THE *OTHER* SHADOW DOCKET: THE JPML'S POWER TO STEER MAJOR LITIGATION

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Multidistrict litigation has become an increasingly important tool for aggregating claims. Whether an MDL is created in the first place is decided by a seven-member panel of federal judges, the Judicial Panel on Multidistrict Litigation ("JPML"). But the JPML decides not only whether to create an MDL; it decides also where and before whom to centralize MDLs for coordinated or consolidated pretrial proceedings. In deciding where and to whom to transfer cases arising under federal law, the JPML can consider the choice-of-law rule applicable in the transferee court. Under the dominant rule among federal courts, the MDL court applies its own law. As a practical matter, this means that the JPML has the power to steer an MDL to a particular court and to a particular judge, mindful of the law that will apply and how that law will affect the outcome of the case. Such a practice is not only contrary to a well-established norm against "matching" judges and cases. It also endows the JPML with an outsized power over these suits. This Article uncovers this largely ignored and considerable power of the JPML that enables it to achieve substantive ends through the nation's MDL dockets. It evaluates two alternative choice-of-law rules. But, more importantly, it proposes that federal judges be randomly assigned to preside over MDLs—a solution that is more likely to be effective.

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I. INTRODUCTION

As the federal courts have become increasingly more hostile to the class action mechanism,[1] multidistrict litigation[2] has become a more important procedural tool for aggregating litigation.[3] One of the more well-known MDLs of the day is the National Prescription Opiate Litigation currently pending before Judge Dan Polster in the U.S. District Court for the Northern District of Ohio ("the Opioid MDL").[4] Perhaps not surprisingly, multidistrict litigation has also been used to aggregate claims relating to mass torts involving things such as airplane disasters[5] and defects in medical products, such as pelvic mesh.[6] But its

1. *See, e.g.*, Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Brystol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1261 (2018); Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 845–50 (2016); Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1771–73 (2013).

2. This Article will use the phrase "multidistrict litigation" to refer generally to such litigation but will use the acronym "MDL" in place of "multidistrict litigation" when using the phrase as an adjective, as in "MDL court" or "MDL judge" or when referring to a singular consolidated suit, as in "an MDL."

3. *See, e.g.*, John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2232 (2008); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 801 (2010) (discussing a number of settlements and concluding that they "suggest that the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements").

4. *See generally In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375 (J.P.M.L. 2017).

5. *See, e.g.*, *In re* Korean Air Lines Disaster of Sept. 1, 1983, 575 F. Supp. 342, 343 (J.P.M.L. 1983).

6. *In re* Boston Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2326 (S.D. W. Va. 2016); *In re* C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2187 (S.D. W. Va. 2014); *In re* Ethicon, Inc.

usefulness as a tool extends beyond the mass-tort context; it has been used to aggregate claims as varied as those involving collusion in the market for generic prescription drugs in violation of the antitrust laws,[7] to claims against facial recognition technology developers for violation of consumer privacy laws,[8] to suits by employees against their employers under the Fair Labor Standards Act[9] and Title VII.[10] Many of these claims arise under federal law.[11] Indeed, MDLs constituted of cases arising under the federal antitrust laws make up the second most common type of MDL (24.9%) after products liability (33%), followed by MDLs constituted of cases involving intellectual property law (5.4%).[12] As the range of types of cases in MDLs reveals, one of the virtues of multidistrict litigation as a procedural tool is that it is trans-substantive.[13] Collectively, the suits and claims constituting the nation's multidistrict litigation address some of the most pressing societal issues, are worth billions of dollars, and raise some of the most challenging legal issues.[14]

In light of the importance of these suits, it is perhaps a bit surprising that a seven-member panel of judges appointed by the Chief Justice of the Supreme Court exercises so much unchecked power over the character and nature of multidistrict litigation. That panel, the Judicial Panel on Multidistrict Litigation ("JPML"), decides not only whether to create an MDL in the first place.[15] It also decides to where and before whom to centralize these MDLs for coordinated or consolidated pretrial proceedings.[16]

At first blush, the JPML's discretion may appear to be "relatively narrow, technical, and procedural."[17] But the procedural guise of the JPML's responsibilities masks the substantive ends the Panel can potentially effect through its decisions. In deciding to where and to whom to transfer cases arising under federal law, the JPML can consider the choice-of-law rule adopted by the court and judge to which the cases are being transferred.[18] And under the rule dominant among the federal courts, the transferee court—*i.e.*, the MDL court—applies its own law, rather than the law of the transferor court—*i.e.*, the court from which

Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2327 (S.D. W. Va. 2014); *In re* Am. Med. Sys., Inc. Pelvic Repair Sys. Prods. Liab. Litig., 844 F. Supp. 2d 1359 (J.P.M.L. 2012).

7. *See, e.g.*, *In re* Generic Drug Pharm. Pricing Antitrust Litig., 227 F. Supp. 3d 1402 (J.P.M.L. 2016).

8. *See, e.g.*, *In re* Clearview AI, Inc. Consumer Priv. Litig., 509 F. Supp. 3d 1368 (J.P.M.L. 2020).

9. *See, e.g.*, *In re* Wayne Farms LLC Fair Labors Standard Act Litig., 528 F. Supp. 2d 1355 (J.P.M.L. 2007).

10. *See, e.g.*, *In re* Union Pac. R.R. Co. Emp. Pracs. Litig., 314 F. Supp. 2d 1383 (J.P.M.L. 2004).

11. *See supra* notes 8–10 and accompanying text.

12. U.S. JUD. PANEL MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS 8 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics%202020.pdf [https://perma.cc/QK4L-9GGC].

13. *See* Robert M. Covert, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) (defining trans-substantive).

14. *See* Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1298 (2020).

15. *See* 28 U.S.C. § 1407(a)

16. *See id*. § 1407(a), (b).

17. Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 364 (2004).

18. *See* Daniel A. Richards, Note, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge,* 78 FORDHAM L. REV. 311, 312 (2009).

the action originated.[19] What this means, as a practical matter, is that the JPML has the power to steer an MDL to a particular court and to a particular judge, mindful of the law that will apply and how that law will affect the outcome of the case. Such a practice is not only contrary to a well-established norm against "matching" judges and cases.[20] It also endows the JPML with an outsized power over these suits.

This Article reveals the other "shadow docket,"[21] so to speak—it uncovers this mostly ignored and considerable power of the JPML through the nation's MDL dockets that enables it to achieve substantive ends. A number of scholars have considered the difficult choice-of-law issues that arise when claims brought under *state* law are aggregated, whether by class action,[22] multidistrict litigation,[23] or otherwise.[24] But few have considered the challenging choice-of-law issues that arise when claims brought under *federal* law are aggregated.[25] Most who have considered the issue confine their analysis to comparing one choice-of-law rule over another.[26] Fewer yet have considered the issue in the context of other systemic considerations, such as the power with which the choice-of-law rule endows the JPML and, consequently, the Chief Justice.[27] But none consider more recent research[28] that reveals the manner in which the JPML exercises its immense discretion. This Article is the first to provide an account of these systemic concerns that is contextualized in the findings of this recent research.

Part II of this Article provides background information about multidistrict litigation and how an MDL is created. One way an MDL may be created is by motion of the JPML.[29] Using the National Prescription Opiate Litigation currently pending in the U.S. District Court for the Northern District of Ohio ("the

19. *See* Mark A. Hill, Note, *Opening the Door for Bias: The Problem of Applying Transferee Forum Law in Multidistrict Litigation*, 85 NOTRE DAME L. REV. 341, 350 (2009) (considering the multidistrict litigation choice-of-federal law rule and arguing that it gives the Chief Justice the power to act on ideological biases).

20. *Ruger*, *supra* note 17, at 382–84.

21. The phrase "shadow docket" was first used by Professor William Baude to describe the Supreme Court's use of "a range of orders and summary decisions that defy its normal procedural regularity." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015).

22. *See* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 3 (1986).

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

24. *See* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 547 (1996).

25. *See* Richard L. Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 678 (1984).

26. *See* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 706–07 (1995) (comparing choice-of-law rule applying law of transferee court with rule that applies law of transferor court and concluding law of the transferee circuit should apply when a case is transferred pursuant to § 1404, but that the law of the transferor court should apply to cases transferred pursuant to § 1407, to reflect the appellate path of the case); Jeffrey L. Rensberger, *The Metasplit: The Law Applied After Transfer in Federal Question Cases*, 2018 WIS. L. REV. 847, 847.

27. *See* Hill, *supra* note 19, at 341.

28. *See* Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 424 (2013).

29. *See* 28 U.S.C. § 1407(c)(i).

Opioid MDL")[30] as a lens through which to understand the process, Part II additionally describes how the JPML is constituted, as well as the scope and breadth of its statutory discretion in creating an MDL.

This discretion, alone, gives the JPML an extraordinary amount of power. That power is amplified by a few features of modern practice—most notably, a choice-of-law rule that requires the MDL judge to apply its own circuit's law to all federal claims constituting the MDL, regardless of whether there are dispositive differences in the law of the circuits in which the constituent suits were filed.[31] Part III of this Article explains this unique choice-of-law rule—what this Article describes as a "choice-of-federal law rule"—together with other features of modern multidistrict litigation that give the JPML the outsized power to determine how some of the most important cases are decided in the United States. It also considers another potential objection to choice-of-federal law rules—that the federal courts are without the power to formulate such rules, in the first place.

Part IV proposes two solutions to the problem presented by the choice-of-federal law rule in the context of multidistrict litigation. It considers two alternative rules: a rule that would require an MDL court to apply the law of the transferee courts, and a rule that would require it to borrow, *from the state in which the transferor court sits*, the choice-of-law rules of an analogous claim. Ultimately, it concludes that applying the law of the transferee courts is an easier rule to administer, although there may be constitutional or jurisprudential reasons for preferring the courts to borrow a rule from the states. In addition to changing the choice-of-federal law rule, Part IV proposes that MDL judges be assigned randomly to neutralize the scope and breadth of power the JPML has over multidistrict litigation. Such a selection mechanism need not be entirely random to achieve this goal; it can feasibly account for factors such as a judge's experience, availability, interests, and expertise.

Part V concludes by suggesting that choice-of-federal law rules, more generally, be given greater attention by lawmakers.

30. *See In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1378 (J.P.M.L. 2017).

31. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987).

II. THE CREATION OF AN MDL BY THE JPML

In 1968, Congress created a mechanism for aggregating cases solely for pretrial proceedings, which was codified in 28 U.S.C. § 1407.[32] That statute provides, "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."[33] Thus, the statute enables multiple cases, filed in different district courts, to be transferred to one court, where the pretrial proceedings can be managed.[34] Suits filed directly in the transferee court—either because venue is proper or because the parties have waived any objections that might exist to venue and personal jurisdiction—and that share a common question of fact with the transferred suits may also be made a part of the MDL.[35] In addition, actions that share a common question of fact with the initially pending actions but are filed after the MDL has been established may be transferred to the MDL as so-called "tag-along" actions.[36]

Transfer is effected by the JPML.[37] The JPML is a seven-member panel composed of federal judges who are appointed by the Chief Justice of the United States Supreme Court.[38] The only constraint on whom the Chief Justice may appoint to the Panel is that no two members may be from the same circuit.[39] Section 1407 is silent with respect to how long members may serve on the panel.[40] But in 2000, Chief Justice Rehnquist adopted a practice of appointing Panel members for seven years in staggered terms, and Chief Justice Roberts has continued that practice.[41]

32. The MDL statute has its origins in the flood of litigation that emerged in response to extensive price-fixing in the electrical equipment industry in the early 1960s. Between 1961 and 1963, 1,880 civil antitrust lawsuits, involving more than 25,000 claims, were filed in 35 judicial districts. The claims raised difficult issues of antitrust law, and they presented a number of procedural challenges, such as duplicative discovery requests. In addition, these suits significantly increased the number of pending actions before the federal judiciary. In response to the litigation, the Judicial Conference of the United States created a special subcommittee to manage the pretrial phase of the litigation. From this was born a proposal for a more formal and permanent mechanism for handling multiple actions sharing common questions of fact. And in 1968, Congress adopted the Conference's recommendation by enacting 28 U.S.C. § 1407. *See, e.g.*, Williams & George, *supra* note 28, at 425–32, and footnotes cited therein. For a more extensive examination of the origins of the multidistrict litigation statute, see Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 847 (2017).

33. 28 U.S.C. § 1407(a).

34. *See id.*

35. *See, e.g.*, Bradt, *supra* note 23, at 763.

36. *See* J.P.M.L. R. P. 1.1(h); *see also* Heyburn, *supra* note 3, at 2233 ("The Panel transfers new cases from other districts to existing MDLs when these so-called 'tag-along' actions are brought to its attention, typically either by the clerk's office of the court where the action was filed or by one of the parties.").

37. *See* 28 U.S.C. § 1407(a).

38. *See id.* § 1407(d). The Panel may be composed of both circuit and district court judges. *Id.*

39. *See id.*

40. *See* Heyburn, *supra* note 3, at 2226.

41. *See id.* at 2227. Chief Justice Warren—the first Chief Justice to appoint members to the Panel—suggested that members not serve for longer than three years. *See* John T. McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215, 218 n.5 (1973), *cited in* Williams & George, *supra* note 28, at 434. The first seven members of the JPML, however, sat on the Panel for an average of ten years. Williams & George, *supra* note 28, at 434.

A transfer pursuant to § 1407 may be initiated either by motion of the Panel or by motion of a party to any action for which transfer may be appropriate.[42] Regardless of who initiates the transfer, the JPML will then hold a hearing.[43] It will decide not only *whether* to transfer the action, but (assuming transfer is appropriate) also to *where* and to *whom* to transfer the pending action.[44]

The Opioid MDL is illustrative.[45] In December 2016 and the first months of 2017, a number of counties filed suit in West Virginia against an array of pharmaceutical companies and local doctors;[46] those cases were initially filed in state court and subsequently removed to the Southern District of West Virginia.[47] The complaints alleged, among other things, that the defendant drug companies and doctors caused opioid addiction by encouraging excessive distribution and prescription of opioid drugs, which resulted in harm to plaintiffs' residents.[48] Around the same time, similar suits were filed in state court in Washington and subsequently removed to federal court.[49] Throughout 2017, county governments filed at least 64 similar cases in state and federal courts.[50]

In September of 2017, plaintiffs in 46 of the actions made a motion to the JPML, seeking to transfer all cases that had been "filed by governmental entities against those in the chain of manufacture and/or distribution of prescription opioid painkillers," as well as cases that would be filed in the future, *i.e.*, the tag-along cases.[51] Plaintiffs requested that the cases be transferred to the Southern District of Ohio or alternatively to the Southern District of Illinois.[52] On

42. 28 U.S.C. § 1407(c).

43. *Id.*

44. *Id.* § 1407(a).

45. *See generally In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375 (J.P.M.L. 2017).

46. *See, e.g.*, Complaint at 1, City of Huntington v. AmerisourceBergen Drug Corp., No. 17-C-38 (Cir. Ct. W. Va. Jan. 19, 2017) (listing AmerisourceBergen Drug Corp., Cardinal Health, Inc., McKesson Corp., and Dr. Gregory Chaney as defendants); Complaint at 1, McDowell County v. McKesson Corp., No. 16-C-137-M (Cir. Ct. W. Va. Jan. 25, 2017) (listing McKesson Corp., AmerisourceBergen Drug Corp., Cardinal Health Inc., and Dr. Harold Cofer, Jr. as defendants).

47. *See, e.g.*, Notice of Removal, City of Huntington v. AmerisourceBergen Drug Corp., No. 3:17-cv-01362 (S.D. W. Va. Feb. 23, 2017); Notice of Removal, McDowell County v. McKesson Corp., No. 1:17-cv-00946 (S.D. W. Va. Jan. 25, 2017).

48. *See, e.g.*, Complaint at 1, *City of Huntington*, No. 17-C-38 ("The Defendants have illegally and tortiously profited from the prescription drug abuse problems knowingly dumping opioids into the city of Huntington."); Complaint at 1, *McDowell County*, No. 16-C-137-M ("McDowell County has suffered actual harm as a result of the conduct of Defendants, motivated by profit and greed, in knowingly flooding McDowell County with opioids (schedule II drugs) well beyond what would be necessary to address the pain and other associated reasons that the residents of McDowell County might use opioids.").

49. *See* Complaint at 1, City of Everett v. Purdue Pharma L.P., No. 17-2-00469-31 (Super. Ct. Wash. Jan. 19, 2017) (alleging, among others, that Purdue "knowingly, recklessly, and/or negligently [supplied] OxyContin to obviously suspicious physicians and pharmacies and [enabled] the illegal diversion of Oxycontin into the black market"); Notice of Removal at 1–2, City of Everett v. Purdue Pharma L.P., No. 2:17-cv-00209 (W.D. Wash. Feb 10, 2017).

