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Plaintiff Personal Jurisdiction and Venue Transfer

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PLAINTIFF PERSONAL JURISDICTION AND VENUE TRANSFER

Scott Dodson*

Personal jurisdiction usually focuses on the rights of the defendant. This is because a plaintiff implicitly consents to personal jurisdiction in the court where the plaintiff chooses to file. But what if the defendant seeks to transfer venue to a court in a state in which the plaintiff has no contacts and never consented to personal jurisdiction? Lower courts operate on the assumption that, in both ordinary venue-transfer cases under 28 U.S.C. § 1404(a) and multidistrict-litigation cases under § 1407(a), personal-jurisdiction concerns for plaintiffs simply do not apply. I contest that assumption. Neither statute expands the statutory authorization of federal-court personal jurisdiction. And theories based on implied consent stretch that notion too far. Personal jurisdiction legitimately can treat plaintiffs and defendants differently, but those differences call for nuance and fact dependency, not a blanket exemption for plaintiffs from personal-jurisdiction protections. This Essay reestablishes plaintiff-side personal jurisdiction by articulating and justifying the standard for protecting the due process rights of plaintiffs subject to interstate venue transfer without their express consent.

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INTRODUCTION

After a twenty-five-year hiatus, personal jurisdiction is once again in the limelight.¹ The Supreme Court's return to the doctrine coincides with the increasing mobility of cases in modern federal litigation, as parties attempt—with judicial encouragement—to use venue-transfer statutes to move cases across state lines.²

The intersection of personal jurisdiction and venue transfer has generated issues before. In *Hoffman v. Blaski*, for example, the Court held that venue transfer to a court that lacked personal jurisdiction over the defendant was improper.³ But Congress amended the general venue-transfer statute to allow transfer to a court that otherwise would lack personal jurisdiction over the defendant if the parties consent to the transfer.⁴ Further, the Court has held that a transferor court lacking personal jurisdiction over the defendant may transfer the case to a court that has personal jurisdiction over the defendant.⁵ Throughout the development of the law at the intersection of personal jurisdiction and venue transfer, the focus has been on personal jurisdiction's protection of *defendants*.⁶

But what about plaintiffs? Personal jurisdiction protects them too.⁷ In most cases, the personal-jurisdiction protections for plaintiffs can be easily

1. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

2. 28 U.S.C. § 1404(a) (2012) (general venue transfer); *id.* § 1407(a) (multidistrict litigation (MDL) transfer); *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49 (2013) (allowing venue transfer based on a contractual forum-selection clause); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) (reporting that nearly 40 percent of the federal courts' civil docket is MDL transfers).

3. 363 U.S. 335 (1960).

4. 28 U.S.C. § 1404(a).

5. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465–67 (1962).

6. The leading treatise on federal practice, in its section on venue transfer, does not even discuss personal jurisdiction over plaintiffs (though it does identify cases on the issue in footnotes). See 15 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3845 (4th ed. 2018).

7. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) (“The Fourteenth Amendment does protect ‘persons,’ not ‘defendants,’ however, so absent plaintiffs as well as

sidestepped because a plaintiff effectively consents to the personal jurisdiction of the court where the plaintiff files.⁸ But what if the case is whisked out from under the plaintiff to a remote destination in a faraway state, against the plaintiff's choice and without the plaintiff's consent? To date, neither courts nor commentators have satisfactorily interrogated the personal-jurisdiction implications for plaintiffs in such a context.⁹ Yet the problem is a prevalent one, for such venue transfer occurs in a sizable percentage of federal cases.¹⁰

In this Essay, I make two contributions to the issue of personal jurisdiction over plaintiffs in venue-transfer cases. First, I hope to force off the blinders and shine a light on the real and serious nature of the issue. The issue should not be ignored or sidestepped but confronted and duly considered. Second, I offer an approach for addressing the issue. Although personal jurisdiction does protect plaintiffs in venue-transfer cases, the application of the consent doctrine depends upon a deeper consideration of the unique posture of plaintiffs. I therefore illustrate some paradigmatic circumstances for when and how personal jurisdiction protects plaintiffs in venue-transfer cases by restricting the range of transferee courts.

I. THE BASICS

Personal jurisdiction is a due process right not to be subject to the adjudicatory authority of a sovereign.¹¹ Although the theory behind personal jurisdiction is unsettled,¹² the Court has made clear that personal jurisdiction exhibits both sovereignty and fairness features.¹³ The sovereignty features help restrain states from adjudicating the rights and obligations of citizens of

absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims.”).

8. See *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938).

9. The few courts to consider the issue have offered perfunctory analyses that do not withstand scrutiny, as explained in more detail below. See *infra* Part II. Academic papers have essentially ignored the issue; the two lone exceptions are three pages in Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1222–24 (2018) (arguing that *Shutts* does not alleviate concerns of personal jurisdiction over plaintiffs in MDL transfers), and two pages at the end of David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 516–17 (1990) (arguing, based on plaintiff protection and defendant symmetry, for the application of the minimum-contacts test for plaintiffs in the transferee court). Cf. Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1126–27 (1993) (arguing that state-based personal jurisdiction should protect plaintiffs whose state cases are moved involuntarily across state lines under a proposed intersystem consolidation regime).

10. See *infra* text accompanying notes 20–21.

11. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011) (plurality opinion).

12. Compare *id.* at 880–81 (plurality opinion) (framing personal jurisdiction as a doctrine of consent), with *id.* at 900–01 (Ginsburg, J., dissenting) (framing personal jurisdiction as a doctrine of reasonableness and fairness).

13. See William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1212–20 (2018) (exploring this dichotomy).

other states.¹⁴ And the fairness features help justify or guard against the burdens parties face when forced to litigate outside of their home states.¹⁵ These constitutional norms set the outer bounds of personal jurisdiction; sovereigns can further restrict their courts' adjudicatory authority by statute.¹⁶

Among the parties to a lawsuit, these features of personal jurisdiction tend to operate by protecting defendants, who are involuntary parties subjected to the initial forum choice of the plaintiff. Plaintiffs understandably may wish to avoid the defendant's home state for strategic reasons; they may even select a forum that is purposefully inconvenient for the defendant. And, as the filing party, the plaintiff has that initial power of forum selection. As a result, the overwhelming body of cases and commentary on personal jurisdiction has focused on its applicability to defendants.

But the Due Process Clauses protect "persons," not just defendants,¹⁷ so plaintiffs arguably have similar entitlements to the protections of personal jurisdiction. In most cases, consent obviates any protections: the plaintiff's act of filing a complaint in a court manifests the plaintiff's consent to the personal jurisdiction of that court for purposes of resolving the claims asserted in that complaint.¹⁸ The Supreme Court has held that the plaintiff's filing-based consent also extends to consent to personal jurisdiction regarding counterclaims asserted by the defendant against the plaintiff in the same case in the same court.¹⁹ In essence, the plaintiff consents to the personal jurisdiction of the court whose jurisdiction the plaintiff invoked.

That much is settled law. Things get fuzzy, however, if the case is transferred to a different state without the plaintiff's consent and the plaintiff would not otherwise be subject to personal jurisdiction in the transferee state. Such venue transfers are common. The two most prominent transfer mechanisms are by court order under 28 U.S.C. § 1404—the general venue-transfer statute—for the convenience of the parties and in the interests of justice,²⁰ and by order of the Judicial Panel on Multidistrict Litigation

14. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780–81 (2017) (reasoning that the "federalism interest may be decisive" and holding it so in a case involving out-of-state plaintiffs suing an out-of-state defendant for out-of-state injuries).

15. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113–16 (1987) (explaining and applying the fairness factors, resulting in a denial of personal jurisdiction).

16. See, e.g., *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961) (discussing the restrictions of the state long-arm statute).

17. U.S. CONST. amend. V; *id.* amend. XIV, § 2.

18. Debra Lyn Bassett, *Class Action Silence*, 94 B.U. L. REV. 1781, 1790 (2014) ("In non-class litigation, personal jurisdiction over the plaintiff is resolved through a perfunctory application of the doctrine of consent: by electing to sue the defendant in that particular forum, the plaintiff thereby is deemed to have consented to the court's power to issue a judgment that will bind her.").

19. See *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938).

20. 28 U.S.C. § 1404(a) (2012).

(JPML) under 28 U.S.C. § 1407—the MDL-transfer statute.²¹ In those circumstances, the plaintiff is subjected, against their will, to the adjudicatory authority of a new court whose jurisdiction the plaintiff did *not* invoke. Do personal-jurisdiction protections for the plaintiff impose limits on such transfers? In my view, the answer is unequivocally yes.

II. A CRITIQUE OF CURRENT APPROACHES

I have found almost no academic literature on the question of how personal jurisdiction applies to plaintiffs subject to involuntary interstate venue transfer,²² though, as I document below, commentators seem to assume that personal jurisdiction does *not* apply to such plaintiffs. The Supreme Court likewise has not addressed the issue. A few lower courts have confronted the issue, but they tended to rely on perfunctory rationales to conclude that personal jurisdiction over plaintiffs is not of concern in venue-transfer cases. The Sections in this Part address these rationales and expose their weaknesses.

A. *Personal Jurisdiction's Applicability to Plaintiffs*

Some courts take the position that plaintiffs, as voluntary party-claimants, are simply not subject to the protections of personal jurisdiction, even in venue-transfer cases.²³ *Murray v. Scott*,²⁴ the leading district-court case espousing this view, reasoned as follows:

The minimum-contacts concerns inhere when a party is haled into court without its consent upon pain of a default judgment. These concerns are not present when a plaintiff is forced to litigate his case in another forum. Barring a counterclaim, plaintiff will not have judgment entered against him in the new forum; even with a counterclaim, plaintiff chose to initiate litigation enabling the counterclaim. In no sense is plaintiff unilaterally being haled into court to defend. Indeed, plaintiff's original choice of forum is preserved in at least one way: the law of the transferor forum will govern in the litigation rather than the law of the new forum. Therefore, the *International Shoe* minimum-contacts analysis is not necessary. The requirement that a litigant have minimum contacts with the forum simply does not exist for an ordinary plaintiff.²⁵

21. *Id.* § 1407(a). Multidistrict litigation has increased dramatically as class actions have declined. See Bradt, *supra* note 9, at 1168 (asserting that MDL has become the “centerpiece of nationwide mass tort litigation”); Burch, *supra* note 2, at 72 (reporting that MDL cases increased from 16 percent of the federal civil docket in 2002 to 39 percent of the docket in 2015).

22. For the few exceptions, see *supra* note 9.

23. See, e.g., *Viron Int'l Corp. v. David Boland, Inc.*, 237 F. Supp. 2d 812, 818 (W.D. Mich. 2002) (“A court may lack personal jurisdiction over a defendant, but never over a plaintiff, who consents to such jurisdiction by filing suit.”).

24. 176 F. Supp. 2d 1249 (M.D. Ala. 2001).

25. *Id.* at 1255–56.

In other words, because personal jurisdiction protects involuntary parties subject to the coercive power of a court, only defendants are entitled to the protections of personal jurisdiction. Some commentators have proffered this theory.²⁶

The position that plaintiffs do not need personal jurisdiction protections because of the differences between the risks faced by plaintiffs and defendants is seriously undermined by the availability of the declaratory-judgment action, which enables a putative defendant to initiate, as a plaintiff, an action seeking a declaration of nonliability against a putative claimant (who becomes the defendant).²⁷ Personal jurisdiction applies equally to defendants to declaratory-judgment actions, even though such suits effectively present no risk of liability to them.²⁸

In any event, the position represented by *Murray v. Scott* is evidently mistaken after *Phillips Petroleum Co. v. Shutts*, which suggests that personal jurisdiction is applicable to plaintiffs: “The Fourteenth Amendment does protect ‘persons,’ not ‘defendants,’ however, so absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims.”²⁹ And, in applying this principle, the Court held that the Constitution’s personal-jurisdiction protections for plaintiffs require certain structural safeguards in class actions.³⁰ Thus, there is no basis for a blanket exemption of plaintiffs from the protections of personal jurisdiction. *Murray* and cases that have followed its reasoning are on the wrong track.

As *Shutts* hints by using the qualifier “some,” however, personal jurisdiction need not apply with equal strength to all parties.³¹ Indeed, *Shutts* itself applies a lightened version of personal jurisdiction to plaintiff class members because of their unique position as quasi plaintiffs with legally protected representation in the litigation by the named plaintiffs.³² *Shutts* thus opens the door for other circumstances that might justify a nuanced approach to the nature of the personal-jurisdiction protection for plaintiffs. I endorse that need for nuance and, in Part III, show how it applies to venue transfer. The points here, however, are that personal jurisdiction *does* protect

26. See Email from Jay Tidmarsh, Judge James J. Clynes, Jr., Professor of Law, Notre Dame Law School, to author (Jan. 9, 2018, 10:46 AM) (forwarding a listserv post by Professor Stanley E. Cox articulating the position that plaintiffs “don’t have [due process] rights re: where the litigation proceeds since they are the potential beneficiaries and originators of the litigation”) (on file with author). I recognize that casual postings to a listserv do not always represent firmly held or deeply considered views, a caveat that applies to *infra* notes 60, 76, and 107 as well.

27. 28 U.S.C. § 2201 (2012).

28. See, e.g., *Xilinx, Inc. v. Papst Licensing GmbH*, 848 F.3d 1346 (Fed. Cir. 2017).

29. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985).

30. *Id.* at 808–12.

31. *Id.*

32. *Id.*

plaintiffs to some degree, and that a blanket exemption for plaintiffs is incompatible with the Constitution.

B. *Personal Jurisdiction's Applicability to Temporary Transfers*

The general venue-transfer statute contemplates transfer for all further proceedings, including trial and judgment, in the transferee court.³³ Such all-purpose transfer calls for ensuring the adjudicatory authority of the transferee court, which completely replaces the transferor court's authority.

But transfers of multidistrict-litigation cases by the JPML are different. With one exception,³⁴ the MDL-transfer statute specifically limits transfer "for coordinated or consolidated pretrial proceedings" and directs 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."³⁵ The Supreme Court has confirmed that MDL transferee courts cannot try transferred cases.³⁶

According to the JPML, the personal-jurisdiction analysis in MDL cases turns on this temporary, limited-purpose nature of the MDL transfer. The prevailing argument in MDL transfers is that regardless of whether personal jurisdiction applies to plaintiffs as a matter of course, personal jurisdiction does not apply to plaintiffs (or defendants, for that matter) when the transfer is limited only to a temporary transfer for pretrial proceedings. According to the JPML, as long as the transferor court had personal jurisdiction at the time the case was filed, MDL transferee proceedings are "simply not encumbered by considerations of in personam jurisdiction."³⁷

In this way, "the JPML essentially disclaims that the transferee court is exercising personal jurisdiction at all"; instead, personal jurisdiction is confined to the transferor court.³⁸ As the JPML explained: "A transfer under Section 1407 is, in essence, a change of venue for pretrial purposes. Following a transfer, the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer."³⁹ In essence, the JPML's theory is that when transfer is temporary, the transferee court has personal

33. 28 U.S.C. § 1404 (2012).

