191</td>
</tr>
<tr>
<td>A. State Choice-of-Law Rules</td>
<td>191</td>
</tr>
<tr>
<td>B. Federal Limitations on Choice of Law</td>
<td>193</td>
</tr>
<tr>
<td>C. Transfer of Venue and Choice of Law</td>
<td>196</td>
</tr>
<tr>
<td>VI. FORUM SHOPPING</td>
<td>199</td>
</tr>
<tr>
<td>VII. CONCLUSION</td>
<td>203</td>
</tr>
</tbody>
</table>

## I. INTRODUCTION

Forum shopping is generally deplored as a dubious tactical maneuver. Courts routinely denounce parties who they find engaged in forum shopping and try to ensure that those parties gain no procedural advantage.¹ Notwithstanding the

---

¹ See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 154 (1987) (adopting a uniform federal statute of limitations because "the use of a state statute would present the danger of forum shopping"); Hanna v. Plumer, 380 U.S. 460, 468 (1965) (stating that "discouragement of forum-shopping" is a reason why federal courts apply state law in cases based upon diversity-of-citizenship jurisdiction).
judicial disapproval of forum shopping, litigants can regularly affect the outcome of their dispute by where they file suit and how they cast their claims. The result is a striking disparity between the common practice of forum shopping and the widespread disapproval of the practice.

One reason for this disparity is that our legal system lacks a comprehensive explanation of why there are opportunities for forum shopping. Forum shopping can be seen as fortuitous — the byproduct of a judicial system with courts of independent, but overlapping, jurisdiction. Under this view, courts should strive to close the procedural loopholes that permit litigants to influence the choice of forum. Yet some forum shopping is considered legitimate — instances where a litigant is entitled to choose the place of suit. These cases raise the question of what justifies a litigant’s forum selection that otherwise would be condemned as forum shopping. And the most common context in which that question arises is how much to defer to the plaintiff’s initial choice of forum.

The forum in which a case is heard often has considerable influence on the outcome. The judge and jury, the procedural rules, and in some cases the substantive law as well, all depend on the place of suit. The procedural skirmishes at the outset of many lawsuits — such as over whether the case can be removed to federal court, or whether venue should be transferred — reflect the reality that the forum can be decisive. Yet, despite the manifest importance of where the case is heard, remarkably little attention has been paid to ascertaining the underlying principles of forum selection. This deficiency is due in part to the fragmented nature of forum-selection law, which is composed of several ostensibly unrelated legal doctrines. Subject-matter jurisdiction, personal jurisdiction, venue and forum non conveniens all address, albeit from different vantage points, the single question of forum selection.

The aim of this article is to explore the fundamental tensions within each of the legal doctrines regarding forum selection, resulting from the presence of two competing legal principles. The first principle, which I will call “plaintiff’s choice,” proceeds from the premise that the plaintiff has the privilege of selecting the place of suit. We tend to take this privilege for granted because the plaintiff exercises it at the outset of every civil lawsuit. In choosing where to bring suit, the plaintiff shapes the course of the litigation before any judicial involvement. The plaintiff’s forum-selection privilege is axiomatic to the common-law tradition of party autonomy. It is related to the idea that the plaintiff is the “master of his complaint” and thereby frames the issues for judicial resolution. The roots of the plaintiff’s

---

2 See Ferens v. John Deere Co., 494 U.S. 516, 527 (1990) (“An opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws.”).

3 See, e.g., Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947) (holding that in forum non conveniens analysis, “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed”).

4 The degree of deference to the plaintiff’s choice of forum arises, for example, in motions to transfer venue. See infra Part II.C.
privilege lie in the party-initiated pleading system at common law. The plaintiff’s privilege is so ingrained in our jurisprudence, and so rarely challenged on its own terms, that it is seldom discussed. The practical effect of the forum-selection privilege, however, is undeniable: the place of suit usually ends up being the forum that the plaintiff chose.

The competing legal principle is what I will call “judicial management.” This principle postulates that an appropriate court — rather than the plaintiff — should decide what is the proper place of suit. The primary consideration should be the convenient and efficient resolution of disputes — such as avoiding duplicative litigation and selecting the forum most convenient to all parties and witnesses. The judicial-management principle thus calls for the kind of judicial balancing characteristic of modern legal thought. Because courts rarely act sua sponte, the judicial-management principle is usually invoked in response to a motion by the defendant. Yet this principle aspires to be party-neutral; it balances the interests of plaintiff and defendant to determine the most convenient forum. In contrast to plaintiff’s choice, the judicial-management principle is discussed explicitly in some judicial opinions, has motivated the legislative enactment of certain procedural reforms and has met with increasing approval in the legal literature in recent years.

The plaintiff’s-choice and judicial-management principles co-exist uneasily. Both principles have the explanatory power to answer on their own all the doctrinal questions regarding forum selection, yet in practice each is hemmed in by the other. The plaintiff has the initial choice of forum, but the defendant then has recourse to various legal doctrines — such as transfer of venue and dismissal for forum non conveniens — that counteract the plaintiff’s choice and seek judicial management of the place of suit. Each of these doctrines has various rules, sub-rules and exceptions to rules that in turn reflect either the plaintiff’s-choice or the judicial-management principle. Tellingly, neither principle dominates the other. Rather, both principles remain vital in developing the law of forum selection.

In this article, I seek to locate these two legal principles across a broad range of doctrines regarding forum selection in civil lawsuits. By exploring generally familiar legal doctrines through the lenses of the two competing juridical models, I hope to shed light on the causes of the conflicted nature of the law of forum selection.

In Part II, I examine the selection of venue, including forum non conveniens and transfer of venue, as well as personal jurisdiction. I argue that the legal rules regarding venue are perhaps the starkest example of the unresolved tension between the plaintiff’s-choice and judicial-management principles. In Part III, I turn to the selection of court system, particularly the degree of control the plaintiff can sometimes exercise over whether a suit can be removed from state to federal court. In Part IV, I examine some aspects of duplicative litigation, including anti-suit injunctions and federal-court abstention, that raise the issue of deference to

---

the plaintiff's choice of forum. In Part V, I turn to the important implications of forum selection for choice of law, including institutional biases in favor of applying forum law and the choice-of-law consequences of transfer of venue.

Finally, in Part VI, I conclude with some thoughts on forum shopping. Despite the disapproving connotations of the term, forum shopping is the inevitable corollary of the plaintiff's-choice principle. If the courts will defer to the plaintiff's choice, then plaintiffs will naturally try to shop for the most favorable forum. I conclude that "forum shopping" — as employed in current legal usage — is little more than a verbal formulation for arguments rejecting, in certain doctrinal contexts, the plaintiff's-choice principle.

II. VENUE

A. Venue Statutes

One reason the plaintiff has a choice of forum is that venue statutes afford him that choice. Rather than define the proper venue with specificity, venue statutes typically let the plaintiff choose among a number of courts — albeit a limited number — in which venue is proper. In federal court, the range of permissible venues for suits against individual defendants currently includes the judicial district where the defendant resides, any district where a substantial part of the events giving rise to the plaintiff's claim occurred, and (if the action can be brought nowhere else) any district where the defendant is subject to personal jurisdiction. Thus, the statute by its terms grants the plaintiff leeway to select a venue that he considers convenient to him, or — and the two are often corollaries — inconvenient to the defendant.

A venue statute need not be so generous. Indeed, under the Judiciary Act of 1789, venue for suit "against an inhabitant of the United States" lay only in a district "whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." As recently as 1966, venue for suits against individual defendants in federal-question cases was limited, even more restrictively, to "the judicial district where any defendant resides." Frequently, the stingy venue rules in federal court at that time offered the plaintiff only one judicial district — presumptively convenient to the defendant because it was pegged to his residence. The current statute, reacting against the perceived arbitrariness of those venue limitations, has liberalized venue choices. The statute incorporates judicial-management principles by including party-neutral venue choices focused on the substance of the lawsuit, such as where the events giving rise to the plaintiff's

---

7 See JAMES ET AL., supra note 5, § 2.23, at 97.
9 Judiciary Act of 1789, § 11, 1 Stat. 73, 78 (1789).
The cases appear conflicted over whether the purpose of venue statutes is to provide the plaintiff with a choice of venue or to further judicial management by protecting against unreasonable venue choices. An excellent example of the plaintiff's-choice view of venue is the 1941 Supreme Court case of \textit{Baltimore & Ohio Railroad v. Kepner}. In \textit{Kepner}, the plaintiff chose a forum with no relation to where the events giving rise to his claim occurred — probably because he thought the jury there would likely award higher damages. The Court upheld the plaintiff's choice of venue, because "venue is a privilege created by federal statute," and that privilege "cannot be frustrated for reasons of convenience or expense." In dissent, Justice Frankfurter denied that the venue statute at issue "was intended to give a plaintiff an absolute and unqualified right to compel trial of his action in any of the specified places he chooses." Expressing the judicial-management principle, Justice Frankfurter urged that the place of suit be determined by judicial balancing of the conveniences to the parties and the public.

In contrast, the judicial-management principle carried the day in \textit{Leroy v. Great Western United Corp.} The Court announced that, "[i]n most instances, the purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." In \textit{Leroy}, the Court decided that the venue statute then in place, which allowed venue in "the judicial district . . . in which the claim arose," should be read narrowly so that only in "unusual case[s]" could a claim arise in more than one judicial district. The \textit{Leroy} decision was based on the premise that "Congress did not intend . . . to

\begin{enumerate}
\item[12] 314 U.S. 44 (1941). In \textit{Kepner}, a railroad employee who resided and was injured in Ohio brought suit in the Eastern District of New York, under a special venue provision of the Federal Employers' Liability Act (FELA) that lay venue in any district in which the employer was doing business. The railroad then brought suit in Ohio state court to enjoin the employee from maintaining the FELA suit in New York.
\item[13] \textit{Id.} at 52-53.
\item[14] \textit{Id.} at 57 (Frankfurter, J., dissenting). Justice Frankfurter's dissent also raised the federalism implications of the denial of the state-court anti-suit injunction. \textit{See id.} at 54. It has since been established that "state courts are completely without power to restrain federal-court proceedings in \textit{in personam} actions." \textit{Donovan v. Dallas}, 377 U.S. 408, 413 (1964).
\item[15] \textit{See Kepner}, 314 U.S. at 57-58 (Frankfurter, J., dissenting).
\item[16] 443 U.S. 173 (1979). The issue in \textit{Leroy} was whether venue lay in the Northern District of Texas for a suit by a corporation with its principal place of business in Dallas, Texas, against Idaho state officials who applied an Idaho anti-takeover statute to the plaintiff's proposed tender offer for the stock of a corporation with its principal place of business in Idaho.
\item[17] \textit{Id.} at 183-84 (emphasis in original).
\item[19] \textit{Leroy}, 443 U.S. at 185.
\end{enumerate}
give [the plaintiff] an unfettered choice among a host of different districts."\(^{20}\) The Leroy Court's narrow reading of the venue statute furthered the judicial-management principle because the courts would determine where the claim arose — the only proper venue besides the defendant's residence.