50. *See In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1377 (J.P.M.L. 2017); *see generally* Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175 (2019) (describing patterns of filing).

51. Plaintiff's Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings at 2, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (J.P.M.L. Sept. 25, 2017).

52. *Id.* at 1–2.

December 12, 2017, the Panel granted the motion, transferring the cases to Judge Dan Polster in the Northern District of Ohio on the grounds that Ohio was geographically convenient for most of the parties and that Judge Polster had had experience with opiate cases.[53] After the creation of the MDL, a number of other, related suits were filed all around the country.[54] Those cases were subsequently transferred to the Northern District of Ohio and made a part of the MDL as tag-along cases.[55]

In making all of these determinations—whether, to where, and to whom—the Panel enjoys incredibly broad discretion.[56] All orders directing transfer are not reviewable except by writ of mandamus.[57] And orders denying transfer are not reviewable at all.[58] But according to former JPML Chair John Heyburn, "appeal from a Panel ruling seldom occurs."[59]

With respect to *whether* to transfer pending actions for consolidated or coordinated pretrial proceedings, there are very few constraints on the Panel. Section 1407 only states two requirements for transfer: the pending actions must share at least one question of fact, and the actions must be pending in at least two different district courts.[60] A rigorous study by Professor Tracey George and Margaret Williams examining the JPML's transfer orders[61] identified a number of factors the Panel frequently cited as relevant to its determination to consolidate,[62]

53. *See In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d at 1379–80.

54. *See, e.g.*, Complaint at 12, Bd. of Comm'rs of the Cnty. of Allen v. Purdue Pharma LP, No. 1:18-cv-00003 (N.D. Ind. Jan. 5, 2018) (alleging that the defendants "are or have been engaged in the manufacture, promotion, distribution, and sale of opioids nationally and in the County"); Complaint at 2, City of Fort Wayne v. Cardinal Health, Inc., No. 1:18-cv-00005 (N.D. Ind. Jan. 8, 2018); Complaint at 2, Assoc. of Ark. Cntys. v. Purdue Pharma Inc., No. 4:17-cv-00831 (E.D. Ark. Dec. 14, 2017); Complaint at 3, Polk Cnty. v. Purdue Pharma L.P., No. 9:17-cv-00213 (E.D. Tex. Dec. 27, 2017).

55. Conditional Transfer Order (CTO-5), *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (J.P.M.L. Jan. 24, 2018).

56. *See* Heyburn, *supra* note 3, at 2228 ("[T]he Panel exercises its considerable and largely unfettered discretion within the unique circumstances that each motion presents.").

57. 28 U.S.C. § 1407(e) ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code.").

58. *Id.* ("There shall be no appeal or review or an order of the panel denying a motion to transfer for consolidated or coordinated proceedings."); *see also* Williams & George, *supra* note 28, at 427 ("The Panel's decision on whether, where, and to whom to transfer these actions is effectively unreviewable and has never been overturned."); *cf.* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2280, 2281 (2008) ("[T]he statute attempts to insulate the actions of the Panel against any review. Contrast decisions to certify a class, for which immediate discretionary appeal is now available.").

59. Heyburn, *supra* note 3, at 2228.

60. 28 U.S.C. § 1407(a).

61. Williams and George examined all orders issued since the JPML's creation in 1968 through early 2012. Williams & George, *supra* note 28, at 430. In addition, they conducted a more detailed analysis of orders spanning a five-year period from 2005 to 2009. *See id*.

62. Those factors include: (1) "[c]onsolidation would conserve judicial resources," (2) "[c]onsolidation would serve the convenience of the parties," (3) the "[c]ases involve common questions of fact," (4) "[c]onsolidation would avoid duplicative discovery," (5) "[c]onsolidation would avoid conflicting judicial rulings," (6) consolidation would promote a just and efficient resolution to the underlying disputes, and (7) the underlying cases involve a class action or a potential class action. *See* Williams & George, *supra* note 28, at 442 tbl.1.

but no one criteria was predictive of whether the Panel would do so.[63] The Panel has indicated, however, that transfer should facilitate "just and efficient" resolution of the underlying actions and that there must be an appropriate judge and court to which to transfer the actions.[64] It only takes four Panel members to agree to transfer an action.[65] And interestingly the Panel may transfer pending actions even if the parties involved oppose transfer.[66]

There are even fewer constraints as to *where* the JPML may transfer the pending actions. Neither § 1407 nor the Panel's Rules of Procedure articulate any criteria the JPML must consider in determining where to transfer multiple pending actions for consolidation.[67] Indeed, as a leading treatise on multidistrict litigation has explained, with respect to the constraints on the JPML's decision as to where to establish an MDL, "there are none."[68] As a practical matter, this means that the JPML need not consider whether the transferee court has personal jurisdiction over the defendants,[69] whether venue would have been proper in the

63. *See id.* at 442–43. It is worth noting that Williams and George recognize that their findings are severely limited insofar as they can only reflect what the Panel stated in its orders, and they cannot meaningfully examine the veracity of the Panel's stated reasons. *Id.* at 442. In addition, they cannot assume that a factor did not play into the Panel's decision simply because it was not mentioned in the transfer order. *Id.*

64. *See* Williams & George, *supra* note 28, at 434, 443 nn.55–56.

65. 28 U.S.C. § 1407(d).

66. Williams & George, *supra* note 28, at 435. At least one scholar has hypothesized that there may be a bias among Panel members in favor of transferring. *See* Marcus, *supra* note 58, at 2285. The historical data may seem to suggest as much. One study found that between 1968 and 2012, the JPML's grant rate was 69%, and between 2005 and 2009, the grant rate was more than 75%. Williams & George, *supra* note 28, at 441. However, more recent data suggest that the rate of transfer has been decreasing over the last few years. In 2015, 2016, 2017, and 2018, the transfer rate was 43%, 39%, 40%, and 45%, respectively. The transfer rate is calculated by dividing the new motions centralized for a given year by the total of the number of motions centralized, number of motions denied, and number of motions withdrawn for a given year. *See* U.S. JUD. PANEL MULTIDISTRICT LITIG., *supra* note 12, at 7–8. And the transfer rate over the last ten years is only about 54%. *See id.* Moreover, as JPML Chair John Heyburn cautioned in a 2008 article reporting similar data, "One should not infer from these statistics, however, that the Panel is somehow predisposed in favor of centralization. The opposite may indeed be true." Heyburn, *supra* note 3, at 2229. Heyburn suggested that, instead, the data may merely reflect that the Panel has been consistent in its application of the requirements for transfer and a sophisticated lawyer would therefore not make a motion to transfer unless there was a reasonable likelihood of the Panel granting it. *Id.*

67. *See* 28 U.S.C. § 1407(a).

68. DAVID F. HERR, MULTIDISTRICT LITIG. MANUAL § 6.2 (2018).

69. *See, e.g.*, *In re* FMC Corp. Pat. Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (per curiam) (citing *In re* Sugar Indus. Antitrust Litig., 399 F. Supp. 1397, 1400 (J.P.M.L. 1976)) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue."); *see also* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1169 (2018) ("[D]espite the fact that the MDL court does everything that matters in the vast majority of cases transferred to it, it does not need to be a court that would have personal jurisdiction under the rules that would apply if the cases were treated as individual litigations.").

transferee court,[70] or whether the parties have consented to the transferee court.[71] For example, in transferring the Opioid MDL to the Northern District of Ohio, the JPML gave no consideration to whether Ohio had personal jurisdiction over all of the various defendants, nor to whether venue was proper in the Northern District of Ohio.[72] Indeed, the JPML may establish the MDL in any of the 94 federal districts, regardless of whether the parties or the actions have any connection to the district.[73]

When it comes to deciding to *whom* to transfer an action, the Panel's discretion is not entirely unconstrained, but it is nonetheless fairly broad. Section 1407 and the Panel's Rules of Procedure are silent with respect to the criteria the Panel must consider in determining to which judge to transfer the multiple pending actions.[74] However, § 1407 does specify that the JPML may assign an out-of-district judge to sit by designation in the district court selected for the MDL.[75] Moreover, it provides that, before assigning the coordinated or consolidated proceedings to a particular judge, the JPML must receive the consent of the district court in which the MDL will be established, as well as from the chief judge of the circuit in which the judge sits if the judge is sitting by designation.[76] But anecdotal evidence suggests it is rare that a chief judge recommends against transfer.[77]

Once the actions are transferred to the MDL court and judge, the MDL judge may exercise all the same powers it could have exercised had the case been filed directly in the transferee court.[78] The MDL judge manages all discovery matters; decides dispositive motions, such as motions to dismiss and motions for summary judgment; handles all other pretrial motions, such as motions for class certification and motions to exclude evidence and experts; and manages all

70. *See In re* Revenue Props. Co., 309 F. Supp. 1002, 1004 (J.P.M.L. 1970) ("Unlike section 1404(a), venue is not particularly relevant to the selection of a transferee court under section 1407."). *Compare* 28 U.S.C. § 1407(a) (providing only requirement for consolidation and transfer pursuant to § 1407 is that consolidated actions have "one or more common questions of fact"), *with id.* § 1391(b) (providing that venue is proper in a judicial district in which any defendant resides if all defendants reside in the State in which the district is located, a judicial district in which a substantial part of the conduct giving rise to the claim occurred or a substantial part of the property that is the subject of the dispute is situated, or a judicial district in which any defendant is subject to personal jurisdiction if there is no other district in which the action may be brought).

71. *Id.* § 1407(h). *Compare id.*, *with id.* § 1404(a).

72. *See In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1375 (J.P.M.L. 2017).

73. *See* 28 U.S.C § 1407(a).

74. *See id.* § 1407(b).

75. *Id*.

76. *Id.*

77. It is difficult to know with certainty the extent to which a chief judge recommends against a transfer because the chief's recommendation is not publicly recorded. Nonetheless, in conducting the research on the JPML's transfer practices, Professor George communicated with Panel members, who reported that a chief judge's recommendation against a transfer was "rare." E-mail from Tracey George, Professor of Law and Political Science, Vanderbilt University, to author (Dec. 19, 2018, 7:31 AM) (on file with author); *see also* Heyburn, *supra* note 3, at 2243 ("[T]hese consents are quickly obtained. But on some occasions, the proposed transferee district or judge is unable to accept an assignment, thus requiring the Panel to identify another appropriate district for centralization.").

78. *See* 28 U.S.C. § 1407(b).

pretrial alternative dispute resolution.[79] For example, early in the Opioid Litigation MDL, Judge Polster attempted to initiate settlement discussions among the various disparate stakeholders.[80] He also appointed three Special Masters to "address pretrial and posttrial matters,"[81] one of whom limited the scope of discovery.[82] In addition, Judge Polster partially granted the defendants' motions to dismiss with respect to two claims and denied it with respect to other claims,[83] and he denied certain defendants' motions for summary judgment.[84]

Upon the completion of pretrial proceedings, the JPML is required to remand each pending transferred action back to the transferor court—the trial court from which it originally came—unless the action has otherwise been terminated.[85] In practice, however, most suits are settled or otherwise resolved before the MDL court.[86] Data from 2017 indicate less than 3% of the cases transferred to an MDL since 1968, when the multidistrict litigation statute was enacted and the JPML was created, have been remanded back to the transferor court.[87] This data suggests that the transferee court will resolve most of these disputes.

79. 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3866 (4th ed. 2021).

80. Case Management Order One at 1, *In re* Nat'l Prescription Opiate Litig., "Applies to All Cases," MDL No. 2804 (N.D. Ohio Apr. 11, 2018) (stating that the court is creating new rules and deadlines for "motion practice, discovery, and trial preparation" because parties have expressed that expediting litigation would in fact help facilitate settlement discussions); *see also* Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html [https://perma.cc/ZCF7-KTW4]; Eric Heisig, *Here's Why a Federal Judge Presiding Over Opioid Lawsuits Thinks Settling Them Is Important*, CLEVELAND.COM (Jan. 9, 2018, 10:28 PM), https://www.cleveland.com/court-justice/2018/01/heres_why_a_federal_judge_pres.html [https://perma.cc/2KTS-J7VR].

81. Appointment Order at 1–2, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Jan. 11, 2018) (citing FED. R. CIV. P. 53(a)(1)(C)).

82. Discovery Ruling No. 2 at 3, *In re* Nat'l Prescription Opiate Litig., "Track One Cases," MDL No. 2804 (N.D. Ohio June 30, 2018).

83. Opinion & Order at 38, *In re* Nat'l Prescription Opiate Litig., "County of Summit, Ohio v. Purdue Pharma L.P.," MDL No. 2804 (N.D. Ohio Dec. 19, 2018).

84. *See e.g.*, Opinion & Order Regarding Defendants' Summary Judgment Motions on Causation at 10, *In re* Nat'l Prescription Opiate Litig., "Track One Cases," MDL No. 2804 (N.D. Ohio Sept. 3, 2019); Order Regarding Defendants' Summary Judgment Motions on Civil Conspiracy Claims at 10, *In re* Nat'l Prescription Opiate Litig., "Track One Cases," MDL No. 2804 (N.D. Ohio Sept. 3, 2019); Opinion & Order re: Preemption at 22–23, *In re* Nat'l Prescription Opiate Litig., "Track One Cases," MDL No. 2804 (N.D. Ohio Sept. 3, 2019); Op. & Ord. Denying Defendants' Motions for Summary Judgment Based on Statutes of Limitations at 25, *In re* Nat'l Prescription Opiate Litig., "Track One Cases," MDL No. 2804 (N.D. Ohio Sept. 4, 2019).

85. 28 U.S.C. § 1407(a).

86. *See* Bradt, *supra* note 69, at 1169.

87. *Judicial Panel on Multidistrict Litigation–Judicial Business 2017*, U.S. CTS. (2017), https://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2017 [https://perma.cc/Y85D-YT2P]. The Administrative Office of U.S. Courts reports that, since the creation of the JPML in 1968, the Panel has centralized 626,938 civil actions for pretrial proceedings, and by the end of fiscal year 2017, 16,600 actions had been remanded for trial. *Id.*

In almost every fiscal year for which data is available, of all the cases pending in an MDL for a given year, less than 2% were remanded back to the transferor court. The exception was between September 30, 1998 and September 30, 1999, in which an extraordinary 4,363 cases were remanded, which represented 6.8% of the 64,052 cases that had been currently pending in MDLs at any point that year.

In addition, the transferee court can conduct a trial over those cases filed directly before it.[88] Such a trial is often referred to as a "bellwether" or "test" trial;[89] it functions as a case-management tool and is conducted by MDL transferee judges in order to produce "reliable information about other cases centralized in that MDL proceeding," promote settlement, and assist the parties and transferor courts during remand.[90]

At the time of this writing, the Opioid MDL is still ongoing, so it is difficult to know whether it will be resolved as most MDLs are. But thus far, there is at least some evidence that it will be resolved in a somewhat novel manner. It has yielded a number of settlements,[91] including a $26 billion global settlement between the three drug distributors and a manufacturer, on the one hand, and the states on the other.[92] But Judge Polster has strategically remanded a few representative cases so as to use the transferor courts as a means of resolving specific categories of cases;[93] the Opioid MDL, meanwhile, will remain a "hub," used to effect global settlements, aided and informed by the proceedings in the remanded cases.[94] A number of bellwether trials were scheduled to begin in 2021.[95] Judge Polster continues to maintain jurisdiction over more than 3,000[96] suits that await the results of ongoing fact-finding and settlements.

III. CHOICE-OF-FEDERAL LAW RULES, OBJECTIONS, AND PRUDENTIAL CONSIDERATIONS

Through its discretion in deciding whether, to where, and to whom to transfer cases, the JPML has an extraordinary amount of power. That power is magnified by a choice-of-law rule applied in multidistrict litigation when the claims arise under federal law. Section III.A describes this unique choice-of-law rule and the circumstances giving rise to it. Section III.B considers the federal courts' authority to formulate such a rule. But even if the federal courts have the power

88. Melissa J. Whitney, *Bellwether Trials in MDL Proceedings* 1, 3, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG. (2019), https://www.fjc.gov/sites/default/files/materials/19/Bellwether%20Trials%20in%20MDL%20Proceedings.pdf [https://perma.cc/694U-YA3V].

89. *Id.*

90. *Id.* at 3–5.

91. *See, e.g.*, Order Amending Dismissal Order, *In re* Nat'l Prescription Opiate Litig., "Track One Cases," MDL No. 2804 (N.D. Ohio Jan. 17, 2020).

92. *See, e.g.*, Jan Hoffman, *Drug Distributors and J.&J. Reach $26 Billion Deal to End Opioid Lawsuits*, N.Y. TIMES (Nov. 11, 2021) https://www.nytimes.com/2021/07/21/health/opioids-distributors-settlement.html [https://perma.cc/CG2X-9SYL].

