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THE FORUM GAME

Debra Lyn Bassett

84 N.C. L. Rev. 333 (2006)

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THE FORUM GAME

DEBRA LYN BASSETT*

One of the more interesting contradictions in law is the common description of litigation as a "game," while simultaneously decrying "game playing" in the litigation process. Litigation involves strategic choice, as game theory illustrates. One of those strategic choices includes the plaintiff's initial selection of the forum, which the defendant may attempt to counter through transfer strategies of its own. Criticizing and trivializing forum selection through the label of forum "shopping" misapprehends the forum game by treating forum selection as a parlor trick—as unfair and abusive—rather than as a lawful, authorized strategy. Forum shopping is not a form of "cheating" by those who refuse to play by the rules. Playing by the rules includes the ability of plaintiff's counsel to select—and the ability of defendant's counsel to attempt to counter—the set of rules by which the litigation "game" will be played.

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INTRODUCTION

One of the more interesting contradictions in law is the common description of litigation as a "game," while simultaneously decrying "game playing." The description of litigation as a "game" can be used to trivialize the choices made, but a "game" is neither necessarily frivolous[1] nor an object of contempt.[2] One definition of "game" is "[a] (form of) contest played according to rules and

1. *See* AVINASH DIXIT & SUSAN SKEATH, GAMES OF STRATEGY 3–4 (2d ed. 2004) (noting that "[t]he word *game* may convey an impression that the subject is frivolous or unimportant," but that games arise in many areas, including "business, politics, diplomacy, and wars"); *id.* at 20 (noting that "[g]ames of strategy arise in many different contexts").

2. The analogy to a "game" can indicate either respect or disparagement; definitions of "game" encompass both extremes. "Game" is defined as "[a]musement, fun, play ... [a]n object of ridicule," and as "[a] simulation of a contest, battle, operation, etc., in order to test a strategy." *See* 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1057 (Lesley Brown ed. 1993) [hereinafter OXFORD ENGLISH DICTIONARY]. Similarly, synonyms for the word "game" encompass the range from "competition," "strategy," and "plan," to "prank" and "kidding around." J.I. RODALE, THE SYNONYM FINDER 450 (1978).

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decided by skill, strength, or luck."[3] Another definition is "to act according to the rules of a game ... to behave as fairness or custom requires."[4]

Litigation generally, and forum shopping specifically, are "games" in the respectful sense of the word. Litigation is a form of competition in which one's success is not assured. As an initial matter, litigation is not decided solely upon the lawyer's skill; the underlying merits of the case matter. In addition, investigation, research, planning, organization, intelligence, skill, and strategy all have roles in litigation, and a litigation outcome can turn on any of these factors—locating an eyewitness (investigation), finding a potentially persuasive case (research), anticipating weaknesses in evidence presentation (planning), meeting or missing a deadline (organization), creating a novel legal argument (intelligence), cross-examining a witness skillfully (skill), or selecting a favorable initial forum (or moving for transfer) (strategy). "Cheating"—dishonest, unethical, illegal, or unauthorized action—certainly can and does happen in litigation, as in other games. However, forum shopping, as a general concept, is not an example of such "cheating." Rather, as this Article will show, forum shopping is a legitimate, expressly authorized action when more than one forum satisfies the requisite legal criteria.

The title of this Article, *The Forum Game*, has multiple meanings. Law generally[5] and litigation in particular[6] are sometimes referred to as a kind of game; lawyers who engage in forum shopping are accused of playing games;[7] and critics assert that forum shopping

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3. OXFORD ENGLISH DICTIONARY, *supra* note 2.

4. *Id.*

5. *See* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 307 (1996) ("The practice of law is becoming a game ....").

6. *See* Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 318 (Tex. Ct. App. 1994) (noting the cynical belief that "litigation is a mere game"); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1780 (2005) (referring to "the high-stakes game of mass tort litigation").

7. *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) ("The name of the game is forum-shopping."); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2259 (2002) (referring to forum shopping as "gam[ing] the process"); Margo E.K. Reder, *Punitive Damages as a Necessary Remedy in Broker-Customer Securities Arbitration Cases*, 29 IND. L. REV. 105, 127 n.189 (1995) (noting that choice of law clauses often "degenerate into a game of forum-shopping"); Linda J. Silberman, *Developments in Jurisdiction and Forum Non-Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 529 (1993) (referring to "forum shopping games").

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trivializes our system of justice, thereby turning justice into a mere game.[8] Moreover, and perhaps most significantly, to the extent that strategy and choice play a role in litigation, forum shopping encompasses both, and thereby implicates important economic theories of decisionmaking, including rational choice and game theory. The notion of "game" is central and crucial to forum shopping. "Game" and "forum shopping" invoke the same notions of "competition," "strategy," and "rules"—the idea that one actively plans, thinks ahead, and strategizes within the parameters of the rules in order to prevail. Rather than thoughtlessly and apathetically filing in the first available forum, forum shopping requires research, appraisal, reflection, and thought. Key to the understanding of the appropriate role of forum shopping, however, is a foundational premise: playing by the rules includes the ability of plaintiff's counsel to select *which* set of rules and the ability of defense counsel to try to counter that choice. Accordingly, disparaging remarks about forum shopping—implying that the practice is a form of cheating because a litigant is attempting to circumvent the rules—misapprehend the "rules." The rules in litigation include the plaintiff's ability to choose which set of rules will govern the game. Accordingly, forum shopping is a strategy for the purpose of finding the most favorable set of rules for litigation.

Despite the frequent availability of a choice in selecting a forum due to the existence of more than one lawfully authorized forum, "forum shopping" is undeniably a pejorative term. No less an authority than a United States Supreme Court Justice has denounced forum shopping as "evil."[9] Congressional efforts to limit forum shopping have portrayed the practice as abusive, devious, and

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8. *See* Thomas F. Geraghty, *Prisons and After Prison*, 94 J. CRIM. L. & CRIMINOLOGY 1149, 1152–53 (2004) (book review) ("[Criminal offenders] viewed the criminal justice system as a 'game' in which 'no one was concerned about' justice, truth, helping offenders, or even exacting punishment for crimes committed. Everybody was out to get the 'best deal,' and the deal you got had little to do with what you did."); J. Thomas Greene, *Meeting Some Current Challenges to Our Legal Profession by the Way We Practice Law*, 222 F.R.D. 201, 201 (2004) ("[T]he public has gained 'the impression that the administration of justice is but a game.' "); Manuel Berrelez et al., Note, *Disappearing Dilemmas: Judicial Construction of Ethical Choice as Strategic Behavior in the Criminal Defense Context*, 23 YALE L. & POL'Y REV. 225, 259 (2005) (noting that some "view the criminal justice system as a game where all tactics are fair play as long as they help produce the desired verdict").

9. Wells v. Simonds Abrasive Co., 345 U.S. 514, 521 (1953) (Jackson, J., dissenting) (referring to forum shopping as "the type of evil aimed at in Erie R.R. Co. v. Tompkins [304 U.S. 64 (1938)]"); *see infra* notes 75–108 and accompanying text (discussing *Erie* and its ramifications).

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unethical.[10] One news report regarding proposed legislation described forum shopping as "the notorious practice by which personal injury attorneys cherry-pick courts and bring lawsuits in jurisdictions that consistently hand down astronomical awards, even when the case has little or no connection to the State or locality."[11]

Critics of forum shopping charge manipulation, wrongdoing, and abuse by lawyers (invariably plaintiffs' lawyers) to obtain a forum and substantive law to which they are not entitled. Indeed, critics charge, so egregious and abusive is this behavior that sanctions should be mandated.[12] There is a real possibility that Congress may act on this misguided concern and require sanctions for forum shopping and legislatively restrict venue choices. Legislatively restricting venue choices by amending 28 U.S.C. § 1391 would limit forum choices for lawsuits filed in federal courts[13] but would not affect forum selection for lawsuits filed in state courts. However, Congress is currently considering a proposal that would federalize venue[14] by limiting

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10. *See, e.g.*, Mary P. Gallagher, *Bill Ramping Up Rule 11 Sanctions Passed by House, Pending in Senate*, N.J. L.J., Oct. 11, 2004, at 1 (describing proposed amendments to Federal Rule of Civil Procedure 11 as "intended to deter frivolous suits and forum shopping"); *Legal Reform, House Bill Would Rein in Frivolous Lawsuits*, SAN DIEGO UNION-TRIB., Sept. 19, 2004, at G2, *available at* 2004 WLNR 16960428 (describing the proposed Lawsuit Abuse Reduction Act as "prevent[ing] so-called 'forum-shopping,' in which attorneys seek out judges and courts known for handing out excessive damage awards").

11. *Blunt Votes to Curb Junk Lawsuits*, U.S. NEWSWIRE, Sept. 14, 2004 (describing the proposed Lawsuit Abuse Reduction Act).

12. *See* Norwood, *supra* note 5, at 329–30 (noting that courts generally have not imposed Rule 11 sanctions in forum shopping cases but suggesting that sanctions are appropriate); *id.* at 326–28 (stating that restrictions on forum shopping "can be enforced through Rule 11 of the Federal Rules of Civil Procedure, Rule 11's state counterparts and the forum's own ethics rules" (footnote omitted)).

13. For example, in diversity cases, § 1391 authorizes venue in

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a) (2000).

14. A prime example of overreaction to forum shopping can be found in proposed congressional "tort reform." After H.R. 4571, the Lawsuit Abuse Reduction Act of 2004, passed the House of Representatives but stalled in the Senate, the bill was reintroduced in the House in the following session. *See Congress Passes Lawsuit Abuse Reduction Act of 2004*, 21 MED. MALPRACTICE L. & STRATEGY, Oct. 2004, at 1, 1 [hereinafter *Congress Passes LARA*] (reporting that the Lawsuit Abuse Reduction Act of 2004 passed the House of Representatives); *see also* Rhonda McMillion, *Standing Pat on Rule 11*, A.B.A. J., July 2005, at 62, 62 ("The [Lawsuit Abuse Reduction Act] passed the House of

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forum options in both federal and state courts.[15]

Forum "shopping" suggests unfairness in choosing to litigate in a particular forum due to differences in the law and fails to acknowledge that the availability of different laws is neither wrong

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Representatives during the 108th Congress (in 2003–04), but did not come to a vote in the Senate. The bill was reintroduced in the House this year by Rep. Lamar S. Smith, R-Texas."). The 2005 version of the bill, H.R. 420, the so-called Lawsuit Abuse Reduction Act of 2005, was favorably reported out of the House Judiciary Committee and placed on the Union Calendar for consideration by the full House of Representatives in June 2005; in October 2005, the bill passed the House of Representatives and was referred to the Senate Committee on the Judiciary. *See* H.R. 420, Bill Summary and Status for the 109th Congress: All Congressional Actions, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00420:@@@R (last visited Nov. 28, 2005); *see also Insurer-Supported 'Lawsuit Abuse Bill' Clears U.S. House Panel*, BESTWIRE SERVICE, May 25, 2005, *available at* Westlaw 5/25/05 BESTWIRE SERVICE (reporting that "[b]y a 19–11 margin, the [U.S. House Judiciary Committee] favorably reported H.R. 420 for consideration by the full House of Representatives"). Section 4 of the proposed Act, entitled "Prevention of Forum-Shopping," provides in part:

> (a) In General. Subject to subsection (b), a personal injury claim filed in State or Federal court may be filed only in the State and, within that State, in the county (or Federal district) in which . . .
> (1) the person bringing the claim, including an estate in the case of a decedent and a parent or guardian in the case of a minor or incompetent—
> (A) resides at the time of filing; or
> (B) resided at the time of the alleged injury; or
> (2) the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred;
> (3) the defendant's principal place of business is located, if the defendant is a corporation; or
> (4) the defendant resides, if the defendant is an individual.
> (b) Determination of Most Appropriate Forum—If a person alleges that the injury or circumstances giving rise to the personal injury claim occurred in more than one county (or Federal district), the trial court shall determine which State and county (or Federal district) is the most appropriate forum for the claim. If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim . . . .

Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. § 4 (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h420rh.txt.pdf.

15. *See supra* note 14 (setting forth the proposed Lawsuit Abuse Reduction Act of 2005, which purports to limit venue options for personal injury lawsuits "filed in State or Federal court"). Another bill—the Class Action Fairness Act, which passed Congress and was signed by President Bush in 2005—also carried implications for forum shopping, but of a different sort. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C.A. § 1711–1715, 1332, 1453 (2005)); *see also* Melanie Warner, *The Food Industry Empire Strikes Back*, N.Y. TIMES, July 7, 2005, at C1 (describing the Class Action Fairness Act as "an initiative intended to prevent trial lawyers from shopping for the most favorable states to bring their cases"). The Act modified the requirements for diversity jurisdiction in certain class actions in which the matter in controversy exceeds $5 million, which will permit many class actions to be filed in—or removed to—the federal courts. *See* 28 U.S.C.A. § 1332(d) (Supp. I 2005) (setting forth the prerequisites).

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nor unusual. Both the Constitution itself and our federal system permit, encourage, and expect states to create their own laws. Far from being illegitimate, if the law authorizes the filing of a lawsuit in more than one forum, the law has authorized choice—and indeed our governmental structure tends to create choice, both between (or among) states and between state courts and federal courts.[16] In enacting laws, states often are conscious of the differences among states' laws. The attractiveness of certain laws to litigants often is a deliberate, intentional result, and thus congressional proposals to federalize venue are tantamount to attacks on states' constitutionally-grounded lawmaking abilities. Indeed, forum shopping furthers state interests.

> Permissive theories of choice of law are the engine that drives much contemporary forum-shopping. They often are based on the notion that a state's broad application of its own law furthers the goals of that law. Thus, encouraging forum-shopping furthers assertion of state interests. It helps states differ from one another. Choice of law is seen as closely bound to substantive law. It can also be seen as an important common-law field in and of itself .... The system should take a hospitable view of the existence of a number of conflicts theories, including those that engender forum-shopping.[17]

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16. Diversity jurisdiction is a prominent example of such choice. Diversity jurisdiction provides, as an alternative choice, the option of filing, in a federal court, a case for which state court jurisdiction already exists. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 23, at 151 (6th ed. 2002) ("Undoubtedly, so long as diversity exists, the choice of forum will be utilized for tactical purposes ...."); John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 405 (1979) (noting that "diversity jurisdiction provides an option" for resolving disputes and stating, "Diversity jurisdiction must be seen for what it is, a social service of the federal government provided for the people of the United States."); *id.* at 410 (discussing the benefits of "maintaining a concurrent system"); John P. Frank, *An Idea Whose Time Is Still Here*, 70 A.B.A. J., June 1984, at 17, 18 ("So far as disputes between citizens of different states are concerned, [diversity jurisdiction] gives a certain amount of option to attorneys to choose where they want to dispose of disputes."); Earl M. Maltz, *Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of* Erie *Principles*, 79 KY. L.J. 231, 236 (1991) ("By its nature, establishing diversity jurisdiction in the judicial system will give some parties the power to choose between state courts and federal courts."); Alvin B. Rubin, *An Idea Whose Time Has Gone*, 70 A.B.A. J., June 1984, at 16, 16 (noting that "the federal system through diversity jurisdiction ... offer[s] forum shopping as a service"); *see also* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 712 n.111 (1974) ("In general, the more one equalizes the ability to choose the forum, the further one deviates from the rationale of the diversity jurisdiction.").