The reason for the conflicting language in the cases is that modern venue statutes are expressly designed to promote both the plaintiff's-choice and the judicial-management principles. As the Leroy Court held, the statutory limitations on venue are intended to prevent the plaintiff from selecting an unfair or inconvenient place of suit.\(^{21}\) On the other hand, as Kepner makes plain, the statute's affirmative grant of venue, by providing the plaintiff with a range of proper places for suit, manifestly serves the plaintiff's interests.\(^{22}\) And the more the venue statute is liberalized, the more significant, too, becomes the plaintiff's venue privilege. That is the irony of the modern movement toward greater emphasis on systemic convenience in laying venue: by discarding the often arbitrary statutory limitations on venue, and providing a wider range of venue choices, reformers have paradoxically increased the effect of the plaintiff's forum-selection privilege. Statutory reforms intended to lead to more efficient venue rules have instead resulted in more choices for the plaintiff, and consequently greater arbitrariness in venue.

B. Forum Non Conveniens

The plaintiff's choice of forum can be overridden by *forum non conveniens*, a prudential doctrine explicitly based on the interests of the judicial system as a whole.\(^{23}\) *Forum non conveniens* allows the judge to dismiss a lawsuit in favor of an alternative, more convenient forum even though venue is proper.\(^{24}\) A thorough-going effectuation of the *forum non conveniens* doctrine promises to instantiate the judicial-management model: a judge would determine what forum would be most convenient for all parties and best serve the interests of the judicial system. Most state courts recognize the *forum non conveniens* doctrine, particularly as applied to out-of-state plaintiffs.\(^{25}\) With the introduction by statute of transfer of venue in the federal courts,\(^{26}\) however, *forum non conveniens* retains vitality in

\(^{20}\) *Id.*. In reaction to Leroy, Congress has amended the federal venue statute to permit venue in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2), (b)(2) (1994).

\(^{21}\) See Leroy, 443 U.S. at 184.


\(^{26}\) See *infra* Part II.C.
federal court only when the alternative forum is a foreign court. Despite the doctrine's limited scope of application, forum non conveniens serves as a primary example of the ambivalent attitude of the law toward the plaintiff's forum-selection privilege.

The classic formulation of the doctrine of forum non conveniens came in Justice Jackson's opinions for the Supreme Court in the 1947 companion cases of Gulf Oil Corp. v. Gilbert and Koster v. (American) Lumbermens Mutual Casualty Co. First, Justice Jackson established the general principle that a court has "the power to decline jurisdiction in exceptional circumstances." He then observed that venue statutes "are drawn with a necessary generality and usually give a plaintiff a choice of courts," which he attributed to a desire that the plaintiff "[might] be quite sure of some place in which to pursue his remedy." Unfortunately, some plaintiffs resort to "misuse of venue" by bringing suit in an inconvenient court, which Justice Jackson described as "justice blended with some harassment." Justice Jackson set forth several "private interest[s]" for the trial court to weigh in its discretion — access to evidence, availability of witnesses, enforceability of the judgment, and inconvenience to the defendant — as well as "[f]actors of public interest" — the congestion of the courts, the imposition of jury duty, local decision of controversies, and application of state law by federal judges more familiar with it.

All of the foregoing is a ringing exposition of the judicial-management principle. Yet, without explanation, Justice Jackson in Gilbert threw in a crucial qualification: "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." In Koster, Justice Jackson added that, when a plaintiff brings suit at his residence:

[he should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.

See American Dredging Co., 510 U.S. at 449 n.2.
Gilbert, 330 U.S. at 504.
Id. at 507.
Id.
See id. at 508-09.
Id. at 508.
Koster, 330 U.S. at 524.
By these dicta, the Supreme Court reinstated the plaintiff's-choice principle as the general rule in *forum non conveniens* doctrine and limited dismissal to extraordinary cases. The Court offered no means of resolving the inherent tensions between the principles underlying *forum non conveniens* dismissal and the competing principle of the plaintiff's choice of forum. Justice Jackson may have felt constrained by the jurisdictional precept that the federal courts "are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends." In any event, the Court cast *forum non conveniens* as a limited, prudential exception to subject-matter jurisdiction and statutory venue, rather than a wide-ranging, pragmatic tool for judicial management of forum selection. The doctrinal result is an amalgam of the two judicial models: *forum non conveniens*, which resonates with the judicial-management principle, is recognized, but only as an exception to the general rule of plaintiff's choice.

The only major subsequent Supreme Court decision on *forum non conveniens*, *Piper Aircraft Co. v. Reyno*, failed to shed much light on the plaintiff's choice of forum. In *Piper Aircraft*, the Court upheld the dismissal of a suit brought in the United States by the representative of the estates of Scottish residents who had died in an airplane crash over Scotland. The defendant airplane manufacturer moved to dismiss *forum non conveniens* in favor of the Scottish courts. The Court held that the unfavorable substantive law in Scotland, such as the lack of a strict-liability theory in tort and the requirement that a survivor bring a wrongful-death action, did not weigh against a *forum non conveniens* dismissal. Most important for our purposes, the Court held that "a foreign plaintiff's choice [of forum] deserves less deference" than that of a citizen or resident because, "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient."

Cases like *Piper Aircraft*, involving foreign plaintiffs, offer an interesting perspective on the role of the plaintiff's-choice and judicial-management principles in *forum non conveniens* law. One rationale for the lesser deference accorded to foreign plaintiffs' forum selection might be that foreign plaintiffs should not enjoy a venue privilege at all, perhaps because non-citizens should not have an unqualified right of access to the courts. Indeed, those judges who have insisted in cases involving domestic plaintiffs that "American taxpayers . . . have a certain 

---

See Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191, 211-20 (1989) (concluding that Gilbert lacks any "satisfactory justification for the basic idea of deferring to the plaintiff's initial choice of forum").

Gilbert, 330 U.S. at 513 (Black, J., dissenting) (internal quotation marks omitted).


See id. at 238.

See id.

See id. at 247-55.

Id. at 256.
basic right of access to American courts when the latter have jurisdiction"43 might well be open to the suggestion that foreign plaintiffs simply do not qualify for the venue privilege. But the prevailing rule in the federal courts after Piper Aircraft is that a foreign plaintiff's forum selection is entitled at least to some deference.44 The degree of deference is determined by whether the foreign plaintiff has made a "strong showing of convenience" so as to overcome the natural "reluctance to assume that the choice is a convenient one."45 Thus, the judicial-management principle has largely shaped the particular application of the venue privilege to foreign plaintiffs. Instead of the binary choice suggested by the plaintiff's-choice principle — whether foreign plaintiffs are entitled to a venue privilege — the courts have opted for judicial balancing of the relative conveniences.

C. Transfer of Venue

In the federal courts, forum non conveniens has largely been replaced by statutory transfer of venue.46 The concept of venue transfer emanates from the judicial-management paradigm. In a pure transfer system, the plaintiff's choice of where to lodge the lawsuit would simply initiate a judicial mechanism for deciding de novo where the suit most properly belonged. Although the plaintiff might be able to choose the decision-maker for the selection of venue, he would have no substantive impact on where to lay venue.

By its language, section 1404(a) of the Judicial Code, which since 1948 has allowed for venue transfer in the federal courts, appears to represent the triumph of the judicial-management principle: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."47 Yet, as Justice Clark noted, "[a]s words on a page torn from the history of our judicial development, this direction is utterly meaningless."48 The federal courts have

---

43 Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 165 (2d Cir.) (en banc) (Oakes, J., dissenting), cert. denied, 449 U.S. 890 (1981); see also id. at 161 (Van Graaaf, J., dissenting).
44 See R. Magnal & Co. v. M.G. Chem. Co., 942 F.2d 164, 168 (2d Cir. 1991) ("The Court's language that a foreign plaintiff's forum selection deserves less deference is not an invitation to accord a foreign plaintiff's selection of an American forum no deference since dismissal for forum non conveniens is the exception rather than the rule.") (quoting In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1164 n.26 (5th Cir. 1987) (en banc), vacated in part on other grounds, 490 U.S. 1032 (1989)).
45 Lony v. E.I. du Pont de Nemours & Co., 886 F.2d 628, 634 (3d Cir. 1989); see also Lacey v. Cessna Aircraft Co., 932 F.2d 170, 179 (3d Cir. 1991) (holding that Lony does not "require[e] a court somehow to mark on a continuum the precise degree it accords a plaintiff's choice").
47 28 U.S.C. § 1404(a) (1994). The transfer-of-venue provision was originally adopted in reaction to the Supreme Court's 1947 forum non conveniens decisions and to Kepner, as discussed above. See Ex parte Collett, 337 U.S. 55, 57-58 (1949).
stolidly maintained the plaintiff’s forum-choice privilege by interpreting section 1404(a) to include deference to the plaintiff’s choice of venue.\footnote{But see Note, Constructing Alternative Avenues of Jurisdictional Protection: Bypassing Burnham’s Jurisdictional Roadblock via § 1404(a), 53 VAND. L. REV. 311, 357-70 (2000) (asserting, from a judicial management perspective, that in practice district courts do not defer to the plaintiff’s choice of an “inappropriate forum” and use § 1404(a) to impose “fundamental fairness” on the choice of forum).}

Judicial deference to the plaintiff’s choice of forum under section 1404(a) may be a vestige of the forum non conveniens antecedents to statutory transfer of venue. When the Supreme Court explained in \textit{Norwood v. Kirkpatrick}\footnote{349 U.S. 29 (1955).} that section 1404(a) does “more than just codify the existing law on forum non conveniens,”\footnote{Id. at 32.} it was careful to note that “[t]his is not to say that the relevant factors have changed or that the plaintiff’s choice of forum is not to be considered, but only that the discretion to be exercised is broader.”\footnote{Id. at 37 (Clark, J., dissenting).} Even so, Justice Clark in dissent strongly criticized any departure from forum non conveniens and warned that the majority “goes far toward assigning to the trial judge the choice of forums, a prerogative which has previously rested with the plaintiff.”\footnote{See Stowell R.R. Kelner, Note, “Adrift on an Uncharted Sea:” A Survey of Section 1404(a) Transfer in the Federal System, 67 N.Y.U. L. REV. 612, 618-22 (1992) (emphasizing the unpredictability of the differing standards).}

In the wake of \textit{Norwood}, the federal courts have been unable to agree on how much weight to give to a plaintiff’s choice of forum.\footnote{See Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), cert. denied, 401 U.S. 910 (1971).} The judicial formulations of the standard for venue transfer can be arrayed along a continuum from the plaintiff’s-choice pole to the judicial-management pole. Some courts hold that “a plaintiff’s choice of a proper forum is a paramount consideration in any determination of a transfer request.”\footnote{In re Warrick, 70 F.3d 736, 741 (2d Cir. 1995) (quoting A. Olinick & Sons v. Dempster Bros. Inc., 365 F.2d 439, 444 (2d Cir. 1966)).} Probably the majority position in the federal courts is that the plaintiff’s choice is “entitled to substantial consideration.”\footnote{See Georgouses v. NaTec Resources, Inc., 963 F. Supp. 728, 730 (N.D. Ill. 1997).} On the other hand, some courts regard the plaintiff’s choice as merely one factor among many.\footnote{See Levine v. Arnold Transit Co., 459 F. Supp. 233, 235 (N.D. Ill. 1978) ("Why, under § 1404(a), one side’s preference should carry greater weight than the other’s escapes us, particularly since it is impossible to determine how much weight is to be accorded plaintiff’s choice given its variable treatment by the courts . . . .").} Finally, isolated voices can be heard from the federal bench for something approaching the pure judicial-management model, casting aside any special consideration for the plaintiff’s choice.\footnote{Because the district court’s ruling

\footnote{But see Note, Constructing Alternative Avenues of Jurisdictional Protection: Bypassing Burnham’s Jurisdictional Roadblock via § 1404(a), 53 VAND. L. REV. 311, 357-70 (2000) (asserting, from a judicial management perspective, that in practice district courts do not defer to the plaintiff’s choice of an “inappropriate forum” and use § 1404(a) to impose “fundamental fairness” on the choice of forum).}
on a section 1404(a) motion is an unappealable interlocutory order, and review by writ of mandamus is usually unavailable unless the district court transferred to a court with improper venue or failed to consider the appropriate factors, the differences persist concerning the weight to accord to the plaintiff’s choice.