34. Congress authorized the JPML to "consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act." *Id.* § 1407(h).

35. *Id.* § 1407(a).

36. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998).

37. *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (per curiam); see also *In re Library Editions of Children's Books*, 299 F. Supp. 1139, 1141-42 (J.P.M.L. 1969).

38. Bradt, *supra* note 9, at 1172.

39. *In re FMC Corp.*, 422 F. Supp. at 1165; see also 15 WRIGHT ET AL., *supra* note 6, § 3866 ("The transferee judge inherits the entire pretrial jurisdiction that the transferor court could have exercised . . .").

jurisdiction derived from the transferor court—and that personal-jurisdiction authority flows through, unchanged, to the transferee court.

There are both legal and practical problems with this reasoning. The legal problem is that nothing in Supreme Court case law suggests that personal jurisdiction is different when the proceedings are temporary and confined to pretrial matters. To the contrary, courts adhere to personal-jurisdiction principles in contempt proceedings⁴⁰ and in enforcing discovery matters, especially against nonparties.⁴¹ It is true that the Supreme Court has indicated that “[personal] jurisdiction is vital only if the court proposes to issue a judgment on the merits” and that a court may dismiss a case on nonmerits grounds without confirming personal jurisdiction.⁴² But that principle has not been extended to full pretrial delegation to a *different court* whose pretrial rulings will bind the parties and shape any final judgment. That is for good reason: the JPML’s rationale essentially bars any personal-jurisdiction objection to the decisions of the court that will render significant and important rulings in the case. Thus, even if the transferee court does not purport to enter judgment on the merits, personal jurisdiction protects parties from being bound by the transferee court’s pretrial rulings.

The practical problem is that MDL transferee courts can and often do enter judgments on the merits; any characterization of MDL transfer as temporary borders on the fictional. As I have noted elsewhere, the promise of MDL remand for merits disposition in the original transferor court is a charade.⁴³ MDL transferee courts decide dispositive motions on the merits of

40. See, e.g., *Reebok Int’l Ltd. v. McLaughlin*, 49 F.3d 1387, 1388 (9th Cir. 1995) (reversing contempt order and sanctions for lack of personal jurisdiction).

41. See, e.g., *In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998) (“The principle that courts lacking jurisdiction over litigants cannot adjudicate their rights is elementary, and cases have noted the problem this creates for the prospect of transferring nonparty discovery disputes.”); *Ariel v. Jones*, 693 F.2d 1058, 1061 (11th Cir. 1982) (upholding the quashing of a subpoena for lack of sufficient contacts with the forum); *Estate of Ungar v. Palestinian Auth.*, 400 F. Supp. 2d 541, 549 (S.D.N.Y. 2005) (holding that a party must “make out a prima facie case for personal jurisdiction” in order to take “any discovery—even jurisdictional discovery—from a foreign corporation”). See generally 16 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 108.125, at 108–48 (3d ed. 2008) (“A nonparty witness cannot be compelled to testify at a trial, hearing, or deposition unless the witness is subject to the personal jurisdiction of the court”); 9A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2454, at 398–99 (3d ed. 2008) (“A corporation is amenable to service of a subpoena under Rule 45(b) in any forum in which it has sufficient minimum contacts.”).

42. *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431–32 (2007) (cleaned up); see also FED. R. CIV. P. 12(i) (allowing personal jurisdiction objections to be deferred until trial).

43. Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 35 (2018) (“But as a practical matter, the pretrial focus, with its implicit promise of remand to the transferor court for final disposition, is a charade.”); see also Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants’ Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1297 (2018) (calling resort to the “temporary” nature of MDL a “masquerade[] . . . to get around the limits . . . on a federal court’s personal jurisdiction”).

the case, and enter judgment orders like summary judgment, all the time.⁴⁴ These merits adjudications undeniably require personal jurisdiction in the transferee court.⁴⁵ Further, these merits dispositions, coupled with the MDL transferee court's power to issue global settlements,⁴⁶ mean that transfers are usually permanent—more than 97 percent of transferred MDL cases are resolved by the transferee court.⁴⁷ The premise that an MDL transfer is for temporary pretrial matters that are just a prelude to remand for disposition in the transferor court is mistaken. For both legal and factual reasons, then, that premise cannot justify ignoring the strictures of personal jurisdiction in MDL-transfer cases.

C. *Statutory Authorization of Nationwide Personal Jurisdiction*

In federal courts, the Fifth Amendment's Due Process Clause supplies the constitutional authority for personal jurisdiction, and that grant is broader than the Fourteenth Amendment's authority, at least for cases involving domestic parties.⁴⁸ How much broader is subject to some uncertainty,⁴⁹ but it seems clear that Congress could, consistent with the Fifth Amendment, create a single district for the United States, with nationwide personal jurisdiction over all domestic parties.⁵⁰ If so, personal jurisdiction would not limit transfers of federal cases within the United States.

44. See 28 U.S.C. § 1407(b) (2012); 15 WRIGHT ET AL., *supra* note 6, § 3866; Bradt & Rave, *supra* note 43, at 1297 (“[T]he MDL court has all the powers of the transferor court, including the power to grant dispositive motions.”).

45. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (stating that personal jurisdiction is “an essential element,” without which the court is “powerless to proceed to an adjudication”) (quoting *Emp’rs Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937)).

46. Settlements probably obviate personal jurisdiction problems through the consent doctrine. Because MDL plaintiffs retain their party status and may reject any global settlement, their decision to opt in to a settlement likely manifests consent to the personal jurisdiction of the transferee court to bind them to that settlement. *But see* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 NYU L. REV. 71 (arguing that transferee judges lack adequate jurisdiction to oversee private settlement agreements). I do not mean to suggest otherwise here; rather, I mention settlements because they help confirm that MDL transfers are nearly always permanent rather than temporary. I note, however, the growing criticism of the enormous pressure placed on MDL plaintiffs to accept transferee courts’ global settlement orders, *see, e.g.*, Burch, *supra* note 2, at 72–73, a pressure that may test the limits of voluntary consent to personal jurisdiction.

47. See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 339, 400–01 (2014).

48. *Dodge & Dodson*, *supra* note 13, at 1236–41 (making this point but distinguishing it from cases involving aliens); *see also* Jonathan R. Nash, *National Personal Jurisdiction*, SSRN (Feb. 6, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119383 [<https://perma.cc/D27E-4ZAD>] (arguing that the Fifth Amendment uses a more generous test than the Fourteenth Amendment).

49. *Dodson*, *supra* note 43, at 34–35 (noting some disagreement among the circuit courts about the different tests).

50. Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1319–20 (2014) (making this argument).