93. Order at 7, *In re* Nat'l Prescription Opiate Litig., "Track One-B Management Order," MDL No. 2804 (J.P.M.L. Nov. 19, 2019).

94. *Id.*

95. Amanda Bronstad, *First Federal Bellwether Trial Over Opioid Addiction Crisis Set to Begin in West Virginia*, LAW.COM (Apr. 30, 2021, 6:14 PM), https://www.law.com/nationallawjournal/2021/04/30/first-federal-bellwether-trial-over-opioid-addiction-crisis-set-to-begin-in-west-virginia/ [https://perma.cc/UV3G-2GZH].

96. U.S. JUD. PANEL MULTIDISTRICT LITIG., MDL STATISTICS REPORT–DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT 4 (2021), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-May-17-2021.pdf [https://perma.cc/P6VV-2AAG].

to devise these sorts of choice-of-law rules, time and experience have revealed prudential reasons that counsel against the specific rule adopted. Section III.C explains how the rule, together with the capabilities and practices of the JPML, enable the JPML to transfer cases to particular jurisdictions and to particular judges to achieve particular, substantive outcomes. In addition, it describes how the rule bestows on the Chief Justice a significant amount of power over the outcomes of cases, albeit inadvertently and not to the same extent it empowers the JPML. Moreover, it notes how the power of the JPML, and the Chief Justice, is amplified further because of the number, breadth, and scope of the cases involved.

A. Choice-of-Federal Law

The law of conflicts, or "choice-of-law," attempts to construct a framework of rules that identify which law should apply when the law of more than one jurisdiction reasonably might and the laws are in conflict, yielding different outcomes.[97] A court presiding over a suit in which such a conflict arises is generally presented with a "horizontal choice," a "vertical choice,"[98] or some combination of the two. A horizontal choice is a choice between or among the law of two or more coequal sovereigns when those sovereigns' laws differ and would yield different results.[99] For example, suppose an individual who lives in Wisconsin and commutes to and works in Minnesota is in a fatal car accident while a passenger in a vehicle driving in Wisconsin. Further suppose the deceased passenger's estate brings suit against the deceased's insurance company in Minnesota and the law of Minnesota and Wisconsin are in conflict with regard to the scope of the ability of the deceased's estate to recover.[100] The Minnesota court will be presented with a horizontal choice as to whether to apply Minnesota law or Wisconsin law, and Minnesota's choice-of-law rules will guide the court in resolving that choice.[101] A court presented with a choice as between the law of two nation states—for example, the United States and Germany—would similarly be presented with a horizontal choice.

A vertical choice of law describes the choice between the law of jurisdictions that operate at different levels of government, specifically the choice

97. 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5166.2 (2d ed. 1987).

98. *See* Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 691 (2006) (describing the question of whether to apply state law or a "court-fashioned federal rule of decision" as a "vertical choice-of-law issue"); *see also* WRIGHT & MILLER, *supra* note 97, § 5166.2 ("'[V]ertical choice-of-law' governs the relationship between state and federal law.").

99. *See id.*

100. These facts are a simplified version of those presented to the Supreme Court in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

101. *See, e.g.*, *id.* at 307–08 (recognizing "that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction" and, as a result, "the forum State may have to select one law from among the laws of several jurisdictions having some contact with the controversy").

between U.S. federal law and state law.[102] *Erie Railroad Co. v. Tompkins*[103] and its progeny[104] explore and develop this vertical choice.

When considering cases that arise under state law, a federal court sitting in diversity may be presented with a choice that has both vertical and horizontal dimensions. For example, imagine plaintiff sues defendant in federal district court in Delaware for breach of a contract executed in New York and assume that Delaware's and New York's laws differ with respect to whether plaintiff can recover interest on any damages awarded. This case implicitly raises at least three choice-of-law issues: First, should the federal court apply state contract law or devise a federal rule of decision? This question implicates the *Erie* Doctrine and is therefore a vertical choice-of-law issue. And *Erie* and its progeny dictate that a federal court sitting in diversity should apply state contract law to claims arising under state law.[105] The second question, then, is whether the federal court should apply New York or Delaware state substantive contract law. This choice-of-law issue is similar to the one raised before the Minnesota state court as to whether to apply Minnesota or Wisconsin law; it requires the court to consider which law of two coequal sovereigns—New York or Delaware—should apply and is therefore a horizontal choice-of-law issue. But both New York and Delaware have choice-of-law rules that govern how to resolve that horizontal issue. So before resolving the second question, the federal court must resolve the third question—*i.e.*, which state's conflict of laws rules should it apply? This question, too, is a horizontal one, as it requires the court to resolve which of two states' laws to apply. But how is the federal court to determine which state's conflict-of-law rules to apply? There is no federal statute that dictates how such questions are to be resolved. But pursuant to *Erie* and subsequent Supreme Court cases construing it, federal courts, sitting in diversity, are required to apply the conflict-of-law rules of the state in which they sit.[106]

Federal courts are sometimes confronted with a special species of choice-of-law. Rather than having to resolve whether to apply federal or state law (vertical) or which of two or more states' laws to apply (horizontal), the federal court must decide which of two or more *circuits'* substantive law to apply.[107] This

102. *See* WRIGHT & MILLER, *supra* note 97.

103. 304 U.S. 64 (1938).

104. *See, e.g.*, *Empire Healthchoice Assurance, Inc.*, 547 U.S. 677 (2006); Transcon. & W. Air v. Koppal, 345 U.S. 653 (1953); Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

105. *See, e.g.*, *Koppal*, 345 U.S. at 656–57.

106. *Klaxon*, 313 U.S. at 494–96.

107. The choice is only with respect to what circuit's substantive law to apply; in general, forums apply the procedural law of the forum. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 6, intro. note (AM. L. INST. 1971) (explaining that "the forum will apply its own local law to matters of procedure"); *cf.* Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962) (explaining that courts have an "inherent power" "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"). The one exception of which the author is aware is the Federal Circuit, which applies the procedural law and the non-patent substantive law of the circuit court in which a case originates. *See generally* Jennifer E. Sturiale, *A Balanced Consideration of the Federal Circuit's Choice-of-Law Rule*, 2020 UTAH L. REV. 475 (2020).

unusual choice could be described as a "choice-of-federal law."[108] The choice-of-federal law issue is seemingly a horizontal one because the jurisdictions are coequals, but as the federal district courts enforce the laws and are a part of the same sovereign—the United States—the sorts of concerns motivating the typical horizontal choice-of-law analysis are not necessarily pertinent.

Broadly speaking, choice-of-federal law issues arise in two types of cases. The first type is suits before the Federal Circuit. Because of its unusual subject-matter-defined jurisdictional grant, it can potentially hear appeals from all 94 federal district courts. Consequently, it constructed a rule for determining when it should apply its own law versus the law of the regional circuit court in which a case originated.[109] The Federal Circuit's choice-of-law rule is beyond the scope of this Article, but I have considered the rule extensively elsewhere.[110]

The second type is suits containing claims arising under federal law and transferred within the federal system from a district court located in one circuit to a district court located in another circuit. There are three types of such transfer cases: cases transferred because the initial venue was improper (§ 1406), cases transferred for the convenience of the parties (§ 1404), and cases transferred for coordinated or consolidated pretrial proceedings and made a part of an MDL (§ 1407). This Article is primarily concerned with the consequences of choice-of-federal law rules adopted in the context of cases transferred into an MDL, but its analysis has implications for choice-of-federal law and transfers, more generally.

The choice-of-federal law issue has the potential to arise when the law of the circuit court in which the transferor court and the transferee court differs and can affect the outcome of the litigation. For example, there is a circuit split regarding how to apply the summary judgment standard in suits arising under § 1 of the Sherman Act.[111] Section 1 prohibits agreements to fix prices.[112] It does not, however, prohibit firms, including oligopolists, from undertaking what is known as "conscious parallelism"—conduct that rationally accounts for the anticipated reactions of their competitors;[113] for example, an oligopolist may

108. "Choice-of-federal law," which describes a choice between more than one federal jurisdiction's law, should not be confused with "federal choice-of-law," which describes a federal rule pertaining to a choice-of-law issue, but the choice is between more than one state's law. *See* Sturiale, *supra* note 107; *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–08 (1981).

109. *See generally* Sturiale, *supra* note 107.

110. *See id.*

111. *Compare In re* Flat Glass Antitrust Litig., 385 F.3d 350, 358 (3d Cir. 2004), *with* Home Depot, U.S.A., Inc. v. E.I. DuPont De Nemours & Co., No. 16-cv-04865, 2019 WL 3804667, at *6 (N.D. Cal. Aug. 13, 2019), *and In re* Titanium Dioxide Litig., 959 F. Supp. 2d 799, 821 (D. Md. 2013).

112. *See* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553 (2007) (concluding that a complaint can defeat a motion to dismiss by alleging "an agreement, tacit or express"); *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223–24 (1940).

113. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) (explaining conscious parallelism). Although a "tacit agreement" is unlawful and "conscious parallelism" is not, it is not at all clear that there is any difference—theoretical or practical—between the two. *See* Valspar Corp. v. E.I. Du Pont de Nemours & Co., 873 F.3d 185, 191 (3d Cir. 2017).

lawfully raise prices fully anticipating that, in response, its competitors will raise prices, thereby yielding higher prices and profits for all.[114]

When considering whether a plaintiff has presented enough evidence of an unlawful agreement to defeat a motion for summary judgment, federal courts generally apply the same standard as they do in other contexts. They evaluate whether the evidence establishes that there is a genuine dispute regarding a material fact relating to whether the defendant entered an illegal conspiracy, and they construe the evidence in the light most favorable to the plaintiff.[115] However, because conscious parallelism is lawful, the Supreme Court has cautioned that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case."[116]

Parsing out lawful from unlawful conduct can therefore be difficult for the lower federal courts and has resulted in conflicting applications of the summary judgment standard. Some circuits permit plaintiffs alleging § 1 violations to defeat a motion for summary judgment relying exclusively on circumstantial evidence, and they will deny a defendant's motion as long as "the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff]."[117] However, at least one circuit—the Third Circuit—is "cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists."[118] Moreover, the Third Circuit requires the district court judge to weigh the evidence, while the other circuit courts do not.[119] These differences in the application of the summary judgment standard have yielded different outcomes in cases alleging virtually the same facts.[120]

When similar § 1 cases from these circuits are consolidated for pre-trial proceedings pursuant to § 1407, these differences in the summary judgment standard have the potential to confront the MDL judge with the question as to which circuit's law it should apply. But in light of the choice-of-federal law rule adopted in some circuits and discussed further below, these differences and the disparate consequences from choosing one standard over another are elided over.[121] For example, in *In re Chocolate Confectionary Antitrust Litigation*, the

114. *See Valspar Corp.*, 873 F.3d at 191 (explaining the economic rationale of conscious parallelism).

115. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585–88 (1986).

116. *Id.* at 588; *cf. Twombly*, 550 U.S. at 556–57 (concluding similarly that allegations of parallel conduct, which is as consistent with conspiracy as it is with rational behavior, is not enough to survive motion to dismiss).

117. Home Depot, U.S.A., Inc. v. E.I. DuPont De Nemours & Co., No. 16-cv-04865, 2019 WL 3804667, at *4 (N.D. Cal. Aug. 13, 2019) (quoting Stanislaus Food Prod. Co. v. USS-POSCO Indus., 803 F.3d 1084, 1089 (9th Cir. 2015)); *see also In re* Titanium Dioxide Litig., 959 F. Supp. 2d 799, 820 (D. Md. 2013).

118. *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 358 (3d Cir. 2004) (citing cases from other circuits); *Valspar*, 873 F.3d at 192 n.1.

119. *Home Depot*, 2019 WL 3804667, at *4.

120. *See id.* at *3 (discussing case law). *Compare id.*, *and Titanium Dioxide Litig.*, 959 F. Supp. 2d 799, *with Valspar*, 873 F.3d 185.

121. *Cf. In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015) (applying, without discussion, the Third Circuit's section 1 summary judgment standard in an MDL constituted of cases originating in Northern District of California, Eastern District of Virginia, and Middle District of Pennsylvania—*i.e.*, originating in circuits with conflicting law—and affirming district court's granting of defendant's motion); *In re* Chocolate Confectionary Antitrust Litig., 542 F. Supp. 2d 1376 (J.P.M.L. 2008) (transferring cases from the

Third Circuit applied its more restrictive § 1 summary judgment standard in an MDL constituted of cases originating in the Northern District of California, the Eastern District of Virginia, and the Middle District of Pennsylvania—*i.e.*, jurisdictions with conflicting standards—without ever acknowledging the conflict or the consequences of its choice.[122]

The MDL judge can be confronted with this question whenever there is a circuit split on an issue of law that arises during the pretrial phase. These sorts of circuit splits can pertain to differences in the summary judgment standard as applied in the context of the relevant substantive law, as discussed above.[123] But they can also pertain to issues of personal jurisdiction[124] and the admissibility of evidence.[125]

Middle District of Pennsylvania into MDL and noting that it consisted of cases from the Northern District of California and the Eastern District of Virginia, among other districts).

122. *See generally In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015); In re *Chocolate Confectionary Antitrust Litig.*, 542 F. Supp. 2d 1376.

123. *See* discussion *supra* Section III.A.

124. For example, there is a circuit split as to whether "conspiracy theory jurisdiction" is a viable theory of personal jurisdiction in section 1 antitrust cases. Under this theory of personal jurisdiction, the contacts of some co-conspirators can be imputed to all co-conspirators. Thus, if one co-conspirator had sufficient contacts with the United States, then a federal district court can exercise personal jurisdiction over all co-conspirators. Conspiracy theory jurisdiction has not been uniformly adopted by the federal courts. Some courts of appeals, like the Second, Fourth, Tenth, and District of Columbia, have recognized conspiracy theory jurisdiction as a valid basis for maintaining personal jurisdiction over defendants. *See, e.g.*, Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 86–87 (2d Cir. 2018); Unspam Techs., Inc. v. Chernuk, 716 F.3d 322, 329 (4th Cir. 2013); Newsome v. Gallacher, 722 F.3d 1257, 1266 (10th Cir. 2013); Wegerer v. First Commodity Corp. of Bos., 744 F.2d 719, 727 (10th Cir. 1984); FC Inv. Grp. LC v. IFX Mkts., Ltd., 529 F.3d 1087, 1097 (D.C. Cir. 2008) (recognizing conspiracy theory of jurisdiction but holding plaintiffs "failed to plead the conspiracy with particularity"); World Wide Mins., Ltd. v. Republic of Kazakhstan, 296 F.3d 1154, 1168 (D.C. Cir. 2002) (same); Edmond v. U.S. Postal Serv. Gen. Couns., 949 F.2d 415, 425 (D.C. Cir. 1991). But others, like the Seventh, Third, and Ninth, have seriously doubted the theory's viability. *See* Smith v. Jefferson Cnty. Bd. of Educ., 378 F. App'x 582, 585–86 (7th Cir. 2010) (Illinois law); Davis v. A & J Elecs., 792 F.2d 74, 76 (7th Cir. 1986) (federal law); LaSala v. Marfin Popular Bank Pub. Co., 410 F. App'x 474, 478 (3d Cir. 2011) (affirming a district court's refusal to consider the theory because its availability was "a question of state law" and "we predict the New Jersey Supreme Court would decline to adopt such a theory of personal jurisdiction"); EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp., 711 F. Supp. 2d 1074, 1089 (C.D. Cal. 2010) (California law); *see also* Gen. Steel Domestic Sales, LLC v. Suthers, No. CIV. S-06-411LKK/KJM, 2007 WL 704477, at *5 (E.D. Cal. Mar. 2, 2007) ("Furthermore, the validity of conspiracy theory of jurisdiction in this circuit is in doubt.") (federal law).

An issue such as whether a federal court may maintain personal jurisdiction over defendants based on a seemingly novel theory of personal jurisdiction is a threshold issue. It is therefore perfectly suited for pretrial disposition by an MDL court. But because of its inconsistent treatment by the courts of appeals, the question of whether the federal district court can maintain personal jurisdiction over a co-conspirator based on the contacts of other co-conspirators can potentially raise an issue as to what precedent the transferee court should apply.