Whatever the verbal formulations of the federal venue-transfer standard, defendants’ motions under section 1404(a) are usually denied. The plaintiff’s-choice principle appears to be too entrenched in the law of venue for even the judicial-management language of section 1404(a) to dislodge it entirely.

A further contested issue in section 1404(a) transfers is to where the case can be transferred. Reading narrowly the statutory provision that the transfer must be to a district where the case “might have been brought,” the Supreme Court ruled in *Hoffman v. Blaski* that a federal court cannot make a section 1404(a) transfer to a district where the plaintiff would not have had the right to bring suit in the first place. Thus, even if the defendant is willing to waive any objection to lack of personal jurisdiction or improper venue in a more convenient transferee district, *Hoffman* holds that the case may not be transferred there. In dissent, once again taking the judicial-management position, Justice Frankfurter charged that “the Court’s view restricts transfer, when concededly warranted in the interest of justice, to protect no legitimate interest on the part of the plaintiff.” Indeed, it is difficult to defend the outcome in *Hoffman* on policy grounds. It appears to be the result of rigid plaintiff’s-choice thinking, in that it restricts the range of venue choices available to the court considering a transfer motion to those originally at the plaintiff’s disposal.

Another illustration of the competition between the plaintiff’s-choice and judicial-management principles involves a different venue transfer statute, section 1407(a), which authorizes transfers by the Judicial Panel on Multidistrict Litigation for “coordinated or consolidated pretrial proceedings.” The multi-district litigation statute is perhaps the apogee of the judicial-management principle, in that party autonomy is subsumed to the convenience of all of the parties and of the judicial system as a whole. Although section 1407(a) provides that “[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated,” a practice developed of so-called “self-transfers”

60 See, e.g., *In re Scott*, 709 F.2d 717, 720 (D.C. Cir. 1983) (per curiam).
63 See id. at 343-44.
64 See id. at 344.
65 Id. at 362 (Frankfurter, J., dissenting in the companion case of *Sullivan v. Behimer*).
67 Id.
under section 1404(a). Transferee judges, who by supervision of the pre-trial proceedings had become familiar with the coordinated cases, often found that it would be more efficient for them to retain the cases for trial rather than send them back to the separate transferor districts. 68 In a recent case, the U.S. Supreme Court put an end to this practice, ruling unanimously that the text of section 1407(a), which states that the cases “shall be remanded,” 69 does not admit of any judicial discretion. 70 Although the Court’s opinion was terse, the policy reasons for not permitting the self-transfer were elaborated in Judge Kozinski’s dissent in the Ninth Circuit decision below. 71 Judge Kozinski maintained that the practice of routine self-transfers in multi-district litigation contravened the “strong presumption that plaintiff’s choice of forum will not be disturbed.” 72 Thus, even in multi-district litigation, where judicial management might be thought to reign supreme, the plaintiff’s-choice principle retains some force.

D. Personal Jurisdiction

While venue is the principal consideration for plaintiffs choosing among federal courts, personal jurisdiction serves as the primary restriction on the plaintiff’s choice among state courts. Since the landmark decision in International Shoe Co. v. Washington, 73 a defendant is not subject to suit in a given forum unless he has “minimum contacts” with that forum. 74 The focus of the “minimum contacts” analysis is on the defendant’s conduct — whether “the defendant purposefully avails itself of the privilege of conducting activities within the forum State.” 75 Nonetheless, to determine whether the exercise of personal jurisdiction comports with “fair play and substantial justice,” 76 courts must also examine various convenience-based factors that take into account the interests of the

72 Id. at 1546. In an earlier opinion in the same case on writ of mandamus, Judge Kozinski expressed himself even more forcefully: “When it comes to conducting a trial (and resolving other dispositive matters) plaintiffs retain their ancient right to select the forum.” Lexecon Inc. v. United States District Court, No. 95-70380, 1995 WL 432395, at *3 (9th Cir. July 21, 1995) (Kozinski, J., dissenting).
73 326 U.S. 310 (1945).
74 See id. at 316. State long-arm statutes, less extensive than the Due Process Clause permits, ma, provide further limitations. See e.g., N.Y. C.P.L.R. § 302(a) (McKinney 1990).
75 Hanson v. Denckla, 357 U.S. 235, 253 (1958); see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-76 (1985) (explaining the “purposeful availment” prong of personal jurisdiction).
76 International Shoe, 326 U.S. at 320.
plaintiff, the forum state and the inter-state judicial system as a whole.\textsuperscript{77}

Personal jurisdiction is couched in terms of the defendant's liberty interest.\textsuperscript{78} In practice, however, it operates as "a doctrine to limit a plaintiff's choices of possible fora."\textsuperscript{79} The doctrine of personal jurisdiction may give the defendant a veto power over the forum of plaintiff's choice. Unlike the transfer-of-venue doctrine, however, personal jurisdiction does not allow the defendant to solicit a court to decide the most convenient forum. The defendant can only veto certain inconvenient fora. From the defendant's perspective, the limited applicability of the doctrine is compensated for by its focus on the defendant's convenience. The only basis for dismissal for lack of personal jurisdiction is the defendant's inconvenience, not the convenience of all parties and witnesses.

For these reasons, personal jurisdiction only partially adopts the judicial-management principle. The examination of the defendant's convenience acts as a filter to screen out cases in which the plaintiff's choice of forum is particularly inconvenient to the defendant. After all, the plaintiff presumably will not have chosen a forum inconvenient to himself. In this way, the overlay of plaintiff's choice and the personal-jurisdiction doctrine results in a weak approximation of the judicial-management principle: at least those fora plainly inconvenient to each party are ruled out. However, the primacy of the plaintiff's choice of forum remains. Notably, as with venue,\textsuperscript{80} the liberalization of personal jurisdiction since \textit{International Shoe} has ended up strengthening the plaintiff's ability to choose the forum.

In federal court, the effect of creating a relatively wide range of forum choices for the plaintiff has been to blur the distinction between venue and personal jurisdiction.\textsuperscript{81} Black-letter law insists that jurisdiction and venue are entirely distinct concepts.\textsuperscript{82} Nevertheless, both personal jurisdiction and restrictions on venue consider the forum's convenience to the defendant.\textsuperscript{83} The result is a

\textsuperscript{77} See \textit{Burger King}, 471 U.S. at 476-77 (listing five factors); see also \textit{Asahi Metal Indus. Co. v. Superior Court}, 480 U.S. 102, 113-16 (1987) (dismissing suit between foreign parties for lack of personal jurisdiction on convenience grounds).

\textsuperscript{78} See \textit{Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée}, 456 U.S. 694, 702 (1982) (stating that personal jurisdiction is not based on "federalism concerns").


\textsuperscript{80} See supra text accompanying notes 21-22.

\textsuperscript{81} See David E. Seidelson, \textit{Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions}, 37 GEO. WASH. L. REV. 82, 83 (1968) ("[D]espite the law teacher's cant that jurisdiction and venue are distinct and disparate concepts, it remains a fact of legal life that federal venue statutes effectively restrict the in personam jurisdiction available to federal courts hearing federal cases").

\textsuperscript{82} See \textit{Neirbo Co. v. Bethlehem Shipbuilding Corp.}, 308 U.S. 165, 168 (1939) (stating that "the basic difference between the court's power and the litigant's convenience is historic in the federal courts").

redundancy of court-access doctrines. As personal jurisdiction has evolved since *International Shoe* away from notions of territorial power and toward the embodiment of fairness to the defendant, the demarcation between personal jurisdiction and venue has become ever harder to locate. Accordingly, a persuasive case can be made for a congruence of the two doctrines into a single, general concept of "forum-reasonableness."  

Recent amendments to the federal venue statute have in large part brought about the congruence of personal jurisdiction and venue in federal court. The most significant innovation in the 1990 amendments to the federal venue statute was the creation of a fallback provision laying venue in "a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." In many cases, venue will be proper wherever the defendant is subject to personal jurisdiction. By expressly tying the scope of proper venue to the presence of personal jurisdiction, Congress has helped to rationalize the law of forum selection.

### III. FEDERAL JURISDICTION

Another area of the law contested by the principles of plaintiff's choice and judicial management is the selection of the federal or state court system. To be sure, the most important disputes regarding the subject-matter jurisdiction of the federal courts turn on concerns of federalism that are beyond the scope of this article. Yet, on the margins, a plaintiff sometimes has the power to control whether his lawsuit will end up in federal or state court.

At first glance, that power may appear odd. Federal courts jealously guard their own jurisdiction and throw out cases that do not belong there. As for lawsuits filed in state court, the defendant has the statutory right to remove cases

---


85 For historical reasons, notions of territoriality unrelated to convenience may still remain part of the doctrine of personal jurisdiction. See *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion of Scalia, J.) (stating that any physical presence in the jurisdiction confers personal jurisdiction).


87 28 U.S.C. § 1391(a)(3) (1994) (diversity of citizenship); see also id. § 1391(b)(3) (federal question). Since the 1988 amendment to the provision of the venue statute for corporate defendants, "a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." § 1391(c). Thus, the federal-court tests for personal jurisdiction and venue over corporations are largely identical.

88 See generally Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (examining the "federalist" and "nationalist" models of the law of federal jurisdiction, in an enterprise similar to that of this article).

within the original jurisdiction of the federal courts from state to federal court. Accordingly, it may seem that plaintiff and defendant are equally able to direct that federal cases end up in federal court.

However, in some cases the plaintiff — as "master of his complaint" — can structure the lawsuit so as to create or destroy federal jurisdiction. The plaintiff’s choice of what causes of action to assert and what parties to join can determine whether there is federal jurisdiction. The doctrines granting plaintiffs that latitude resonate with the plaintiff’s-choice principle. Considering the mandatory nature of subject-matter jurisdiction, even minor departures from the judicial-management principle in this area are surprising.