But Congress has instead created discrete districts for the district courts, suggesting that, as a legislative default, district courts may exercise personal jurisdiction only over their own districts. As the Supreme Court long ago wrote:

The judiciary act has divided the United States into judicial districts. Within these districts, a circuit court is required to be holden. The circuit court of each district sits within and for that district; and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property; it can only be exercised within the limits of the district . . . We think that the opinion of the legislature is thus manifested to be, that the process of a circuit court cannot be served without the district in which it is established; without the special authority of law therefor.⁵¹

Of course, the law has overridden this default by authorizing more expansive district-court personal jurisdiction in a number of ways, including through service under Rule 4 of the Federal Rules of Civil Procedure and specific statutory provisions enacted by Congress.⁵² But these are authorizations beyond a narrower default of district-specific personal jurisdiction in federal court.⁵³

Nevertheless, Congress undoubtedly could give a transferee court personal jurisdiction over a plaintiff in all cases in which the plaintiff is a U.S. citizen or resident or has sufficient national contacts to comport with the Fifth Amendment's Due Process Clause, even if the plaintiff has never had any contacts or connections to the transferee court's district or state.⁵⁴ The question, then, is whether the venue-transfer statutes grant such nationwide jurisdiction.

Some federal courts of appeals have construed the MDL-transfer statute, which allows transfer to "any district . . . for the convenience of parties and witnesses and . . . [to] promote the just and efficient conduct of such actions,"⁵⁵ to provide for just such a grant of nationwide personal jurisdiction.

51. Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328–29 (1838); see also Robertson v. R.R. Labor Bd., 268 U.S. 619, 622–23 (1925) ("Under the general provisions of law, a United States District Court cannot issue process beyond the limits of the district, and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. Such was the general rule established by [Judiciary Act] in accordance with the practice at the common law. And such has been the general rule ever since." (citations omitted)); Hagan v. Cent. Ave. Dairy, Inc., 180 F.2d 502, 503 n.3 (9th Cir. 1950) ("Before the adoption of Rule 4(f), process could issue only within the district in which the court sat.").

52. E.g., FED. R. CIV. P. 4(k).

53. Georgia v. Pa. R.R. Co., 324 U.S. 439, 467 (1945) ("Apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial.").

54. The statutory authorization might also apply to alien plaintiffs who do *not* have sufficient national contacts by virtue of the consent doctrine; by filing in a U.S. court, the alien would consent to adjudication in the United States, and the nationwide statutory authorization would moot the question of which state.

55. 28 U.S.C. § 1407(a) (2012).

In the words of one court: “The MDL statute is, in fact, legislation authorizing the federal courts to exercise nationwide personal jurisdiction.”⁵⁶ These courts have gone further to characterize arguments contesting the jurisdiction of MDL transfers as “frivolous”⁵⁷ or “meritless.”⁵⁸

As for the general venue-transfer statute, courts have made a somewhat different argument in support of nationwide personal jurisdiction, at least as applied to the plaintiff. The general venue-transfer statute has language similar to the MDL-transfer statute, authorizing transfer to “any other district or division where it might have been brought or to any district or division to which all parties have consented” based on “the convenience of parties and witnesses, in the interest of justice,” without addressing personal jurisdiction in any way.⁵⁹ But rather than construe the statute as an express authorization of nationwide personal jurisdiction like the MDL-transfer statute, courts have inferred transferee personal jurisdiction over the plaintiff because the general venue-transfer statute authorizes transfer *without regard* to personal jurisdiction.⁶⁰

The leading case on personal jurisdiction and the general venue-transfer statute is *In re Genentech, Inc.*,⁶¹ in which Sanofi, a German company, sued two California companies for patent infringement in the Eastern District of Texas, a forum without any significant contacts with the parties or claims.⁶² The defendants moved to transfer under § 1404(a) to the Northern District of California.⁶³ Among other arguments opposing the transfer, Sanofi argued, and the district court credited, that the Northern District of California would lack personal jurisdiction over Sanofi.⁶⁴ The Federal Circuit, however,

56. *Howard v. Sulzer Orthopedics, Inc.*, 382 F. App'x 436, 442 (6th Cir. 2010) (cleaned up); see also *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987) (expressing the same sentiment).

57. *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425, 1432 (2d Cir. 1993), *overruled on other grounds* by *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002).

58. *Howard*, 322 F. App'x at 442.

59. 28 U.S.C. § 1404(a). A few other courts have attempted to fit plaintiff personal jurisdiction into the language of the statute. See, e.g., *Viron Int'l Corp. v. David Boland, Inc.*, 237 F. Supp. 2d 812, 818–19 (W.D. Mich. 2002) (granting a motion to transfer venue under 1404(a), despite the lack of personal jurisdiction in the transferee court, because the plaintiff could have brought suit there).

60. Commentators also have articulated this argument. See Email from Jay Tidmarsh, Judge James J. Clynes, Jr., Professor of Law, Notre Dame Law School, to author (Jan. 9, 2018, 10:44 AM) (forwarding a listserv post by Professor Kevin Clermont noting that § 1404(a) “does not require the plaintiff’s consent or jurisdiction over plaintiff”) (on file with author). At least one commentator also has articulated the argument that the general venue-transfer statute does expressly authorize nationwide personal jurisdiction. See *id.* (forwarding a listserv post by Professor Allan Stein suggesting that the statute “authorizes the transferee court to assert jurisdiction over the parties”).

61. 566 F.3d 1338 (Fed. Cir. 2009).

62. *Id.* at 1340–41.

63. *Id.*

64. *Id.* at 1341.

rejected the argument that the Northern District of California must have personal jurisdiction over Sanofi:

We . . . conclude that the court clearly erred. There is no requirement under § 1404(a) that a transferee court have jurisdiction over the plaintiff or that there be sufficient minimum contacts with the plaintiff; there is only a requirement that the transferee court have jurisdiction over the defendants in the transferred complaint.⁶⁵

The court engaged in no other analysis of the issue. Its perfunctory reasoning mirrors that of a number of district courts that have addressed the question,⁶⁶ in that the lack of a statutory *restriction* manifests authorization of nationwide personal jurisdiction.

Constructions of the MDL-transfer statute as express authorization of nationwide personal jurisdiction and of the general venue-transfer statute as authorization-by-lack-of-restriction cannot withstand scrutiny. The first problem is that, in other contexts, Congress authorized nationwide jurisdiction only by using clear jurisdictional terms or the established equivalent of nationwide service of process,⁶⁷ neither of which is present in either transfer statute. The language of the statutes says nothing about personal jurisdiction. The authorization of transfer to “any district” cannot sensibly be read as an express or implied authorization of personal jurisdiction.⁶⁸ Further, these are eponymously *venue* statutes, which generally operate under—rather than

65. *Id.* at 1346 (citing *Hoffman v. Blaski*, 363 U.S. 335, 343–44 (1960)).

66. *See, e.g.*, *Pac. Coast Trailers, LLC v. Cozad Trailer Sales, LLC*, No. CV–10–111–EFS, 2010 WL 2985701, at *2 n.1 (E.D. Wash. July 21, 2010); *FTC v. Watson Pharm., Inc.*, 611 F. Supp. 2d 1081, 1090 (C.D. Cal. 2009); *Murray v. Scott*, 176 F. Supp. 2d 1249, 1255 (M.D. Ala. 2001). *But see* *Sanofi-Aventis Deutschland GmbH v. Novo Nordisk, Inc.*, 614 F. Supp. 2d 772, 780 (E.D. Tex. 2009) (acknowledging that some courts rejecting venue transfer rely in part on the possibility that the transferee court would lack personal jurisdiction over the plaintiff) (citing *Tape & Techs., Inc. v. Davlyn Mfg. Co.*, No. Civ.A.SA04CA-1150-XR, 2005 WL 1072169, at *4 (W.D. Tex. May 6, 2005), and *Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 198 (S.D.N.Y. 2000)).