17. George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 665 (1993) (footnote

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The "unfairness" alleged in forum shopping is curious. After all, no state's law authorizes recovery against a blameless defendant. In every state, a favorable verdict for the plaintiff requires the plaintiff to prove her case. Accordingly, the complaints about forum shopping's "unfairness" largely fall into three categories: (1) forum shopping can result in a defendant, who has been proven blameworthy, paying the injured plaintiff a higher amount because the lawsuit was legitimately filed in a lawful forum authorizing higher damages (when the wrongdoing defendant would rather have paid a lower amount, which would have been the result had the lawsuit been filed in a different lawful, legitimate forum); (2) forum shopping can permit a plaintiff's lawsuit to proceed in one state having a longer statute of limitations when the lawsuit would have been barred in another state having a shorter statute of limitations (when the wrongdoing defendant would have preferred to avoid compensating the plaintiff at all by arguing that the plaintiff missed the deadline); and (3) forum shopping pressures defendants to settle lawsuits filed in forums viewed as sympathetic to plaintiffs, even when the specific lawsuit at issue lacks foundation or merit (which suggests some forums are so pro-plaintiff that plaintiffs obtain favorable verdicts without requiring the plaintiff to prove the defendant's liability).

This Article assumes that these complaints are valid in some instances, although the existence of pro-plaintiff forums has been exaggerated,[18] and with respect to the alleged pressure to settle meritless cases, one additionally might question whether this reflects a larger problem with settlements more generally rather than a problem with the practice of forum shopping.[19] However, current

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omitted).

18. *See* Stephanie Mencimer, *False Alarm: How the Media Helps the Insurance Industry and the GOP Promote the Myth of America's "Lawsuit Crisis,"* WASH. MONTHLY, Oct. 2004, at 18, 18 (discussing the prevalence of "fictional lawsuit horror stories," including misleading stories regarding supposedly pro-plaintiff forums); *see also* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 731 (1998) (discussing the hyping of seemingly outrageous cases that are sometimes entirely fictional and sometimes grossly exaggerated, and noting that, "[i]t is a universe in which corporations and governments are [portrayed as] victims, and individuals (and their lawyers) are [portrayed as] the aggressors"); Edith Greene, *A Love-Hate Relationship*, 18 JUST. SYS. J. 99, 100 (1995) ("The plural of anecdote is not *data*."). Indeed, some of the publicity concerning so-called pro-plaintiff forums comes from the American Tort Reform Association, "which every year publishes a 'study' purporting to identify various jurisdictions around the country it deems too plaintiff-friendly and in need of reform." Mencimer, *supra*, at 18.

19. *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (presenting arguments against the trend toward settlement of disputes); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1 (2004) (discussing

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congressional proposals exhibit little more than hostility toward plaintiffs—the notion that "I want someone else to win"—which suggests that politics, rather than a genuine problem with forum shopping itself, motivates these proposals.[20] "Tort reform is not simply a 'product' being marketed, it is also a set of political goals that involve changing the civil justice system to favor particular

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issues arising from encouraging—and pressuring—parties to settle); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 155 (discussing "the puzzles presented by the contrast between judicial preferences for settlement and litigants' preferences for process").

20. *See* Stephen Daniels & Joanne Martin, *"The Impact that It Has Had Is Between People's Ears": Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 453–54 (2000) ("Tort reform, it now seems, is a permanent fixture of the political agenda .... Tort reform's vision of civil litigation ... is a vision full of evocative metaphors and threatening images.").

> [Tort reform] describes a system where, among other things, the number of personal injury suits is significantly higher than in the past (the litigation explosion); where more people bring lawsuits than should (frivolous lawsuits); where the size of awards is increasing faster than inflation (skyrocketing awards); where the size of most awards is excessive (outrageous awards); where the logic of verdicts and awards is capricious (the lawsuit lottery); where the cost of lawsuits is too high and the delays too great (a wasteful, inefficient system); where there is no longer a fair balance between the injured person and the defendant (exploiting "deep pockets"); and ultimately a system where the cost to society is unacceptably high ("we all pay the price").

Id. at 454; *see also id.* (describing tort reform as "constructing this vision and persuading the public of its veracity (and in turn persuading them of the need for change)").

> At the core of this agenda-setting process ... is the identification of "problems." Problems ... "[a]re not given, out there in the world waiting for smart analysts to come along and define them correctly. They are created in the minds of citizens by other citizens, leaders, organizations, and governmental agencies, as an essential part of political maneuvering." As a result, the process of gaining a place on the agenda is essentially "a struggle to control which images of the world govern policy." This process has come to resemble the mass marketing of products by commercial interests.

Id. at 460 (quoting DEBORAH STONE, POLICY PARADOX AND POLITICAL REASON 122, 309 (1988)).

> In constructing its vision of civil litigation, tort reform does not, as a number of commentators have shown, rely on systematic, empirical investigation of the civil justice system and how that system works. The vision represents a triumph of marketing over reality. ... The reformers' purpose ... is not ... to construct a reasonably accurate vision of reality .... They want to sell to the public, as well as to key elites, a vision of civil litigation that would serve a set of political goals.

Id. at 461 (footnote omitted); *see also* Jay Yeager, *Congress and Indiana Class Actions*, INDIANAPOLIS BUS. J., Mar. 28, 2005, at 13A (stating that Congress, in passing the Class Action Fairness Act, "assum[ed] that litigating in federal court will ... yield a better result than litigating in state court").

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interests."[21] In particular, corporations, small businesses, and physicians seem to have co-opted the attention of Congress and the media, asserting that out-of-control, frivolous lawsuits are unfairly filed in pro-plaintiff forums and that resultant outrageous judgments are forcing them out of business.[22] In light of the political component within anti-forum shopping rhetoric, one must ask whether forum shopping is genuinely so problematic—in terms of both the number of cases implicated and the severity of the practice's effect—as to warrant the drastic step of congressional intermeddling with the work of state legislatures.

Faced with two or more courthouse choices, the lawyer must make a selection. The semantic distinction between forum "selection" and forum "shopping" suggests a legitimate choice versus an illegitimate one. But this distinction is impossible to maintain with any consistency. Consider *Black's Law Dictionary*, which defines "forum shopping" as a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict."[23] Implicit in this definition is the recognition that, in deciding where to file a lawsuit, lawyers often have more than one option,[24] yet the definition also implies that choices based on the potential for the most favorable outcome are illegitimate.

The venomous rhetoric recently directed toward forum shopping conveys a sense that forum shopping is "cheating"—unscrupulously manipulating the choice of forum in order to gain an unfair result (one to which the litigant is not entitled). It is the premise of this

21. Daniels & Martin, *supra* note 20, at 459.

22. *See Congress Passes LARA*, *supra* note 14 (quoting Rep. Randy Neugebauer, the co-sponsor of the Lawsuit Abuse Reduction Act of 2004, as saying, "People trying to cash in on the lawsuit lottery are causing doctors to stop practicing and forcing many small businesses to eliminate jobs or even shut down."); *see also* Mencimer, *supra* note 18 (noting that "skewed [media] coverage" has benefited "corporate giants" by helping to "fuel political support for curtailing Americans' right to hold corporations and individuals accountable for negligence, fraud, and other malfeasance in court").

23. BLACK'S LAW DICTIONARY 590 (5th ed. 1979); *see also* Norwood, *supra* note 5, at 268 (citing Black's Law Dictionary); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (same). *But see* Brown, *supra* note 17, at 653 (footnote omitted) (noting that "[t]he concept of 'forum-shopping' is exceedingly difficult to define because it encompasses a broad range of actions by plaintiffs and defendants").

24. *See* ROBERT S. CASAD, JURISDICTION AND FORUM SELECTION § 1:01, at 1-1 (2d ed. 1999) ("The United States contains 52 different court systems. More than one court system may be competent to adjudicate any given case."); *see also id.* § 6:01, at 6-1 ("Just as parties seeking the most favorable forum may have a choice between courts in different states, so parties may also have a choice within the same state between state and federal courts.").

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Article that the hostility toward forum shopping is based on numerous flawed underlying assumptions—flawed assumptions regarding legitimate forums, flawed assumptions regarding law and remedies, and flawed assumptions regarding justice. Moreover, the widespread approbation associated with forum shopping would seem to suggest that forum shopping comprises one specific illegitimate act or course of conduct. Forum shopping, however, actually encompasses not one but five basic and overlapping types of decisionmaking considerations—only one of which the Supreme Court has condemned. "Type One" forum shopping involves the choice between federal court and state court. "Type Two" forum shopping involves the choice between a court in one state (whether a state court or a federal court) and a court in another state. "Type Three" forum shopping involves differences in substantive law depending on where the lawsuit is filed. "Type Four" forum shopping involves differences in procedural provisions depending on where the lawsuit is filed. And "Type Five" forum shopping involves subjective and personal factors, such as the convenience of the forum, where the attorney is licensed to practice, or the reputations of the prospective judges. A full analysis of forum shopping requires examining whether any or all of these considerations contribute to the complaints leveled at forum selection. Unless these considerations contribute to genuine unfairness, rather than merely constituting a political preference for defendants over plaintiffs, the condemnation of forum shopping is misdirected and congressional remedies are either misguided or outright harmful.

Moreover, even if there are legitimate objections directed to one or more of these five types of forum shopping, the current outcry is curiously one-sided. Current spin ascribes forum shopping as a device employed by unsavory, greedy plaintiffs' lawyers.[25]

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25. *See* Charles B. Camp, *Advocates Hope To Pass the "Big Four" Tort Reforms*, DALLAS MORNING NEWS, Jan. 8, 1995, at 10H (referring to the "Big Four priority items" in the Texas legislature as including "[m]easures to prevent forum-shopping by plaintiffs .... Defendants jockey for favorable venues, too, but the proposed change would focus on plaintiffs, forcing them to sue only in a corporate defendant's home county or where the event occurred."); Jim Drinkard, *Bush To Sign Bill on Class-Action Suits*, USA TODAY, Feb. 18, 2005, at 1B, *available at* 2005 WLNR 2345720 (describing forum shopping as "the quest by plaintiffs' lawyers to find the most friendly and generous jurisdictions in which to file their cases"); Arthur D. Postal, *Senate Puts Class-Action Reform on Fast Track*, NAT'L UNDERWRITER PROP. & CAS., Jan. 31, 2005, at 10 (quoting executive with the National Association of Mutual Insurance Companies as stating, with respect to the Class Action Fairness Act, "This bill will go a long way toward discouraging forum shopping by the plaintiffs' bar."). *See generally* H.R. REP. 109-123, at 3 (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports

Conveniently overlooked is the broad range of forum shopping tactics available to—and regularly employed by—defense attorneys, including such tactics as removal, transfer of venue, and forum non conveniens.[26] Accordingly, "forum shopping" begins to sound simply like a pejorative label.[27]

Multiple options implicate choice—and choice involves evaluation. Moreover, a lawyer who does not thoroughly and conscientiously evaluate all available options does so at her professional peril. The ethical rules require lawyers to represent clients to the best of their ability,[28] and selecting the forum most favorable to the client's claim is an integral part of vigorous and effective representation.[29] Indeed, the failure to forum shop would, in most instances, constitute malpractice.[30]

Law and economics' rational choice theory and game theory also

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&docid=f:hr123.109.pdf (stating that the Act would "prevent forum shopping, the nefarious practice by which personal injury attorneys bring lawsuits in courts that notoriously and consistently hand down astronomical awards even when the case has little or no connection to the court's jurisdiction").

26. *See* Brown, *supra* note 17, at 653 ("The plaintiff makes the initial forum choice, but the defendant may be able to trump it through such devices as removal from state to federal court, transfer from one federal court to another, or dismissal from a state court on forum non conveniens grounds." (footnotes omitted)).

> [D]efendants too can engage in forum shopping. Removal of a case from state to federal court is an obvious example. Defendants can also challenge personal jurisdiction, subject matter jurisdiction, or venue, and can seek dismissal on forum non conveniens grounds .... Juror challenges, moreover, are open to defendants as well as plaintiffs. Even the choice not to challenge may be forum shopping—for example, a defendant may accept jurisdiction where constitutionally sufficient minimum contacts do not exist, hoping for a more favorable final adjudication of a claim or issue. Another option is to turn the tables and become a plaintiff by suing for a declaratory judgment. Finally, parties can contract through forum selection clauses to create jurisdiction in a particular forum.

Note, *supra* note 23, at 1679–80.

27. *See* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 571 (1989) (noting that forum shopping "is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation" (quotation omitted)); *see also* Goad v. Celotex Corp., 831 F.2d 508, 512 n.12 (4th Cir. 1987) ("There is nothing inherently evil about forum-shopping.").

28. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.3 cmt. 1 (2004) ("A lawyer must ... act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); *see also infra* note 156 and authorities cited therein.

29. *See* Juenger, *supra* note 27, at 572 (noting that "attorneys owe a duty to vindicate their clients' rights wherever they can expect the best results").

30. *See id.* (noting that "[w]hen a relationship becomes litigious, failure to select an advantageous forum may amount to malpractice" (footnote omitted)).

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support the evaluation of forum options. Contrary to the media-fueled clamor suggesting that forum shopping involves illicit choices and irrational results, when the law authorizes more than one legitimate forum, and when one of those lawfully authorized forums implicates the potential for a more favorable outcome, both rational choice theory and game theory support the rationality of selecting that more favorable forum. Accordingly, rather than permitting politics to distort the lens through which we view forum shopping, it becomes important to evaluate forum shopping with a clearer eye.

This Article examines the forum game from historical, ethical, and economic perspectives. Part I examines a taxonomy of forum shopping.[31] Part II analyzes the law of forum shopping—both the law generally, which often authorizes a choice between two or more legitimate forums and the law in terms of the Supreme Court's forum shopping jurisprudence. This Part reveals inconsistencies in the Supreme Court's view of the practice: the Supreme Court has condemned forum shopping only in a very limited, very narrow context and has otherwise repeatedly endorsed forum shopping's validity.[32] Part III analyzes the ethical rules and the ethical demands of vigorous representation, concluding that forum shopping is an essential component of zealous representation, and that courts may not sanction attorneys whose sole "offense" is seeking a favorable forum.[33] Part IV analyzes forum shopping under law and economics' rational choice and game theories of decisionmaking, which illustrate the rationality of forum shopping.[34] Part V examines the myths underlying the vocal antipathy toward forum shopping, despite the legitimacy of the practice under most circumstances.[35] Finally, Part VI argues that Congress is also attempting to play the forum game through proposals to federalize venue that would shift the existing litigation balances—proposals that would infringe upon legitimate lawmaking choices exercised by the states.[36]

I. A TAXONOMY OF FORUM SHOPPING

Forum shopping is not one act or course of conduct but instead encompasses a variety of factors and choices. This Part describes the five basic, and overlapping, types of decisionmaking considerations

31. *See infra* notes 37–53 and accompanying text.
32. *See infra* notes 54–149 and accompanying text.
33. *See infra* notes 150–63 and accompanying text.
34. *See infra* notes 164–205 and accompanying text.
35. *See infra* notes 206–33 and accompanying text.
36. *See infra* notes 234–41 and accompanying text.

inherent in forum selection: (1) choices involving federal courts versus state courts; (2) choices involving courts in different states; (3) choices involving different substantive laws; (4) choices involving different procedural provisions; and (5) choices involving subjective and personal factors.