A. Federal-Question Jurisdiction

One of the fundamental precepts of federal-question jurisdiction is the "well-pleaded complaint" rule. That rule "provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint." Even if it is apparent that the case will turn on a federal-law defense, the federal courts lack jurisdiction if the plaintiff’s cause of action is asserted under state law.

The well-pleaded complaint rule usually arises when the defendant attempts to remove to federal court a lawsuit the plaintiff has filed in state court. In that context, the federal courts apply what is sometimes referred to as the master-of-the-complaint rule. That rule permits the plaintiff to decide whether to assert federal-law claims that will support removal jurisdiction, on the theory that "the party who brings a suit is master to decide what law he will rely upon." For example, the plaintiff can ensure that the lawsuit remains in state court simply by omitting a cause of action that, if pleaded, would support removal jurisdiction. The pervasive influence of the plaintiff’s-choice principle is unmistakable.

There is, however, a narrow exception to the well-pleaded complaint rule, commonly known as the "artful pleading" doctrine. "If a court concludes that a plaintiff has ‘artfully pleaded’ claims” by "omitting to plead necessary federal questions,” it “may uphold removal even though no federal question appears on the

92 See Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908); see also Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 14 (1983) (holding that removal is precluded “even if both parties admit that the defense is the only question truly at issue in the case”).
94 Franchise Tax Bd., 463 U.S. at 22 (quoting The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) (Holmes, J.) (internal quotation marks omitted)).
95 See Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (“The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.”).
face of the plaintiff’s complaint.” So far, the Supreme Court has applied the “artful pleading” doctrine principally in those few cases where federal law completely pre-empts state law and replaces any state-law right of action with a federal one. Recently, the Court cut back on its previous suggestion of a more expansive reading of the doctrine. Despite the limited applicability of the “artful pleading” doctrine, it clearly articulates the judicial-management principle that a court rather than the plaintiff should decide whether a lawsuit belongs in federal or state court.

One of the more recondite aspects of the well-pleaded complaint rule is how to accommodate declaratory judgments. Using a declaratory-judgment action, any lawsuit is in principle reversible. The federal Declaratory Judgment Act, and its state-court analogues, permit a party to turn what would be a federal defense to an action for coercive relief under state law into an element of a declaratory-judgment action on the face of a well-pleaded complaint. The Supreme Court has therefore carved out an exception to the well-pleaded complaint rule for declaratory-judgment actions. The federal courts will exercise federal-question jurisdiction over a declaratory-judgment action only in cases in which, “if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.” This rule may at first appear like a departure from the plaintiff’s-choice principle. But that depends on who the “plaintiff” is. The courts ignore, for jurisdictional purposes, the procedural innovation of the Declaratory Judgment Act and scrutinize instead a putative action by the “natural” plaintiff — the defendant to the declaratory-judgment action. If the “plaintiff” is considered in this way to be the party with a cause of action for

---


101 Franchise Tax Bd., 463 U.S. at 19.
coercive relief, the exception to the well-pleaded complaint rule is consistent with the plaintiff's-choice principle after all.

B. Diversity-of-Citizenship Jurisdiction

The plaintiff's-choice principle also helps to explain some of the doctrines allowing plaintiffs, in certain circumstances, to create or destroy diversity-of-citizenship jurisdiction in federal court. The jurisdictional statute requires "complete diversity" — no plaintiff can be a citizen of the same state as any of the defendants. Despite the seeming objectivity of this jurisdictional criterion, plaintiffs have devised several methods for creating or destroying diversity-of-citizenship jurisdiction.

The most brazen way to attempt to create diversity-of-citizenship jurisdiction where none exists is for the plaintiff to assign his claim to a citizen of another state. However, Congress has enacted a statute precluding jurisdiction in cases "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction" of the federal courts. This judicial-management device has worked well in thwarting sham assignments and focusing courts on the substantive structure of the case rather than the form of the plaintiff's pleading.

Another common method of trying to manufacture federal-court jurisdiction is to align the parties as plaintiffs or defendants in the complaint in such a way as to create complete diversity. Here, too, the judicial-management principle has prevailed, and courts will "look beyond the pleadings, and arrange the parties according to their sides in the dispute." However, in some cases a plaintiff can create federal-court jurisdiction by simply not joining a party whose presence would destroy diversity of citizenship. So long as the absent party is not deemed "indispensable," this device will succeed in conferring federal-court jurisdiction.

---

102 See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (announcing the "complete diversity" rule). The jurisdictional statute also requires an amount in controversy of more than $75,000. See 28 U.S.C. § 1332 (1994 & Supp. IV 1998). The plaintiff's-choice principle allows the plaintiff to prevent removal to federal court by claiming an amount below the jurisdictional threshold, even though he might have claimed more. See Burns v. Windsor Ins. Co., 31 F.3d 1092, 1094-97 (11th Cir. 1994). But cf Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 871-73 (6th Cir. 2000) (holding that removal is proper if state law would permit plaintiff to recover more than the amount claimed in the complaint and that defendant establishes that it is more likely than not that plaintiff will recover more than the jurisdictional amount, even though plaintiff stipulated after removal that her damages are below the jurisdictional amount).

103 28 U.S.C. § 1335 (1994). A related statute provides that the representative of an estate is deemed to be a citizen of the state of the decedent. Id. § 1332(o)(2). This statute ended the practice of appointing an out-of-state representative to create diversity jurisdiction.


105 City of Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178, 180 (1905); see also City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941) (holding that in re-aligning parties, the court looks to the "primary and controlling matter in dispute").

The same competing principles recur in the debates over devices to destroy diversity jurisdiction and thereby prevent the defendant from removing the action to federal court. There is no statute preventing collusive assignments of claims to destroy federal-court jurisdiction, as there is for assignments designed to create jurisdiction. Nonetheless, federal courts are generally just as intolerant of sham transactions designed to defeat removal. Similarly, the judicial-management principle has carried the day in allowing courts, upon removal to federal court, to re-align parties to create diversity jurisdiction. In the context of party joiner, however, the plaintiff’s-choice principle has proved resilient. The doctrine of “fraudulent joinder” prevents the joinder as defendants only of persons against whom the plaintiff has no bona fide claim. The plaintiff may legitimately preclude removal by joining as defendants persons whom he knows to be judgment-proof. As one court expressed this doctrine, in classic plaintiff’s-choice terms:

If under our dual court system a potential plaintiff has a choice between a state forum and a federal forum, it is his privilege to exercise that choice subject to legal limitations, and if he can avoid the federal forum by the device of properly joining a nondiverse defendant or a nondiverse co-plaintiff, he is free to do so.

Both with respect to creating and destroying diversity jurisdiction, the judicial-management principle is weakest in the context of a plaintiff's decision regarding what parties to join. The courts are reluctant to take the activist step of

---

107 See Western Md. Ry. v. Harbor Ins. Co., 910 F.2d 960, 964 (D.C. Cir. 1990) (“Congress has so far proscribed only collusive joinder meant to invoke federal jurisdiction, see 28 U.S.C. § 1359; parties may still obtain a federal forum by colluding not to join”).

108 See supra text accompanying note 103.

109 See, e.g., Gentle v. Lamb-Weston, Inc., 302 F. Supp. 161, 166 (D. Me. 1969) (“[T]he essential diversity of citizenship of the parties at bar has not been vitiated by plaintiffs’ sham transaction.”).

110 See, e.g., Broidy v. State Mut. Life Assurance Co., 186 F.2d 490, 492 (2d Cir. 1951) (re-aligning non-diverse co-plaintiff and upholding removal to federal court where that party in fact “ha[d] every interest in supporting the plaintiff’s recovery”).


112 See, e.g., Clipper Air Cargo, Inc. v. Aviation Prods. Int’l, Inc., 981 F. Supp. 956, 960 (D. S.C. 1997) (drawing “the distinction between a defendant who was fraudulently joined and a defendant who was judgment proof”).

113 Iowa Pub. Serv. Co. v. Medicine Bow Coal Co., 555 F.2d 400, 406 (8th Cir. 1977) (remanding to state court because of joinder of non-diverse co-plaintiffs who, although not indispensable parties, were real parties in interest).

114 See Richard D. Freer, Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit, 50 U. PITT. L. REV. 809, 825 (1989) (listing reasons plaintiffs often decline to join potential co-plaintiffs). Freer has forcefully expressed the judicial-management view:
restructuring the scope of a plaintiff's lawsuit. Consequently, a plaintiff is often permitted to pursue related lawsuits in federal and state court against different defendants. The judicial inefficiencies that result can be justified only on the basis of the plaintiff's-choice principle.

IV. DUPLICATIVE LITIGATION

The area of duplicative litigation is one for which the principle of judicial management appears excellently suited. When the judicial system is burdened with a repetitive lawsuit brought by the same plaintiff in a different forum, or a reactive lawsuit in which the defendant in the first suit sues the original plaintiff in a separate action, inefficiencies naturally result. Duplicative litigation arises in a number of different doctrinal contexts, including injunctions against suits in another federal court, federal-court abstention in favor of parallel state-court proceedings, and discretion over whether to hear a declaratory-judgment action. In each case, however, the legal doctrines have been shaped by the cross-currents of the plaintiff's-choice and judicial-management principles.

A. Anti-Suit Injunctions

Perhaps the most blatant example of duplicative litigation is when the same underlying dispute is the subject of two lawsuits in the same court system. The litigants either ask the favored court to enjoin the opposing party from proceeding in the alternative forum — an "anti-suit injunction" — or ask the disfavored court to stay or dismiss its proceedings in favor of the parallel action.

Either way, the issue is which suit gets priority. In that situation, the plaintiff’s-choice principle counsels in favor of giving priority to the first-filed lawsuit. Under this view, the plaintiff who won the race to the courthouse should not be deprived of his action because the second-filed suit will likely be more efficient or convenient. On the other hand, the judicial-management principle supports balancing the relative conveniences of the two lawsuits and giving priority to the lawsuit likely to lead to the more efficient resolution of the underlying dispute. According to the judicial-management principle, the question of which party filed first should function as no more than a tie-breaker when the balance of conveniences is close.

The leading Supreme Court case on anti-suit injunctions within the federal-

"A plaintiff... has no right to sole possession of center stage; we need to tell the prima donna of the legal world that she must work with some co-stars." Id. at 813.

115 See, e.g., Temple v. Synthes Corp., 498 U.S. 5, 7 (1990) (per curiam) (reversing dismissal of federal-court suit, in light of parallel state-court suit brought by same plaintiff against other defendants, on the ground that "it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit").