67. *See* *Bradt, supra* note 9, at 1227. Congress has created nationwide personal jurisdiction in a number of other areas. *See, e.g.*, 9 U.S.C. § 9 (2012) (Federal Arbitration Act); 15 U.S.C. § 5 (2012) (Sherman Act); *id.* § 22 (Clayton Act); *id.* § 77v (Securities Act of 1933); *id.* § 77vvv (Trust Indenture Act); *id.* § 78aa (Securities Act of 1934); *id.* § 79y (Public Utility Holding Act); *id.* § 80a–43 (Investment Companies Act); *id.* § 80b–14 (Investment Advisors Act); 18 U.S.C. § 1965 (2012) (RICO); 28 U.S.C. § 1608 (2012) (Foreign Sovereign Immunities Act); 29 U.S.C. § 1132(e)(2) (2012) (ERISA); 33 U.S.C. § 921 (2012) (Longshoreman’s Workers’ Compensation Act); 42 U.S.C. § 9613 (2012) (CERCLA); 45 U.S.C. § 362 (2012) (Railroad Unemployment Insurance Act).

68. 28 U.S.C. § 1407(a) (allowing transfers to “any district . . . for the convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions”); *see also* *Bradt, supra* note 9, at 1168, 1172 (arguing that the MDL-transfer statute exhibits no textual support for nationwide personal jurisdiction); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1189 n.194 (1998) (same).

supplant—the normal limits of personal jurisdiction,⁶⁹ as the Supreme Court recently confirmed in *BSNF Railway v. Tyrrell*.⁷⁰ In light of that backdrop, it would be odd for Congress to create nationwide personal jurisdiction in a venue statute without using clear jurisdictional language, especially for domestic parties who often assert claims based on state law.⁷¹

The second problem is that the state-based scope of personal jurisdiction set out in Rule 4(k) does apply to both forms of venue transfer, at least for defendants, which is inconsistent with a construction of the statute that supplants Rule 4(k)'s limits with nationwide personal jurisdiction. Rule 4(k) applies to general venue transfer to protect defendants from transfer to a transferee court that lacks personal jurisdiction over them, as assessed under the normal state-based standard of Rule 4(k).⁷² Rule 4(k) also applies in MDL cases. For one, the JPML recognizes that an MDL transferor court must still have personal jurisdiction under Rule 4(k) and that MDL transfer does not “expand the territorial limits” of Rule 4(k).⁷³ For another, plaintiffs cannot file directly in the MDL court if the MDL court would lack personal jurisdiction over the defendant under Rule 4(k), unless the defendant consents.⁷⁴ These Rule 4(k)-based restrictions could not exist were the venue statutes to authorize nationwide personal jurisdiction over all parties. And because the venue-transfer statutes do not distinguish between plaintiffs and defendants,⁷⁵ it would strain statutory construction to read them as authorizing personal jurisdiction over plaintiffs but not defendants, especially without language even mentioning personal jurisdiction. For these reasons, the statutes cannot be read to authorize expanded personal jurisdiction.

69. See, e.g., 28 U.S.C. § 1391(b); see also Michael J. Waggoner, *Section 1404(a)*, “Where It Might Have Been Brought”: *Brought by Whom?*, 1988 BYU L. REV. 67, 70 (suggesting that the venue-transfer statute was “intended to preserve normal concepts of personal jurisdiction and venue”).

70. 137 S. Ct. 1549, 1553 (2017) (holding that a statute reading “an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action” was a venue statute that did not confer personal jurisdiction).

71. See *Bradt*, *supra* note 9, at 1173. The legislative history of the MDL statute indicates that Congress did not consider the implications of personal jurisdiction at all. See *id.* at 1204 (“Substantively, there was no discussion among the drafters—or the Congress—about whether there were due process-based limitations on the location of the transferee district There was no substantive debate over whether the proposal presented constitutional problems”).

72. See *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960) (rejecting venue transfer under § 1404(a) because the defendant could not be subject to personal jurisdiction in the transferee court); see also *id.* at 343–44 (holding the prior iteration of § 1404(a) to be subject to normal rules of personal jurisdiction).

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

74. Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 763 (2012).

75. See 28 U.S.C. § 1404(a) (2012) (addressing “all parties”); *id.* § 1407 (referring only to “parties”).

D. Consent

Even though personal jurisdiction applies to plaintiffs and the venue statutes do not authorize the transferee court to exercise nationwide personal jurisdiction, one could argue that plaintiffs consent to personal jurisdiction in the transferee court by filing the lawsuit in the first place. In other words, perhaps consent supplies the answer to the problem, even if personal jurisdiction otherwise would protect plaintiffs in transfer cases. Some commentators have proposed such a theory.⁷⁶

I think that this theory stretches the idea of consent too far. Personal jurisdiction can, of course, be waived or consented to, and consent is exactly what justifies the personal jurisdiction of the plaintiff's chosen court over the plaintiff himself.⁷⁷ A plaintiff who files a lawsuit in a Texas court submits to the personal jurisdiction of that court over them for purposes of adjudicating their claim, even if the plaintiff lacks any other contacts with Texas.⁷⁸ I have no quibble with that unremarkable application of the consent doctrine of personal jurisdiction.

But it is a significant extension to say that the plaintiff's consent to personal jurisdiction in the plaintiff's chosen court also extends to any other court where the lawsuit ultimately may end up.⁷⁹ Consider a man from New Jersey who is injured in New Jersey by a machine manufactured in California by a California company and distributed into New Jersey by a New Jersey distributor. The plaintiff sues both the manufacturer and the distributor in New Jersey state court for state-law claims, and both defendants concede personal jurisdiction over them in New Jersey. The case is eligible neither to be filed in federal court nor to be removed to federal court because of the presence of a nondiverse defendant, the distributor.⁸⁰ By all expectations, this case would be resolved in New Jersey.⁸¹

76. See Email from Jay Tidmarsh, Judge James J. Clynes, Jr., Professor of Law, Notre Dame Law School, to author, *supra* note 26 (forwarding a listserv post by Professor Mary Garvey Algero noting that “[p]laintiffs frequently sue defendants in jurisdictions in which the courts would not have jurisdiction over the plaintiffs” and that “the basis for the court being able to rule against the plaintiff is that the plaintiff consented to the court’s jurisdiction by filing and maintaining the suit in that jurisdiction” and surmising that “the argument for jurisdiction after a transfer [would] be plaintiff’s consent”).

77. See *supra* text accompanying note 18.

78. Cf. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779–81 (1983) (affirming the adjudicatory authority of the court despite the plaintiff’s lack of connection to the court’s state).

79. See *Bradt*, *supra* note 9, at 1234 (stating that consent in such a case “borders on the fictional”).

80. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (requiring complete diversity).

81. Of course, it is possible that the New Jersey court could dismiss on *forum non conveniens* grounds, effectively forcing the plaintiff to file a new lawsuit in a different state. But, if so, the plaintiff’s refiling in that state would establish clear consent to that state’s personal jurisdiction.

But what if, six months into the lawsuit, the distributor agrees to a default judgment and exits the case? The manufacturer now can remove the case to federal court⁸² and then, once there, can move to transfer the case to federal court in California based on the convenience of the parties, over the objection of the plaintiff.⁸³ The upshot is that the plaintiff filed a case in New Jersey state court with no expectation that it could ever be transferred without his consent to California for trial on the merits before a California jury, and yet it was. To take the example a step further, perhaps after transfer to California, the defendant asserts a significant counterclaim against the plaintiff, forcing him to defend against that claim—and the risk of a money judgment—in California.