Forum selection necessarily involves choice; if only one forum is an option, no forum "selection" process ever comes into play. However, the structure of our judicial system tends to create more than one authorized forum and gives the initial choice to the plaintiff.

> The American system ... envisions a set of fora in which it would be fair for the defendant to be forced to litigate. The plaintiff has the power to choose any forum within that set as the venue for the lawsuit. If the plaintiff chooses a court that is not within the set of fair fora, the defendant has the right to veto the plaintiff's choice, but the defendant generally does not have the right to designate the specific court that will hear the lawsuit. The key question is not whether the plaintiff has chosen the forum that would be most appropriate to hear the lawsuit; instead, the only issue is whether the court selected by the plaintiff is included in the set of fair fora.[37]

The first two choices discussed in this Part involve the forum type and the forum location. The three remaining choices are an overlay—the considerations that inform and guide decisions between and among forum type and location.

A. *"Type One" Forum Shopping: Choices Involving Federal Courts Versus State Courts*

In selecting a forum, one consideration in the decisionmaking process is whether a choice is available that allows filing the lawsuit in either a federal court or a state court. Some types of cases, of course, are restricted solely to state courts or solely to federal courts, such as

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37. Maltz, *supra* note 16, at 249 (footnote omitted).

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

Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 202 (2000).

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divorce actions, which must be filed in state courts,[38] or patent litigation, which must be filed in federal courts.[39] If the nature of the lawsuit does not limit filing to a state court (or to a federal court), a choice may exist between federal court and state court due to the concurrent jurisdiction of these courts over most types of claims.[40] To make use of that concurrent jurisdiction in a particular case, the litigant must satisfy the prerequisites for subject matter jurisdiction, personal jurisdiction, and venue[41]—but assuming that she is able to do so, the choice between a federal versus a state forum becomes a consideration. In evaluating this consideration for forum selection purposes, unless the attorney harbors an unusual conviction that a federal court is always superior to a state court (or vice-versa), the decisionmaking process typically will overlap with one or more of the additional considerations set forth in Parts I.B through I.E below.

B. "Type Two" Forum Shopping: Choices Involving Courts in Different States

In addition to choices between federal courts and state courts, another consideration in the forum selection process is whether more than one state provides a potential forum. In some cases, a litigant may be able to satisfy subject matter jurisdiction, personal jurisdiction, and venue prerequisites in more than one state, thereby

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38. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.5, at 26 (1999).

> [T]here are two areas of substantive law in which the federal courts traditionally have refused to exercise jurisdiction, despite the existence of all the necessary ingredients for diversity. These are domestic relations and probate cases. In the field of domestic relations, the established rule is that federal courts will not adjudicate cases involving marital status. A federal court will not grant a divorce, make an award of alimony, or settle a controversy over the custody of a child. The rationale for this limitation is that family relations are uniquely a matter of state policy and state interest, with which the federal courts should not interfere.

Id.

39. *See* 28 U.S.C. § 1338(a) (2000) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents .... Such jurisdiction shall be exclusive of the courts of the states in patent ... cases."). Other examples of exclusive federal court jurisdiction include federal crimes and bankruptcy. *See* 18 U.S.C. § 3231 (2000) ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."); 28 U.S.C.A. § 1334(a), *amended by* 28 U.S.C.A. § 1334(a) (Supp. I 2005) ("[T]he district courts shall have original and exclusive jurisdiction of all cases under title 11.").

40. *See infra* note 55 and accompanying text (discussing concurrent jurisdiction).

41. *See infra* notes 55–62 and accompanying text (discussing subject matter jurisdiction, personal jurisdiction, and venue prerequisites).

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providing a choice between (or among) courts in different states.[42] Subject to subject matter jurisdiction, personal jurisdiction, and venue limitations, the litigant may have choices between state courts in different states, between federal courts in different states, or between (or among) a patchwork of options involving both federal and state courts. This latter option—choices between federal courts and state courts—was discussed in Part I.A above, and the decisionmaking process for any of these court choices will tend to involve the additional considerations set forth in Parts I.C through I.E below.

C. *"Type Three" Forum Shopping: Choices Involving Different Substantive Laws*

In some cases, the availability of more than one forum will be accompanied by differences in the substantive law that will govern the litigation, depending on which forum is selected.[43] Thus, sometimes when a choice is available involving courts in different states, the choice between (or among) states also implicates a choice in the governing substantive law. A choice of courts in different states will not always afford a choice in substantive law, of course, but will depend on whether differences exist in the provisions of the states' applicable laws, as well as the choice-of-law principles followed by those states.[44]

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42. *See* CASAD, *supra* note 24, § 6:01, at 6-1 (noting that parties "may have a choice between courts in different states"); *see also* Juenger, *supra* note 27, at 559–60 (noting that "intrastate forum shopping between state and federal courts continues unabated").

43. *See* Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1390 (2004) ("The choice of forum may give the party some control over . . . substantive law."); Ryan, *supra* note 37, at 191 ("One of the most important potential consequences of forum selection is a difference in applicable law . . . . [T]he substantive law applied to a given dispute often depends on the place of suit.").

44. *See* Juenger, *supra* note 27, at 558–59 ("Choice-of-law doctrines present yet another incentive to the forum shopper . . . . If the decision of a lawsuit depends upon where it is brought, plaintiffs are tempted to file in states whose law is favorable to their causes."); *see also* Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 49 (1989) (discussing states' approaches to choice of law). Choice of law "means a court's determination of which law to apply in private law litigation with multistate elements." *Id.* at 49 n.1. Accordingly, "[t]he plaintiff's shopping will consist generally of a twofold search for a jurisdiction with a favorable substantive law and a choice of law theory that will point to the application of that law." Brown, *supra* note 17, at 674. "[T]here is a strong tendency under all modern conflicts systems to apply forum law." Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 560 (2002). Professor Brilmayer has charged that choice of law approaches are typically "pro-resident, pro-forum-law, and pro-recovery." Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 398 (1980); *see also* Brown, *supra* note 17, at 720

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A choice of forums invoking different substantive laws is perhaps the classic forum shopping paradigm, and the one most likely to stir incendiary debate.[45] Differences in substantive law raise the spectre of differences in ultimate outcome based on the lawyer's choice of forum. When forum shopping has the possibility of netting a more favorable outcome, some observers castigate such forum shopping as unfair, devious, and impermissible. However, choices involving different substantive laws do not raise uniform concerns and are not uniformly impermissible. Under the principles set forth in *Erie Railroad Co. v. Tompkins*[46] and subsequent cases, concerns regarding the potential for applying different substantive law as between a federal court and a state court located within the same state led the Supreme Court to require federal courts in diversity cases to apply the substantive law of the state in which they sit. As explained more thoroughly in Part II below, however, the Supreme Court has only condemned forum shopping in the narrow context presented by the *Erie* case—in order to prevent different results from inuring within the same state due to the application of different substantive law as between a state court and a federal court located within that state.[47] The Supreme Court has never prohibited choices involving different substantive laws beyond the narrow *Erie* context, and therefore differences in the substantive law remain one of the considerations in forum selection.

D. *"Type Four" Forum Shopping: Choices Involving Different Procedural Provisions*

A choice of forums implicating different procedural provisions also impacts the forum selection process.[48] Procedure is a powerful

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("State court choice of law practices often favor forum-shopping.").

45. The late Professor Juenger argued, however, that "forum shopping is prompted, in large measure, by reasons other than the diversity of substantive and choice-of-law rules," including familiarity, procedural advantages, forum reputation, and the pace of judicial proceedings. Juenger, *supra* note 27, at 573–74.

46. 304 U.S. 64 (1938).

47. *See infra* note 101 and accompanying text (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945), which sought substantially the same outcome in diversity cases regardless of whether the case is tried in federal or state court); *see also* Hanna v. Plumer, 380 U.S. 460, 472–73 (1965) (holding that Congress has the power to prescribe procedural rules that differ from state law rules, such as the Federal Rules of Civil Procedure, even at the expense of altering the outcome of litigation, and observing that *Erie* "involved no Federal Rule and dealt with a question which was 'substantive' in every traditional sense (whether the railroad owed a duty of care to Tompkins as a trespasser or a licensee)").

48. *See* Ghei & Parisi, *supra* note 43, at 1390 (noting that "[t]he choice of forum may give the party some control over . . . procedural . . . law"); *see also* Ryan, *supra* note 37, at 200 ("The choice of favorable substantive law is the most dramatic prize for the successful

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tool, as noted in the oft-quoted line, "I'll let you write the substance ... and you let me write the procedure, and I'll screw you every time."[49] Procedural provisions may include such differences in statutes, rules, or local rules; civil procedure or evidence provisions; and under some circumstances, federal provisions versus state provisions. A difference in procedural provisions may lead to a difference in the ultimate outcome of the case[50] or may merely constitute a relevant decisionmaking consideration due to the lawyer's greater familiarity with a particular set of procedural provisions.

E. *"Type Five" Forum Shopping: Choices Involving Subjective and Personal Factors*

The fifth and last consideration in forum selection encompasses subjective and personal factors. This wide-reaching category is a form of catch-all for the numerous remaining considerations that lawyers factor into their forum selection decisions. Examples of these subjective and personal factors include the jurisdictions in which the lawyer is licensed to practice; the reputations of (or prior experience before) the prospective judges; perceptions of the prospective jury pool as pro-plaintiff or pro-defendant; prior judicial decisions issued by the available forums; previous jury awards in the available forums; and convenience factors (both in terms of convenience to parties and witnesses and in terms of personal convenience to the lawyer).[51]

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forum-shopper, but there are also many important procedural distinctions among courts.").

49. *Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell).

50. *See* Kimberly A. Moore & Francesco Parisi, *Rethinking Forum Shopping in Cyberspace*, 77 CHI.-KENT L. REV. 1325, 1331 (2002) (noting that "the outcome of the case can be independently influenced by ... procedural variations").

51. *See* Friedrich K. Juenger, *What's Wrong with Forum Shopping?*, 16 SYDNEY L. REV. 5, 9–10 (1994) (discussing American practice and stating that "[t]he plaintiff usually shops in the forum with which he is most familiar or in which he gains the greatest procedural advantage or puts the defendant to the greatest procedural disadvantage" (citing L. Collins, *Contractual Obligations: The EEC Preliminary Draft Convention on Private International Law*, 25 INT'L & COMP. L.Q. 35, 36 (1976)); *see also* CASAD, *supra* note 24, §§ 2:01–2:28 (discussing practical and tactical considerations in selecting a forum). Professor Algero has catalogued the reasons for forum shopping as follows:

> An attorney who is forum shopping might take into account any one or more of the following factors: the reputation of the judges in a particular trial court and the corresponding appellate court; an evaluation of the reputation and characteristics of potential jurors who would make up the jury venire; potential success by counsel for both parties in the jurisdiction, including perceived

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Some of these factors merely concern familiarity or convenience. However, to the extent that these factors include prior jury awards and perceptions of the jury pool, they implicate the spectre of an outcome-altering choice—the type of choice criticized by the media and congressional proposals.[52] "Spectre," of course, is a particularly appropriate word in light of the numerous studies finding that charges of pro-plaintiff bias by juries are largely unsubstantiated.[53]

> advantages attorneys might have in that jurisdiction because of political connections, friendships, family name, past success, or current reputation; the political climate and bias in a particular jurisdiction; the characteristics and reputation of one's own client in light of the above; traditional factors of convenience, including convenience of witnesses, parties, and attorneys; procedural rules existing in the venue; and the law likely to be applied in a particular jurisdiction.

Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 80 n.2 (1999); *see also* Juenger, *supra* note 27, at 573–74 (noting that an "informed [forum] choice" includes considerations of "the forum's reputation for fairness (or pro-plaintiff bias), the efficacy and speed of judicial proceedings, the quality of available counsel, and . . . the 'legal climate' ").

52. *See supra* notes 18, 22 and accompanying text (discussing exaggerations regarding purportedly pro-plaintiff forums).

53. *See, e.g.*, VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 216 (2000) ("The . . . claim, that juries are pro-plaintiff, cannot be supported. The studies that have contrasted judicial views and civil jury verdicts find substantial overlap between judge and jury, and when their decisions diverge, juries are no more likely to favor the plaintiff in civil litigation, including litigation with business defendants."); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1125–26, 1133–34 (1992) (analyzing a study covering fiscal years 1979–1989 for all ninety-four federal districts, using data gathered by the Administrative Office of the United States Courts, comparing plaintiff win rates and recoveries in civil cases tried before juries and judges, and concluding that, contrary to popular belief, in two of the most controversial areas of tort law—product liability and medical malpractice—plaintiffs "prevail at trial at a much higher rate before *judges* than they do before juries"); Marc Galanter, *The Regulatory Function of the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 61, 70 (Robert E. Litan ed., 1993) ("The literature, on the whole, converges on the judgment that juries are fine decisionmakers. They are conscientious, collectively they understand and recall the evidence as well as judges, and they decide on the basis of the evidence presented." (footnotes omitted)); Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 883–84 (1993) (reporting "a controlled experiment involving a medical negligence case, comparing juror awards with those rendered by experienced legal professionals," and concluding that the damages awarded "for pain and suffering and disfigurement and the rationales behind the awards did not differ between the two sets of decisionmakers"); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 898 (1998) (summarizing studies of civil juries and concluding that "[r]esearch findings bearing on the performance of civil juries yield little support for the extreme claims charging juries with poor and irresponsible performance").

If the anecdotes accurately reflected jury verdicts, one would expect to find the vast majority of jury verdicts favoring plaintiffs. But this is not the reality. The most

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All five of these decisionmaking considerations are inherent in forum selection, and the potential exists for some, or even all, of these considerations to overlap, depending on the specific case. Accordingly, forum shopping is, at its core, merely the decision that a lawyer makes when more than one lawful forum is available—yet forum shopping carries an unusually strong negative connotation. The next Part analyzes the law of forum shopping, finding that the law regularly creates and authorizes a choice between two or more forums, and that the Supreme Court has criticized only one very limited type of forum shopping.