116 For the origins of this terminology, see Allan D. Vestal, Repetitive Litigation, 45 IOWA L. REV. 525 (1960); and Allan D. Vestal, Reactive Litigation, 47 IOWA L. REV. 11 (1961).
court system, Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.,117 adopted the judicial-management principle. Kerotest involved a common patent-law fact pattern, the so-called “customer suit,” in which the patentee sues a distributor of the allegedly infringing product (the “customer”), rather than the rival manufacturer itself.118 In Kerotest, the manufacturer then brought a declaratory-judgment action to have the patent declared invalid.119 The stage was set when the patentee joined the manufacturer as a defendant in the first-filed action.120 The manufacturer was unable to join the customer in the declaratory-judgment action, presumably due to lack of personal jurisdiction. The Court, in an opinion by Justice Frankfurter, did not apply the first-to-file rule,121 stating that “[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems.”122 As between the two suits, the Court preferred the customer suit because all parties to the controversy were before that court, and “all interests will be best served by prosecution of the single action.”123

Despite the judicial-management tone of the Kerotest opinion, the lower federal courts have generally adhered to a first-to-file rule with limited exceptions.124 For example, the Second Circuit gives priority to the first-filed suit with two exceptions: first, if the first-filed suit is a “customer suit” in patent litigation, and second, if “forum-shopping alone motivated the choice of the situs for the first suit.”125 It is unclear what triggers the forum-shopping exception in the

---

118 See id. at 185-86.
119 See id.
120 See id. at 186.
121 See id. at 186.
122 The district court in the declaratory-judgment action had enjoined the patentee from proceeding against the manufacturer in the customer suit, on the ground that the manufacturer’s declaratory-judgment action was the first filed as between the patentee and the manufacturer. See Kerotest Mfg. Co. v. C-O-Two Fire Equip., 92 F. Supp. 943, 947 (D. Del. 1950) (citing Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 930 (3d Cir. 1941) (applying first-to-file rule), cert. denied, 315 U.S. 813 (1942)).
123 Kerotest, 342 U.S. at 183.
125 See William Gluckin & Co. v. International Playtex Corp., 407 F.2d 177, 178 (2d Cir. 1969); Mattel, 353 F.2d at 423-24 & n.4. In the customer-suit cases, the balancing of conveniences generally favors the manufacturer’s declaratory-judgment action. See, e.g., Codex Corp. v. Milgo Elec. Corp., 553 F.2d 735, 738 (1st Cir.) (establishing “rebuttable presumption” in favor of manufacturer’s declaratory-judgment action), cert. denied, 434 U.S. 860 (1977); William Gluckin, 407 F.2d at 179-80. The Federal Circuit has recognized the customer-suit exception. See Katz v. Lear Siegler, Inc., 909 F.2d 1459, 1464 (Fed. Cir. 1990).
Second Circuit case law.\textsuperscript{126} The district courts have seldom found "forum shopping" except when the recipient of a demand letter spurns the prospect of settlement and files an anticipatory suit in an effort to pre-empt the threatened action.\textsuperscript{127} Inherent in any litigation for which alternative districts are available is the plaintiff's choice of venue; that alone cannot constitute forum shopping in the sense the Second Circuit intended.\textsuperscript{128}

The law of anti-suit injunctions in federal court remains confused. The principal reason for that is the uneasy co-existence of Kerotest's admonitions of wise judicial management with the first-to-file rule. The appeal of the first-to-file rule lies in the reluctance of many judges to substitute their own conclusions about what the litigative structure of the dispute should be for the structure chosen by the plaintiff.

\textbf{B. Federal-Court Abstention}

The doctrine of federal-court abstention is another instance of the tensions between competing legal principles. The federal courts are prohibited by statute from issuing anti-suit injunctions against state-court proceedings.\textsuperscript{129} Accordingly, when faced with duplicative litigation in federal and state court, the federal court must decide whether to stay or dismiss its proceedings in favor of the state-court action. Inevitably, federalism issues are paramount. Yet here, too, the judicial-management principle plays its part in shaping forum selection. In \textit{Colorado River Water Conservation District v. United States},\textsuperscript{130} the Supreme Court extended the principles of Kerotest to duplicative litigation between federal and state court.\textsuperscript{131} The same considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,"\textsuperscript{132} apply to federal-state duplicative litigation, unrelated to the federalism concerns underlying traditional abstention doctrines.\textsuperscript{133} Despite the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,"\textsuperscript{134} the Court

\textsuperscript{126} The cases are not illuminating. \textit{See}, e.g., Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc., 804 F.2d 16 (2d Cir. 1986).

\textsuperscript{127} \textit{See} e.g., Hanson plc v. Metro-Goldwyn-Mayer Inc., 932 F. Supp. 104, 106-08 (S.D.N.Y. 1996); \textit{see infra} text accompanying notes 154-56.

\textsuperscript{128} A plain example of forum shopping is when the plaintiff, having received an adverse ruling in another court, tries to get a second bite at the apple and files a repetitive action. \textit{See} Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1203 (2d Cir. 1970) (Friendly, J.) (condemning plaintiffs' "forum shopping or, more accurately, judge shopping").


\textsuperscript{130} 424 U.S. 800 (1976).

\textsuperscript{131} \textit{See id.} at 817-18.

\textsuperscript{132} \textit{Id.} at 817 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Corp., 342 U.S. 180, 183 (1952)).

\textsuperscript{133} \textit{See id.}

\textsuperscript{134} \textit{Id.} at 817.
held that in "exceptional" circumstances, concerns of judicial efficiency could lead to dismissing or staying the federal suit in favor of parallel state-court litigation.\(^{135}\) As further developed in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,\(^{136}\) the list of relevant concerns includes the interest in avoiding piecemeal litigation, the assumption by either court of jurisdiction over a *res*, the relative convenience of the fora to the parties, the order in which the courts obtained jurisdiction, the source of substantive law to be applied, and the adequacy of the state-court proceedings.\(^{137}\) The *Colorado River* abstention doctrine is a clear example of the judicial-management principle, because a plaintiff can lose his federal forum for reasons of overall systemic efficiency.

The Ninth Circuit has gone further and authorized *Colorado River* abstention in cases in which the district court finds that the federal-court plaintiff engaged in "forum shopping." In one such case, *American International Underwriters, (Philippines), Inc. v. Continental Insurance Co.*\(^{138}\) a plaintiff in New York state court, faced with the prospect that crucial evidence would be inadmissible under the New York evidence rules, brought a duplicative action in federal court in California, where it could enjoy the more liberal Federal Rules of Evidence.\(^{139}\) The court held that the plaintiff's "forum-shopping, or 'rule-of-evidence shopping,'"\(^{140}\) was properly weighed as a factor in favor of abstention.\(^{141}\) Although the Ninth Circuit has instructed lower courts that forum shopping alone is not a sufficient reason for abstention,\(^{142}\) the Ninth Circuit continues to include forum shopping, along with the factors that the Supreme Court has enumerated, for *Colorado River* abstention.\(^{143}\) Thus, the Ninth Circuit appears to have pushed the judicial-management principle a little further.

---

137 *See id.* at 19-27; *see also* Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 Geo. L.J. 99, 118-28 (1986). Consistent with the judicial-management principle of avoiding needless waste of judicial efforts, the Court has adopted a flexible first-to-file factor: "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone*, 460 U.S. at 21.
138 843 F.2d 1253 (9th Cir. 1988).
139 *See id.* at 1255.
140 *Id.* at 1259.
141 The differences in evidentiary rules involved expert opinion testimony and exceptions to the hearsay rule. *See id.* at 1259 n.5.
142 *See Federal Deposit Ins. Corp. v. Nichols*, 885 F.2d 633, 637 (9th Cir. 1989).
C. Declaratory Judgment Actions

As previously mentioned,\(^\text{144}\) the declaratory-judgment procedure threatens to undermine the conceptual structure of plaintiff-initiated litigation. Every state-court action is potentially reversible using the Declaratory Judgment Act. The “natural plaintiff”—the party with the cause of action for coercive relief—can find itself defending a declaratory-judgment action. This opens up new opportunities for forum shopping by the actual or potential state-court defendant, acting as a federal-court plaintiff.

In *Wilton v. Seven Falls Co.*,\(^\text{145}\) the Supreme Court shut down this technique by interpreting the Declaratory Judgment Act as an exception to normal obligatory-jurisdiction precepts.\(^\text{146}\) In *Wilton*, when one party gave notice of its intention to file a state-court action for coercive relief, the other party acted first and filed a declaratory-judgment action in federal court.\(^\text{147}\) Because the Declaratory Judgment Act “confers a discretion on the courts rather than an absolute right upon the litigant,”\(^\text{148}\) the *Wilton* Court held that federal district courts enjoy discretion on whether to hear a declaratory-judgment action.\(^\text{149}\) In the case before it, the Court ruled that “considerations of practicality and wise judicial administration” supported a stay of the federal-court proceedings.\(^\text{150}\) With its emphasis on avoiding duplicative litigation, the *Wilton* holding appears to be based on the judicial-management principle.

The most important open question in the wake of *Wilton* is whether its ruling applies when the parallel action is in another federal (rather than a state) court.\(^\text{151}\) In *Wilton*, the Court expressly reserved the question of applying its discretionary standard when the dispute turns on questions of federal (rather than state) law.\(^\text{152}\)

---

144 See supra text accompanying notes 99-102.
146 See id. at 286-88. The Supreme Court had previously held that jurisdiction in a Declaratory Judgment Act case was discretionary. See Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 494-95 (1942). More recently, though, several courts of appeals had applied the “exceptional circumstances” test of Colorado River to declaratory-judgment actions. See Employers Ins. of Wausau v. Missouri Elec. Works, Inc., 23 F.3d 1372, 1374-75 (8th Cir. 1994); Lumbermens Mut. Cas. Co. v. Connecticut Bank & Trust Co., 806 F.2d 411, 413-14 (2d Cir. 1986).
147 See Wilton, 515 U.S. at 280.
148 Id. at 287 (quoting Public Serv. Comm’n v. Wycoff Co., 344 U.S. 237, 241 (1952)).
149 See id. at 288.
150 Id. Although the court of appeals decision in *Wilton* expressed disapproval of the federal-court plaintiffs’ “attempts to forum shop,” *Wilton v. Seven Falls Co.*, 41 F.3d 934, 935 (5th Cir. 1994), aff’d, 515 U.S. 277 (1995), the Supreme Court did not expressly refer to that consideration.
Accordingly, some courts have read Wilton to be founded on federalism concerns and have not applied it to disputes involving duplicative federal-court litigation. On the other hand, many federal courts even before Wilton declined to hear declaratory-judgment actions in cases in which a parallel damages action had been filed. Because the purpose of the Declaratory Judgment Act is to protect potential defendants from uncertainty, these courts reasoned that the pendency of the action for coercive relief means that "a declaratory judgment would serve no useful purpose." Moreover, many courts do not want to reward perceived forum shopping when parties who are put on notice of a potential lawsuit win the race to the courthouse by filing a declaratory-judgment action. These judicial-management concerns have been complemented by the plaintiff's-choice principle. Several courts have declared that "a suit for declaratory judgment aimed solely at wresting the choice of forum from the "natural" plaintiff will normally be dismissed." Reactive litigation using the declaratory-judgment procedure is a situation in which the role of the plaintiff's-choice principle is unclear. Reflexive plaintiff's-choice thinking might allow the first-filed lawsuit to proceed in favor of the second suit, regardless of which was the action for coercive relief. The more faithful application of the plaintiff's-choice principle, however, may be to defer to the choice of forum by the "natural plaintiff," which usually means favoring the action for coercive relief over the declaratory-judgment action. Thus, the judicial-management and plaintiff's-choice principles will often result in the same legal rules for reactive litigation using the declaratory-judgment procedure. Although the Supreme Court opinion in Wilton articulates more clearly the judicial-management principle, subsequent cases may show whether the plaintiff's-choice principle remains an important part of judicial decision-making in this area of the law.