I think that consent to personal jurisdiction in California under these circumstances cannot be implied from the filing of a nonremovable lawsuit in New Jersey. No Supreme Court case supports such an attenuated notion of consent. The Supreme Court has extended the consent doctrine in two ways,⁸⁴ but neither justifies blanket consent in transferred cases.

First, under *Adam v. Saenger*, the plaintiff consents to their chosen court's personal jurisdiction as to the defendant's asserted counterclaims in that court.⁸⁵ But *Saenger* does not extend consent beyond the state in which the plaintiff filed.⁸⁶ Indeed, the language of the Court's opinion is quite clear in its limitations:

There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment in personam may be rendered in a cross-action against a plaintiff *in its courts*, upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction *of the court*, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening *its courts to the plaintiff*.⁸⁷

82. See 28 U.S.C. § 1446(b)(3) (2012) (allowing removal even though the original case was not removable).

83. *Id.* § 1404(a).

84. The Supreme Court has also held that plaintiffs can consent to a state's personal jurisdiction *ex ante* in a valid contract, see *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991), and I agree that, in such circumstances, the transferee state would have personal jurisdiction over the plaintiff based on contractual consent. This unique circumstance, however, has nothing to do with the operation of the venue-transfer statutes generally.

85. *Adam v. Saenger*, 303 U.S. 59, 67 (1938). For the argument that unrelated counterclaims should not carry the same implication, see Jon D. Bressler, Comment, *Impermissible Counterclaims: Why Nonresident Plaintiffs Can Contest Personal Jurisdiction in Unrelated Countersuits*, 65 AM. U. L. REV. 641 (2016).

86. I have found no court of appeals decision intimating that *Saenger* has any bearing in venue-transfer cases.

87. *Saenger*, 303 U.S. at 67–68 (emphases added).

Second, the Court allowed a limited “implied consent” to personal jurisdiction in pre-*International Shoe* cases based on conduct committed by a defendant in the forum state.⁸⁸ But those cases, like *Saenger*, depend upon some conduct by the party *in or into the forum state*.⁸⁹ They do not support the proposition that the mere filing of a lawsuit in one state implies consent to personal jurisdiction in any other state.

In sum, the doctrine of consent cannot support a blanket extension of personal jurisdiction over plaintiffs to transferee courts in different states. This does not mean that consent cannot extend to *some* multistate transfer cases. I explain below why it does indeed.⁹⁰

III. PATHS FORWARD

The conclusion that personal jurisdiction protects plaintiffs in venue-transfer cases leads to three important takeaways. First, courts must confront the personal-jurisdiction issue rather than avoid it or assume blindly that it is of no concern. Second, this conclusion creates space for the development of more nuanced approaches to personal jurisdiction over plaintiffs in venue-transfer cases, and I stake out some of the considerations for how personal jurisdiction applies in those contexts. Third, the ability of plaintiffs to preserve and invoke personal-jurisdiction objections to a transferee court must be preserved; I address those mechanics below.

A. *Recognizing the Issue*

The easy takeaway is that courts should avoid the kind of perfunctory reasoning that currently dominates their approaches to the issue. It is wrong to say, as the district court in *Murray* did, that personal jurisdiction does not apply to plaintiffs because they are not involuntary parties.⁹¹ Nor is it correct to say, as the JPML has, that personal jurisdiction is wholly irrelevant in cases transferred solely for pretrial matters.⁹² Nor should courts conclude, as the Federal Circuit did in *Genentech*, that the venue-transfer statutes automatically confer personal jurisdiction over the plaintiff.⁹³ Nor does consent supply a complete answer to personal jurisdiction over plaintiffs.

The right path forward is for courts and commentators to confront the issue with the seriousness and consideration that it deserves. Personal jurisdiction over the plaintiff applies and presents some protection when the case is transferred to a state in which the plaintiff otherwise neither is subject to nor has consented to personal jurisdiction. Whether and how personal juris-

88. See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

89. For a modern confirmation of this principle, see *Walden v. Fiore*, 571 U.S. 277 (2014).

90. See *infra* Section III.B.

91. See *supra* note 25 and accompanying text.

92. See *supra* note 37 and accompanying text.

93. See *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009).

diction applies depends upon considerations other than blunt exemptions, statutory authorization, and consent.

B. *Establishing Standards*

In this Section, I consider two questions. First, even though personal jurisdiction applies to plaintiffs subject to involuntary interstate venue transfer, does the doctrine apply with the same scope and force as it does to defendants? Second, do the varied circumstances of venue transfer demand close attention for resolving the scope of personal jurisdiction in venue-transfer cases? I answer yes to both questions.

1. The Scope of Personal Jurisdiction over Plaintiffs

Personal jurisdiction applies to plaintiffs, but it need not necessarily apply with the same scope or force as it does to defendants. In *Shutts*, the Supreme Court acknowledged that the protections of personal jurisdiction could apply with less force to absent class members, who are quasi-voluntary parties.⁹⁴ Absent class members need not hire counsel, travel to appear in court, or engage in discovery; they do not have the same litigation burdens as named parties.⁹⁵ Further, they are not subject to the kind of money judgments and injunctions that defendants are.⁹⁶ Based on *Shutts*, should a similarly lighter personal-jurisdiction doctrine apply to venue-transfer plaintiffs?

I think not. The principles animating *Shutts* do not apply to nonclass plaintiffs.⁹⁷ As true parties, nonclass plaintiffs bear the usual litigation burdens and expenses.⁹⁸ They hire their own counsel, travel to court as parties, and engage in pretrial and trial matters. They also are susceptible to the usual risk of counterclaims for money judgments or for injunctive relief. The availability—even the expectation—of counterclaims⁹⁹ places ordinary plaintiffs at a realistic risk for judgments like defendants, judgments that could be rendered in a forum not chosen by the plaintiff. Further, under the Declaratory Judgment Act, parties who would ordinarily be styled as defendants can act as plaintiffs to sue their prospective claimants for nonliability; this risk of liability in such suits actually falls on the plaintiffs.¹⁰⁰ And the status of plain-

94. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808–12 (1985).

95. *Id.* at 810.

96. *Id.*

97. *See Bradt, supra* note 9, at 1221–24.

98. This remains true even though, as others have recognized, MDL plaintiffs can lose some control in an MDL proceeding. *See Bradt, supra* note 9, at 1207; Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131–35 (2010).

99. *See* FED. R. CIV. P. 13(a) (compelling certain counterclaims); FED. R. CIV. P. 13(b) (making all other counterclaims permissive).

100. *See supra* notes 27–28 and accompanying text.

tiffs as voluntary parties tends, in other contexts, to work in favor of plaintiffs on forum questions. Plaintiffs, after all, must take the enormous step of initiating an action, and the law usually privileges their particular choice of forum as a result¹⁰¹—especially in an era in which the Supreme Court has narrowed personal jurisdiction over defendants to restrict the range of choices for plaintiffs in the first place,¹⁰² and in an age in which defendants often use forum-selection clauses to further control forum.¹⁰³ I see little reason to give plaintiffs less due process protection from unreasonable forums selected by the court or other parties through venue transfer.¹⁰⁴ Accordingly, I think *Shutts* cannot justify less than the full scope of personal jurisdiction to plaintiffs subject to interstate venue transfer.