II. THE LAW OF FORUM SHOPPING

If forum shopping were indeed a devious, illegitimate, and unfair practice, one would expect the law to circumscribe the available forum options and would expect the Supreme Court to criticize the forum shopping practice. But this is not the case. The law regularly authorizes a choice between two or more legitimate forums, and the Supreme Court generally has recognized the validity of forum shopping, criticizing the practice only in one very narrow context.

A. *The Law Regularly Authorizes a Choice Between Two (or More) Legitimate Forums*

Given a client with a legally cognizable claim, once a decision is made to pursue litigation, an attorney faces an initial decision regarding where to file the lawsuit. Typically, choices are available. Should she file in federal court or in state court? Should she file in New York or in Pennsylvania? Should she file in the Northern District of New York, the Eastern District of New York, the Western District of New York, or the Southern District of New York? Preliminary considerations of subject matter jurisdiction, personal jurisdiction, and venue guide the inquiry, but any court in which these three prerequisites can be satisfied becomes one of the choices available.[54]

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recent study compiled by the Rand Institute for Civil Justice concluded that across all cases, plaintiffs won only "slightly more than 55 percent of all verdicts," and they won "least often in medical malpractice and product liability cases, winning only 33 percent of the former and 44 percent of the latter." ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985, at xv, 39 (1996) (reporting a study based on jury verdicts from 1985 to 1994 in fifteen jurisdictions across the country). "Perhaps the most striking finding that emerges from the jury verdict data in this study is that punitive damages are awarded very rarely." *Id.* at 33. The study noted that punitive damages were awarded in only 2.6% of all product liability verdicts. *Id.* at 36.

54. *See infra* notes 55–62 and accompanying text (discussing subject matter

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Subject matter jurisdiction and personal jurisdiction implicitly—and venue explicitly—contemplate forum shopping. In the subject matter jurisdiction arena, there is concurrent state jurisdiction over most federal claims, thus creating a legitimate choice between a state court and a federal court in most cases.[55] In addition, diversity jurisdiction provides the opportunity to file a state-law claim in federal court at the plaintiff's option—or at the defendant's option through removal—when the amount in controversy and diversity of citizenship prerequisites can be satisfied.[56] Personal jurisdiction is not limited to a single forum,[57] but is instead assessed on the basis of satisfying the state's long-arm statute[58] and constitutional minimum contacts[59] (or, in the case of "tag jurisdiction," actual physical

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jurisdiction, personal jurisdiction, and venue).

55. *See* FRIEDENTHAL ET AL., *supra* note 38, § 2.2, at 13 ("By and large, federal court subject matter jurisdiction is concurrent with that of the courts of the various states."); *see also* CASAD, *supra* note 24, § 6:01, at 6-1 (noting that parties may have "a choice within the same state between state and federal courts"). Another subject matter jurisdiction example is the established rule that one's citizenship for diversity purposes is determined as of the filing of the complaint, rather than the accrual of the cause of action, thereby permitting a post-accrual change of citizenship so long as the relocation is bona fide. *See* Baker v. Keck, 13 F. Supp. 486, 487 (E.D. Ill. 1936).

56. *See* 28 U.S.C. § 1332 (2000); *see also supra* note 16 (discussing diversity jurisdiction as providing an option between state court and federal court).

57. *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 54 (1990) ("*International Shoe* has been widely heralded as the great 'liberator' of personal jurisdiction from the formalisms of *Pennoyer*, and it is undoubtedly true that *International Shoe* ushered in an era of expanded jurisdictional reach for state courts." (footnote omitted)); Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 834 (1995) (noting that the Supreme Court "has eschewed the opportunity to create definitive rules," thus "mandat[ing] case-by-case, fact-specific inquiry"); *id.* at 836 (noting that "the core of jurisdiction doctrine is unsettled"); Rex R. Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in* Burger King Corp. v. Rudzewicz, 1986 ARIZ. ST. L.J. 585, 629 ("[S]ince *International Shoe*, the due process limits on personal jurisdiction have been stated as broad principles using vague terms that are difficult to apply in specific cases.").

58. *See* CASAD, *supra* note 24, app. B (setting forth the state long-arm statutes).

59. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires . . . that in order to subject a defendant to a judgment *in personam*, if he be not within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "). Indeed, *International Shoe*'s expansion of personal jurisdiction is often credited (or blamed) as a significant contributing factor to forum shopping. *See, e.g.*, Brown, *supra* note 17, at 700 ("After all, forum-shopping cannot occur unless the defendant can be sued in the forum, and the post-*International Shoe* developments in constitutional standards are often cited as a factor in the growth of forum-shopping." (footnote omitted)); Juenger, *supra* note 27, at 557–58 (crediting *International Shoe*'s expansion of personal jurisdiction with increasing forum choices).

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presence in the forum[60]). Similarly, venue does not provide a single option, but instead lists a number of choices, any of which is appropriate.[61] Moreover, in federal courts, even when venue is proper, § 1404 authorizes transfer of the lawsuit to "any other district or division where it might have been brought" when such a transfer is "[f]or the convenience of parties and witnesses, [and] in the interest of justice."[62] These principles and provisions indicate that choices typically are available in deciding where to file a lawsuit. In some instances, the choice may be simply between federal courts and state courts within the same jurisdiction. In other instances, however, there may be a broader range of options, encompassing more than one state and encompassing both federal and state courts.

In addition to considerations of subject matter jurisdiction, personal jurisdiction, and venue, choice of law principles play a role in forum selection. In brief, choice of law principles vary by state,[63] with some states following the old lex loci approach and others following what is often called the "modern" or "new conflicts" approach. The lex loci theory, found in the *First Restatement of Conflict of Laws*, takes the approach that lawsuits are governed by the substantive law of the jurisdiction where the tort or injury occurred, or more generally, where the dispute arose.[64] As a result of criticisms of the lex loci theory,[65] other "modern" approaches

60. *See* Burnham v. Superior Court, 495 U.S. 604, 628 (1990) (upholding personal jurisdiction over a nonresident who was personally served with process while briefly in the forum state).

61. *See supra* note 13 (setting forth the venue options under 28 U.S.C. § 1391(a)); *see also* Ryan, *supra* note 37, at 170 ("One reason the plaintiff has a choice of forum is that venue statutes afford him that choice. Rather than define the proper venue with specificity, venue statutes typically let the plaintiff choose among a number of courts—albeit a limited number—in which venue is proper."); *id.* at 172 (noting that "the more the venue statute is liberalized, the more significant, too, becomes the plaintiff's venue privilege"). *See generally* Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 356 (2d Cir. 2005) ("[T]he civil venue statute permits venue in multiple judicial districts . . . ."); *id.* (noting that Congress amended the federal civil venue statute in 1990 to "lay[] venue in 'a'—not 'the'—judicial district in which a substantial part of the events or omissions giving rise to the claim occurred' [and thus t]he new language contemplates that venue can be appropriate in more than one district").

62. 28 U.S.C. § 1404(a) (2000).

63. *See* Juenger, *supra* note 27, at 559 (noting that the Supreme Court's decision in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), "obliges federal judges to follow the forum-biased choice-of-law approach adopted by state courts").

64. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934) (discussing choice of law in tort actions).

65. *See, e.g.*, WALTER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 71–89 (1949) (discussing and criticizing the *First Restatement*'s approach); Solimine, *supra* note 44, at 51–52 (discussing criticisms of the lex loci approach).

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developed which tend to use a more policy-oriented approach—including Professor Currie's theory of interest analysis, which concludes that in cases involving a "true" conflict the courts are ill-equipped to balance the interests of several states and therefore should apply the forum's law,[66] as well as the approach of the *Restatement (Second) of Conflict of Laws*, which attempts to incorporate the relevant policies of the interested states along with the older territorial notion.[67]

> The result is a cornucopia of opportunities for forum-shopping in any case in which there is more than one state with an interest in the matter that might justify application of its law. The plaintiff's shopping will consist generally of a twofold search for a jurisdiction with a favorable substantive law and a choice of law theory that will point to the application of that law. Any of the modern methodologies would facilitate this endeavor, including the seemingly neutral *Second Restatement*.[68]

When more than one option is available, the multiple options implicate choice[69]—and choice involves an evaluation of the available options for potential benefits. The next step is to examine whether the Supreme Court's decisions criticize forum shopping or provide a legal basis for limiting the practice.

B. The Supreme Court Goes Forum Shopping—And Enjoys the Choices Available

If forum shopping were indeed as inherently unfair as the current outcry would suggest, one might expect that the Supreme Court would rein in the practice—either by suggesting the necessity for legislative reforms, or by taking affirmative steps of its own, as the Court has done in the area of punitive damages.[70] But the Supreme

66. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183–84 (1963) (discussing true conflicts and use of forum law); *see also* LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 229–43 (1986) (summarizing and critiquing Professor Currie's approach).

67. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (discussing policy considerations); *id.* §§ 145–146 (discussing choice of law in tort actions).

68. Brown, *supra* note 17, at 674.

69. *See* Cass R. Sunstein, *Introduction*, *in* BEHAVIORAL LAW & ECONOMICS 2 (Cass R. Sunstein ed., 2000) ("[T]he legal system is pervasively in the business of constructing procedures, descriptions, and contexts for choice.").

70. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (holding that a $145 million punitive damages award violated due process where the underlying compensatory judgment was $1 million); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585–

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Court has taken no such steps. Unlike the negative undercurrent in recent news stories and proposed congressional action, the Supreme Court has recognized that both plaintiffs and defendants engage in forum shopping.[71] Far from consistently condemning strategic forum selection, the Court has criticized only federal versus state court forum shopping[72] (despite sometimes adopting rules that encourage the practice[73]), and has repeatedly acknowledged the validity of state-to-state forum shopping.[74]

1. The Supreme Court's Very Narrow Prohibition Against a Very Limited Type of Forum Shopping

The Supreme Court weighed in on the forum game to outlaw one particular move. The Court's foray into this area began with a case in which the plaintiff openly sought a more favorable outcome due to differences in the substantive law as between federal court and state court—differences that the Supreme Court itself had authorized. Harry Tompkins and his lawyers went forum shopping; defendant Erie Railroad made its move; and the Supreme Court, to everyone's surprise, declared that it had misread the rules in its prior decision—and changed forever one part of the federal-state forum game.

Erie Railroad Co. v. Tompkins[75] involved alleged negligence by the Erie Railroad Company, resulting in injury and permanent disability to Harry Tompkins. Tompkins was walking home late at night on a footpath running parallel to the railroad tracks when he

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86 (1996) (refusing to uphold $2 million punitive damages award accompanying a $4,000 compensatory damages award); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 903 (2004) (noting that "[t]he impetus for the Court's intervention [into the area of proportionality and punitive damages] was the perception that punitive damages had 'run wild' ").

71. *See* Ferens v. John Deere Co., 494 U.S. 516, 528 (1990) (plaintiffs); Van Dusen v. Barrack, 376 U.S. 612, 626–36 (1964) (defendants).

72. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), because *Swift* "made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court").

73. *See Ferens*, 494 U.S. at 528, 531 (acknowledging that the Court's holding might, in effect, reward forum shopping, but concluding that there was no preferable alternative).

74. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984) (characterizing, without criticism, state-to-state forum shopping as a typical litigation strategy).

75. 304 U.S. 64 (1938). The story of the accident underlying the *Erie* litigation and the legal tactical strategies involved in litigating the case are compellingly told in the classic article by Irving Younger. *See* Irving Younger, *What Happened in* Erie, 56 TEX. L. REV. 1011 (1978); *see also* Edward A. Purcell, Jr., *The Story of* Erie: *How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES 21 (Kevin M. Clermont ed., 2004).

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was "struck by something which looked like a door projecting from one of the moving cars."[76] Tompkins was a Pennsylvania citizen, and the accident occurred in Pennsylvania.[77] However, Pennsylvania law would have precluded any recovery.

> [U]nder the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and . . . the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful.[78]

To avoid this unfavorable Pennsylvania law, Tompkins's lawyer filed the lawsuit in federal court in the Southern District of New York.[79] Erie Railroad was incorporated in New York, thus creating federal subject matter jurisdiction on the basis of diversity.[80] Filing in New York permitted the federal court, under principles previously announced in *Swift v. Tyson*,[81] to determine the railroad's duty without regard to state case law; only state statutory law was considered binding on the federal courts.[82] Although the same opportunity theoretically was available by filing in federal court in Pennsylvania, the Third Circuit had established a practice of deferring to the applicable state's case law.[83] The Second Circuit, governing New York, had not adopted such a deferential practice. Therefore, New York's federal courts appeared to afford the only possibility for a fresh look at the railroad's duty without the constraints of Pennsylvania case law.[84]

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76. *Erie*, 304 U.S. at 69.
77. *Id.*
78. *Id.* at 70.
79. *Id.* at 69.
80. *Id.*
81. 41 U.S. (16 Pet.) 1 (1842).
82. *See id.* at 18 ("In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws .... The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof . . . ."); *see also Erie*, 304 U.S. at 71 (noting that *Swift v. Tyson* "held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be").
83. *See* Younger, *supra* note 75, at 1016.
84. *See id.* An additional important benefit to filing in New York was that Tompkins's lawyers were licensed to practice in New York but not in Pennsylvania. *See id.*

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The strategy was successful; the New York federal court refused to apply Pennsylvania state case law to preclude recovery and the jury awarded Tompkins $30,000.[85] The circuit court upheld the verdict,[86] but the Supreme Court took the opportunity to overrule *Swift v. Tyson*.[87] The Supreme Court justified its conclusion using several factors: (1) the historical inaccuracy underpinning *Swift*; (2) the "mischievous results" of *Swift*'s application; and (3) federalism concerns.[88]

The Court first observed that a scholar's research had undermined *Swift*'s construction of the Rules of Decision Act.[89] Moreover, not only was *Swift* based on erroneous history, but the application of federal "general law" led to differences in diversity cases as to the law applied, depending on "whether enforcement was sought in the state or in the federal court"[90]—a standard forum shopping complaint. Authorizing the use of federal "general law" in diversity cases would create the potential for a different outcome depending on whether the suit was filed in federal or state court—precisely the type of forum shopping that occurred in *Erie*.[91]

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85. *See Erie*, 304 U.S. at 70.

86. *Id.*

87. *See id.* at 69 (framing the question presented as "whether the oft-challenged doctrine of *Swift* v. *Tyson* shall now be disapproved").

88. *Id.* at 72–73, 74–75, 78–80.

89. 28 U.S.C. § 1652 (2000).

> [I]t was the more recent research of a competent scholar, who examined the original document, which established that the construction given to [the Rules of Decision Act] by the [*Swift v. Tyson*] Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.

Erie, 304 U.S. at 72–73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923)).

90. *Erie*, 304 U.S. at 74–75. The Supreme Court observed that in this manner, "*Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens." *Id.* at 74; *see also* Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965) (noting that one of the underlying issues in the application of state law in diversity cases is "whether application of the [state] rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State").