125. For example, the courts of appeals have inconsistently applied the requirements and underlying concerns of Rule 702 of the Federal Rules of Evidence, which pertains to testimony by expert witnesses. The Ninth Circuit, in particular, has applied a more lenient standard. *Compare* Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227, 1233–38 (9th Cir. 2017), *and* City of Pomona v. SQM North Am. Corp., 750 F.3d 1036, 1043–49 (9th Cir. 2014), *with In re* Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig., 858 F.3d 787, 800 (3d Cir. 2017), *and* McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1244–45 (11th Cir. 2005). The difference in the standard applied by the courts of appeals is one that can affect the outcome of the case. Indeed, in determining whether the testimonies of plaintiffs' experts in the *In re* Roundup Products Liability Litigation, 16-md-02741-VC (N.D. Ca.) would be admissible at a jury trial, the district court judge noted,

> The Ninth Circuit has placed great emphasis on *Daubert*'s admonition that a district court should conduct this analysis "with a 'liberal thrust' favoring admission." . . . Accordingly, the Ninth Circuit has emphasized

So how do federal courts resolve this conflict? Section 1407 is silent as to what law an MDL judge should apply to cases transferred from another circuit.[126] And no other federal statute addresses the choice-of-federal law issue.[127] But in *In re Korean Air Lines Disaster of September 1, 1983*,[128] an opinion authored by then-Judge Ruth Bader Ginsburg, the D.C. Circuit concluded that the transferee court should apply the law of the transferee circuit.[129] *Korean Air Lines* involved an airplane disaster; a commercial airliner was destroyed by a Soviet Union military aircraft while flying over the Sea of Japan.[130] A number of wrongful death actions were filed against the airline in numerous federal district courts, and the JPML transferred them to the District Court for the District of Columbia for pretrial proceedings.[131] A question presented to the district court was whether the airline's damages were limited pursuant to an international agreement, even though the airline had not complied with the terms of that agreement.[132] Some of the cases had been transferred from the Second Circuit, which had previously concluded that, under such circumstances, damages were not so limited.[133] But the MDL court rejected the Second Circuit's view, concluding instead that the airline's damages were limited.[134] The issue presented to the D.C. Circuit was whether the district court should have applied the law of the Second Circuit—*i.e.*, whether the transferee forum should apply the law of the transferor forum to federal claims transferred pursuant to § 1407.[135] Ultimately, the D.C. Circuit concluded that it need not.[136]

that the gatekeeping function is meant to "screen the jury from unreliable nonsense opinions, but not to exclude opinions merely because they are impeachable." . . . *This emphasis has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits. . . . This is a difference that could matter in close cases*.

Pretrial Order No. 45: Summary Judgment and Daubert Motions at 8–9, *In re* Roundup Prods. Liab. Litig., MDL No. 2741 (N.D. Ca. July 10, 2018) (emphasis added) (citations omitted). Expert testimony permitted in the Ninth Circuit might be just convincing enough to persuade a jury to decide in favor of the party offering the testimony. But if the same testimony were found inadmissible in another circuit, the plaintiffs' case could fall apart and summary judgment likely awarded against them.

126. 28 U.S.C. § 1407.

127. *See generally* Sturiale, *supra* note 107.

128. 829 F.2d 1171 (D.C. Cir. 1987).

129. *Id.* at 1178.

130. *Id.* at 1172.

131. *Id.* Cases were transferred from the Eastern District of New York, the Southern District of New York, the Eastern District of Michigan, the District of Massachusetts, and the District Court in the District of Columbia. *Id.* at 1173.

132. *Id.* at 1172. *Korean Air Lines* explains that the Warsaw Convention limited per passenger damages, which were then raised pursuant to an accord among airlines known as the Montreal Agreement. *Id.* The Montreal Agreement required airlines to print a liability limitation notice on passenger tickets in ten-point type; Korean Air Lines, however, had printed the notice in eight-point type. *Id.* The Second Circuit had previously concluded that a failure to comply with the type-size requirement would prevent an airline from benefiting from the liability limitation. *Id.*

133. *Id.* at 1172–73.

134. *Id.*

135. *Id.* at 1174.

136. *Id.* at 1173; *see also id.* at 1174–75.

Korean Air Lines appears to be the dominant view among the circuit courts. Although only the Second Circuit[137] has considered and adopted *Korean Air Lines*'s reasoning in the context of § 1407 and MDLs,[138] the Fourth,[139] Seventh,[140] and Eleventh[141] Circuits have relied on it to adopt a similar rule in the context of transfers made for the convenience of the parties pursuant to § 1404.[142] And those circuits that have adopted an opposing view have done so

137. *See generally* Menowitz v. Brown, 991 F.2d 36 (2d Cir. 1993).

138. *Id.* at 40–41 (applying the federal law of the Second Circuit in suit transferred pursuant to § 1407 and that required federal court to look to analogous state law for statute of limitations). In *Temporomandibular Joint (TMJ) Implant Recipients v. E.I. DuPont De Nemours & Co.*, 97 F.3d 1050 (8th Cir. 1996), the Eighth Circuit noted, "When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located." *Id.* at 1055 (citing *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987)). However, the court's statement was merely dicta, as TMJ was an MDL involving products liability claims arising under state law, not federal law.

139. Bradley v. United States, 161 F.3d 777, 782 n.4 (4th Cir. 1998) (holding in suit transferred from federal district court in Texas to federal district court in Maryland pursuant to § 1404 that law of the Fourth Circuit, not Fifth Circuit, applied) ("[T]his court cannot and does not apply the law of another circuit simply because the case was transferred from the other circuit.").

140. *See* Eckstein v. Balcor Film Invs., 8 F.3d 1121, 1126 (7th Cir. 1993). *Eckstein* is noteworthy for a few reasons. First, the appeal involved a case that was initially transferred from the Central District of California to the Eastern District of Wisconsin pursuant to § 1407, but the MDL court subsequently transferred the pending cases permanently to itself pursuant to § 1404(a). *Id.* at 1124–26. The court's consideration of what law to apply was therefore in the context of a § 1404(a) transfer. This practice of an MDL court transforming a § 1407 transfer into a permanent § 1404(a) transfer was later put to an end by the Supreme Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), in which the Court concluded that a district court presiding over pretrial proceedings pursuant to § 1407 is without authority to assign transferred cases to itself permanently. *Id.* at 40.

Second, although the *Eckstein* court noted that it "agree[d] with *Korean Air Lines* that a transferee court normally should use its own best judgment about the meaning of federal law when evaluating a federal claim," ultimately, the court applied the law of the transferor jurisdiction. *Eckstein*, 8 F.3d at 1126. The *Eckstein* court was interpreting a statute—§ 27A of the Securities Act of 1934—that references the "laws applicable in the jurisdiction"; this reference to "jurisdiction," the court explained, recognizes that the law of the many circuits is not uniform, and in those cases, the court should apply the law of the transferor court. *See id.* at 1126–27. The court noted, "When the law of the United States is geographically non-uniform, a transferee court should use the rule of the transferor forum in order to implement the central conclusion of *Van Dusen* and *Ferrens* [sic]: that a transfer under § 1404(a) accomplishes 'but a change of courtrooms.'" *Id.* at 1127. Because the law with respect to § 27A was not uniform, the Seventh Circuit concluded that it should apply the law of the Ninth Circuit to the plaintiffs' claims. *Id.*

Third, given the facts of the case and the court's ultimate conclusion in *Eckstein*, it is not clear how much to make of the court's agreement with *Korean Air Lines*. The court's endorsement of *Korean Air Lines* was untethered to the actual facts of *Eckstein*. In addition, whether the court agreed or disagreed with *Korean Air Lines*—a non-binding case from another circuit—was irrelevant to the Seventh Circuit's conclusion that it should apply the transferor law when the underlying federal law is non-uniform, *i.e.*, it was unnecessary for the *Eckstein* court, applying a statute that anticipated *non-uniform* federal law, to conclude that a court applying a statute that anticipated *uniform* federal law should apply the transferee law. Because the *Eckstein* court's agreement with *Korean Air Lines* was not based upon the facts presented in *Eckstein* and was not necessary for the judgment in the case, the court's comments appear to be little more than dicta. *See id* at 1126–29.

141. Murphy v. FDIC, 208 F.3d 959, 964–66 (11th Cir. 2000) (concluding in case transferred pursuant to § 1404(a) that the law of the transferee jurisdiction applies).

142. It is worth noting that no court has seriously considered whether there are differences between transfers pursuant to § 1404 and § 1407 that matter for purposes of the federal choice-of-law analysis. In re *United Mine Workers of America Employee Benefits Plans Litigation*, 854 F. Supp. 914 (D.D.C. 1994), noted that some cases to consider the choice-of-law issue were cases transferred pursuant to § 1404(a) while others were transferred

in the context of federal statutes that require the federal court to look to state law, implicating different choice-of-law considerations.[143] (The Third,[144] Fifth,[145] and Sixth[146] Circuits have noted the issue but have avoided deciding it.)

pursuant to § 1407, but it did not consider the substantive differences between the two statutes and concluded the distinction did not alter its conclusion. *Id.* at 919.

Presumably, no court has considered the issue because, at first blush, the statutes appear to present the same issue. Both § 1404 and § 1407 enable venue transfers within the federal system, and the question is whether the transferee court should apply the law of its own circuit or the law of the transferee circuit. *See id.* But according to the terms of the statutes, cases transferred pursuant to § 1407 are supposed to be remanded back to the federal district court from which they came unless they are otherwise terminated before the MDL court, whereas cases transferred pursuant to § 1404 are transferred with the expectation that they will not be transferred back. *Id.*

As a practical matter, most cases transferred pursuant to § 1407 will end up being resolved in the transferee court. But at the outset of the case, an MDL court will not necessarily know whether the case will be resolved—for example, through settlement—before it or whether it will be remanded back to the transferor court. These characteristics make cases transferred pursuant to § 1407 quite different than those transferred pursuant to § 1404. Indeed, because cases transferred pursuant to § 1404 are not supposed to be remanded back to the district court from which they came, they present a stronger case for applying the transferee law than do cases transferred pursuant to § 1407. It is therefore not clear whether these same courts, presented with a § 1407 transfer, would similarly conclude that the transferee law should apply in federal question cases.

143. Most circuits that have concluded that the court should apply the transferor court's law have done so when the underlying federal statute does not expressly contain a limitations period, which, as a practical matter, results in the court looking to analogous limitations periods under the law of the state in which the federal court sits. *See* Hooper v. Lockheed Martin Corp., 688 F.3d 1037, 1044–46 (9th Cir. 2012) (applying statute of limitations of Maryland, where the case was filed, to claim brought under § 3730(h) of the False Claims Act, which does not expressly provide a limitations period, requiring the court to borrow the most closely analogous state statute of limitations); Trull v. Dayco Prods., LLC, 178 Fed. App'x. 247, 249 (4th Cir. 2006) (applying statute of limitations of Ohio to LMRA and ERISA claims filed in the Southern District of Ohio); Olcott v. Del. Flood Co., 76 F.3d 1538, 1544–47 (10th Cir. 1996) (applying statute of limitations of the Third Circuit to claims brought pursuant to SEC Rule 10b-5); *Eckstein*, 8 F.3d at 1123, 1127 (applying statute of limitations of the Ninth Circuit to claims brought pursuant to Section 10(b) of the Securities and Exchange Act of 1934 and SEC Rule 10b-5); *In re* United Mine Workers of Am. Emp. Benefits Plans Litig., 854 F. Supp. 914, 916–21 (D.D.C. 1994) (applying statute of limitations of transferor forums to LMRA and ERISA claims, despite D.C. Circuit's holding in *Korean Air Lines*); *see also In re* Ford Motor Co., 591 F.3d 406, 410–13 (5th Cir. 2009) (in case remanded back to transferor court, applying law of transferor circuit—the Fifth Circuit—to determine whether transferor court should have granted motion to reconsider MDL court's denial of dismissal on *forum non conveniens* grounds). The reasoning of these courts has been that, by not expressly providing for a limitations period and by requiring the federal court to look to the law of the jurisdiction in which it sits, the federal statute contemplates non-uniformity; *Korean Air Lines*, however, operated under the assumption of uniformity of federal law, and its reasoning therefore did not apply.

144. *See, e.g.*, *In re* Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 368 n.8 (3d Cir. 1993) (noting in case transferred pursuant to § 1407 a "potential choice of law issue in terms of whether Second or Third Circuit precedent controls," but because neither party challenged the district court's application of the transferee law, "assum[ing] without deciding that it was correct").

145. *See, e.g.*, *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 742 F.3d 576, 586 (5th Cir. 2014) (declining to decide "which circuit's law should apply because regardless of which circuit's approach we use, the outcome is the same").

146. *See, e.g.*, *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 911–13 n.17 (6th Cir. 2003) (noting in an interlocutory appeal from a district court presiding over proceedings consolidated pursuant to § 1407 that it was not clear whether the Sixth Circuit's precedent should apply to federal antitrust claims originating in other circuits, but following the same path given no party had taken issue with the district court's application of Sixth Circuit precedent) ("In considering the issue of antitrust injury, the district court applied the same analysis, including the application of Sixth Circuit precedent, to all of the antitrust claims. As no party has taken issue with this approach, . . . we have followed the same path. We note, however, that although it is clear and undisputed . . . that in a federal multidistrict litigation there is a preference for applying the law of the transferee district, it is not

At first blush, the *Korean Air Lines* choice-of-federal law rule seems perhaps unspectacular. Neither § 1407 nor any other statutory provision instruct the federal courts as to which circuit's law to apply when the law of more than one reasonably might.[147] And judges and commentators who have considered the appropriate choice-of-federal law rule appear to have taken it for granted that devising a rule is well within the courts' federal common-lawmaking authority.[148] But, as I have discussed elsewhere, courts can use choice-of-federal law rules as a mechanism to obscure what are, in essence, determinations about the underlying substantive law.[149] Therefore, before considering how to resolve these problems, it is useful to contemplate a federal court's authority for constructing such rules in the first place.

B. The Federal Courts' Authority to Devise a Choice-of-Federal Law Rule

So what is the scope of federal common-lawmaking[150] authority of a federal court, and does it embrace formulating a choice-of-law rule? As a preliminary matter, it is worth noting that, even in cases where a federal court is required to apply state law, the court's announcement of a decision and a rule is necessarily a federal one.[151] Thus, *Korean Air Lines* is necessarily a federal rule, but so is *Erie*.[152] Indeed, it is inescapable that, whenever a federal court announces a choice-of-law rule, it is engaging in federal common lawmaking, even if the

clear that precedent 'unique' to a particular circuit and arguably divergent from the predominant interpretation of a federal law, such as the Sixth Circuit's 'necessary predicate' gloss on the antitrust injury doctrine, should be applied to . . . federal antitrust claims that originated in other circuits." (citations omitted)).

147. *See, e.g.*, 28 U.S.C. § 1407.

148. *See, e.g.*, Rensberger, *supra* note 26; Hill, *supra* note 19 (discussing federal choice-of-law rule adopted in *Korean Air Lines*).

149. *See* Sturiale, *supra* note 107, at 497 & n.136, 514.

150. There are multiple reasonable definitions of the phrase "federal common law." *Compare* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 890–95 (1986) (defining "federal common law" as meaning "any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments–constitutional or congressional"), *and* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 7 (1985) (defining "federal common law" broadly as referring to legal procedural and substantive rules that "are propounded by courts" and "have the status of federal law"), *with* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026–29 (1967) (defining "federal common law" in such a way as to exclude the construction of constitutional or statutory language, determining the remedial implications of a legal rule, and instances in which federal law preempts state law, thereby "devolving upon the federal courts the duty of fashioning rules of decision"). A full examination of these competing definitions is beyond the scope of this Article. But for purposes of this Article, the phrase will be given the broadest, most inclusive definition and will thus mean any rule of federal law created by a court when the rule is not plainly or clearly stated by federal enactment, whether statutory or constitutional. *See* Field, *supra*, at 890; Merrill, *supra*, at 7. This definition is thus the most permissive in terms of the federal court's lawmaking authority, and the argument put forward in this Article that the federal court's lawmaking authority embraces devising a choice-of-federal law rule thus the most permissive.

151. *Cf.* DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 159 n.13 (1983) (noting that choice of limitations for a federal cause of action is a question of federal law).

152. *Korean Air Lines* and *Erie* could therefore be described as "federal choice-of-law rules"—*i.e.*, federal rules pertaining to what law to apply. *See supra* note 108. But *Korean Air Lines* can more accurately be described as a "federal choice-of-federal law rule" because it is not simply a federal rule pertaining to what law to apply; it is a federal rule pertaining to what federal law to apply. However, for simplicity, this Article refers to rules such as the one announced in *Korean Air Lines* simply as "choice-of-federal law rules."

rule directs the federal court to apply the substantive law—including the choice-of-law rules—of the states.

In addition, the Supreme Court has long recognized that federal courts are vested with certain "inherent powers" necessary to manage their affairs and expeditiously dispose of cases.[153] The only real constraints on such inherent powers is that the exercise of the power must be "a reasonable response to the problems and needs," and it must not contradict an express rule or statute.[154] When the circumstances and facts of a case suggest that the law of more than one jurisdiction might reasonably apply, formulating a choice-of-law rule is a reasonable response. Indeed, the Supreme Court has itself announced at least a few choice-of-law rules, including those articulated in *Erie*, *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[155] *Van Dusen v. Barrack*,[156] and *Ferens v. John Deere Co.*[157] After all, without deciding what law to apply, how would a federal court dispose of a case? A federal court would be practically paralyzed.