152 See Wilton, 515 U.S. at 290.

153 See Youell v. Exxon Corp., 74 F.3d 373, 376 (2d Cir.) (per curiam) (implying that federal-court abstention would always be inappropriate in a case involving federal law and distinguishing Wilton as a state-law case), cert. denied, 517 U.S. 1251 (1996).

154 Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987); see also Continental Cas. Co. v. Robsae Indus., 947 F.2d 1367, 1370-71 (9th Cir. 1991) (establishing a "presumption" that a declaratory-judgment action should give way to a coercive action in another court). This reasoning has been rejected in patent cases, in which an action for a declaration of patent invalidity is considered on the same footing as an action for patent infringement. See Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 937 (Fed. Cir. 1993) (rejecting the Tempco rule because it would systematically favor patentees); see also cases cited supra in note 125.


156 BASF Corp. v. Symington, 50 F.3d 555, 558 (8th Cir. 1995) (quoting Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431 (7th Cir. 1993)); see also Hanes Corp. v. Millard, 531 F.2d 585, 592-93 (D.C. Cir. 1976) (permitting anticipatory declaratory-judgment suits would "deprive the plaintiff of his traditional choice of forum and timing, and . . . provoke a disorderly race to the courthouse").
V. CHOICE OF LAW

One of the most important potential consequences of forum selection is a difference in applicable law. The *Erie*\(^{157}\) doctrine ensures that federal courts will apply the same law (including choice-of-law rules) as courts of the states in which they sit.\(^{158}\) Forum selection between court systems should therefore have no effect on the applicable law. Among the states, however, there are significant differences in choice-of-law rules, and the federal system provides little constraint on states' choice-of-law rules. Consequently, the substantive law applied to a given dispute often depends on the place of suit.

A. State Choice-of-Law Rules

States differ widely in their choice-of-law rules.\(^{159}\) This diversity has a profound effect on the significance of whether a court defers to the plaintiff's choice of forum. If courts always applied forum law, then it would follow automatically that a plaintiff's choice of forum would also be a choice of the substantive law. At the other extreme, if choice-of-law analysis were forum-neutral and uniform across jurisdictions, then the plaintiff's choice of forum would have no effect on the substantive law applied to the facts of the case.

Traditionally, courts applied what is known as the "vested rights" approach to the conflict of laws. Under this approach, associated with the first Restatement of Conflict of Laws, courts generally applied the law of the place where the cause of action was said to have accrued, such as *lex loci delicti* for torts or *lex loci contractus* for contracts.\(^{160}\) Occasionally, courts had leeway in which state's law would apply, such as when the applicable law in a given case turned on characterizing whether the plaintiff's claim sounded, say, in tort or in contract.\(^{161}\)

More recently, most courts have abandoned the traditional "vested rights" theory for explicit "interest analysis." For example, the second Restatement calls for determining the state with the "most significant relationship" to the dispute, as indicated by several choice-influencing considerations.\(^{162}\) Yet, critically, the "choice-of-law revolution" has taken place differently in different states, and the

\(^{157}\) *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).


\(^{160}\) See *RESTATEMENT OF CONFLICT OF LAWS* §§ 332, 377 (1934).

\(^{161}\) See, e.g., *Levy v. Daniels U-Drive Auto Renting Co.*, 143 A. 163 (Conn. 1928) (characterizing claim by plaintiff injured in automobile accident against company that rented car to negligent driver as sounding in contract rather than in tort).

\(^{162}\) *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6 (1971).
current law is characterized by a welter of different choice-of-law approaches.163

One feature of many modern approaches to the conflict of laws is a marked tendency to apply the law of the forum (the lex fori). Some states explicitly favor lex fori; for example, Kentucky courts will apply their local law whenever there are "enough contacts" with the state.164 Other states incorporate the "better law" as one of the choice-influencing considerations and, not surprisingly, find more often than not that their own law is better.165 In still other states, interest analysis has in practice tended toward application of forum law.166 Indeed, some choice-of-law theorists have called for explicit recognition of a lex fori approach.167 Relatively few courts appear to have been troubled by the avenues for forum shopping opened up by favoring local law.168 The result is what one commentator has termed "conflicts localism."169

The consequence of the difference among states’ choice-of-law rules and the tendency of choice-of-law analysis to favor the forum state is of heightened importance in forum selection. The current lack of uniformity in choice-of-law rules means that the plaintiff who can capture the forum can also capture the applicable choice-of-law rules — and perhaps the substantive law that the court will apply. Further, the bias toward lex fori means that, even if the choice-of-law rules are identical, the plaintiff who can capture the forum stands a better chance of getting the substantive law he wants. The more choice-of-law rules vary among the states, and the more states favor application of their own law, the more significant the plaintiff’s forum-selection privilege becomes.

Finally, the lex fori approach is most entrenched for issues considered “procedural” rather than “substantive,” for which courts apply forum law without


164 See Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972); Arnett v. Thompson, 433 S.W.2d 109, 113 (Ky. 1968).

165 See, e.g., Milkovich v. Saari, 203 N.W.2d 408, 417 (Minn. 1973) (applying forum law in part because it was “better” than the foreign law in question). Recent Minnesota cases place less emphasis on the “better law” factor. See Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co., 604 N.W.2d 91, 96-97 (Minn. 2000).

166 A well-known example is Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), cert. denied, 414 U.S. 856 (1973), in which the court applied New York law in a wrongful death action in which plaintiff’s decedent, a New York resident, travelled to Massachusetts and was operated on there.


168 An exception is Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 679 (N.Y. 1985), in which the court explicitly considered "reducing forum-shopping opportunities" in deciding to apply the same substantive law as the other interested state would have. Id. at 687.

169 Gene R. Schar, Choice of Law and the Forging Constitution, 71 Ind. L.J. 271, 271 (1996); see also Louise Weinberg, Choice of Law and Minimal Scrutiny, 49 U. Chi. L. Rev. 440, 467 (1982) ("The new approaches to choice of law have in common a widely noted tendency to result in the application of forum law — in other words, of plaintiff’s law.").
further analysis. One of the more important — and debatable — procedural issues is the statute of limitations. In cases in which the statute of limitations has run in one state but not another, the plaintiff’s ability to select the forum can be critical. The principal check against forum shopping for a longer statute of limitations is the “borrowing statute” that most, but not all, states have enacted. These statutes provide that, under some circumstances, the forum court borrows the statute of limitations of the state where the cause of action accrued. Because of the lack of uniformity in borrowing statutes and the fact that many favor resident plaintiffs, the borrowing statutes have not entirely eliminated forum shopping in this area. Recently, several states have re-classified statutes of limitation as substantive, either judicially or by statute. Thus, the effect of the plaintiff’s choice of forum on the applicable statute of limitations depends in large measure on the states involved in the dispute.

B. Federal Limitations on Choice of Law

The federal system offers several potential — but as yet unrealized — limitations on the states’ freedom to formulate pro-forum choice-of-law rules. These potential limitations include the enactment of a federal choice-of-law statute and the development of a federal common law of conflict of laws. The most obvious such limitation, though, is the United States Constitution. Just as the Due Process Clause has proved a powerful limitation on states’ assertions of

170 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. b (1971).
171 Id. The principal common-law exception to this rule is a statute of limitations built into the statute creating the right of action. See id. § 143.
173 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 reporter’s note (1986).
174 See, e.g., N.Y. C.P.L.R. 202 (McKinney 1990) (providing that the claims of a non-resident plaintiff are governed by the shorter statute of limitations as between New York and the state where the cause of action accrued, whereas the claims of a resident plaintiff are always governed by New York’s statute of limitations).
175 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1986) (providing that the court should generally apply a shorter forum statute of limitations but generally should not apply a longer forum statute of limitations unless the forum has a substantial interest); UNIF. LIMITATIONS ACT § 2, 12 U.L.A. 158 (1996) (providing that the court should generally apply the statute of limitations of the state whose substantive law applies); see Heavner v. Uniroyal, Inc., 305 A.2d 412, 418 (N.J. 1973) (discarding the traditional rule that statutes of limitation are regarded as “procedural”).
178 Recently, the Supreme Court has not distinguished between the Due Process and Full Faith and Credit Clauses as sources of limitation on state choice-of-law rules. See Sun Oil Co. v. Wortman, 486 U.S. 717, 729-30 n.3, 735 n.2 (1988) (Brennan, J., concurring in part and concurring in the judgment).
personal jurisdiction, so too could the Supreme Court police the states' application of their own law in cases in which they have only a tenuous relationship to the dispute.\footnote{See generally Willis L.M. Reese, Legislative Jurisdiction, 78 COLUM. L. REV. 1587 (1978) (arguing that a state's application of its own law must be fair to the parties and consistent with the needs of the judicial system as a whole); Weinberg, supra note 169, at 487 (arguing that the Supreme Court should exercise only "minimal scrutiny" over a state's choice of law).}

The leading modern case on federal limitations on choice of law is \textit{Allstate Insurance Co. v. Hague}.
\footnote{449 U.S. 302 (1981).} \textit{Hague} was a case in which plaintiff's decedent was killed in an automobile accident in Wisconsin.\footnote{Id. at 305.} Everyone involved in the accident resided in Wisconsin.\footnote{See id. Minnesota law permitted a policy-holder to recover the total coverage amount for all automobiles he owned and insured (a legal rule known as "stacking"), whereas Wisconsin law did not.} The Court held that the forum "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."\footnote{Id. at 313 (plurality opinion of Brennan, J.). A majority of the Court endorsed this test in \textit{Phillips Petroleum Co. v. Shutts}, 472 U.S. 797, 821-22 (1985).} When applied to the facts of the case, though, the \textit{Hague} Court set a low threshold. The Court upheld the Minnesota courts' decision to apply Minnesota law to the dispute on the basis of the following aggregation of contacts: plaintiff's decedent worked in Minnesota, the defendant insurer did business in Minnesota, and the plaintiff had moved to Minnesota after the accident but before filing suit.\footnote{See \textit{Hague}, 449 U.S. at 313-20. The dissent noted that plaintiff's decedent's place of employment and the plaintiff's post-accident change of residence were unrelated to the dispute and that the defendant insurer did business in all fifty states. \textit{See id.} at 337-39 (Powell, J., dissenting). In particular, the dissent observed that, "[i]f a plaintiff could choose the substantive rules to be applied to an action by moving to a hospitable forum, the invitation to forum shopping would be irresistible." \textit{Id.} at 337.} Thus, in \textit{Hague}, the plaintiff's choice of Minnesota as the place of suit determined the law applied despite the attenuated connection between Minnesota and the underlying dispute. The result in \textit{Hague} is based on the plaintiff's-choice principle.