91. This same problem had occurred in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), decided a decade before *Erie*. In *Taxicab*, both companies had originally been Kentucky corporations. *See id.* at 523–24. One had an exclusive contract with a railroad company, and sued to enjoin the other from operating taxis at the railroad station. *Id.* at 522–23. Under Kentucky state law, such exclusive dealing contracts were deemed to violate public policy and therefore were unenforceable. *Id.* at 526. The plaintiff, prior to filing suit, dissolved the corporation in Kentucky and reincorporated in Tennessee, then filed the lawsuit in federal court in

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Most importantly, however, the Court had decided that its previous decision in *Swift v. Tyson* had been unconstitutional.[92] Although some commentators have criticized *Erie* as ambiguous, confusing, and potentially invoking doctrines of federalism, separation of powers, equal protection, and due process,[93] any "ambiguity" seems overstated.

Erie plainly and repeatedly expressed concern that *Swift v. Tyson* had unconstitutionally authorized federal court intermeddling with state law, and thereby with states' constitutionally-protected rights. "[I]n applying the [*Swift v. Tyson*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."[94] Other references to federalism concerns abound.[95] Accordingly, federalism would appear to be at

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Kentucky to create diversity jurisdiction and thereby permit the application of federal "general law" rather than the unfavorable Kentucky state law. *Id.* at 523–24. Consistent with *Swift v. Tyson*, the Supreme Court affirmed the determination that the federal court need not follow Kentucky law. *Id.* at 530. Setting the stage for the future *Erie* decision, however, Justice Holmes, joined by Justices Brandeis and Stone, dissented, calling the *Taxicab* decision an "unconstitutional assumption of powers by the Courts of the United States." *Id.* at 533 (Holmes, J., dissenting). Justice Brandeis, one of the *Taxicab* dissenters, was, of course, the author of the subsequent majority opinion in *Erie*. *See Erie*, 304 U.S. at 69.

92. *Erie*, 304 U.S. at 77–78 ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.").

93. *See, e.g.*, Brown, *supra* note 17, at 657 (discussing the ambiguous grounds of the *Erie* decision); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 927 (1986) (noting that "*Erie* is ambiguous as to whether courts can make rules as broadly as Congress"); *see also* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 29–46 (1991) (arguing that federal courts have created federal common law in spite of the rule of *Erie*).

> *Erie*'s ambiguities are several and obvious. If the decision rests on statutory grounds, the constitutional portion may be unnecessary dictum. Even if it is constitutionally based, the Court confused the matter by failing to cite directly any provision of the Constitution and by placing some of the apparent constitutional analysis in the portion of the opinion that rests on other grounds. One can find in the opinion possible invocations of the doctrines of due process, equal protection, separation of powers, and federalism.

Brown, *supra* note 17, at 657 (footnote omitted). Any suggestion that *Erie* rests on statutory grounds comes not from the majority opinion, which expressly disavowed such a position, *see supra* note 92, and repeatedly emphasized constitutional considerations. *See Erie*, 304 U.S. at 77–79. Rather, the discussion of statutory construction appears in the separate opinion of Justice Butler, who rejected any need to address any constitutional question. *Id.* at 90 (Butler, J., concurring) ("I am of the opinion that the constitutional validity of the rule need not be considered . . . .").

94. *Erie*, 304 U.S. at 80.

95. *See, e.g.*, *id.* at 78 ("Except in matters governed by the Federal Constitution or by

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the heart of *Erie*.[96]

It is noteworthy that any implication of forum shopping in the *Erie* opinion itself is minimal, restricted largely to two observations. The first of those observations was that *Swift v. Tyson* "made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court"[97]; the second observation was that "[i]n attempting to promote uniformity of law throughout the United States, the [*Swift v. Tyson*] doctrine had prevented uniformity in the administration of the law of the State."[98] Appropriately enough, the Court recognized that although it had removed the gambit of litigating a state-law-based claim in federal court to gain access to federal "common law" versus a given state's common law, other aspects of forum shopping remained unchanged or were exacerbated. The law applied in different federal courts now varied by geography. Federal courts in Pennsylvania would apply different legal rules in diversity cases than the federal courts located in New Jersey, subject to applicable choice of law principles, despite the fact that both Pennsylvania and New Jersey are within the Third Circuit. Moreover, as highlighted by the advent of the Federal Rules of Civil Procedure, court procedural rules would now vary, depending on whether the claim was filed in federal versus state court. As the Supreme Court later recognized, these differences in procedure also

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Acts of Congress, the law to be applied in any case is the law of the State .... Congress has no power to declare substantive rules of common law applicable in a State ...."); *id.* at 79 ("[T]he doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States ....' "); *id.* ("[T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." (citations omitted)).

> [N]otwithstanding the frequency with which the [*Swift v. Tyson*] doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. 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. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Id. at 78–79.

96. *See* BLACK'S LAW DICTIONARY 551 (5th ed. 1979) (defining federalism as a term including the "relationship between the states and the federal government"); *see also* Ely, *supra* note 16, at 695 (stating that the *Erie* decision "implicates, indeed perhaps it is, the very essence of our federalism").

97. *Erie*, 304 U.S. at 74–75.

98. *Id.* at 75.

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raised the possibility of a different result.[99]

The Supreme Court's next major decision in this area, *Guaranty Trust Co. v. York*,[100] explained the *Erie* decision in a similar fashion:

> In essence, the intent of [the *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. The nub of the policy that underlies *Erie Railroad Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.[101]

Accordingly, it was not *Erie* itself, but instead the Court's subsequent decision in *Hanna v. Plumer*[102] which, in retrospect, assigned a "discouragement of forum shopping" purpose to *Erie*, describing *Erie* as "in part[,] a reaction to the practice of 'forum-shopping' which had grown up in response to the rule of *Swift v. Tyson*."[103]

> *Erie* . . ., overruling *Swift v. Tyson* . . ., held that federal courts sitting in diversity cases, when deciding questions of "substantive" law, are bound by state court decisions as well as state statutes. The broad command of *Erie* was therefore identical to that of the [Rules] Enabling Act: federal courts are to apply state substantive law and federal procedural law . . . . The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court. "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights

99. *See* Hanna v. Plumer, 380 U.S. 460, 461–64 (1965) (holding that the Federal Rules of Civil Procedure governing service of process, rather than the state rules, apply to diversity cases filed in federal court, even when application of the Federal Rules might lead to a different outcome in the federal court).

100. 326 U.S. 99 (1945).

101. *Id.* at 109.

102. 380 U.S. 460 (1965).

103. *Id.* at 467 (citing Swift v. Tyson, 41 U.S. 1 (1842)).

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> enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen."[104]

But look at what *Erie* left untouched. *Erie* did not address substantive law choices available as among various state courts; *Erie*'s concern with forum shopping involved a litigant's potential ability to employ different substantive law *depending on whether the lawsuit was filed in a state or federal court within the same state*—whether the plaintiff through the initial filing of the lawsuit or the defendant through removal. Because *Swift v. Tyson* required federal courts to follow state statutes but not state case law, disputes which, if filed in state court, would be governed by that state's decisional law, could instead be filed in federal court and thereby dodge the precedential effect of unfavorable case law. The practice created a problem with a constitutional dimension:

> [T]he scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard. Thus, in diversity cases *Erie* commands that it be the state law governing primary private activity which prevails.[105]

Accordingly, *Erie*'s condemnation of forum shopping involved a relatively narrow application: the ability to obtain different substantive law as between federal and state courts within the same state.[106] Indeed, Justice Harlan's concurrence in *Hanna* acknowledged, even endorsed, forum shopping outside *Erie*'s narrow context, expressly disavowing a broad prohibition: "[F]or a simple forum-shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge."[107] *Erie* and *Hanna* did not criticize (much less prohibit) forum shopping as between (or among)

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104. *Id.* at 465, 467 (citations omitted).

105. *Id.* at 474–75 (Harlan, J., concurring).

106. *See* Note, *supra* note 23, at 1682 ("Although the Supreme Court denounces state-federal forum shopping on grounds of comity and parity, it countenances interstate forum shopping."); *see also* Brown, *supra* note 17, at 664 (suggesting that "*Erie* actually favors" state-to-state forum shopping).

107. *Hanna*, 380 U.S. at 475 (Harlan, J., concurring).

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states, but instead held only that federalism concerns mandated that federal courts employ state substantive law.[108] Thus, "Type Three" differences in substantive law, "Type Four" differences in procedural provisions, and "Type Five" subjective and personal differences among forums remain game-choices available to plaintiffs and defendants.

2. The Supreme Court's Repeated Acceptance of Forum Shopping Absent Federalism Concerns

The narrow reach of the *Erie* line of cases to encompass only federal court versus state court forum shopping is sensible and unsurprising. The *Erie* line of cases addressed federalism concerns in the context of the Rules of Decision Act[109] and the Rules Enabling Act.[110] Although federal versus state court forum shopping potentially invokes both Acts, neither Act raises state-to-state forum shopping issues. If state-to-state forum shopping is indeed a "problem," it is transfer of venue, rather than the *Erie* doctrine, through which the federal courts typically address the problem.

As one might expect, forum shopping regularly arises in the Supreme Court's jurisprudence addressing change of venue. The Court invoked the prohibition against forum shopping against defendants' attempts to effect a change in the applicable law through a change of venue[111] in *Van Dusen v. Barrack*.[112] *Van Dusen* involved the crash of a commercial airliner in Boston Harbor. The defendants sought to transfer venue from the Eastern District of Pennsylvania to the District of Massachusetts, where more than 100 other lawsuits involving the same crash were pending and most of the witnesses

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108. The Court's rationale in *Erie* found a consistent approach in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). *Klaxon* generally requires federal courts sitting in diversity to follow the conflict of laws rules of the state in which the federal court sits under the same rationale as *Erie*—to preserve the principle of uniformity within a state. *Id.* at 496.

109. 28 U.S.C. § 1652 (2000) ("The 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.").

110. *Id.* § 2072 (noting that the Supreme Court "shall have the power to prescribe general rules" of practice, procedure, and evidence in the federal district courts and courts of appeals, but that "[s]uch rules shall not abridge, enlarge or modify any substantive right").

111. *See id.* § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

112. 376 U.S. 612 (1964).

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resided.[113] Defendants also urged that a transfer of venue should result in a corresponding change in the applicable law from that of Pennsylvania to that of Massachusetts.[114] Rejecting this contention, the Court noted that "[t]he legislative 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."[115] Instead, the Court held that a transfer of venue under § 1404(a) "simply . . . authorize[s] a change of courtrooms," not a change of law.[116]

Despite its critical language, the *Van Dusen* Court accepted the underlying reality of forum shopping and the "state-law advantages" resulting from forum shopping, acknowledging that these rules "allow plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected."[117]

> [Section] 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 .... If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument. And, more importantly, courts would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum.[118]

The Court noted that in enacting § 1404(a), Congress "was primarily concerned with the problems arising where, despite the propriety of the plaintiff's venue selection, the chosen forum was an inconvenient one."[119] The Court also observed that a potential *Erie*

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113. *Id.* at 614.

114. *Id.*

115. *Id.* at 635–36.

116. *Id.* at 636–37; *see also id.* at 639 ("[I]n 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 of courtrooms.").

117. *Id.* at 633.

118. *Id.* at 635–36; *see also id.* at 633–34 ("There is nothing . . . in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.").

119. *Id.* at 634.

> The effect is to give the plaintiff the benefit which traditionally he has had in the

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issue lurked in transferring venue: *Erie* sought "an identity or uniformity between federal and state courts,"[120] and "[t]his purpose would be defeated in cases such as the present if nonresident defendants, properly subjected to suit in the transferor State (Pennsylvania), could invoke § 1404(a) to gain the benefits of the laws of another jurisdiction (Massachusetts)."[121] Thus, the Court did not disturb, and seemed to endorse, the choice of forum and accompanying choice of law as squarely within the purview and control of the plaintiff and preserved those choices against the defendant's preferences resulting from a transfer of venue.[122]

More than two decades later, the Court upheld the *Van Dusen* result in *Ferens v. John Deere Co.*,[123] in which the change of venue had been sought by the plaintiffs instead of the defendants. The Court "again conclude[d] that the transferor law should apply regardless of who makes the § 1404(a) motion."[124]

> The text of § 1404(a) may not say anything about choice of law, but we think it not the purpose of the section to protect a party's ability to use inconvenience as a shield to discourage or hinder litigation otherwise proper. The section exists to eliminate inconvenience without altering permissible choices under the venue statutes.[125]

Mr. and Mrs. Ferens sued John Deere Company for contract claims in the Western District of Pennsylvania, and then filed a second suit for tort claims in the Southern District of Mississippi.[126] The Ferenses then moved pursuant to § 1404(a) to transfer venue of the Mississippi action to Pennsylvania—thereby permitting use of the

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> selection of a forum with favorable choice-of-law rules .... It may be thought undesirable to let the plaintiff reap a choice-of-law benefit from the deliberate selection of an inconvenient forum. In a sense this is so, but the alternatives seem even more undesirable. If the rules of the state where the transferee district is located were to control, the judge exercising his discretion upon a motion for transfer might well make a ruling decisive of the merits of the case.

Id. at 637 n.36 (quoting STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 65–66 (Am. L. Inst., Tentative Draft No. 1, 1963)).

120. *Id.* at 638.

121. *Id.*

122. *See id.* at 633; *see also* Ferens v. John Deere Co., 494 U.S. 516, 524–25 (1990) (noting that *Van Dusen* permitted a defendant to transfer venue "and at the same time preserve the plaintiff's state-law advantages").

123. 494 U.S. 516 (1990).

124. *Id.* at 531.

125. *Id.* at 525.

126. *Id.* at 519.

Mississippi statute of limitations for the tort claims, which would have been time-barred by the Pennsylvania statute of limitations.[127] The Court expressly acknowledged the "indirect" opportunity for forum shopping: "The advantage to Mississippi's personal injury lawyers that resulted from the State's then-applicable 6-year statute of limitations has not escaped us; Mississippi's long limitation period no doubt drew plaintiffs to the State."[128] Yet the potential for such forum shopping did not give the Court pause:

> Our rule may seem too generous because it allows the Ferenses to have both their choice of law and their choice of forum, or even to reward the Ferenses for conduct that seems manipulative. We nonetheless see no alternative rule that would produce a more acceptable result. Deciding that the transferee law should apply, in effect, would tell the Ferenses that they should have continued to litigate their warranty action in Pennsylvania and their tort action in Mississippi. Some might find this preferable, but we do not. We have made quite clear that to permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.[129]

Indeed, the Court again noted the importance of preserving the state law advantages accruing to the plaintiff through the forum shopping process, noting that "if the applicable law were to change after transfer [of venue], the plaintiff's venue privilege and resulting state-law advantages could be defeated at the defendant's option."[130] *Ferens* declined to condemn forum shopping either under the circumstances of this specific case or as a general matter. The Court observed that "[a]n opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws,"[131] and noted that plaintiffs shop for the forum with the most favorable law as a matter of course:

> No interpretation of § 1404(a) ... will create comparable opportunities for forum shopping by a plaintiff because, even without § 1404(a), a plaintiff already has the option of shopping

127. *Id.* at 519–20.