More specifically, then, does a federal court have the authority to formulate the substance of a choice-of-federal law rule—*i.e.*, a rule pertaining to which federal jurisdiction's federal law will apply when more than one reasonably might—rather than look to state law to provide the substance of the rule? For example, in *Korean Air Lines*, the D.C. Circuit announced a rule requiring the federal district transferee court to apply its own federal law rather than the law of the transferor court.[158] In arriving at this rule, the D.C. Circuit did not even pause to consider the choice-of-law rules of the District of Columbia and what law it might have directed a local court to apply in considering an analogous (tort) claim.[159] But it could have. Indeed, when a claim arises under federal law but the relevant statute does not provide a limitation period, the federal courts do something very similar; they "borrow" the statute of limitation of an analogous claim under local state law.[160] In adopting a choice-of-law rule in *Korean Air Lines*, was the D.C. Circuit required to similarly "borrow" the state's choice of law rule pertaining to an analogous claim?

The scope of the federal courts' power to make federal common law is not at all clear. Indeed, Professor Martha Field has described this area of law as "highly confused."[161] In general, federal courts are courts of limited jurisdiction; they can fill in gaps in the law only when the Constitution or a statute permits

153. *See, e.g.*, Dietz v. Bouldin, 579 U.S. 40, 45 (2016); Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962).

154. *See Dietz*, 579 U.S. at 45.

155. 313 U.S. 487, 496 (1941).

156. 376 U.S. 612, 639 (1964).

157. 494 U.S. 516, 519 (1990).

158. *In re* Korean Airlines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987).

159. *See generally id.*

160. *See, e.g.*, DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 158–59 & n.12 (1983); Holmberg v. Armbrecht, 327 U.S. 392, 395–96 (1946).

161. Field, *supra* note 150, at 927; *see also id.* at 909 (arguing that the Supreme Court precedent "reveal an extensive federal common law, of many different varieties, with no coherent unifying principle").

them to do so.[162] Otherwise, lawmaking is left to the states.[163] Unfortunately, however, the Supreme Court has announced various formulations regarding the boundaries of a federal court's lawmaking power.[164] In some instances, the Court has concluded that a congressional grant of judicial power to the federal courts empowers the courts to create substantive rules of decision.[165] For example, in *National Society of Professional Engineers v. United States*,[166] the Court concluded that, in enacting the Sherman Act, which prohibits collusion among competitors and monopolization by firms, Congress expected the federal courts to "give shape" to the Act's "broad mandate."[167] Likewise, in *Textile Workers Union of America v. Lincoln Mill*,[168] the Court concluded that § 301 of the Labor Management Relations Act does more than merely grant the federal district courts jurisdiction over controversies relating to contracts between employers and labor organizations; it authorizes the courts to develop a substantive body of federal law to enforce those contracts.[169] In reaching this conclusion, the Court looked to the legislative history of § 301, but it admitted that history was "somewhat cloudy and confusing."[170] Of course, *Erie Railroad Co. v. Tompkins*[171] makes clear that a congressional grant of judicial power—in that case, the grant of diversity jurisdiction—to the federal courts, alone, is, in at least some circumstances, insufficient to authorize the federal courts to make federal common law.[172] What *Erie* does not make clear, however, is the breadth of the federal common-lawmaking power a court *does* have.[173] Thus, when cases like *National Society of Professional Engineers* and *Textile Workers Union* are considered in conjunction with *Erie*, it is not entirely clear when a congressional grant of jurisdiction to the federal courts is sufficient to authorize the courts to create substantive rules of decision.

In other instances, the Court has concluded that, unless Congress specifically authorizes the federal courts to formulate substantive rules of decision, the federal courts' common-lawmaking authority extends only to specific

162. *See id.* at 899.

163. *See id.*

164. Martha Field reflects,

> There are myriad suggestions of standards in language used in different cases, but the formulation in one case is ignored in the next. The case law creates the overall impression that courts' power to create federal rules is less broad than Congress's power, but no clear picture emerges of the limits of federal common law.

Id. at 927.

165. *Id.* at 899.

166. 435 U.S. 679 (1978).

167. *Id.* at 688. The Court explained, "Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *Id.*

168. 353 U.S. 448 (1957).

169. *See, e.g.*, *id.* at 450–51, 456; *see also* 29 U.S.C. § 185.

170. *Textile Workers Union of Am.*, 353 U.S. at 452.

171. 304 U.S. 64 (1938).

172. *See generally id.*; *see also* Field, *supra* note 150, at 906 (characterizing as a rejected approach the view that "federal common law is permissible in any case in which a federal court has jurisdiction").

173. *See* Field, *supra* note 150, at 915.

"enclaves"—cases concerning the rights and obligations of the United States, disputes between states, international disputes, and admiralty cases.[174] For example, in *Texas Industries, Inc. v. Radcliff Materials, Inc.*,[175] the Supreme Court concluded that the federal courts did not have the authority to create a cause of action for contribution in antitrust cases.[176] The Court reasoned that, although Congress enacted the antitrust laws, the right to contribution among antitrust wrongdoers—a private right of action—does not implicate the rights and obligations of the United States.[177] In addition, there was no suggestion in the antitrust laws, the legislative history, or the overall regulatory scheme that Congress intended to give the courts the same breadth of power with respect to formulating remedies as it did with respect to formulating an offense.[178]

Yet in still other instances, the Supreme Court has concluded federal common lawmaking was proper without ever identifying a specific federal provision that supported a finding of such authority.[179]

These disparate formulations might be beside the point if the Supreme Court had clearly addressed the federal courts' authority to formulate the substance of choice-of-law rules. But the relevant precedents are inconclusive and no more illuminating. The uncertainty stems from the ambiguity of the breadth of the Court's holding in *Erie*.[180] *Erie*, recall, involved a suit in federal court sitting in diversity by a resident of Pennsylvania for injuries he sustained while walking on a footpath next to the tracks of the Erie Railroad Company, a New

174. *See, e.g.*, Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." (internal footnotes omitted)); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426–27 (1964) ("[T]here are enclaves of federal judge-made law which bind the States."); *see also* Hill, *supra* note 150, at 1066; Field, *supra* note 150, at 885, 911–12 & n.140 (noting that commentators have suggested that federal common law is appropriate in certain categories of cases); RICHARD H. FALLON, JR., JOHN E. MANNING, DANIEL J. METZLER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 647, 649 (7th ed. 2015).

175. 451 U.S. 630 (1981).

176. *Id.* at 647.

177. *See id.* at 642.

178. *Id.* at 645. The Court also concluded that there was no suggestion that Congress, itself, intended to create a right to contribution. *Id.* at 639–40. But this conclusion, the opinion suggests, was a matter of statutory interpretation, rather than of discerning the boundaries of a federal court's federal common-lawmaking powers. *See id.* at 639–41; *see also* Field, *supra* note 150, at 892 n.39 (noting that in *Texas Industries*, "the Court drew a peculiar distinction between federal common law and rules made with reference to congressional intent"). This dichotomy—statutory interpretation versus federal common lawmaking—suggests a definition of federal common law that is more narrow than the one this Article proposed. *See* Field, *supra* note 150, at 891–92 (discussing competing definitions of "federal common law," including those that distinguish between statutory interpretation and federal common lawmaking).

179. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 101–07 & n.5 (1972) (reviewing a number of federal laws relating to the interstate waterways and concluding that federal common law applies to "air and water in their ambient or interstate aspects"); *Banco Nacional de Cuba*, 376 U.S. at 423–27 (concluding that the act of state doctrine is not compelled by the inherent nature of sovereign authority, international law, the text of the constitution, or a federal statute, but nonetheless concluding that issues are intrinsically federal and therefore "the scope of the act of state doctrine must be determined according to federal law").

180. *See, e.g.*, Field, *supra* note 150, at 905 ("[T]he reasoning of that case provides the foundation for several different arguments concerning the scope of federal common law."); *id.* at 924–27.

York corporation.[181] The question before the Supreme Court was whether the district court was bound to apply Pennsylvania common law or was instead permitted to formulate a federal rule.[182] Ultimately, the Supreme Court held that the district court was bound to apply Pennsylvania law because the federal court was not free to develop federal common law.[183]

The decision rested on an interpretation of the Rules of Decision Act ("RDA"),[184] as well as the Constitution,[185] but the scope of the constitutional holding is unclear. The RDA provided—and still provides—that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[186] *Erie* suggested it was correcting the Court's prior interpretation of "laws" in *Swift v. Tyson*[187] so that it would include not only the statutory law of the states, but also the judge-made common law of the states.[188] But as others have noted, a reinterpretation of the RDA was problematic, not least of all because it rested on a questionable conclusion as to the meaning of an amendment to the RDA and because the *Swift* interpretation was well-established—*Swift* had been decided almost a 100 years prior—so any change in the meaning of the statute should have come from Congress.[189] The Court therefore appears to have further rationalized its reinterpretation by concluding that the prior interpretation was unconstitutional; it suggested that the court lacked the power to announce a rule of decision because doing so would go *beyond* Congress's power,[190] while at the same time suggesting that federal courts generally lack the power to make federal common law at all.[191] Subsequent Supreme Court decisions have indicated that the federal courts' powers are indeed not as broad as Congress's.[192] And other decisions have underscored *Erie*'s relevance to cases in which the federal courts sole basis for jurisdiction is diversity of citizenship.[193] But the Court has not located the exact boundaries of the federal courts' authority, and it

181. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69 (1938).

182. *Id.* at 69–71.

183. *Id.* at 78.

184. *Id.* at 71.

185. *Id*. at 78.

186. 28 U.S.C. § 1652.

187. 41 U.S. 1, 1 (1842).

188. *Erie*, 304 U.S. at 71.

189. *See* Field, *supra* note 150, at 903–04.

190. *Erie*, 304 U.S. at 72 ("The federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes.").

191. *See id.* at 78–79 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law. . . . Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States." (cleaned up)).

192. *See* Tex. Indus., Inc. v. Radcliff Materials, 451 U.S. 630, 641 (1981).

193. *See, e.g.*, Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) ("In essence, the intent of [*Erie*] decision was to insure that, in all cases *where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties*, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." (emphasis added)).

therefore remains unclear whether *Erie*'s constitutional holdings pertain *only* to diversity cases.[194] Is it possible that, even when an issue arises under federal law, *Erie* requires a federal court to rely on state substantive law when federal law is silent on an issue?

The Supreme Court's choice-of-law decisions in *Klaxon*, *Van Dusen*, and *Ferens* provide no more insight because in none is the federal courts' jurisdiction based on a federal question. Rather, in each, the Court is sitting in diversity, importantly relies on *Erie*, and ultimately looks to state law for the substance of the choice-of-law rule.[195] *Klaxon* involved a suit for breach of contract by a New York corporation against a Delaware corporation in the federal district court in Delaware.[196] The issue was whether the federal court could formulate its own choice-of-law rule and, in doing so, apply New York law to an issue in dispute.[197] The Court held that the district court should have applied Delaware's choice-of-law rules, explaining,

> [w]e are of opinion that the prohibition declared in *Erie Railroad Co. v. Tompkins*, [ ], against such independent determinations by the federal courts, extends to the field of conflict of laws. . . . [T]he proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.[198]

Part of the Court's rationale for its conclusion was that the *Klaxon* rule would promote intra-state uniformity, a principle upon which *Erie* was based.[199] After *Klaxon*, a federal court, sitting in diversity, is required to apply the choice-of-law rules of the state in which the court is situated.[200]

Van Dusen considered the related issue of which state's law should a federal court apply when, pursuant to 28 U.S.C. § 1404(a), a diversity action is transferred from one proper venue to another proper venue for the convenience of the parties.[201] *Van Dusen* involved a plane crash over Boston Harbor while a plane was en route from Boston to Philadelphia.[202] A number of personal injury suits were subsequently brought.[203] Most of the plaintiffs filed suit in Massachusetts, but a number of claims were brought in Pennsylvania.[204] Defendants in the Pennsylvania actions sought to transfer their actions to the District of Massachusetts,

194. *See* Field, *supra* note 150, at 919.

195. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 494 (1941); Van Dusen v. Barrack, 376 U.S. 612, 637–38 (1964); Ferens v. John Deere Co., 494 U.S. 516, 524–27 (1990).

196. *Klaxon*, 313 U.S. at 494.

197. *See id.* at 496 ("Application of the New York statute apparently followed from the court's independent determination of the 'better view' without regard to Delaware law, for no Delaware decision or statute was cited or discussed.").

198. *Id.* at 496–97.

199. *Id.* at 496 ("Any other ruling would do violence to the principle of uniformity within a state, upon which the [*Erie v.*] *Tompkins* decision is based.").

200. *Id*. at 496.

201. Van Dusen v. Barrack, 376 U.S. 612, 626–30 (1964).

202. *Id*. at 613.

203. *Id*. at 613–14.

204. *Id.* at 614. There were more than 100 actions brought in Massachusetts and more than 45 brought in Pennsylvania. *Id.*

where a significant number of witnesses were located.[205] The choice-of-law issue presented to the Supreme Court was whether Massachusetts's law or Pennsylvania's law should apply to the transferred cases,[206] as there were outcome-determinative differences between the two states' laws.[207] The Supreme Court concluded that the law of the transferor court (Pennsylvania)—not the transferee court (Massachusetts)—should apply.[208]

In reaching this conclusion, the Court looked to the legislative history of § 1404(a).[209] That history, the Court concluded, suggested that the venue transfer statute was not designed to effect a change in the applicable state law.[210] In addition, the Court noted that its interpretation of § 1404(a) was consistent with and supported by *Erie*'s concern with uniformity.[211] But the uniformity with which the federal court should be concerned is the uniformity of the transferor court, not the transferee court, so as to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed."[212] It is worth noting that *Van Dusen* does not claim, as *Klaxon* does, that its holding was *compelled* by *Erie*; it merely claims that its holding "fully *accords*" with *Erie* and the policies underlying it.[213] In addition, *Van Dusen* claims its holding is a matter of statutory interpretation (§ 1404).[214]

The Supreme Court reiterated this reasoning again in *Ferens v. John Deere Co.*,[215] when it extended the holding of *Van Dusen* to transfers initiated by plaintiffs (as opposed to defendants, as in *Van Dusen*).[216] But *Ferens* walks back *Van Dusen*'s claim that it was merely a statutory interpretation case, suggesting it was additionally compelled by *Erie*.[217]

205. *Id.*

206. *See id.* at 626–30.

207. *See id.* at 626–27.

208. *See id.* at 639 ("We conclude, therefore, that in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change in courtrooms.").

209. *See id.* at 635–37.

210. *See id.* at 635–37. The Court explained,

> [The legislative history] supports the view that § 1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court. The history of § 1404(a) certainly does not justify the rather startling conclusion that one might "get a change of law as a bonus for a change of venue."

Id. at 635–36.

211. *Id.* at 637.

212. *Id.* at 638.

213. *Id.* at 637.

214. *See id.* at 635–37.

215. *See* 494 U.S. 516, 516 (1990).

216. *Id.* at 523–31. *But see id.* at 533–39 (Scalia, J., dissenting) (arguing that *Van Dusen* should not apply to transfers initiated by plaintiff because it enables a plaintiff "to achieve exactly what *Klaxon* was designed to prevent: the use of a Pennsylvania federal court instead of a Pennsylvania state court in order to obtain application of a different substantive law").

217. *Id.* at 524 ("The policy that § 1404(a) should not deprive parties of state-law advantages, although perhaps discernible in the legislative history, has its real foundation in *Erie R. Co. v. Tompkins*.").

Considered together, *Erie*, *Klaxon*, *Van Dusen*, and *Ferens* suggest that when a case is transferred within the federal system from one proper venue to another, a federal court, sitting in diversity, is required to apply the choice-of-law rules of the state in which the transferor court sits, regardless of who initiated the transfer. But it is unclear whether this requirement stems from one or all of the Constitution, an interpretation of § 1404(a), or *Erie*. Moreover, the cases say *nothing* about whether, when the federal court's jurisdiction is based on something other than diversity—*i.e.*, it raises a federal question—a federal court has the authority to formulate its own choice-of-law rule or whether it is instead required to apply state choice-of-law rules.