Conversely, the best recent illustration of the judicial-management principle is \textit{Phillips Petroleum Co. v. Shutts}.\footnote{472 U.S. 797 (1985).} In \textit{Shutts}, the Kansas courts applied Kansas law in a nationwide class action, even though most of the absent members of the plaintiff class "had no apparent connection to the State of Kansas except for this lawsuit."\footnote{Id. at 815. There were several conflicts between the law of Kansas and that of Oklahoma and Texas, where most of the plaintiffs resided. \textit{See id.} at 816-18.} In a clear repudiation of the plaintiff's-choice principle, the \textit{Shutts} Court declared that the "plaintiff's desire for forum law is rarely, if ever controlling."\footnote{Id. at 820.} The Court therefore concluded that application of Kansas law to members of the plaintiff class residing outside Kansas "is sufficiently arbitrary and
unfair as to exceed constitutional limits.\textsuperscript{188}

In practice, the constitutional limitation on state choice-of-law rules has had little effect in curtailing the effects of the plaintiff's choice of forum. The slender aggregation of contacts with the forum in \textit{Hague} can be matched in most cases, thereby allowing the forum to apply its own law. The \textit{Shutts} holding is unlikely to apply outside the context of a class action; if a defendant had as few contacts to a state as most members of the plaintiff class did in \textit{Shutts}, the court would lack personal jurisdiction and would not reach the choice-of-law question.\textsuperscript{189} Thus, in light of \textit{Hague} and \textit{Shutts}, the judicial-management principle — which urges a more forum-neutral approach to choice of law — has been largely still-born in the area of constitutional limitation on state choice-of-law rules.

The constitutional limitation on choice-of-law principles that favor applying the \textit{lex fori} is even weaker if the conflict involves the statute of limitations. In \textit{Sun Oil v. Wortman},\textsuperscript{190} the Court held that, because statutes of limitations were traditionally classified as "procedural," the Constitution set no limits on the forum's ability to apply its own statute of limitations.\textsuperscript{191} \textit{Wortman} strongly supports the plaintiff's-choice principle by encouraging plaintiffs to bring suit in a forum with a longer statute of limitations.\textsuperscript{192}

For example, in \textit{Keeton v. Hustler Magazine, Inc.},\textsuperscript{193} the plaintiff brought suit in New Hampshire because it was the only state in which the statute of limitations had not run.\textsuperscript{194} The Supreme Court upheld personal jurisdiction over the defendant publisher based on its purposeful sale of the magazine in New Hampshire.\textsuperscript{195} Although the plaintiff had no contacts with New Hampshire, the Court considered her choice of forum unobjectionable.\textsuperscript{196} On remand, the Supreme

\textsuperscript{188} \textit{Id.} at 822.

\textsuperscript{189} In \textit{Shutts}, the Court held that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." 472 U.S. at 811.

\textsuperscript{190} 486 U.S. 717 (1988). \textit{Wortman} reviewed the Kansas Supreme Court's decision on remand from \textit{Shutts}.

\textsuperscript{191} \textit{Id.} at 722-30. The concurrence reached the same result by applying interest analysis rather than relying on tradition. \textit{See id.} at 737 (Brennan, J., concurring in part and concurring in the judgment). A majority of the Court left open the question whether there is any constitutional restraint if the foreign state regards its statute of limitations as substantive, rather than procedural. \textit{See id.} at 742; \textit{id.} at 743 (O'Connor, J., concurring in part and dissenting in part).

\textsuperscript{192} The Fourth Circuit, in reaching the same result as \textit{Wortman} one year earlier, declared that "[t]here is nothing inherently evil about forum-shopping." \textit{Goad v. Celotex Corp.}, 831 F.2d 508, 512 n.12 (4th Cir. 1987).


\textsuperscript{194} \textit{Id.} at 778.

\textsuperscript{195} \textit{See id.} at 781.

\textsuperscript{196} "Petitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations." \textit{Id.} at 779.
Court of New Hampshire adhered to the traditional rule that statutes of limitation are “procedural” and upheld the application of New Hampshire’s statute of limitations.197 In dissent, Justice Souter (then on the New Hampshire Supreme Court) described the case pointedly as an “egregious example of forum shopping.”198 He urged that statutes of limitations be considered substantive and concluded that New Hampshire had no interest in applying its own statute.199

Keeton illustrates the wide latitude that states currently enjoy in formulating their choice-of-law rules. In the narrow sense, the question of forum selection was decided when the Supreme Court ruled that New Hampshire had personal jurisdiction over the defendant. The significant implications of the plaintiff’s forum selection, though, lay in the consequent application of the lex fori.200 The judicial-management principle that Justice Souter espoused in dissent, which would have prevented the plaintiff from choosing the law of a state to which she had no connection whatsoever, did not prevail. Thus, Keeton underscores the significance of the plaintiff’s-choice principle.

C. Transfer of Venue and Choice of Law

Although the conflict-of-laws problem arises most forcefully in the context of state-court litigation, the federal venue-transfer statute also calls for choice-of-law analysis. Federal courts adjudicating state-law claims under diversity-of-citizenship jurisdiction apply the forum state’s choice-of-law rules.201 This principle follows naturally from the dictate in Erie R.R. Co. v. Tompkins202 of vertical uniformity between federal and state courts. But what choice-of-law rules apply if the plaintiff files suit in federal court in one state and the defendant then successfully moves under section 1404(a) to transfer venue to federal court in a second state?

The Supreme Court answered this question in 1964 in Van Dusen v. Barrack,203 holding that the transferee court must apply the choice-of-law rules that the transferor court would have.204 The Court held that Erie’s vertical-uniformity
requirement mandated "identity . . . between the federal district court which decides the case and the courts of the State in which the action was filed."\textsuperscript{205} The Court recognized that its holding "allow[ed] plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected,"\textsuperscript{206} but maintained that such an advantage was entirely appropriate because "§ 1404(a) operates on the premise that the plaintiff has properly exercised his venue privilege."\textsuperscript{207} The Court was concerned not with plaintiffs' forum shopping, but that defendants "might well regard [§ 1404(a)] as a forum-shopping instrument."\textsuperscript{208} Therefore, the Court concluded that "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms."\textsuperscript{209}

The judicial-management model would have decided \textit{Van Dusen} differently. If the second forum is so much more convenient that the defendant can overcome the plaintiff's forum-selection privilege, systemic efficiency would be furthered by proceeding as though the plaintiff had initially filed suit in the second forum. Indeed, when venue is transferred under section 1406 because venue was improper in the district where plaintiff filed suit,\textsuperscript{210} the courts do apply the choice-of-law rules of the transferee forum.\textsuperscript{211} The rationale for the different rule is that the transferor forum was outside the plaintiff's forum-selection privilege.\textsuperscript{212} The coexistence of these two rules is a strong example of plaintiff's-choice thinking, in that the question of which state's choice-of-law rules govern turns on a binary decision as to whether the plaintiff's forum selection was privileged or not.

Justice Goldberg's opinion in \textit{Van Dusen} is notable for its explicit recognition of the "plaintiff's venue privilege."\textsuperscript{213} However, its systemic-efficiency rationale for avoiding defendants' forum shopping is suspect. Certainly, defendants indifferent as to the supposed disparity in convenience between the plaintiff's chosen forum and an alternative forum may forbear from moving to transfer under section 1404(a) when they cannot gain a change in choice-of-law rules. But this scenario ought to be relatively rare, since a defendant would only be able to

\begin{footnotes}
\item[205] Id. at 639.
\item[206] Id. at 633.
\item[207] Id. at 634.
\item[208] Id. at 636.
\item[211] \textit{See}, \textit{e.g.}, \textit{Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.}, 975 F.2d 1134, 1141 (5th Cir. 1992). Similarly, when the court transfers under § 1404(a) and the transferor court had no personal jurisdiction over the defendant, the transferee court will apply its own law. \textit{See, e.g., Muldoon v. Tropitone Furniture Co.}, 1 F.3d 964, 967 (9th Cir. 1993).
\item[212] \textit{See Van Dusen}, 376 U.S. at 634.
\item[213] Id. at 635.
\end{footnotes}
overcome deference to the plaintiff's forum selection by showing that the alternative forum is significantly more convenient. Thus, if Van Dusen had been decided differently, there would be few cases in which a defendant would successfully move to transfer venue only because of the choice-of-law consequences. On the other hand, Van Dusen encourages plaintiffs' forum shopping by allowing the plaintiff to capture favorable choice-of-law rules. In choosing among proper venues, a plaintiff will file suit in the forum with the most favorable choice-of-law rules even though he knows that the court will grant defendant's motion to transfer under section 1404(a).

The opportunities for plaintiffs' forum shopping were expanded when the Court extended Van Dusen to plaintiff-initiated transfer motions in Ferens v. John Deere Co. The plaintiff in Ferens was a resident of Pennsylvania who had been injured there, but the two-year statute of limitations for his personal-injury claim had run in Pennsylvania. So he brought suit against a national manufacturer in federal district court in Mississippi, because Mississippi conflicts law mandated the application of Pennsylvania substantive law but Mississippi procedural law, including the six-year Mississippi statute of limitations. Then the plaintiff himself moved to transfer the case under section 1404(a) back to Pennsylvania, the forum most convenient for him. The Court held that the choice-of-law results under section 1404(a) were the same regardless of which party moved for transfer. Writing for the Court, Justice Kennedy noted that "[a]n opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws." In dissent, Justice Scalia deplored the Court's rule, which allowed a plaintiff "to appropriate the law of a distant and inconvenient forum in which he does not intend to litigate, and to carry that prize back to the State in which he wishes to try the case." Although Justice Scalia set forth the practical objections to the plaintiff's "filing-and-transfer" ploy, he rested his dissent on the vertical uniformity principle of Erie and Klaxon. A problem with Justice Scalia's dissenting opinion was that he had to concede that Van Dusen, which he did not want to overrule, had already "compromised" the Erie principle "in the abstract" by instructing federal courts in certain circumstances to apply the choice-of-law rules

215 See id. at 519.
216 See id.
217 See id. at 519-20.
218 See id. at 523.
219 Ferens, 494 U.S. at 527.
220 Id. at 535 (Scalia, J., dissenting).
221 See id. at 536-39.
222 See id. at 535-36, 539-40.
of another forum, which would never occur in state court.\textsuperscript{223}

Most commentators have shared Justice Scalia's outrage at the improbable result in \textit{Ferens}.\textsuperscript{224} Of course, one cause of the outcome in that case was Mississippi's treatment of statutes of limitations as procedural for choice-of-law purposes — an anachronistic rule that some states have recently abandoned.\textsuperscript{225} Another culprit is section 1404(a), which allows the plaintiff to move for transfer of venue even though he was responsible for the initial selection of venue.\textsuperscript{228} Yet, given both those preconditions, \textit{Ferens} followed naturally from the plaintiff's-choice reasoning in \textit{Van Dusen v. Barrack}, which tolerated plaintiffs' forum shopping.\textsuperscript{227} The choice-of-law rules in federal venue transfer are perhaps the most thoroughgoing success of the plaintiff's-choice paradigm.

VI. FORUM SHOPPING

So far, I have demonstrated that both the plaintiff's-choice and judicial-management principles have explanatory power across a wide range of legal doctrines concerning forum selection. Although the two principles often conflict, neither can be considered dominant, or favored in our legal system over the other. At this point, I want to step back from examining the plaintiff's-choice and judicial-management principles and offer some thoughts on the implications of these principles for the current debate on "forum shopping."