128. *Id.* at 528.

129. *Id.* at 531 (quotation marks and citation omitted).

130. *Id.* at 524–25. *See also* Balt. & Ohio R.R. Co. v. Kepner, 314 U.S. 44, 52 (1941) (stating that "venue is a privilege created by federal statute").

131. *Ferens*, 494 U.S. at 527.

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> for a forum with the most favorable law. The Ferenses, for example, had an opportunity for forum shopping in the state courts because both the Mississippi and Pennsylvania courts had jurisdiction and because they each would have applied a different statute of limitations. Diversity jurisdiction did not eliminate these forum shopping opportunities; instead, under *Erie*, the federal courts had to replicate them .... Applying the transferor law would not give a plaintiff an opportunity to use a transfer to obtain a law that he could not obtain through his initial forum selection. If it does make selection of the most favorable law more convenient, it does no more than recognize a forum shopping choice that already exists.[132]

Similarly, in the related area of forum non conveniens, the Supreme Court has observed that venue statutes "are drawn with a necessary generality and usually give a plaintiff a choice of courts," and affirmed the plaintiff's control over forum selection: "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[133] Subsequently, in *Piper Aircraft Co. v. Reyno*,[134] the Supreme Court matter-of-factly acknowledged that forum shopping is an accepted, integral, and logical part of civil litigation:

> [I]f conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the forum non conveniens inquiry, dismissal would rarely be proper.[135]

In the same vein, the Court also noted that a defendant's motivation in moving to dismiss a lawsuit on the ground of forum non conveniens may well be to seek a more favorable forum but declined to discourage such forum shopping:

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132. *Id.* at 527–28.

133. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–08 (1947); *see also* Ryan, *supra* note 37, at 174 (stating that forum non conveniens "is recognized, but only as an exception to the general rule of plaintiff's choice").

134. 454 U.S. 235 (1981).

135. *Id.* at 250.

> We recognize, of course, that Piper and Hartzell may be engaged in reverse forum-shopping. However, this possibility ordinarily should not enter into a trial court's analysis of the private interests. If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum.[136]

The Court has upheld the practice of shopping among states for the forum with the most generous statute of limitations on several occasions,[137] notably in *Keeton v. Hustler Magazine, Inc.*[138] Kathy Keeton, a New York resident, sued Hustler Magazine, Inc. and others for libel in a federal district court in New Hampshire.[139] Keeton previously had filed suit in Ohio against Hustler, an Ohio corporation with its principal place of business in California, but the court dismissed her claims on statute of limitations grounds.[140] New Hampshire's six-year limitations period for libel claims rendered "New Hampshire ... the only State where [Keeton's] suit would not have been time-barred when it was filed."[141] The Court noted that Keeton's lawsuit sought damages for the nationwide distribution of the libelous issues, "even though only a small portion of those copies were distributed in New Hampshire,"[142] but nevertheless permitted the lawsuit to proceed. "Petitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations."[143]

Commentators and politicians seeking a comprehensive condemnation of forum shopping will not obtain help from the

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136. *Id.* at 252–53 n.19.

137. *See, e.g.*, N. Star Steel Co. v. Thomas, 515 U.S. 29, 36 (1995) (upholding the use of state statutes of limitations, rather than imposing a uniform federal rule for claims under the Worker Adjustment and Retraining Notification Act and observing that "the practice of adopting state statutes of limitations for federal causes of action can result in different limitations periods in different States for the same federal action, and ... some plaintiffs will canvass the variations and shop around for a forum. But these are just the costs of the rule itself"). *But see* Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 156 (1987) (finding state statutes of limitations inappropriate for civil RICO claims and therefore selecting a uniform federal limitations period of four years).

138. 465 U.S. 770 (1984).

139. *Id.* at 772.

140. *Id.* at 772 & n.1.

141. *Id.* at 773.

142. *Id.* at 775.

143. *Id.* at 779.

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Supreme Court's jurisprudence. Instead, the Supreme Court has repeatedly recognized the existence and the value of forum shopping, and its jurisprudence shows an inclination to curtail forum shopping only when mandated by federalism concerns. The forum shopping discouraged by the Supreme Court is of a limited variety—that occurring in diversity cases and resulting from substantive law differences between federal and state courts in the same state. Benefits or unfairness to one side or the other do not warrant placing limits on forum shopping. Substantive law differences among the states is a fact of life and is properly treated as such by the Supreme Court.

The Supreme Court's acceptance of state-to-state forum shopping does not reflect a thoughtless or laissez-faire approach; in fact, such state-to-state forum shopping is broadly approved, probably because protections against the most egregious potential abuses are already in place. Of particular note are the due process limitations on the exercise of personal jurisdiction and choice of law, and the statutory limitations on venue,[144] which restrict the forums available to a litigant and restrict a litigant's choices of the substantive law that can be applied. Personal jurisdiction will exist over a nonresident defendant only when that defendant's conduct comes within the language of the state's long-arm statute and additionally satisfies constitutional due process "minimum contacts" analysis. Similarly, choice of law is not unlimited. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[145]

Any suggestion that the Court should take a more aggressive stance against state-to-state forum shopping is misguided. The power of the Supreme Court is constitutionally limited. The *Erie* line of cases involved federal statutes—the Rules of Decision Act[146] and the Rules Enabling Act[147]—as well as notions of federalism. There is no

144. *See* 28 U.S.C. § 1391(a) (2000) (setting forth the venue choices when federal subject matter jurisdiction is founded solely on diversity); *see also id.* § 1391(b) (setting forth the venue choices when federal subject matter jurisdiction is not founded solely on diversity); *id.* § 1391(c) (pertaining to corporate defendants).

145. Phillips Petroleum Corp. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion)).

146. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (interpreting the Rules of Decision Act).

147. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965) (interpreting the Rules Enabling Act).

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implication of federal law or constitutional doctrine in state-to-state forum shopping. Within constitutional parameters, the states are free to enact their own laws and are not required to conform their laws to existing laws in other states. The Constitution

> recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. 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. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.[148]

Accordingly, the attractions of the laws of one state over another are the inevitable consequence of our governmental structure[149] and are within the province of the states. Unless state law raises issues of a constitutional dimension, that state law is beyond the concern of the federal courts.

In light of differences in state law, lawyers not only do, in fact, check for the most favorable applicable law, but diligent and ethical legal practice requires consideration of this factor.

III. THE ETHICAL RULES AND FORUM SHOPPING AS ZEALOUS REPRESENTATION

If forum shopping indeed constituted unfair and impermissible "cheating," one might expect to find a prohibition within the ethical rules that would authorize the imposition of attorney discipline upon lawyers who engage in the practice. But although "the nasty phrase 'forum shopping' ... suggests that those who represent their clients' interests [by engaging in the practice] effectively commit a breach of professional etiquette,"[150] in fact just the opposite is true. As the Preamble to the Model Rules of Professional Conduct observes, one of the basic principles underlying the Rules is "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law."[151] This statement summarizes the premise of

148. *Erie*, 304 U.S. at 78–79 (quoting Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

149. *See* Juenger, *supra* note 27, at 569 (noting that "our federalism ... invites intrasystem forum shopping").

150. *Id.* at 572.

151. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 9 (2004).

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this Article: so long as the forum shopping behavior comports with choices permitted under the law, such behavior should be supported—and is not subject to sanctions—because it falls within the legally permissible choices available to lawyers in furthering their clients' causes.[152]

The legal profession has several sources of ethical rules. The American Bar Association's Model Rules of Professional Conduct sets forth ethical rules and guidelines which, together with the former Model Code of Professional Responsibility, form the basis for most states' ethical rules.[153] The recently adopted *Restatement (Third) of the Law Governing Lawyers* summarizes the existing rules and case law and also departs from existing authority where the drafters believed better solutions were available.[154] In addition, the American Bar Association, and state, county, and local bar associations, publish formal and informal opinions concerning ethical issues.[155] One of the most enduring canons of legal ethics—that a lawyer zealously represent her client within the bounds of the law[156]—requires lawyers

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152. *See* Algero, *supra* note 51, at 106 ("[I]n many cases, an attorney's ethical duty to his client may include selecting a forum with little connection to the events giving rise to a cause of action if that forum is an acceptable forum under the law . . . ."); *id.* at 107 ("[T]he attorney's behavior should not be considered unethical when he is proceeding within the procedural and substantive limits of the law."); *id.* at 108 ("[E]xcept in those cases in which attorneys have acted outside of procedural and substantive law, attorneys should be assured that they are acting ethically when they abide by the law in selecting a forum."); *see also* Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 322 (1994) ("*Forum-shopping* is not a disparaging term; it is part of a litigator's job.").

153. *See generally* MODEL RULES OF PROF'L CONDUCT (2004) (providing current rules of professional conduct); MODEL CODE OF PROF'L RESPONSIBILITY (1982) (providing now superseded rules of professional conduct). Thirty-nine states, plus the District of Columbia and the Virgin Islands, have adopted the Model Rules; with the exception of California, the remaining states base their standards on the Model Code. *See* COMPENDIUM OF PROF'L RESPONSIBILITY RULES AND STANDARDS 517, at 7–8 & inside back cover (1997). California has adopted neither the Model Rules nor the Model Code. *See* CAL. RULES OF PROF'L CONDUCT (2004).

154. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000); *see also* Geoffrey C. Hazard, Jr., *Foreword* to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, at xxii (2000) ("In many instances, ... the Restatement significantly departs from the code formulations. These departures are carefully considered and were extensively debated. As those of us involved in the drafting of the codes will testify, many of these departures simply clarify the intendment of the code provisions and others seek to supersede drafting mistakes. Other departures reflect recognition that experience with the codes revealed that better resolutions were to be had on a variety of issues.").

155. *See, e.g.*, Am. Bar Ass'n, ABA Formal Ethics Opinions, *available at* http://www.abanet.org/cpr/ethicopinions.html; State Bar of Cal., Ethics Opinions, *available at* http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=101330id=1129.

156. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (noting "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the

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to seek the law most favorable to their clients' interests, that is, to forum shop.

Several ethical rules are relevant to this inquiry, including the rules pertaining to competence, diligence, and meritorious claims. Model Rule 1.1 addresses competence, providing that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[157] Model Rule 1.3 addresses diligence, providing that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[158] Model Rule 3.1 addresses meritorious claims and contentions, providing, in pertinent part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.[159]

The Comments to these rules provide additional guidance. Comment (1) to Model Rule 1.3 explains:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.[160]

Similarly, Comment (1) to Model Rule 3.1 provides that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within

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law"); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . ."); CANONS OF PROF'L ETHICS Canon 15 (1967) ("The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.").

157. MODEL RULES OF PROF'L CONDUCT R. 1.1.

158. *Id.* R. 1.3.

159. *Id.* R. 3.1.

160. *Id.* R. 1.3 cmt. 1.

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which an advocate may proceed."[161] Comment (2) explains that an action is frivolous "if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."[162] Taken together, these rules and comments establish the ethical foundation relevant to selecting a forum.

All of these ethical rules support the practice of forum shopping; forum shopping would be improper only when the claim was frivolous or no good-faith rationale could justify the selection of a particular forum. The ethical rules require lawyers to research thoroughly the potential forum choices available and evaluate the pros and cons of each forum, including the substantive law, procedural rules, and local rules. When more than one forum is legally authorized, the lawyer must take into account which forum is more favorable to the client's cause in selecting the forum in which to file suit.[163] Opportunities of choice in turn afford opportunities to strategize. The opportunity for strategic behavior implicates both games and rules.

IV. THE FORUM GAME: GAME THEORY AND THE RATIONALITY OF FORUM SHOPPING

The intensity of the negative rhetoric invoked against forum shopping reflects an underlying belief that forum shopping is unfair, irrational, unethical, and improper. If the law generally, the Supreme Court's jurisprudence specifically, and the ethical rules do not prohibit—and, in fact, condone—forum shopping, the next question is whether there is some form of irrationality or faulty decisionmaking at work within the practice of forum shopping.[164] Decisionmaking is a

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161. *Id.* R. 3.1 cmt. 1.

> [Comment 1 to Rule 3.1] describes well the pressures on the attorney and illustrates why attorneys should not be and cannot be expected to refrain from forum shopping within the procedural rules when doing so is in their client's best interest. This comment indicates that actions taken within the procedural and substantive rules for the benefit of a client are ethical so long as they do not constitute an abuse of legal procedure.

Algero, *supra* note 51, at 106.

162. MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2.

163. *See* Russell J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 TEX. INT'L L.J. 463, 463 (2002) ("It is part of a lawyer's job to bring suit in the forum that is best for the client's interests.").

164. Concerns regarding irrationality, and irrational results in particular, are, of course, found in the related area of conflict of laws. *See* Bruce Posnak, *Choice of Law—Interest Analysis: They Still Don't Get It*, 40 WAYNE L. REV. 1121, 1134–36 (1994) (discussing

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subject studied within many disciplines.[165] Although, at its core, decisionmaking merely means reaching a judgment or conclusion,[166] scholars study the process through which conclusions are reached for evaluative and predictive purposes.[167] Thus, when initial research reveals that the legal prerequisites for filing suit can be satisfied in more than one forum, the multiple options implicate choice and decisionmaking.[168] Moreover, the uncertainty inherent in litigation[169] draws in strategy and risk-taking behavior.[170]

In evaluating the available options in the decisionmaking process, analysis under rational choice theory has tended to predominate.[171] Rational choice theory, as its name suggests, assumes

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treatment of foreign choice-of-law rules under interest analysis as designed to avoid "irrational" results); Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1651 (2005) (describing "irrationality in choice of law" as "intractable").

165. *See* Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, *in* CHOICES, VALUES, AND FRAMES 1, 1 (Daniel Kahneman & Amos Tversky eds., 2000) (noting that "the topic of decision making is shared by many disciplines, from mathematics and statistics, through economics and political science, to sociology and psychology").

166. *See* WEBSTER'S NEW WORLD DICTIONARY 366 (2d college ed. 1982) (defining decision as "a judgment or conclusion reached or given").

167. *See* Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1115 (2003) ("Nearly every action we take and nearly every decision we make involve consequences we cannot foresee. To understand how people behave in an uncertain world, and to make viable recommendations about how the law should try to shape that behavior, legal scholars must employ, even if only implicitly, a model or theory of decisionmaking."); *see also* DIXIT & SKEATH, *supra* note 1, at 36–37 (noting that game theory can be used for explanation, prediction, and prescription purposes).

168. *See* MICHAEL W. EYSENCK & MARK T. KEANE, COGNITIVE PSYCHOLOGY 475 (4th ed. 2000) (noting that "decision making is concerned with choosing among options").