At least two considerations suggest a federal court is not so required, regardless of whether the basis for the Court's choice-of-law decisions is constitutional or otherwise. First, in each of *Klaxon*, *Van Dusen*, and *Ferens*, the Court's rationale for concluding that it was required to apply state choice-of-law rules was that doing so would ensure that, consistent with *Erie*, cases filed in federal court would reach the same result as those filed in state court.[218] The Court necessarily took it for granted that the substantive law applied in actions filed in state court and the substantive law applied in actions filed in federal court would be the same; that was, after all, the intention and direct consequence of *Erie*.[219] But if the substantive law was merely analogous, but nonetheless different—*i.e.*, a federal law analogous to a state law but undoubtedly different than that state law—the same result could not be ensured, regardless of the identity of the choice-of-law rules.[220] The rationale for applying state choice-of-law rules therefore simply would not hold in cases arising under federal law.

Nonetheless, *Erie* was motivated not merely to achieve uniformity as between cases decided in state and federal court. The opinion also indicates that applying state law was required to give due regard to state sovereignty.[221] When a federal court applies state choice-of-law rules, it arguably is respecting state independence, even if applying such rules does not effect uniformity of results. After all, a state may have an interest in its choice-of-law rules that is independent and different from its interest in its substantive laws; such rules might reflect values such as due regard for another state's sovereignty, inter-state cooperation and coordination, and the like.[222]

This line of argument gives rise to the second consideration: Can choice-of-law *values* be animated by the application of choice-of-law rules that are divorced from the underlying substantive law? For example, could North Carolina

218. *See* Klaxon Co. v. Stentor Electric Mfg. Co., Inc, 313 U.S. 487, 496 (1941); Van Dusen, 376 U.S. at 638; Ferens, 494 U.S. at 527–29; *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938).

219. *Erie*, 304 U.S. at 78.

220. Jeffrey W. Stempel, Shady Grove *and the Potential Democracy-Enhancing Benefits of* Erie *Formalism*, 44 AKRON L. REV. 907, 977 (2011).

221. *See Erie*, 304 U.S. at 78 (noting that the Constitution "recognizes and preserves the autonomy and independence of the states").

222. *See, e.g.*, LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 74–75 (1991) ("Choice of law rules are as amenable to purposive interpretation as substantive rules. . . . Tort rules embody tort policies; contract rules embody contract policies; conflicts rules embody conflicts policies.").

have an interest in having its choice-of-law rules used to determine whether to apply the law of the Fourth Circuit, within which North Carolina is located, versus the law of the Sixth Circuit, its neighbor to the west?[223] Perhaps. But the state's values—whatever they might be, discernible or not[224]—when untethered from the substantive law of the states and animated instead by federal law, may no longer be recognizably the state's values, as such.

Adding to these considerations are the arguments of some that the federal courts' lawmaking authority is generally quite broad. For example, Professor Martha Field has argued that a federal court may engage in common lawmaking "as long as the court can point to a federal enactment that it interprets to authorize the federal common law rule" and that enactment is not the Constitution's grant of diversity jurisdiction.[225] Others, like Professor Louise Weinberg, have argued that the courts' authority is potentially even broader, extending to any matter in which there is "the existence of a legitimate national governmental interest," as long as acting is "within their constitutional and statutory jurisdiction."[226] Neither of these theories have been adopted by the Supreme Court. But under either, the courts would have the authority to formulate a choice-of-federal law rule such as the one announced in *Korean Air Lines*.[227] Although *Korean Air Lines* does not hold itself out as an interpretation of § 1407, the court's decision could reasonably be justified as such, in the same way that the Supreme Court characterized its decision in *Van Dusen* as an interpretation of § 1404.[228] Moreover, the *Korean Air Lines* rule is relatively easy to administer—certainly when compared to a rule requiring the federal courts to apply the states' choice-of-law rules, untethered from state substantive law—and more predictable for litigants (at least after the case has been transferred). These sorts of concerns are the legitimate considerations of any system of justice.

C. Prudential Considerations

But even assuming the federal courts have the power to formulate choice-of-federal law rules, there are prudential reasons to consider alternatives to the *Korean Air Lines* rule.

223. *Cf.* Bishop v. Wood, 426 U.S. 341, 345 (1976) (deferring to district court's interpretation of North Carolina law because district court judge "sits in North Carolina and practiced law there for many years"). Bishop suggests that federal court decisions may reflect state *substantive-law interests*, but not necessarily state *choice-of-law interests*.

224. *See* BRILMAYER, *supra* note 222, at 77 (noting that it is difficult to discern a state's conflicts-of-law interest from the legislative history).

225. *See* Field, *supra* note 150, at 982.

226. Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 813 (1989).

227. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1186 (D.C. Cir. 1987).

228. *Id.*

1. JPML Power to Transfer Cases

As discussed above, in deciding whether, to where, and to whom to transfer actions, the JPML has broad discretion.[229] The JPML's transfer orders are not particularly revealing as to how the Panel exercises its discretion regarding *whether* to transfer cases. But with respect to *where* and to *whom* to transfer cases, the Panel exercises "meaningful discretion."[230] In the most recent rigorous study of the transfer practices of the JPML, Margaret Williams and Professor Tracey George examined all transfer orders of the JPML since the Panel's creation in 1968 through early 2012.[231] They concluded that the JPML is more likely to assign cases to the districts in which the present Panel members serve.[232] In addition, the probability that the Panel will transfer the pending actions to a present Panel member is three times more likely than is the baseline probability that the Panel will transfer the pending actions to a non-Panel judge.[233] Moreover, recall that less than 3% of cases transferred to an MDL are remanded back to the transferor court.[234] These data, taken together, suggest that a member of the JPML will not only participate in the decision of *whether*, to *where*, and to *whom* to transfer cases for consolidated or coordinated pretrial proceedings, but in many instances will also decide the pretrial issues pertaining to the underlying claims. Moreover, in many cases, the Panel member will ultimately resolve the case[235]—*e.g.*, by supervising and presiding over a settlement or by deciding a dispositive motion, such as the motion for summary judgment in an antitrust case, as discussed earlier.

These data, alone, are troubling. They suggest that Panel members have the capacity to steer cases to themselves for resolution—a practice that is at odds with a longstanding "norm against strategic matching of particular judges with particular cases."[236] This norm serves to legitimate judicial decision-making by

229. *See supra* notes 53–74 and accompanying text.

230. *See* Williams & George, *supra* note 28, at 430.

231. *See generally id.* In addition, they conducted a more detailed analysis of orders spanning a five-year period from 2005 to 2009. *See id.*

232. *See id.* at 430, 457. Specifically, they found that the Panel assigns cases to the districts in which Panel members serve 36% of the time. *Id.* at 457.

233. *Id.*

234. *See supra* note 87 and accompanying text.

235. Furthermore, in more than one out of three cases, even if the case is not transferred to one of the Panelists, it will be transferred to the home district court of one of the Panelists, where one of the colleagues of that Panelist will preside over the MDL. *See* Williams & George, *supra* note 28, at 430, 457. Transfer to a Panelist or to a Panelist's home district court may be made with full knowledge of the Panelist's court's choice-of-federal law rule and its likely legal effects.

236. *See* Ruger, *supra* note 17, at 382–84; J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1069 & nn. 215–17 (2000); *see also* Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 96–102 (2017) (discussing the normative rationale for random assignment, but providing qualitative evidence that panel assignments are not strictly random); Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignments in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 50 (2015) (providing quantitative evidence that panel assignments are nonrandom).

promoting the view that it is principled and reasoned, rather than driven by the desire to achieve particular outcomes.[237]

But the data are more troubling when considered in the context of the *Korean Air Lines* choice-of-federal law rule. An MDL judge wields a significant amount of power in her capacity as a managerial judge.[238] Indeed, at least one commentator has suggested that the MDL statute "concentrates more power in the hands of a single person than perhaps any other part of our judicial system."[239] Nonetheless, the judge is, at the very least, constrained by the relevant law and the appellate court that reviews the judge's decisions, and any attempt by the Panel to match a judge with a particular case to yield a particular outcome will accordingly be constrained.[240] For example, an MDL judge exercises significant power when she appoints special masters, limits the scope of discovery, selects a case for a bellwether trial, and urges the parties to settle.[241] But if a defendant challenges the court's ability to exercise personal jurisdiction and the plaintiff's theory of personal jurisdiction is not recognized under the applicable circuit's law (whatever circuit that might be),[242] then the MDL judge will be bound to dismiss the suit or, if the judge acts contrary to the law, face having her ruling overturned by the appellate court that reviews the trial court's decisions.[243] However, in making a transfer decision the JPML can select not only for the judge but also for the applicable law. The law, therefore, serves less as a constraint on the JPML's ability to match judges, cases, and outcomes.

It may be tempting to conflate the judge, the jurisdiction, and the law and reject the premise that the *Korean Air Lines* rule has the potential independently to influence the JPML's transfer decision. This temptation likely follows from the assumption that, in selecting to which judge to transfer a case, the JPML is necessarily selecting the jurisdiction and the applicable law. There are at least two reasons, however, why that assumption does not hold true. First, under other candidate choice-of-federal law rules—for example, a rule that would require the MDL court to apply the transferor court's law—the judge could potentially apply the law of a jurisdiction other than the one in which it sits and, indeed, the law of more than one jurisdiction. The choice of a jurisdiction is therefore not the same as the choice of the applicable law. Second, and perhaps more importantly, § 1407 expressly permits the JPML independently to select the judge and the

237. *See* Ruger, *supra* note 17, at 382. This norm implicitly and necessarily assumes that judges are non-fungible, such that they have diverse views about the interpretation, application, or administration of the law that can be "matched" with particular cases to yield particular outcomes. *Id.* at 377–78; *see also* Chilton & Levy, *supra* note 236, at 96 (discussing the non-fungibility of judges). But as discussed *infra* note 246 and accompanying text, the choice-of-federal law is troubling even under the assumption that judges are fungible and homogenous.

238. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 375, 425 (1983).

239. Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 L. & CONTEMP. PROBS. 107, 107 (2021).

240. *Id*. at 116.

241. *See id.* at 108, 119 n.57; Marcus, *supra* note 58, at 2273; *see* Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2133 (2020).

242. *See supra* note 124.

243. *See* Fitzpatrick, *supra* note 239, at 108.

jurisdiction.[244] Section 1407 empowers the JPML to request that a judge of its choosing be "designated and assigned temporarily for service"[245] in the district court in which the MDL is being created. And the *Korean Air Lines* rule dictates that MDL judges apply the law of the circuit in which the MDL court is located. Taking the JPML's powers created by § 1407 together with the *Korean Air Lines* rule, the JPML have the capability to mix and match judges and jurisdictions, which effectively enables it to mix and match judges and law[246] (a power, granted, that, in practice, is rarely exercised[247]).

In considering the data from the Williams and George study, it is worth noting that their study has a couple of limitations. First, they did not measure the effect of the transferee judge's ideology and political affiliation on the Panel's decision to transfer an MDL to a particular judge.[248] Williams and George acknowledged that ideology is a common variable when evaluating courts.[249] But they concluded that the rationale for collecting and evaluating such data—that judges have preferences that may correlate with their political ideology—does not pertain to the decision to transfer an MDL to a particular judge.[250] "The transfer assignment," they explain, "is less clearly conceptualized along the traditional ideological spectrum of liberal to conservative."[251] Williams and George's conclusion is difficult to reconcile with their recognition that "nearly all cases are resolved in the transferee court"[252] and thus, as a practical matter, the judge to whom an MDL is transferred will in the large majority of cases be the judge to resolve the case.[253] If the transferee judge has particular views that correlate with a particular ideology, then transferring the case to her may be likely to yield particular results. Evaluating the correlation between a judge's ideology and the

244. 28 U.S.C. § 1407(b).

245. *Id.*

246. Indeed, it is because the JPML can choose the judge and the law separately that the argument against the *Korean Air Lines* choice-of-federal law rule does not hinge on an assumption that judges are diverse and non-fungible. *Cf.* Ruger, *supra* note 17, at 377–78. Under the *Korean Air Lines* rule, the JPML can strategically match cases and outcomes, even if judges are entirely fungible. For example, assume Judge A normally sits in Circuit A. Further assume that Circuit A recognizes a novel theory of personal jurisdiction, upon which an MDL plaintiff relies; Circuit B, in contrast, does not recognize this novel theory. Finally, assume that both jurisdictions have adopted the *Korean Air Lines* choice-of-federal law rule. If the JPML selects Judge A to preside over the MDL, whether the case will survive a motion to dismiss for lack of personal jurisdiction will depend on where the Panel creates the MDL because the jurisdictions' laws are different and the *Korean Air Lines* rule dictates that each circuit will apply its own law. Whether the case survives a motion to dismiss will not, however, depend on the judge because regardless of where the Panel creates the MDL, the judge is the same—Judge A. If judges are entirely fungible, the result will be the same. It will not matter, for example, if, instead of assigning Judge A, the JPML assigns Judge Z; all that will matter in deciding the outcome of a defendant's motion to dismiss for lack of personal jurisdiction is whether the JPML creates the MDL in Circuit A or Circuit B.

247. *See* Williams & George, *supra* note 28, at 445 (noting that the JPML's "choice of a district is frequently justified based on the location of the judge to whom they want to assign the matters").

248. *Id.* at 454.

249. *Id.*

250. *Id.* at 454–55.

251. *Id.* at 455.

252. *Id.* at 426.

253. *See id.*

JPML's decision to transfer an MDL to a given judge is therefore an endeavor worthy of empirical inquiry, which I endeavor to undertake elsewhere.

Second, an important limitation to any study of the JPML's rationale for consolidating actions in one court or before one judge over another—a limitation that Williams and George recognize[254]—is that it can only examine rationale actually articulated. And unfortunately, the JPML is neither required nor motivated to articulate its rationale clearly or fully. Neither the MDL statute nor the Panel's Rules of Procedure require the JPML to articulate any rationale whatsoever. Moreover, orders of the JPML are not reviewable "except by extraordinary writ."[255] Because its orders are not reviewable, it may have little to no motivation to provide rationale, and even less motivation to provide *detailed* rationale. Any rationale—including no rationale at all—will do. And, in fact, in some instances, no rationale is provided. These two facts together—that rationales are neither required nor reviewable—prevent a more searching examination of the Panel's reasons. In instances in which the JPML actually offers reasons, there can be no consideration of whether those reasons are merely pretextual for ones that could subject the Panel to criticism about the fairness or legitimacy of the Panel's proceedings. For example, the Panel purportedly does not consider the factual or legal strength of a case[256] and "is particularly alert [ ] to parties who may venture to use the MDL process for some substantive or procedural advantage," and consequently, "will act to avert or deflect attempts by a party or parties to 'game' the system."[257] But because there is no review of the Panel's decisions, the Panel's proffered reasons are practically beside the point. And in instances in which no rationale is offered, it may be impossible to critique the underlying rationale in any manner whatsoever.

2. Chief Justice's Power to Appoint JPML Members

The problem created by the *Korean Air Lines* choice-of-federal law rule in the context of the JPML's power and practices is compounded by another characteristic of the JPML—how the Panelists are appointed. The members of the JPML are appointed by the Chief Justice of the Supreme Court.[258] Aside from the requirement that no two judges be from the same Circuit, there are no constraints on the Chief Justice's appointment power.[259]

As Professor Ted Ruger has argued, the Chief Justice's unconstrained appointment power is troubling for a number of reasons.[260] One reason is that the

254. *See id.* at 442 ("[R]eliance on the orders themselves to understand the reasoning for consolidation poses difficulties. . . . [W]e cannot assume that a factor did not exist simply because the Panel failed to mention it. All that we can conclude is that the Panel did not mention the factor in its formal decision.").

255. 28 U.S.C. § 1407(e).

256. *See* Heyburn, *supra* note 3, at 2237.

257. *Id.* at 2241.

258. 28 U.S.C. § 1407(b).

259. *Id.* § 1407(d).

260. Ruger argues that there are three problems with vesting the Chief Justice with the power to appoint Article III judges. First, he contends doing so is inconsistent with how the Constitution delegates the analogous power to appoint federal judges—to the political branches, divided between the Executive and Legislative

Chief's power is at odds with the norm against "matching" specific judges with particular cases.[261] This concern is therefore similar to the concern regarding the ability of the JPML to match judges, cases, and outcomes, already discussed above.