2. Applying Personal Jurisdiction over Plaintiffs

That personal jurisdiction applies with full force to plaintiffs in venue-transfer cases is not to say that the doctrine results in the same outcome in all circumstances. I think a particularly important consideration is consent. Although filing the case cannot supply blanket consent to personal jurisdiction anywhere the case ends up, it may manifest consent beyond the state where the case was filed. If the plaintiff files a case in federal court in a state either lacking serious connection to the lawsuit or otherwise under circumstances in which a transfer under § 1404(a) or even § 1406(a) is obvious,¹⁰⁵ then the invocation of federal court under these circumstances could be construed as consent to the expected transferee court's personal jurisdiction.

The state-case illustration in Section II.D above presents an extreme example where lack of consent is obvious. But in other contexts—some of which are quite common—consent to the transferee court's personal juris-

101. See, e.g., 28 U.S.C. § 1404(a) (2012) (allowing venue transfer from the plaintiff's chosen forum only if convenience and justice support transfer); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 265–66 (1981) (explaining that the plaintiff's choice of forum is given substantial weight in determining whether to dismiss under the doctrine of *forum non conveniens*). Although the Supreme Court has undermined those preferences where the plaintiff agrees to a different forum in a private contract antedating the litigation, see, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (enforcing arbitration clauses); *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49 (2013) (enforcing forum-selection clauses), those decisions can be seen as enforcing the plaintiff's earlier choice of forum.

102. See *Dodson*, *supra* note 43, at 23–28.

103. See, e.g., David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008).

104. Cf. *Bradt & Rave*, *supra* note 43, at 1298–99 (arguing that fundamental fairness supplies personal jurisdiction protection for plaintiffs in MDL-transfer cases); Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 875 (1995) (“[I]f the central due process concern of personal jurisdiction derives from the doctrine of *res judicata* and the binding effects of judgments, then the requirements of plaintiffs' due process in mandatory class actions ought to parallel those for defendants.”).

105. The applicability of a valid forum-selection clause restricting the agreed-upon forum to the transferee court is a possible example.

diction may be implied by the plaintiff's conduct and in light of reasonably foreseeable transfers.¹⁰⁶ Two scenarios help illustrate this principle.

In the first scenario, say a plaintiff from California is injured in Arizona by a device manufactured by a Texas defendant whose principal place of business is in Texas. The device was designed and manufactured entirely in Texas. The plaintiff sues the defendant in federal court in Arizona, claiming the device had a design defect. No one disputes the injury or the accident. The only dispute is whether the defendant is liable for a design defect. The plaintiff can reasonably expect the defendant (or the court) to transfer the case to Texas, where the defendant is headquartered, where the product was designed and manufactured, and where most witnesses are likely to be. To be sure, transfer may not happen. But by filing in federal court in these circumstances, the plaintiff can reasonably expect the case to end up in Texas and should be deemed to have consented to personal jurisdiction in Texas on that basis, even if the plaintiff has no contacts with Texas.

In the second scenario, say the same accident occurred on the same facts, except that there currently is pending in the District of Delaware a multidistrict litigation under the MDL statute against the defendant for the same design defect, consolidating hundreds of existing cases. The plaintiff's act of filing a case in Arizona that is highly likely to be transferred to the District of Delaware for consolidation in the MDL should be deemed consent to personal jurisdiction in Delaware on those facts.

Myriad variations on these circumstances exist, and some may present difficult cases, but the key point I emphasize here is that they should be dealt with on grounds of plaintiff consent (or normal minimum contacts) in ways that are consistent with the operation of the ordinary precepts of personal jurisdiction. And that inquiry will demand appreciation for the nuances of the facts and circumstances at hand. The inquiry will be a fact-sensitive one governed by the usual rules of personal jurisdiction.

C. Practicalities

The remaining issue is how plaintiffs should invoke objections to a transferee court's personal jurisdiction over them. Some have suggested that the plaintiff may dismiss the case in the transferee court.¹⁰⁷ But I find that a perplexing proposition. For one, moving to dismiss seems inappropriate for

106. The term "reasonably foreseeable" here has a different meaning than in the context of specific personal jurisdiction over defendants. Reasonable foreseeability in the defense-side personal jurisdiction context focuses on the primary behavior and expectations of parties before a lawsuit, perhaps without the advice and expertise of counsel. But for plaintiff-side consent based on lawsuit filing, the act is itself initiated by counsel, or by the party acting as their own counsel. Thus, the reasonable foreseeability of transfer should be evaluated from a lawyer's perspective.

107. See Email from Jay Tidmarsh, Judge James J. Clynes, Jr., Professor of Law, Notre Dame Law School, to author, *supra* note 26 (forwarding a listserv post by Professor Mary Garvey Algero noting that "[i]f plaintiff doesn't consent to jurisdiction by the court to which the case has been transferred, plaintiff can dismiss the suit").

plaintiffs because maintaining the lawsuit (absent any counterclaims) is exactly what the plaintiff wants to do. For another, it is unclear what rule would authorize such a motion. Defendants typically object to personal jurisdiction by way of dismissal under Rule 12(b) or transfer under § 1406, but claimants do not have recourse to Rule 12 (except as opponents to a counterclaim),¹⁰⁸ and § 1406 only applies to a challenge to the court where the case was filed.¹⁰⁹ Voluntary dismissal may be available under Rule 41,¹¹⁰ but, again, that seems unfair because a dismissal is the antithesis of what the plaintiff is pursuing in the case.¹¹¹ If the plaintiff does not have the opportunity to voluntarily dismiss as of right—and this is dripping with irony—the plaintiff might need *the defendant's consent!*¹¹²

Instead of these mismatched mechanisms, I propose that the lack of personal jurisdiction of the transferee court be considered as part of the transfer or retransfer decision. This is analogous to the practice of courts denying joinder of plaintiffs under Rule 19 who cannot be joined for lack of personal jurisdiction, as opposed to allowing joinder and then forcing those plaintiffs into an odd procedural posture of having to assert a lack of personal jurisdiction.¹¹³

Happily, the language of both the general venue-transfer statute and the MDL-transfer statute can be read to incorporate consideration of the personal jurisdiction of the transferee court. Each statute uses the word “may” to lodge ultimate discretion in the transferor court.¹¹⁴ And each demands that transfer be “just” or “in the interest of justice.”¹¹⁵ I propose that transfer to a court that lacks personal jurisdiction cannot be just and that such a transfer would be an abuse of discretion. Thus, the plaintiff’s primary opportunity to invoke personal jurisdiction will be in the transferor court in the briefing on the propriety of a transfer order,¹¹⁶ with the remedy for a finding of lack of personal jurisdiction being a denial of transfer.

108. See FED. R. CIV. P. 12(b)(2). Rule 12 applies only when the lack of personal jurisdiction is characterized as a “defense to a claim for relief,” which the plaintiff clearly cannot invoke absent a counterclaim. See FED. R. CIV. P. 12(b).

109. 28 U.S.C. § 1406(a) (2012).

110. FED. R. CIV. P. 41(a).

111. I recognize that the remedy of a voluntary dismissal has some parallels to the doctrine of forum non conveniens—which the general venue-transfer statute codified for domestic cases, see *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49 (2013)—in that a plaintiff subject to a forum non conveniens dismissal can always decline to pursue their case in the designated forum.

112. FED. R. CIV. P. 41(a)(1)(A)(ii) (requiring consent of all parties for certain voluntary dismissals by the plaintiff).