169. *See* Amos Tversky & Craig R. Fox, *Weighing Risk and Uncertainty*, *in* CHOICES, VALUES, AND FRAMES, *supra* note 165, at 93 ("Decisions are generally made without definite knowledge of their consequences. The decision[] . . . to go to court [is] generally made without knowing in advance whether . . . the court will decide in one's favor.").

170. *See* Guthrie, *supra* note 167, at 1122 (noting that "litigation is an uncertain process requiring litigants to make risky decisions"); Kahneman & Tversky, *supra* note 165, at 1 ("[A]nalyses of decision making commonly distinguish risky and riskless choices."); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 114 (1996) ("Every litigant gambles. When they choose to file suit, take discovery, file motions, decline settlement offers, and appeal, they take chances.").

171. *See* Daniel Kahneman, *New Challenges to the Rationality Assumption*, *in* CHOICES, VALUES, AND FRAMES, *supra* note 165, at 758 ("The assumption that agents are rational is central to much theory in the social sciences. Its role is particularly obvious in economic analysis, where it supports the useful corollary that no significant opportunity will remain unexploited."); Sunstein, *supra* note 69, at 1 (noting that rational choice models "have dominated the social sciences, including the economic analysis of law"). *See generally* Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, *in* RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67, 89 (Robin M. Hogarth & Melvin W. Reder eds., 1986) ("The assumption of rationality has a favored position in economics. It is accorded all the methodological privileges of a self-evident truth, a reasonable idealization, a tautology,

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that decisionmakers evaluate options rationally and act to maximize their goals and preferences,[172] seeking what is sometimes referred to as "outcome maximization."[173]

Variants of rational choice theory include expected utility theory and wealth maximization theory. Expected utility theory posits "that decision makers conduct an explicit or implicit cost-benefit analysis of competing options and select the optimal method of achieving their goals (that is, the method that maximizes expected benefits and minimizes expected costs, or maximizes net expected benefits), subject to external constraints."[174] Similarly, wealth maximization theory specifically predicts that decisionmakers will seek to maximize profits or financial well-being.[175] Thus, in the forum shopping context, the most logical choice under rational choice theory is to select the forum potentially offering the more favorable outcome, which thereby will maximize the client's economic welfare. Forum shopping is a strategy for the purpose of finding the most favorable set of rules for litigation.

Rational choice theory offers valuable insights, especially into certain types of legal decisionmaking.[176] Indeed, inadequate attention

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and a null hypothesis .... The advantage of the rational model is compounded because no other theory of judgment and decision can ever match it in scope, power, and simplicity.").

172. *See* NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM 57 (1997) (noting the basic assumption within law and economics that "individuals are rational maximizers of their satisfactions in their nonmarket as well as their market behavior"); Richard A. Posner, *Are We One Self or Multiple Selves?: Implications for Law and Public Policy*, 3 LEGAL THEORY 23, 24 (1997) (noting that "man is a rational maximizer of his ends"); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 761 (1973) ("The basis of an economic approach to law is the assumption that the people involved with the legal system act as rational maximizers of their satisfactions.").

173. *See* Guthrie, *supra* note 167, at 1115–16 ("Rational choice theory, which describes how people would behave if they followed the dictates of a series of logical axioms, posits that people make outcome-maximizing decisions."); *see also* Eldar Shafir & Amos Tversky, *Decision Making*, *in* FOUNDATIONS OF COGNITIVE PSYCHOLOGY § 26.6, at 614 (Daniel J. Levitin ed., 2002) ("The rational theory of choice assumes that each alternative has a utility or subjective value for the decision maker. Given a set of options, the decision maker selects the alternative with the highest value.").

174. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1063 (2000). Expected utility theory is expressed mathematically as "[e]xpected utility = (probability of a given outcome) x (utility of the outcome)." EYSENCK & KEANE, *supra* note 168, at 483.

175. *See* Korobkin & Ulen, *supra* note 174, at 1066 ("[N]early all law-and-economics literature on business organizations ... is built on the explicit or implicit assumption that firms seek to maximize profits. And much law-and-economics literature on individual behavior makes an analogous assumption ....").

176. Law and economics' use of rational choice theory has come under attack for its

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has been paid to the impact and significance of the specific type of legal decisionmaking at issue. Significant differences in the decisionmaking process exist between, for example, settlement decisions and forum selection decisions. One difference is the nature of the game: settlement decisions are usually characterized as a non-

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perfect rationality assumption and corresponding failure to account for human irrationality. *See* Guthrie, *supra* note 167, at 1116 ("Rational-choice-based analyses of law and legal behavior have been enormously influential, but legal scholars have begun to question the wisdom of relying on them because there is 'too much credible experimental evidence that individuals frequently act in ways that are incompatible with the assumptions of' the theory."); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1487 (1998) ("The project of behavioral law and economics . . . is to take the core insights and successes of economics and build upon them by making more realistic assumptions about human behavior."); Korobkin & Ulen, *supra* note 174, at 1056 ("The shortcomings of rational choice theory have become more apparent. Behavioral anomalies and puzzles that rational choice theory (at least relatively strong versions) cannot explain—once little noticed because of the considerable utility rational choice theory did have—began to appear more significant as the economic analysis of law gained influence within the legal community"); Rachlinski, *supra* note 170, at 114 ("Litigants' decisionmaking under risk and uncertainty may not comport with rational theories of behavior."); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, *in* CHOICES, VALUES, AND FRAMES, *supra* note 165, at 44 ("Expected utility theory reigned for several decades as the dominant normative and descriptive model of decision making under uncertainty, but it has come under serious question in recent years. There is now general agreement that the theory does not provide an adequate description of individual choice: a substantial body of evidence shows that decision makers systematically violate its basic tenets."). These criticisms have led to the modification of law and economics with psychological concepts, coined "behavioral law and economics." *See, e.g.*, Jolls et al., *supra*, at 1477–80 (incorporating the behavioral concepts of bounded rationality and bounded willpower); Korobkin & Ulen, *supra* note 174, at 1075–1112 (incorporating numerous psychological concepts, including bounded rationality, the representativeness heuristic, the availability heuristic, hindsight bias, anchoring and adjustment bias, the framing effect, and status quo bias); *see also* Thomas S. Ulen, *The Growing Pains of Behavioral Law and Economics*, 51 VAND. L. REV. 1747, 1748 (1998) ("Behavioral law and economics does not attempt to undo any of the remarkable accomplishments of law and economics. Rather, it is an attempt to refine."). *See generally* BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein ed., 2000) (compiling articles critical of law and economics' pure rationality assumption and integrating psychological concepts). However, behavioral law and economics has been criticized for going too far in the other direction by "treat[ing] all legal actors in all situations as if they were equally predisposed to commit errors of judgment and choice." Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 69 (2002); *see id.* at 77 (criticizing proponents of "behavioral law and economics" for relying on "selective and convenient interpretations of a limited data set"). Professor Mitchell notes, in particular, that individual and situational differences affect rationality in decisionmaking. *See id.* at 98–105 (discussing individual differences); *id.* at 105–09 (discussing situational differences); *id.* at 87 ("[D]epending on the characteristics of the individual and the system of thought activated in a particular decisionmaking situation, the behavior of different groups of individuals and the behavior of the same individual over time may vary considerably, from perfect rationality to seeming irrationality.").

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zero-sum game, meaning that all the players can win,[177] whereas litigation is a zero-sum game, meaning that one party wins only if the other party loses.[178] Another important difference is the ultimate decisionmaker: settlement decisions rest with the client,[179] whereas procedural and tactical decisions—including forum selection—rest with the lawyer.[180] When the client—the litigant himself—is the decisionmaker, the client's lack of familiarity with litigation and intense personal stake in the litigation can increase fear and decrease the willingness to take risks.[181] When the lawyer is the decisionmaker, however, he or she typically sits in a very different position from the client—which has distinct implications for the decisionmaking process.[182]

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177. *See* David Straus, *Facilitated Collaborative Problem Solving and Process Management*, *in* NEGOTIATION: STRATEGIES FOR MUTUAL GAIN 28, 29 (Lavinia Hall ed., 1993) ("Negotiation, mediation, facilitation, and collaborative problem solving are all examples of consensus-based win-win approaches.").

178. *See* DIXIT & SKEATH, *supra* note 1, at 21 (noting that situations where "[o]ne player's gain is the other's loss" are zero-sum games); *id.* ("[T]he idea [in zero-sum games] is that the players' interests are in complete conflict."); Straus, *supra* note 177, at 31 (noting that "taking disputes to courts" is classified a "win-lose" approach).

179. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2004) ("A lawyer shall abide by a client's decision whether to settle a matter.").

180. *See id.* R. 1.2 cmt. 2 ("Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.").

181. *See* Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 7 (2002) (noting that, according to rational choice theory, "individual litigants are presumed to be risk averse"); *accord* EYSENCK & KEANE, *supra* note 168, at 485 (noting that "choices that seem generally desirable are avoided if they produce anticipated regret"); *see also* Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation*, 1999 U. ILL. L. REV. 43, 89 ("The Regret Aversion Theory views litigants as regret-averse human beings who settle their cases at least in part to avoid the unpleasant feeling of regret.").

182. The lawyer is an agent for the client, and thus in most cases is more emotionally detached from the litigation than is the client, who has the more direct and more personal stake. Yet despite a lessened emotional involvement in the litigation, the lawyer nevertheless typically retains significant financial and reputational interests in the litigation, which tend to encourage rationality by encouraging outcome maximization—the seeking of the most favorable outcome. Rational choice theory, therefore, will tend to yield more consistent results when the legal decision at stake is forum selection than when the legal decision at stake is settlement, which potentially implicates additional distracting cognitive psychology factors. *See* Korobkin, *supra* note 181, at 12–13 (discussing implications of egocentric bias on settlement); *id.* at 31–34 (discussing implications of anchoring and framing on settlement). *See generally* DAVID G. MYERS, PSYCHOLOGY 394–95 (7th ed. 2004) (discussing the psychological concept of framing); Shafir & Tversky, *supra* note 173, at 601–10 (discussing cognitive psychology concepts of risk, framing, and loss aversion as factors in decisionmaking); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 1, 14–18 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (discussing cognitive psychology concepts of adjustment and anchoring in

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The strategy involved in forum selection also implicates game theory.[183]

> When you think carefully before you act—when you are aware of your objectives or preferences and of any limitations or constraints on your actions and choose your actions in a calculated way to do the best according to your own criteria—you are said to be behaving rationally. Game theory adds another dimension to rational behavior—namely, interaction with other equally rational decision makers. In other words, game theory is the science of rational behavior in interactive situations.[184]

Generally speaking, game theory is a collection of decisionmaking models.[185] Game theory has been applied to lawyers' behavior in litigation, but has tended to focus on factors influencing litigation versus settlement.[186] However, the basic concepts in game theory also apply to forum selection.

In the context of forum selection, the game theory issue is how the availability of more than one legal forum affects decisions

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decisionmaking).

183. *See* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 1 (1994) ("Legal scholars have long recognized the need to take account of strategic behavior. Too often, however, they have not taken advantage of the formal tools of game theory to analyze strategic behavior . . . ."); *id.* at 46 ("If a problem does not involve strategic behavior, we should not bring the tools of game theory to bear upon it."). *See generally* MORTON D. DAVIS, GAME THEORY: A NONTECHNICAL INTRODUCTION (1983) (discussing game theory concepts); R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY (1985) (same); J.D. WILLIAMS, THE COMPLEAT STRATEGYST (1982) (same).

184. DIXIT & SKEATH, *supra* note 1, at 5; *see also* David Glenn, *Nobel Prize in Economics Goes to 2 Scholars Who Developed Game Theory as Analytical Tool in Public Policy*, CHRON. HIGHER EDUC., Oct. 10, 2005, at 1 (reporting the award of the Nobel Prize in Economic Science to two game theorists, and explaining that "game theory provides a pervasive mode of analysis of human interaction").

185. John von Neumann and Oskar Morgenstern are credited with developing the foundations of game theory. JOHN VON NEUMANN & OSKAR MORGENSTERN, THE THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944). "[G]ame theory is primarily a product of mathematicians and not of scientists from the empirical fields." LUCE & RAIFFA, *supra* note 183, at 3.

> The foundations of game theory were laid by John von Neumann, who in 1928 proved the basic minimax theorem, and with the publication in 1944 of the *Theory of Games and Economic Behavior* the field was established. It was shown that social events can best be described by models taken from suitable games of strategy. These games in turn are amenable to thorough mathematical analysis.

Oskar Morgenstern, *Foreword* to DAVIS, *supra* note 183, at x.

186. *See* BAIRD ET AL., *supra* note 183, at 266–67.

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regarding where to file suit.[187] Game theory encompasses both sequential-move games, in which the player makes choices by calculating the future consequences, as well as the more highly publicized simultaneous-move games, in which the player makes choices by a more complicated anticipatory and predictive process of evaluating the opposing player's beliefs regarding what the first player thinks (the "he thinks that I think that he thinks" process).[188] The moves in forum selection are sequential, so choices are made by calculating the future consequences. The "normal form game," also known as the "strategic form" of a game, posits three elements: (1) the players, (2) the available strategies, and (3) the payoff for each strategy or possible combination of strategies.[189] The players in forum shopping include the plaintiff(s) and counsel, the defendant(s) and counsel, and any anticipated additional participants.[190]

Strategies in forum selection tend to vary because the number of forums and their respective advantages and disadvantages will vary from lawsuit to lawsuit.[191] However, for the purposes of this Article, a limited strategy space is appropriate as an example because only a binary choice is necessary to make the point. The aspect of forum shopping that generates the most criticism is the filing of suit in the forum believed to offer the potential for the most favorable outcome, rather than the forum most convenient or having the most obvious

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187. The availability of more than one forum is, of course, essential. If only one forum provides the requisite subject matter jurisdiction, personal jurisdiction, and venue, no choice is available and thus no strategy is implicated.

188. *See* DIXIT & SKEATH, *supra* note 1, at 20.

> The distinction between *sequential* and *simultaneous moves* is important because the two types of games require different types of interactive thinking. In a sequential move game, each player must think: if I do this, how will my opponent react? Your current move is governed by your calculation of its *future* consequences. With simultaneous moves, you have the trickier task of trying to figure out what your opponent is going to do *right now*. But you must recognize that, in making his own calculation, the opponent is also trying to figure out your current move, while at the same time recognizing that you are doing the same with him.

Id. (italics in original). Accordingly, game theory encompasses both sequential-move games, "where you must look ahead to act now," as well as simultaneous-move games, "where you must square the circle of 'he thinks that I think that he thinks . . . .' " *Id.* at 21.

189. *See* BAIRD ET AL., *supra* note 183, at 8.

190. Examples of such additional participants could include third-party defendants added under Rule 14(a) of the Federal Rules of Civil Procedure, or anticipated intervenors under Rule 24, among others.