But the concern is not *exactly* the same. Whereas the JPML is empowered to choose the actual decisionmaker and law in a particular case, the Chief Justice is merely empowered to choose the decisionmakers who will choose the actual decisionmaker and law in a particular case. The Chief's power to match judges, cases, and outcomes is accordingly more attenuated. Still, it is worth noting that, because of the Panel's practice of transferring cases to a present Panelist at a higher rate than to a non-Panelist,[262] the Chief Justice is, in many instances, selecting the judges who will ultimately preside over the MDLs, although he will not know beforehand which MDL. And even if the Chief is not choosing the actual decisionmaker and law, he is nonetheless wielding a significant amount of power in choosing the Panel members, whether deliberately or inadvertently. The Chief Justice is not merely appointing a particular judge for service on the JPML; he is determining the composition of the Panel. In addition, he may choose the JPML members based on the criteria of his choosing. For example, the Chief Justice may select Panelists for their trans-substantive views on what Professors Stephen Burbank and Sean Farhang call the "private enforcement regime"—that is, their views about various mechanisms that enable direct private enforcement of rights, such as statutorily provided private rights of action or the allocation of attorney's fees.[263] In addition, the Chief can appoint Panelists based on their views of aggregate litigation and the judge's managerial role in such litigation, which may reveal whether the Panel member is in favor of centralization and creating MDLs, in the first place, [264] and whether the Panelist is likely to engage in close supervision over the MDL once created.[265] Appointment decisions based on these sorts of criteria might not directly translate into "matching" particular

Branches. Second, he argues that the Chief's discretionary appointment power is unconstrained by a number of norms, such as the norm to provide reasons, the norm of acting collectively, and the norm against strategically matching particular judges with particular cases. And third, Ruger suggests that the Chief's unfettered appointment power—particularly the power to make strategic appointments—will undermine the perception that judicial decisions are nonpolitical and, in doing so, undermine the perceived legitimacy of the judiciary. *See generally* Ruger, *supra* note 17, at 357–58, 373, 376. This Article focuses only on the problem of strategic appointments.

261. *Id.* at 342–43.

262. Williams & George, *supra* note 28, at 424.

263. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 8 (2017).

264. A 2019 study by Margaret Williams indicates that the rate at which the Panel has granted motions for centralization has "varied substantially" over the more than 50 years since the creation of the MDL procedural device and has clearly declined in more recent years. Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary Over the Past 50 Years*, 53 GA. L. REV. 1245, 1249, 1265–66 (2019); *cf. generally* Marcus, *supra* note 58, at 2250 (arguing that the JPML takes a "maximalist" approach—*i.e.*, that it employs its power to transfer to the greatest extent possible and may in some instances be designed to achieve a "'substantive' objective").

265. *See* Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 FORDHAM L. REV. 41, 59–60 (1971) (discussing the Panel's direct supervision over created MDLs in the early days of the MDL procedural device), *discussed in* Marcus, *supra* note 58, at 2273.

judges with particular outcomes. But they do enable the Chief to pursue an agenda regarding the role of litigation and the judiciary in enforcing rights.[266] Ultimately, the Chief's discretion enables him to affect the scope of multidistrict litigation, writ large. And it enables the Chief to do so indirectly, rather than directly through the cases to which the Court grants certiorari, which has been declining over the last few decades.[267]

3. Aggregation of a Large Number of Claims

The impact of the *Korean Air Lines* choice-of-federal law rule, together with the JPML's transfer power and the Chief Justice's appointment power, is compounded further by the sheer number of cases that are often involved in an MDL. A single MDL can potentially aggregate a large number of claims. Recall that, under § 1407, there are only two requirements for centralization. There must be actions pending in at least two different district courts, and they must have at least one common question of fact.[268] Thus, the JPML can create an MDL with as little as two pending actions, but practically speaking, it often involves many more cases. For example, in 2021, the most recent year for which data are available, the JPML granted 19 motions to centralize, but those 19 MDLs were composed of 203 actions, not including any subsequently filed tag-along actions.[269] And in 2008, the year in which the number of MDLs peaked, 85 MDLs were established, composed of 3,182 individual actions, not including any subsequently filed tag-along actions.[270] These data suggest that multidistrict litigation can involve a large number of cases.[271]

Moreover, in some instances, the breadth and effect of a particular MDL can be so pervasive that the MDL effectively resolves most, if not all, of the issues pertinent to the particular category of cases. For example, in 1991, when a massive number of asbestos cases were filed, there were only 26 MDLs, but

266. Or, as Ruger suggests,

> the Chief Justice's ability to manifest policy preferences into outcomes through the special appointment power is constrained by other judges in a literal sense—the appointee judges themselves. But the grant to a single individual of absolute discretion to select these appointees is a significant step toward the Chief Justice's ability to promote probable outcomes.

Ruger, *supra* note 17, at 381.

267. *See, e.g.*, Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: For the Use of the* Irons *Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 991, 994 (explaining that the Supreme Court has reduced its caseload, granting 141 petitions for certiorari in 1990, 99 in 2000, as few as 66 in 2011, but averaging approximately 80 since 2000).

268. 28 U.S.C. § 1407(a).

269. *See* U.S. JUD. PANEL MULTIDISTRICT LITIG., *supra* note 12, at 3. The 2021 Calendar Year Statistics also reports the number of tag-alongs transferred in a given year; however, those tag-along actions can include both actions transferred into an MDL created that year, as well as tag-alongs transferred to an MDL created in a prior year. *See generally id.*

270. *See id.*

271. *See, e.g.*, Williams, *supra* note 264, at 1273–74 (reporting that, from 2008 to 2017, the average size of a common disaster proceeding was 1544 actions, of a products liability proceeding was 2256.9 actions, and of all proceeding was 555 actions).

they involved 31,215 individual actions.[272] The asbestos MDL alone involved 26,639 actions when the MDL was created,[273] and by September 1992, another 10,548 actions had been filed or transferred to the MDL court.[274]

The Opioid MDL provides another, more recent example. The Opioid MDL was initially created in December 2017 and involved 63 individual actions.[275] By September 30, 2018, almost 1,293 actions had been filed or transferred to the MDL court.[276] The opioid lawsuits involve a variety of plaintiffs—*e.g.*, cities, counties, Native American Tribes—a variety of defendants—*e.g.*, manufacturers, distributors, and retailers of prescription painkillers, as well as individual doctors—and a multiplicity of types of claims, arising under both state and federal law.[277] In a closed-door conference held in January of 2018, Judge Polster made clear that his objective was not just to "mov[e] money around."[278] Rather, he aimed to "dramatically reduce the number of pills that are out there and make sure that the pills that are out there are being used properly."[279] He explained,

> I am confident we can do something to dramatically reduce the number of opioids that are being disseminated, manufactured, and distributed. Just dramatically reduce the quantity, and make sure that the pills that are manufactured and distributed go to the right people and no one else, and that there be an effective system in place to monitor the delivery and distribution, and if there's a problem, to immediately address it and to make sure that those pills are prescribed only when there's an appropriate diagnosis, and that we get some amount of money to the government agencies for treatment.[280]

Judge Polster's comments sound more like the objectives of a congressional committee or an administrative agency than the aims of a federal judge presiding over litigation. Indeed, Judge Polster seemed to recognize as much, commenting

272. U.S. JUD. PANEL MULTIDISTRICT LITIG., ANNUAL STATISTICS 4 (2008), https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Annual%20Statistics-CY%202008.pdf [https://perma.cc/55RA-NCC3].

273. *In re* Asbestos Prods. Liab. Litig., 771 F. Supp. 415, 425 sched. A (J.P.M.L. 1991).

274. *See* U.S. JUD. PANEL MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION 21 (1992), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-1992_0.pdf [https://perma.cc/9W9W-QB5M]. The total number of cases transferred to the Eastern District of Pennsylvania and apart of the asbestos MDL was 30,468, and the total number of cases directly filed in that court was 6,719, for a total of 37,187 cases, for a difference of 10,548 from the 26,639 originally a part of the MDL. Some of the 37,187 actions had been dismissed or remanded, for a total of 33,685 actions pending at the time of the report. *See id.* at 5.

275. Richard C. Ausness, *The Current State of Opioid Litigation*, 70 S.C. L. REV. 565, 566 (2019).

276. *See* JUD. PANEL MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407 39 (2018), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2018.pdf [https://perma.cc/FC7J-74PY]. The total number of cases transferred to the Northern District of Ohio and apart of the Opioid MDL was 1,080, and the total number of cases filed directly in that court was 213, for a total of 1,293 cases. Some of the 1,293 actions have been dismissed or remanded, for a total of 1,280 actions pending at the time of the report. *See id.*

277. *See generally* Michalski, *supra* note 50 (describing types of litigants); Hoffman, *supra* note 80.

278. *See* Transcript of Proceedings at 9, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Jan. 9, 2018).

279. *Id.*

280. *Id.* at 5.

that "[t]he federal court is probably the least likely branch of government to try and tackle" the opioid crisis.[281] However, he noted, "candidly, the other branches of government, federal and state, have punted."[282]

Judge Polster's comments reveal as much about multidistrict litigation, in general, as they do about the opioid litigation specifically. Multidistrict litigation of the magnitude and breadth of the asbestos or opioid litigation has the potential to operate akin to an administrative or legislative solution to the underlying problem.[283] It aims to address one or more problems, involving a number of different stakeholders, the solution to which may vary by stakeholder.[284] As Professor David Noll notes, "MDL is not simply a super-sized version of the litigation that takes place every day in federal court, but a form of public administration that blends tools of ordinary litigation with tools of institutional design."[285] The ability to achieve, through litigation, before an unelected judge, the sort of ends that are normally achieved through the elected branches of government is alone noteworthy. [286] But the fact that the JPML and the Chief Justice wield significant power over that litigation—power that is amplified further by the *Korean Air Lines* rule—is quite remarkable.

* * * * *

In sum, the *Korean Air Lines* choice-of-federal law rule creates an opportunity for the JPML strategically to select the applicable law and for the Chief Justice strategically to select (albeit to a lesser degree) the Panel members, such that both can influence the outcome of the case and achieve substantive goals.

IV. PROPOSED SOLUTIONS

The problem created by the *Korean Air Lines* rule can be addressed in at least two ways: by changing the choice-of-federal law rule or by changing the process by which both MDL judges and JPML members are chosen.

281. *See id.* at 4.

282. *Id.*

283. *See generally* Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997) (suggesting that judges, like Judge Jack Weinstein, who manage lawsuits by "expand[ing] the lawsuit to encompass more of the actors and institutions involved in a given problem" create what Minow calls the "temporary administrative agency"); *cf.* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3076–83 (2015) (arguing that the Supreme Court's arbitration jurisprudence is troubling because it enables private entities to craft agreements that effectively "rework[ ] . . . obligations under substantive law" without engaging in the "democratic processes typically associated with public lawmaking and changing").

284. David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 407 (2019); *see generally id.* (arguing that MDL is a form of public administration).

285. *Id.* at 407.

286. *See, e.g.*, Minow, *supra* note 283, at 2022 (arguing that court-created solutions "invite[ ] intense scrutiny and potentially fatal objection on Article III and separation-of-powers grounds") ("If a federal court, rather than the legislative or executive branches, creates an administrative agency, it is fair to inquire into the potential breach of separation-of-powers requirements and bounded authority for the judiciary. . . . A judge who engages in the process of creating administrative responses to social problems is also inevitably immersed in political views, but lacks the tethering or camouflage of the traditional adjudicatory procedure.").

A. Change the Choice-of-Federal Law Rule

There are at least two alternative choice-of-federal law rules that would likely resolve the problems created by the *Korean Air Lines* rule. The more obvious rule would require the MDL court to apply the law of the transferor court. A less obvious rule would require the MDL court to look to the choice-of-law rules of the state in which the federal court—specifically the transferor court—sits and devise a rule similar to the one the state would apply under analogous circumstances. Ideally, any change in the choice-of-federal law rule applicable in multidistrict litigation would come from Congress and would consequently facilitate a national, uniform approach. Without congressional action, it would be up to the federal courts to adopt a new rule.

1. Apply Transferor Law

In contrast to the *Korean Air Lines* rule, an MDL court could apply the law of the transferor court. Such a rule would be similar to the rule the Court announced in *Van Dusen*.[287] Because suits may be transferred into an MDL from more than one federal district court, located in different courts of appeals, the *Van Dusen* rule could potentially require an MDL court to apply the substantive law of multiple jurisdictions.[288] For example, if an MDL was created in the Southern District of New York and included suits initially filed there, as well as suits transferred from the Northern District of Illinois, the Northern District of California, and the Southern District of Texas, the MDL court be tasked with applying Second, Seventh, Ninth, and Fifth Circuit law, respectively.

The virtue of the *Van Dusen* rule is that it would prevent the JPML from creating an MDL in a particular federal district court, even in part, to secure a particular court of appeal's substantive law to achieve substantive ends. The same law—the law of the transferor court—would apply regardless of where the MDL was created.

The rule, however, is not without its criticisms. First, the *Van Dusen* rule may be difficult to administer in at least two respects.[289] As an initial matter, would the MDL court apply only the substantive law of the transferor court or also its procedural law? Even under *Erie* and its progeny, federal courts apply their own procedural law and only apply state law to issues of substantive law.[290] It would therefore be reasonable to permit the transferee court to apply its own circuit's procedural law. However, as I and others have discussed at length,[291] issues of procedural law often require a determination of an underlying substantive law issue; as a result, the line between procedural law and substantive law is

287. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (describing a rule requiring the federal court to apply the transferor law as the "*Van Dusen* rule").

288. *Id.* at 1175.

289. *See* Sturiale, *supra* note 107, at 527–28 (discussing the shortcomings of the *Van Dusen* rule as applied to MDLs).

290. *Id.* at 487.

291. *See, e.g.*, *id.* at 492–99 and authorities cited therein.

a difficult one to draw.[292] But it is a line the *Van Dusen* rule would likely require an MDL court to regularly draw.

In addition, the *Van Dusen* rule would require the MDL court to manage the cases constituting the MDL on separate, circuit-specific tracks, thereby undermining some of the efficiencies of consolidating the classes in the first place. In addition, although the MDL judge is required to remand the transferred cases at the completion of the pretrial proceedings, most cases are resolved before the MDL court, and thus, applying the transferor law would generate few benefits to the transferor court.[293] At the same time, *Van Dusen* arguably[294] already requires an MDL court to apply the law of more than one jurisdiction when the case arises under *state* law, so MDL judges should have the dexterity and capabilities to manage such a rule.

Second, the rule would require a federal court to defer to the judgment of a sister circuit, rather than exercising its own judgment and making an independent determination of the law itself. This criticism was the D.C. Circuit's primary objection to the *Van Dusen* rule in *Korean Air Lines*, as well as the primary objection of law professor Richard Marcus in a scholarly article upon which *Korean Air Lines* extensively relied.[295] In a passage quoted by the D.C. Circuit, Marcus explains,

> [F]ederal courts have not only the power but the duty to decide correctly. There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review. If a federal

292. *See id.* at 496.

293. Cases transferred to the MDL and then remanded back present their own difficulties for the transferor court, as the transferor court may be asked to reconsider a decision by the MDL court, and, in doing so, it must consider how much deference to accord the MDL court and what law to apply. *See, e.g.*, *In re* Ford Motor Co., 591 F.3d 406, 410–13 (5th Cir. 2009) (reconsidering decision by MDL court and remanded back to transferor court under the law-of-the-case doctrine); *see also* Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978) (arguing that transferor courts should overturn the orders of the transferee court).

294. It is not entirely clear that *Van Dusen* should apply to cases arising under state law and made a part of an MDL. It is at least arguable that, because the purpose of § 1407 is to consolidate and resolve efficiently pretrial issues across multiple cases, there is a strong federal interest in a federal court formulating the substance of a choice-of-law rule, rather than looking to state choice-of-law rules, as *Van Dusen* requires. *See* Field *supra* note 150, at 913–14 (noting that the consolidation and transfer "for reasons of judicial economy" should not affect the applicable substantive law, but the inefficiencies in applying different law, and the tension between the two ideas). *But see* Kramer, *supra* note 24, at 549 (arguing that choice-of-law rules should not be changed solely to accommodate mass litigation). If *Van Dusen* is merely an interpretation of § 1404(a), then the conclusion that it does not apply to MDLs is permissible as an interpretation of § 1407. But to the extent *Ferens* recharacterizes *Van Dusen* as a constitutional decision stemming from *Erie*, then the suggestion that *Van Dusen* applies to claims arising under state law and made a part of an MDLs is stronger. *See generally* Bradt, *supra* note 23 (arguing that, for suits filed directly with an MDL, rather than transferred to it, MDL courts apply the state choice-of-law rules of an otherwise proper forum).

295. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1175 (D.C. Cir. 1987); Marcus, *supra* note 25, at 701–02. Marcus explains that the system created by the Evarts Act assumes that the courts of appeals are competent to decide questions of federal law correctly and mandates that they do so, subject only to review by the Supreme Court. This principle of competence undercuts any rule that would require the transferee court to follow another circuit's interpretation of federal law. Neither the legislative history nor the policy of the transfer statutes provides a reason for overriding this principle. *Id.* at 702.

> court simply accepts the interpretation of another circuit without addressing the merits, it is not doing its job.[296]

Indeed, it is for this reason that some might argue that there is no "choice" to be made (and, consequently, *Korean Air Lines* does not articulate a "choice-of-law rule," as such). All that a federal court is tasked with doing is interpreting and applying one unified body of federal law, which the Supreme Court can review and bless (or not).