113. See, e.g., *Maldonado-Viñas v. Nat’l W. Life Ins. Co.*, 862 F.3d 118, 122–23 (1st Cir. 2017).

114. See 28 U.S.C. §§ 1404(a), 1407(a).

115. See *id.* §§ 1404(a), 1406(a), 1407(a).

116. Although § 1404(a) appears to permit a district court to transfer a case sua sponte without offering pretransfer briefing to the parties, the court should give the parties an oppor-

If erroneous transfer is made nonetheless, the plaintiff's timely objection to transfer in the transferor court is enough to preserve the issue for appeal in the transferee court's circuit whenever the transfer is within a single circuit.¹¹⁷ Objection in the transferor court is also sufficient to preserve the issue for appeal when transfer is between circuits for those circuits that allow review of out-of-circuit orders.¹¹⁸

In circuits that hold themselves without authority to review a transferor order by an out-of-circuit court,¹¹⁹ or if the transferor court did not offer the plaintiff an opportunity to object to or contest the transfer, the plaintiff should immediately move, in the transferee court, to retransfer the case back to the original transferor court.¹²⁰ Most circuits have held that the law-of-the-case doctrine, which usually provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case,"¹²¹ does not prevent the transferee court from revisiting the personal-jurisdiction determination made by the transferor court.¹²² The transferee court's denial of such a motion then would be reviewable by the transferee court's circuit court, with the circuit court empowered to order retransfer.¹²³

tunity to be heard before ordering transfer to a court where personal jurisdiction could be challenged.

117. See, e.g., *Cioffi v. Gilbert Enters., Inc.*, 769 F.3d 90, 92–93 (1st Cir. 2014).

118. See, e.g., *SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 178–80 (2d Cir. 2000) (reviewing a pretransfer personal jurisdiction ruling made by a district court outside the Second Circuit).

119. See, e.g., *Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1136 (6th Cir. 1991) ("We have no appellate jurisdiction over decisions of district courts outside the Sixth Circuit."). *But see* *EEOC v. Nw. Airlines, Inc.*, 188 F.3d 695, 700 (6th Cir. 1999) (holding that the transferee circuit could review a partial summary judgment entered by a § 1404(a) transferor court after final judgment in the transferee court).

120. *Cf.*, e.g., *ESCO Corp. v. Cashman Equip. Co.*, 65 F. Supp. 3d 626, 630 (C.D. Ill. 2014) (granting a plaintiff's motion to retransfer based on lack of personal jurisdiction over the defendant in the transferee court).

121. *Pepper v. United States*, 562 U.S. 476, 506 (2011) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

122. See, e.g., *FDIC v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996). A higher, clear-error standard may apply, however, in light of the need to prevent an endless cycle of transfers. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816–19 (1988); *McGlamery*, 74 F.3d at 221.

123. See *In re Carefirst of Md., Inc.*, 305 F.3d 253, 259 (4th Cir. 2002) ("Indirect review of the [transfer] order is available by way of a motion to retransfer the case; if the transferee court denies that motion, that decision will be reviewable . . . on appeal."); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 766 (3d Cir. 1984) ("If the transferee district court denied the motion to retransfer, the plaintiff could petition the 'transferee appellate court' (i.e., the appellate court serving the transferee district court) for a writ of mandamus. And, if mandamus failed, and if the plaintiff ultimately could appeal from an adverse final judgment in the case, we believe the plaintiff could then raise the failure of the district court to re-transfer as grounds for reversal." (citation omitted)). *But see* *Brigham v. Patla, Straus, Robinson & Moore, P.A.*, 671 F. App'x 168, 169 (4th Cir. 2016) (refusing to review a retransfer order because it would effectively constitute a review of the transferor court's original transfer order).

The seminal case *Hoffman v. Blaski* was just such a case, though it involved personal jurisdiction over the defendant.¹²⁴ There, the case was transferred from the Northern District of Texas to the Northern District of Illinois under § 1404(a), even though the Illinois court lacked personal jurisdiction over the defendants at the time the case was filed.¹²⁵ The plaintiff moved to retransfer, but the Illinois court denied the motion.¹²⁶ The Seventh Circuit reversed this decision, finding that retransfer was appropriate, and the Supreme Court affirmed the Seventh Circuit's reversal and remedy.¹²⁷

Because transfer orders are interlocutory and not immediately appealable,¹²⁸ and because mandamus orders are extraordinarily rare,¹²⁹ an appeal of an erroneous transfer order ordinarily would have to await a final judgment. But that is no different from the denial of a defendant's motion to dismiss for lack of personal jurisdiction under Rule 12, in which the defendant must await final judgment before appealing the personal-jurisdiction ruling. If the appellate court agrees that the transferee court lacked personal jurisdiction over the plaintiff,¹³⁰ it can vacate the judgment and remand to the transferee court with instructions to retransfer the case back to the transferor court for resumption of proceedings there.

Of course, if the original transferor court refuses to transfer in the first place based on the transferee court's lack of personal jurisdiction over the plaintiff, the defendant would be able to, as under current law, appeal any adverse judgment rendered against it in the transferor court.¹³¹

124. 363 U.S. 335 (1960).

125. *Id.* at 336–37.

126. *Id.* at 337–38.

127. *Id.* at 344.

128. See *In re Carefirst of Md.*, 305 F.3d at 260 (holding that an erroneous transfer order was not immediately appealable).

129. See 28 U.S.C. § 1407(e) (2012) (providing that appeal of an MDL-transfer order may only be by extraordinary writ). The only known instance of mandamus being granted against the JPML involved its decision to remand cases prematurely. See *In re Food Lion, Inc., Fair Labor Standards Act "Effective Scheduling" Litig.*, 73 F.3d 528, 532–33, 532 n.10 (4th Cir. 1996). For a challenge to MDL's limited-appeal regime, see Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1643, 1663 (2011) (arguing for the expansion of the right to appeal in MDL proceedings).

130. The appellate court will review the question of personal jurisdiction either de novo, see *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1025 (2d Cir. 1997), or for clear error, see *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816–19 (1988).

131. Congress may wish to limit appellate review of such *refusals* to transfer under § 1404(a) as it has in other contexts, including review of MDL-transfer refusals. See 28 U.S.C. § 1407(e) ("There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings."); cf. *id.* § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . ."). After all, if the transferor court has proper jurisdiction and venue and proceeds to final judgment, there is little benefit to allowing the defendant to appeal to vindicate the supposed "convenience of the parties and witnesses" just to, in effect, redo the entire case.

CONCLUSION

Personal jurisdiction over plaintiffs in venue-transfer cases has long been sidestepped. It ought not be. Plaintiffs are entitled to the same personal-jurisdiction protections as any other parties. And it is time for courts and commentators to treat the issue with the seriousness and sensitivity it deserves.

My proposal to treat personal jurisdiction as offering some protection to plaintiffs in venue-transfer cases gives meaning to personal jurisdiction for plaintiffs without causing undue disruption to existing practice. In most general venue-transfer cases, plaintiffs will have connections to transferee states sufficient to give rise to personal jurisdiction there, or they will have consented to personal jurisdiction in those states in prelitigation forum-selection clauses.¹³² In MDL cases, plaintiffs often will want to consent to MDL transfer to take advantage of the consolidation pressures that MDL aggregation affords plaintiffs. For other cases in which plaintiffs are differently situated, my proposed analysis for implied consent will often allow transferee courts to exercise appropriate personal jurisdiction. In the remaining cases, personal-jurisdiction protections will demand that the transfer options be duly limited to accommodate the due process rights of the plaintiff.

132. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