Judge Skelly Wright once described forum shopping as our "national legal pastime."\textsuperscript{228} The commonplace nature of forum shopping has not, however, earned it a good name. One reason for the general opprobrium is the amorphous nature of the term. In many disputes, the parties have a choice of forum. The term "forum shopping" is generally reserved for a choice of forum regarded as improper for some reason.\textsuperscript{229} Thus, the description of a particular practice as "forum shopping"

\textsuperscript{223} Id. at 535.


\textsuperscript{225} See supra text accompanying note 175.


\textsuperscript{227} Norwood's claim that \textit{Van Dusen} was "against forum shopping," Norwood, supra note 224, at 555, overlooks that, as we have seen, \textit{Van Dusen} targeted only defendants' forum shopping and did not disturb the plaintiff's forum-selection privilege.


\textsuperscript{229} Cf. Mary Garvey Algero, \textit{In Defense of Forum Shopping: A Realistic Look at Selecting a Venue}, 78 NEB. L. REV. 79, 80 (1999) (positing that the traditional view is that "forum shopping [is] a terrible thing, practiced by only the most manipulative and devious attorneys"); Note, \textit{Forum Shopping Reconsidered}, 103 HARV. L. REV. 1677, 1677 (1990) ("[I]t is difficult for an observer to note definitively that forum shopping has occurred without analyzing the litigant's motives."); Georgene M. Vairo, \textit{Is Selection Shopping?}, NAT'L
tells us little without an understanding of what the proper principles of forum selection are.

There can be little doubt that forum selection affects the outcome of litigation. The choice of favorable substantive law is the most dramatic prize for the successful forum-shopper, but there are also many important procedural distinctions among courts. Less tangible from a theoretical perspective, but just as real for the practicing lawyer, are differences in the quality and sympathies of the judge and in the pool from which the jury is drawn. A recent empirical study of transfer motions in federal court found a marked decline in the plaintiff’s rate of winning in cases in which venue was transferred. Another study found a similar decline in the plaintiff’s win rate in cases removed to federal court. Forum shopping can be outcome-determinative.

This raises the question why our judicial system allows such wide latitude for forum shopping. Although perhaps an obvious question, it has seldom been answered. Some degree of forum shopping is probably inevitable in any judicial system with courts of independent, but overlapping, jurisdiction. Forum shopping may be a price we pay for federalism. Yet that does not mean that there need be so many opportunities for forum shopping. As we have seen, there are many situations in which courts could, but do not, stop litigants from forum shopping.

One possible explanation is that the law has a substantive preference for plaintiffs. It has been suggested that enforcement of plaintiffs’ rights in interstate cases leads to “rational national policies in favor of safe and fair interstate

---

L. J., Sept. 18, 2000, at A16 (arguing that the forum selection becomes “forum shopping” only when the choice of forum is “frivolous”).

230 For example, it has been suggested that the reason for the dispute over personal jurisdiction in World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), was that the plaintiff joined non-diverse defendants in an effort to preclude the defendants from removing the case so as to ensure that the case would be tried to a state-court jury drawn from just one county. See Friedrich K. Juenger, Forum Shopping, Domestic and International, 63 TULANE L. REV. 553, 560 (1989).

231 See Kevin M. Clermont & Theodore Eisenberg, Exorcising the Evil of Forum-Shopping, 80 CORNELL L. REV. 1507, 1511-12 (1995) (finding that the plaintiff wins in 58% of non-transferred federal-court cases but only 29% of transferred cases).

232 See Kevin M. Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 CORNELL L. REV. 581, 593 (1998) (finding that the plaintiff wins in only 37% of cases removed to federal court). Although these data are persuasive, they are not conclusive. The groups of cases in which venue is transferred or which are removed to federal court are not necessarily comparable to litigation as a whole.

233 See Louise Weinberg, Against Comity, 80 GEO. L.J. 53, 69 (1991) (“What accounts for such persistent plaintiff bias in the evolved mechanism of interstate litigation?”).

234 See Algero, supra note 229, at 82 (claiming that forum shopping is “an intrinsic part of the American judicial system” because of the independence of the federal and state court systems).

235 One commentator has recently offered a “defense of forum shopping,” which urges that attorneys should zealously defend their clients’ interests by taking advantage of all of the opportunities for forum shopping afforded by the procedural rules. See id. at 111. However, the commentary does not attempt to answer the question posed in this article, which is why there are so many forum-shopping opportunities in the first place.
commerce." Under this view, opportunities are created for forum shopping so as to make it more likely that injured parties (plaintiffs) can find a court in which they can find redress. I find this explanation implausible. The fundamental place in our judicial system of the principle of party-neutrality makes even an implicit juridical bias in favor of plaintiffs unlikely. Moreover, it is impossible to say a priori whether an outcome in favor of the plaintiff is a good thing without reference to the underlying substantive law. Increasing the number of plaintiffs' victories in general does not further any substantive goal.

Another possible explanation for the toleration — or encouragement — of forum shopping is federalism. One commentator has suggested that the Supreme Court disfavors forum shopping between federal and state courts but encourages it among state courts. In this view, "[s]tate-state forum-shopping is fundamentally different from federal-state forum shopping because the latter impairs state governance, while the former reflects the differences state governance fosters." There is something to this explanation. By ensuring vertical uniformity of the applicable substantive law, the *Erie* doctrine has eliminated one of the principal reasons for forum shopping between federal and state courts. Yet even under *Erie* undeniable differences between federal and state courts remain, and as we have seen various legal doctrines continue to allow some forum shopping between court systems. In addition, it is not clear that forum shopping among state courts in fact furthers the states'-rights principles that the current Supreme Court is said to favor. Increased forum shopping does not encourage diversity in state law or fortify the sovereignty of state courts. Rather, a greater scope for forum shopping simply allows the plaintiff — rather than a court — to select the forum. Federalism concerns cannot explain why that should be so.

Yet another possible explanation — and undoubtedly the most prosaic — for why there is so much forum shopping is historical accident. In the last several

---


239 See *Weinberg, supra* note 233, at 70-71.


239 *Id.* at 710; *see also id.* at 711. ("Federalism is the dominant variable in the forum-shopping equation."); Note, *supra* note 229, at 1693-95 (suggesting that forum shopping encourages "local autonomy").

240 *See supra* Part III. Brown's otherwise excellent article is perhaps too focused on choice-of-law rules to the exclusion of other reasons for forum shopping. *See Brown, supra* note 238, at 695 ("Choice of law practices in the state courts are the main impetus behind the current wave of forum-shopping.").

241 Because Brown concentrates on choice of law, he argues that the Supreme Court favors state sovereignty by not imposing significant constitutional limits on state choice-of-law rules. *See Brown, supra* note 238, at 695-700, 704-06.

242 *Cf.* Stein, *supra* note 84, at 795-808 (arguing, based on the changes in the law of personal jurisdiction and venue, that "[t]he doctrinal redundancy of the various court-access doctrines and the differences in the procedural ramifications of each doctrine appear to be in significant measure the result of
decades, several critical court-access doctrines were fundamentally altered: personal jurisdiction was expanded by *International Shoe* and its progeny; federal venue rules were liberalized; and the Declaratory Judgment Act was enacted. During the same period, the "choice-of-law revolution" swept through the states. All of these changes in legal doctrine expanded the scope for forum shopping — but as an unintended consequence. This explanation too may have some merit. But it can explain only why our judicial system incorporates so many opportunities for forum shopping; it cannot provide the underlying justification for the plaintiff's ability to shop for a forum, which pre-dates any of those changes in legal doctrine.

Finally, one justification of forum-shopping that has been advanced is that deference to the plaintiff's choice of forum lessens the judicial resources devoted to rulings on the place of suit. Under this view, the plaintiff's privilege "is best understood simply as an impediment to unnecessary redetermination of, or reconsideration of, forum choice issues." This argument employs the efficiency concerns that underlie the judicial-management principle in support of tolerating plaintiffs' forum shopping. Yet the argument is unpersuasive. The plaintiff's forum-selection privilege is a strong thumb on the scales, but it does not relieve the courts of having to balance those scales. Anyone observing the amount of judicial attention devoted today to questions of forum selection is unlikely to conclude that the plaintiff's privilege minimizes decision-making costs in practice.

The strongest justification for forum shopping is the plaintiff's-choice principle. After all, inherent in the principle that the plaintiff can choose the place of suit is that the plaintiff may shop for a favorable forum. The plaintiff's privilege of forum selection is meaningful only if the plaintiff can choose a court that he believes will be more favorable to his interests than the more logical or convenient court. Forum shopping is made possible by the fact that the law provides a range of permissible venues, instead of establishing rules that would lead to a single proper place of suit.

When courts defer to the plaintiff's choice to bring suit in a state or federal judicial district with tenuous connections to the underlying dispute, they in effect ratify forum shopping. Conversely, when courts follow the judicial-management
principle and steer the suit to the most convenient forum, they curtail forum shopping.

The plaintiff’s-choice principle posits that the lawsuit belongs to the plaintiff — it is his chose in action, his property. Under this view, the plaintiff, as “master of his complaint,” should be able to select the forum in which to vindicate his right to relief. This is fundamentally a private-law view of civil litigation — one with deep roots in our common-law tradition. Forum shopping partakes just as much of that tradition as do other incidents of party autonomy, such as the plaintiff’s right to choose what causes of action to assert.

The label “forum shopping,” with its negative connotations, is little more than a rhetorical device used in defense of outcomes supported by the judicial-management principle. As we have seen, there are many situations in which plaintiffs can control the place of suit that are not called “forum shopping.” There is no principled distinction between those cases and ones in which the plaintiffs’ actions are condemned as “forum shopping.” Thus, the cases on forum selection cannot be explained by whether or not they involve “forum shopping”: either they all do, or none of them does. Rather, the best way to understand the cases is through the lenses of the two competing legal principles: plaintiff’s choice and judicial management.

VII. CONCLUSION

Efforts to curtail forum shopping affect only a fraction of the cases in which the plaintiff can control the place of suit. There are many more in which courts decide to let the plaintiff choose the forum. Across legal doctrines regarding forum selection, the plaintiff’s-choice principle authorizes forum shopping in many situations. The equally powerful counter-principle of judicial management tends to support judicial control over the place of suit.

The tension between the two principles leads to the conflicted nature of the law of forum selection. Inconsistent judicial decisions, or exceptions that threaten to swallow the rule, can often be explained as the result of courts’ applying different principles to similar situations. The divide between judicial management and plaintiff’s choice is the fault line underlying the law of forum selection. Likewise, the basic resonance of both principles in our legal culture helps to explain why the current debate on forum shopping remains unresolved.

The purpose of this article is not to urge the primacy of either principle of forum selection. Rather, I hope that identifying these two fundamental principles will help to make legal reasoning regarding forum selection more transparent. This article has pointed out some of the internal inconsistencies in legal doctrines regarding forum selection, resulting from the co-existence of the two competing principles. At the same time, plaintiff’s choice and judicial management are organizing principles that point the way toward structural coherence across legal doctrines in the law of forum selection.