But this argument ignores a couple of practical realities—namely that the Supreme Court grants certiorari in very few cases and, consequently, federal law is not, in fact, uniform.[297] So, as a practical matter, there is a "choice" that *Korean Air Lines* attempts to resolve.

In addition, as I have argued elsewhere, there are examples within the federal system in which a federal court is required to do exactly what *Korean Air Lines* claims a federal court should not do—*i.e.*, refrain from making its own determination about an issue of federal law.[298] For example, a federal court may not grant a prisoner's petition for habeas relief based on its independent interpretation of federal law.[299] Rather, it may only grant such a petition if it concludes that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law."[300] And the Supreme Court has made clear that an "unreasonable application" of federal law is different than an *incorrect* application of federal law.[301] Likewise, a federal court reviewing an agency's construction of a statute does not seek independently to construe the statute,[302] but only to determine whether the agency's interpretation is a "permissible construction."[303] And relatedly, whether an arbitration agreement provides for class-wide arbitration is for the arbitrator, and not a federal court, to decide.[304] These examples suggest that priorities other than having a federal court attempt to decide an issue of federal law correctly may sometimes justify requiring a court to refrain from "[independently] addressing the merits"[305] of a case.[306]

296. Marcus, *supra* note 25, at 702.

297. *See Supreme Court Procedures*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Nov. 18, 2022) [https://perma.cc/GK69-49DK].

298. *See* Sturiale, *supra* note 107, at 528–29.

299. *See* Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254; Williams v. Taylor, 529 U.S. 362, 367 (2000) (construing § 2254).

300. 28 U.S.C. § 2254(d)(1) (2018).

301. *Williams*, 529 U.S. at 410.

302. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 n.11 (1984) ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." (citations omitted)).

303. *Id.* at 866.

304. *See* Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 451, 459 (2003).

305. *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1175 (D.C. Cir. 1987).

306. Sturiale, *supra* note 107, at 529.

Moreover, as I have also suggested elsewhere,[307] even if *Korean Air Lines* properly describes an obligation of the federal courts, it is not clear that, were a federal court to adopt the *Van Dusen* rule to cases arising under federal law (*i.e.*, apply the transferor court's law), it would be contravening that obligation. In adopting such a rule, an MDL court would arguably be interpreting § 1407, *Erie* and its progeny, or both—*i.e.*, it would be engaged in an exercise of attempting to interpret and apply federal law accurately. It may simply be that federal law (whether the statute, the Constitution, or Supreme Court precedent) requires federal courts to apply the law of the transferor court.[308]

2. Borrow Choice-of-Law Rule of Analogous State Claim

Rather than simply applying the federal law of the transferor court, a federal court could instead borrow the choice-of-law rules of an analogous claim under the law of the state in which the transferor court sits. Such a rule would essentially combine the effects of *Klaxon*[309] and *Van Dusen*[310] and would be similar to the federal courts' practice when federal claims lack a statute of limitations.[311] The *Klaxon-Van Dusen* rule could, like the *Van Dusen* rule, require the MDL court to apply the law of multiple jurisdictions, only it would be the choice-of-law rules of multiple states, rather than the substantive law of multiple courts of appeals. Whether the court would apply the substantive law of multiple courts of appeals would ultimately depend on the choice-of-law analyses the court would have to undertake.

As a practical matter, the only real benefit of the *Klaxon-Van Dusen* rule is that it too would make it difficult for the JPML to assign an MDL to a particular court simply to achieve substantive ends. But it would do so in a manner that would be significantly more cumbersome than the *Van Dusen* rule, operating alone. The only imaginable reason why a lawmaker (whether Congress or a federal court) might adopt such a burdensome rule is if the lawmaker believed such a rule was required by the Constitution, *Erie* and its progeny, or both. But as discussed above,[312] it is far from clear that the *Van Dusen* rule is constitutionally required. Moreover, even if *Van Dusen* is a constitutional rule, it is far from clear that the requirement extends to cases arising under federal (as opposed to state) law. It therefore seems unlikely that a court would be required to borrow state choice-of-law rules.

307. *Id.*
308. *Id.*
309. *See supra* notes 195–224 and accompanying text.
310. *See supra* notes 195–224 and accompanying text.
311. *See supra* note 143.
312. *See supra* notes 201–17 and accompanying text.

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In short, either a rule that applied the law of the transferor court or a rule that applied the choice-of-law rules of the state in which a case was originally filed would avoid the problems inherent in the *Korean Air Lines* rule. However, neither rule is without its criticisms, and both would be difficult to administer.

B. Randomize Selection of the MDL Judge and the JPML

Rather than locating the solution to the problem presented by the *Korean Air Lines* rule in alternative choice-of-law rules, then, it is perhaps prudent and more obvious to create and implement a mechanism for randomly assigning judges to preside over an MDL. There are three noteworthy virtues of this solution. First, randomization can be implemented regardless of whether the choice-of-federal law rule is ultimately changed. Second, randomization would prevent strategic appointments by insulating appointment decisions from any biases of the Panelists and, in doing so, dilute the influence of the Chief Justice's appointment discretion on the selection of the MDL judge. Specifically, randomly assigning MDL judges would eliminate the potential for the JPML to assign cases to particular judges, sitting in particular courts, with particular law, to achieve particular, substantive ends. And it would certainly prevent the self-appointment practice Panel members currently employ.[313] A process that incorporates an element of randomness to assign cases to trial court judges and three-judge panels is already in place in many district courts[314] and courts of appeals,[315] respectively. Third, adopting a randomized assignment process would not require Congress to enact or amend a law; the Panel has the authority to adopt its own rules and therefore could unilaterally change how it assigns MDLs to judges.[316]

To be sure, any random-selection mechanism devised should not prevent tag-along actions from being transferred to an already-created MDL with which they share a common question of fact. The mechanism need only make the initial assignment randomly to effectively prevent strategic appointments.

313. *See* Williams & George, *supra* note 28, at 430, 455–56.

314. *See* S.D.N.Y. R. 50.2(b) ("All cases shall be randomly assigned by the clerk or his designee in public view in one of the clerk's offices in such a manner that each active judge shall receive as nearly as possible the same number of cases . . . ."); E.D. Mo. R. 40-2.08 ("Unless otherwise ordered by the Court, the Clerk will assign each civil action to a district judge or a magistrate judge by automated random selection, except that when preliminary injunctive relief is requested by motion, the Clerk will assign the action to a district judge."); *see also FAQs: Filing a Case*, U.S. CTS., https://www.uscourts.gov/faqs-filing-case (last visited Nov. 18, 2022) [https://perma.cc/6VSR-XUF8] ("The majority of courts use some variation of a random drawing.").

315. *See, e.g.*, 3D. CIR. INTERNAL OP. P. 1.1 ("Generally, fully briefed cases are randomly assigned by the clerk to a three-judge panel."); 9TH CIR. R., Court Structure and Procedures ("The random assignment of judges by computer to particular days or weeks on the calendars is intended to equalize the workload among judges. At the time of assigning judges to panels, the Clerk does not know which cases ultimately will be allocated to each of the panels. . . . The Court makes every effort to ensure that calendars are prepared objectively and that no case is given unwarranted preference. The only exception to the rule of random assignment of cases to panels is that a case heard by the Court on a prior appeal may be set before the same panel upon a later appeal.").

316. 28 U.S.C. § 1407(f); *see also Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation*, U.S. JUD. PANEL MULTIDISTRICT LITIG. (Oct. 4, 2016), https://www.jpml.uscourts.gov/sites/jpml/files/Panel%20Rules-Index_%20Copy-Effective-10-4-2016.pdf [https://perma.cc/LM8S-GXB8].

Random selection does not have to be completely unbounded to remain a neutral mechanism for assigning judges. Criteria for identifying judges fit for the relevant assignment could be used as a filter and incorporated into an algorithm that would otherwise randomly select judges. For example, an algorithm could be devised to account for factors such as a potential assignee's time on the bench, years of experience as a practicing lawyer, and prior participation in an MDL. In addition, it could (but need not) take account of whether the potential MDL judge had initially presided over one of the cases ultimately consolidated and made a part of the MDL. Indeed, the selection algorithm could account for any criteria desired.

Of course, the more criteria incorporated into the algorithm, the narrower the pool of potential assignees and the more it looks like a means for strategically exercising discretion rather than a process for randomly appointing judges. To ensure the neutrality of the algorithm, the process for identifying selection criteria to be reflected in the algorithm should itself curb the JPML's discretion. Otherwise, any resulting mechanism will do nothing more than automate the Panel's biases and, in doing so, risk obscuring its exercise of discretion, insulating such discretion from public scrutiny, and wrongly legitimating the process as a neutral one. One way to ensure the integrity of the algorithm is to disperse the power for devising it among a broader group of judges, for example, all the Supreme Court Justices or all the chief judges of the federal circuits.[317]

One potential concern is that a system that randomly assigns MDL judges cannot account for a judge's availability, interests, or specialized expertise.[318] But these factors are not considered when cases are assigned to judges in the first instance, so it is not clear why such factors should be considered when assigning an MDL to a judge. However, even if such factors were to be considered, each could be accounted for and incorporated into a selection algorithm. A selection method could effectuate something akin to the "pool system" that many law firms employ to staff matters.[319] Judges who had the availability and interest[320] in working on an MDL could communicate their availability to the JPML. Those judges would then constitute the pool of potential judges to whom an MDL could be randomly assigned. In addition, judges with availability could indicate their

317. *Cf.* Ruger, *supra* note 17, at 388 (proposing a collective appointment authority, which "would remove the problem of unilateralism"); Theodore W. Ruger, *The Chief Justice's Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551, 1570 (2006) (proposing collectivizing decision-making among a broader group of judges as a way of dealing with the fact that the Chief Justice's special appointment power is inconsistent with judicial norms).

318. *Cf.* Ruger, *supra* note 317, at 1572 (discussing the challenges with a completely random process for appointing judges to specialized courts or committees).

319. *See id.* at 1570.

320. *See* Williams & George, *supra* note 28, at 440. It might not be immediately apparent that a district court judge would have an interest in presiding over something as complicated as an MDL that could potentially involve hundreds, if not thousands, of claims, many litigants and lawyers, and difficult choice of law issues for claims arising under state law. But Williams and George note that assignment of an MDL is perceived as a badge of honor—a recognition of the judge's "skill and acumen and a sign of his or her status." *Id.* They note, "If a trial judge wants to be involved in interesting and important dispute resolution, MDL cases offer an opportunity to have an impact." *Id.*

substantive expertise and preferences if such factors were deemed relevant to selecting MDL judges.[321] For example, an MDL that raised issues of patent and antitrust law could be assigned randomly from a pool of judges that were available; interested in presiding over an MDL; and expressed an expertise or interest in either patent law, antitrust law, or both. As with any selection prerequisites, such criteria can serve as a veiled mechanism for giving effect to the biases of the individual identifying the criteria. Here, again, the integrity of the selection algorithm can be ensured by dispersing the discretion to identify the relevant criteria.[322]

A closely related concern is that a randomized process cannot account for whether a judge is capable of, and well-suited for, managing a complex MDL. Random selection takes *all judgment*—including the type of judgment that we may actually want the JPML to exercise—out of the process. There is something to this concern. It seems reasonable that, in assigning a judge to preside over some of the nation's most complex litigation matters, a judge's dexterity and skillset be considered. Indeed, in a study examining circuit-court-panel assignments, Professor Marin Levy identifies a number of factors upon which the examined circuits rely to justify deviating from strictly random assignment, and among the factors is a judge's experience.[323] Moreover, there is evidence that judicial competency matters very much to litigants.[324] One way to address this concern is for the Panel to make necessary "corrections" and adjustments if the randomized process yields a judge that is simply not up for the task. But the Panel should be constrained in exercising this power (perhaps subject to an in-camera review by the entire Supreme Court) so that it does not serve as another mechanism for the Panel to strategically exercise discretion. And the exercise of such power should be rare.

Another way to address the risk and associated costs of a less skilled judge being assigned to an MDL is to couple random assignment with Professor Brian Fitzpatrick's proposal of assigning MDLs to multi-judge panels.[325] A panel of judges, Fitzpatrick argues, would effectively neutralize any outlier judge and improve the accuracy of adjudication.[326] Such a proposal would operationalize the "many minds" theory. In its simplest form, the many minds theory is the intuitive idea that more minds are better than one. One version of the theory suggests that, to the extent there is a question that has a "correct answer"—*e.g.*, factual questions ("what happened?")—the more individuals who are asked the question, the

321. Whether a judge's expertise *should* be deemed relevant is another matter. As some have argued, while specialization has its benefits, namely efficiency and increased uniformity, it also runs the risk of judges becoming captured by special interests, as well as of transforming judges into technocrats and making their rulings inaccessible to the public. *See, e.g.*, Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1766–67 (1997).

322. *See supra* note 315 and accompanying text.

323. *See* Levy, *supra* note 236, at 87. Specifically, Levy identifies providing new judges with an opportunity for training as a rationale at least two circuit courts use to deviate from random assignment.

324. See Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2169–71 (2019) (discussing studies that indicate litigants care about judicial competence).

325. *See generally* Fitzpatrick, *supra* note 239.

326. *Id.* at 111–13.

greater the chance they will choose the correct answer.[327] Another version of the theory suggests that, even if a question is one that does not have a "correct" or "incorrect" answer, as such—*e.g.*, questions of interpretation—asking the question of more people improves the outcome by increasing the likelihood it is answered with a representative, or "mainstream," answer rather than an outlier answer.[328] Together, these two versions of the theory suggest that increasing the number of decisionmakers can improve the accuracy of the decision, identify the representative answer, or both. Assigning an MDL to a panel of judges would effectively implement the many-minds theory. And as with the proposal for randomly selecting judges, this proposal would not require Congress to act; the JPML could unilaterally adopt a panel-assignment process. The two proposals together (random assignment of all judges on a multi-judge panel) would marry the benefits of random selection with those of the many-minds theory.

A randomized mechanism could also be used to assign judges to the JPML. Selection criteria, such as experience on the bench or managing an MDL, as well as the interest and availability of judges in actually serving on the Panel, can all be reflected in the selection mechanism. At least a few scholars have already proposed that a random-selection mechanism replace the various appointment powers presently assigned to the Chief Justice.[329]

Randomly selecting Panel members would have similar benefits to randomly selecting MDL judges. A randomized process can be implemented regardless of a change in the choice-of-federal law rule, and it would prevent strategic appointments by the Chief Justice. But randomly selecting the JPML would require congressional action (most likely, an amendment to § 1407), so making this solution a reality may be challenging.

V. CONCLUSION

Multidistrict litigation provides an opportunity for the efficient administration of the law. It enables multiple suits, containing multiple claims, relying on multiple theories of harm, and brought in multiple jurisdictions, to be aggregated in one court, and managed for pretrial purposes by one judge. But the

327. Fitzpatrick call this version the "decisional many-minds theory." *See id.*

328. Fitzpatrick refers to this version as the "statistical many-minds theory." *See id.* at 113.

329. *See* Ruger, *supra* note 17, at 389 ("[An alternative] would remove all possibility of strategic selection by making the selection of special court judges either random or via a mechanical application of a universal principle (like seniority, for example, whereby every active federal judge would serve for a time on a special court after ten years of service.)"); Erwin Chemerinsky, *Learning the Wrong Lessons from History: Why There Must Be an Independent Counsel Law*, 5 WIDENER L. SYMP. J. 1, 11 (2000) (discussing the Chief Justice's power to appoint the Special Division of the D.C. Circuit and suggesting that judges of the Special Division be randomly selected) ("I would offer another alternative: choose the members of the special division randomly, just as judges for all cases are randomly selected in the federal system. This would eliminate the perception of partisanship in the composition of the panel which chooses an independent counsel."); John Q. Barrett, *Special Division Agonistes*, 5 WIDENER L. SYMP. J. 17, 41 (2000) (suggesting that, with respect to the Special Division of the D.C. Circuit, "[t]he law . . . could define a process that would rotate responsibility for serving on this court randomly among senior Circuit Judges, eliminating the Chief Justice's participation in this process and thus conserving his time and credibility for his own Article III judging").

consolidation of many parties, claims, and legal theories in one court also endows the MDL judge presiding over the consolidated litigation and the JPML, which chose the MDL judge in the first place, with great power. That power, the above discussion reveals, is magnified by a choice-of-federal law rule that enables the MDL judge to apply one jurisdiction's law to all consolidated claims. In short, "choice of [federal] law matters to the outcomes and values of cases."[330] And it matters across the full array of cases arising under federal law—indeed in any case in which there is a circuit split. It would therefore be prudent of Congress to give due regard to choice-of-federal law issues, not only in the context of multidistrict litigation, but also in all other instances in which such issues arise.

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330. Bradt, *supra* note 23, at 760.