191. *See* BAIRD ET AL., *supra* note 183, at 245 ("Altering the sequence or the number of moves in a game has a dramatic effect on the likely course of play. Hence, the effects of even small changes in the rules of civil procedure are often significant.").

connection to the litigation.[192] Accordingly, a full strategy space articulating every conceivable strategy is unnecessary because a more focused approach will address the heart of the underlying debate. Thus, in this model, the lawyer has two choices, both of which satisfy the subject matter jurisdiction, personal jurisdiction, and venue prerequisites—either (1) to file suit in the forum that has more favorable substantive law,[193] but seemingly has fewer connections to the claim, or (2) to file suit in the forum appearing to have more connections to the claim, but has less favorable substantive law. "Connections" to the litigation might include, among other factors, where the cause of action arose, the location of witnesses or other evidence, or the location of the defendant.

The third element is the payoff structure. "Each player's aim in the game will be to achieve as high a payoff for himself as possible."[194] Filing suit in the forum having the more favorable substantive law has the potential payoff of a higher recovery, with the potential consequence that the defendant may move to transfer venue. Of course, there is no certainty that the defendant would file such a motion, nor any certainty that a court would grant the motion. Filing suit in the forum that appears to have more connections to the claim, but less favorable substantive law, has the potential payoff of reducing the likelihood that the defendant will move to transfer venue but does not eliminate the possibility altogether, especially if the "connection" favors the plaintiff. If the defendant does not move to transfer venue, or the court denies the motion, the plaintiff is stuck with this forum, which carries the consequences of less favorable substantive law and—depending on exactly how "less favorable" the substantive law is—presents the potential for reducing the chance of prevailing at trial or reducing the likely recovery amount. Moreover, if the "connection" is that the forum is where the defendant is

192. *See* Moore & Parisi, *supra* note 50, at 1334 (noting that "the most favorable forum . . . often is not the closest or most convenient location").

193. *See* Algero, *supra* note 51, at 88 ("A review of reported cases in which forum shopping has been discussed reveals that the most common motive for forum shopping is selection of the law to be applied to the case."). Some have suggested that the potential for a sympathetic court (whether judge or jury), rather than a difference in substantive law, is the more important factor in forum selection. *See* Whitten, *supra* note 44, at 564 (asserting that "non-choice-of-law factors, such as sympathetic juries, [are] more important in a plaintiff's selection of a forum than choice-of-law doctrine"). However, even if a sympathetic court, rather than more favorable substantive law, is indeed the more important factor in forum selection, precisely the same rational choice theory and game theory analysis will apply because both encompass the same notions of increased recovery and more favorable outcome.

194. DIXIT & SKEATH, *supra* note 1, at 29.

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located, this may provide an additional benefit to the defendant, and an additional detriment to the plaintiff. The game diagram might look like this:[195]

	Forum 1 (favorable substantive law)	Forum 2 ("connections" to claim)
Plaintiff	100	-100
Defendant	-100	100

The next step is to solve the game.

Games are solved through the use of *solution concepts*, that is, general precepts about how rational parties are likely to choose strategies and about the characteristics of these strategies given the players' goals. Solving a game is the process of identifying which strategies the players are likely to adopt.

We must begin by making a fundamental assumption about how individuals make choices: Individuals are rational in the sense that they consistently prefer outcomes with higher payoffs to those with lower payoffs.[196]

"[P]layers compare their payoffs under a strategy relative to their own payoffs under other strategies,"[197] and thus "[p]layers choose the strategies that maximize their own payoffs."[198] Rational choice theory is incorporated in many game theory models,[199] and as discussed

195. *See* BAIRD ET AL., *supra* note 183, at 46 ("The two-by-two bimatrix . . . [is] well suited to analyzing the way legal rules affect the behavior of players when each must make decisions without knowing what the other will do."). The ascribed values in the diagram reflect the zero-sum nature of the game. The more favorable substantive law enhances the plaintiff's chances both of winning and of obtaining a larger recovery, and correspondingly minimizes the defendant's chances of winning or of a minimal verdict. Similarly, filing in the forum with more connections to the litigation but less favorable substantive law enhances the defendant's chances of winning or of a minimal verdict, and correspondingly minimizes the plaintiff's chances of winning or of obtaining a larger recovery. Thus, the plaintiff's odds of winning or the plaintiff's damages award can be affected by the choice of forum. Accordingly, the choice of forum carries potential implications for actual loss to the plaintiff.

196. *Id.* at 11 ("The basic assumption at the heart of this mode of analysis is not that individuals are self-interested profit-maximizers or care only about money, but rather that they act in a way that is sensible for them given their own tastes and predilections.").

197. *Id.* at 19.

198. *Id.*; *see also* DIXIT & SKEATH, *supra* note 1, at 32 (noting that game theory assumes "that each player is a rational maximizer").

199. MARTIN J. OSBORNE, AN INTRODUCTION TO GAME THEORY 4 (2004); *see also* DIXIT & SKEATH, *supra* note 1, at 30 ("Game theory assumes that all players are rational.").

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earlier, posits that decisionmakers "choose[] the best action according to [their] preferences, among all the actions available to [them]."[200] As illustrated in the diagram, the plaintiff benefits by selecting the forum with the more favorable substantive law, and receives no benefit—indeed, actually suffers loss—by selecting the alternative forum. Choosing the forum with more connections but less favorable substantive law costs the plaintiff—either in terms of the ability to recover altogether or the ability to recover a higher amount. Choosing the forum with the more favorable substantive law is the only rational choice because it maximizes the plaintiff's potential outcome. Any other choice benefits the defendant—not the plaintiff.

The possibility of settlement changes nothing with respect to strategy and payoff considerations. Most cases settle,[201] which might initially seem to suggest that the choice of forum carries less significance because the more favorable substantive law would not be put to the test of trial. However, the choice of forum frames the settlement negotiations as the parties evaluate the risks and benefits of litigation versus settlement. Filing the lawsuit in a more favorable forum gives the plaintiff greater bargaining power in settlement negotiations due to the potential for a more favorable outcome, while also securing that more favorable forum for litigation should negotiations fail.[202]

Applying rational choice theory to the process of forum selection when two or more forums are legitimate options for filing suit (or for transferring an existing suit), the rational lawyer will choose the "best" forum, typically meaning the forum that the lawyer believes will offer the potential for a more favorable outcome.[203] If the lawyer

200. OSBORNE, *supra* note 199, at 4; *see also* BAIRD ET AL., *supra* note 183, at 11, 19 ("Players choose the strategies that maximize their own payoffs. Hence, players compare their payoffs under a strategy relative to their own payoffs under other strategies."); Pamela H. Bucy, *Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups*, 35 LOY. U. CHI. L.J. 1021, 1027 (2004) ("[G]ame theory assumes that decisionmakers are rational actors who pursue their self-interest. Game theory further assumes that when making decisions, actors take into account what they expect other rational self-interested decisionmakers to do.").

201. *See* BAIRD ET AL., *supra* note 183, at 246 ("Most litigants do, in fact, settle."); *see also* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL STUD. 459, 459 (2004) (documenting that the portion of federal civil cases proceeding to trial has dropped to 1.8%).

202. *See* BAIRD ET AL., *supra* note 183, at 245 (noting that "[t]he rights that parties have at trial . . . determine the terms of settlement").

203. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 204 n.72 (1983) ("Rational behavior to an economist is a matter of consequences rather than intentions . . . ."); *see also* Ghei & Parisi, *supra* note 43, at 1378 ("A rational party will choose the forum that is most likely to yield a favorable outcome."); *id.* at 1378 n.61 (noting that the

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discerns no likely difference in the potential outcome as between (or among) forums, the lawyer will base the decision on other factors, such as greater personal convenience to the plaintiff (or greater inconvenience to the defendant) or the lawyer's greater familiarity with the applicable local rules. Accordingly, although rational choice theory and game theory do not independently render forum shopping legitimate or ethical,[204] these economic theories do address any potential concerns regarding irrationality or faulty decisionmaking. Rational choice theory and game theory support the underlying rationality of shopping for the forum that offers the potential for the most favorable outcome.

The law regularly provides more than one authorized, legitimate forum in which a litigant's claims may be heard. To shop among those legitimate choices for the forum that offers the potential for the most favorable outcome is the only rational decision under rational choice theory and game theory because forum shopping maximizes the client's expected payoff. Maximizing the client's expected payoff is also a lawyer's obligation under the ethical rules. Accordingly, forum shopping is a legitimate, rational, ethical practice endorsed and required by the rules of professional conduct. The sanctioning of forum shopping would be authorized under only two circumstances. The first of these circumstances is when forum shopping is accompanied by impermissible activity, such as when a lawyer initially files the lawsuit in a forum obviously lacking subject matter jurisdiction, personal jurisdiction, or venue, or when a lawsuit is dismissed with prejudice but the lawyer refiles the action in a different court without acknowledging the bar of res judicata.[205] The second of these circumstances is when the sanctioning of forum shopping has expressly been authorized, which is the subject of the next Part.

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party selecting the forum "will choose one that maximize[s] expected net benefits").

204. *See* DIXIT & SKEATH, *supra* note 1, at 30 ("[B]eing rational does not mean having the same value system as other players, or sensible people, or ethical or moral people would use; it means merely pursuing one's own value sysetm consistently.").

205. *See* Algero, *supra* note 51, at 108 ("The published cases in which attorneys have been sanctioned for forum shopping have involved attorneys who have shopped for better results for their clients after courts have ruled against their clients. The attorneys have essentially ignored the rulings of the original courts and have shopped for better results, not by filing appeals, but by filing independent actions."); *see also* Juenger, *supra* note 27, at 558 (noting that before the passage of legislation, the possibility of relitigating child custody determinations sometimes led to the kidnapping of the child by the non-custodial parent to another forum).

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V. THE MYTHS UNDERLYING THE PERCEPTION OF FORUM SHOPPING AS "CHEATING"

If forum shopping involves legitimate choice under the law and the ethical rules, and constitutes a rational decision under rational choice theory and game theory, why does the practice have a bad name? The intense reaction evoked by forum shopping is the result of unexamined assumptions. The level of antipathy toward forum shopping implies that the practice constitutes some sort of "cheating," amounting to a subversion of justice. Examining this notion yields several possibilities: (1) forum shopping for a potentially more favorable result is itself cheating—which implies that only one "proper" forum exists for any given lawsuit; (2) the "law," and penalties for violating the law, are consistent across forums, and thus efforts to obtain a more favorable outcome necessarily implicate some form of cheating; and (3) forum shopping to obtain a more favorable result undermines justice's fairness and impartiality by suggesting that justice is subject to manipulation. All of these assumptions are flawed, as explained below.

A. *The "One Proper Forum" Myth*

If only one proper forum existed for any given lawsuit, attempting to subvert that forum by initially filing suit in, or subsequently transferring the suit to, a different forum in order to obtain a more favorable outcome would suggest a form of "cheating" that would justify current animosity toward forum shopping.[206] Typically, however, more than one legitimate option is available.[207]

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206. The notion of "one proper forum" reflects the largely-repudiated lex loci approach to choice of law:

> In the late nineteenth and early twentieth centuries, choice of law decisions and thinking came to be dominated by a vested-rights approach: only the jurisdiction where the dispute arose was capable of giving parties the right to contest a dispute in court. This model provided the intellectual foundation for the traditional approach to conflict of laws cases, embodied in the *First Restatement of Conflict of Laws* by Reporter Joseph Beale, and variously described as the territorial, *situs* or lex loci approach. The suit was controlled by the substantive law of the place where the tort or the injury occurred, where land was located, where a contract was consummated or was to be performed, and the like.

Solimine, *supra* note 44, at 51; *see id.* at 54 (noting that "by 1989, only fourteen states still adhered" to the lex loci approach); *see also supra* notes 63–68 and accompanying text (discussing choice of law principles).

207. *See supra* notes 38–44 and accompanying text (discussing choices between federal

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By virtue of providing for the concurrent jurisdiction of federal and state courts for most claims, authorizing the constitutional reach of personal jurisdiction to wherever defendants have "minimum contacts," and providing multiple acceptable options for venue, multiple legitimate forums for filing suit will necessarily follow. Therefore, by its very nature, the law supports a lawyer's selection of one forum over another.

B. *The "One Proper Law" Myth*

States create their own substantive and procedural laws. Each state has a long-arm statute, in which the state legislature has defined the state's potential reach over nonresident defendants.[208] Each state has one or more venue statutes, in which the state legislature has defined the parameters for appropriately suing in that state.[209] And each state has numerous statutes setting forth that state's substantive law in a broad variety of subject matter areas, including crimes, torts, contracts, property, taxation, environmental, and myriad other areas.[210] Although many federal laws with a nationwide uniform application exist, federal law is not the norm. Most lawmaking is left to the states. State legislatures consider their state's strengths, weaknesses, goals, policies, finances, and powerbrokers, and craft laws tailored to their state's needs. State autonomy is part of the constitutional equation: the federal government has limited, specifically enumerated powers, and all other powers rest with the states.[211]

As a result of their independence and autonomy, laws vary from state to state.[212] Some states have enacted laws more protective of

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and state courts and among states).

208. *See* CASAD, *supra* note 24, app. B (setting forth state long-arm statutes).

209. *See id.* § 6:05, at 6-10 to -11 ("If the defendant is sued in a state court that the defendant feels is inconvenient, but which is not so inconvenient that it would be a denial of due process to force the defendant to defend there, the defendant cannot seek to have the case transferred to a state court in another state. The defendant can move to have the suit dismissed for forum non conveniens, but for such a motion to succeed, the court must be convinced that the forum is seriously inconvenient.")

210. *See* J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) ("The lack of uniformity in state substantive law, compounded by proliferation of state long-arm statutes, has made forum-shopping, among both federal and state courts, a national legal pastime.").

211. *See* U.S. CONST. amend. X (reserving to the states those powers not specifically delegated to the United States).

212. *See* Brown, *supra* note 17, at 664 ("American common law will often vary from state to state, reflecting both the differences in state values and the different organs used to express those values. These differences comprise one of the hallmarks of our system.").

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environmental concerns and carrying stiffer penalties for violations.[213] Some states impose hefty state income taxes, while other states impose no state income taxes at all.[214] Some states have enacted laws intended to encourage businesses to incorporate or locate operations there.[215] Some states have enacted statutory caps on certain kinds of damages.[216] The list goes on and on. In each instance, state legislatures have expressed priorities, goals, or concerns specific to their electorate, to their state's circumstances (financial and otherwise), and perhaps more cynically, to their most powerful special interest groups.[217] Accordingly, there is no such thing as one proper law because "the law" varies from state to state.

Differences in the applicable law can lead, not surprisingly, to different outcomes.[218] Research has demonstrated the practical reality that choice of forum influences litigation outcomes. For example, a study by Professors Kevin Clermont and Theodore Eisenberg employing a thirteen-year database of three million federal

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213. *See, e.g.*, Robert F. Gruenig, *Killington Mountain and Act 250: An Eco-Legal Perspective*, 26 VT. L. REV. 543, 544 (2002) (describing Vermont's Land Use and Development Law, known as Act 250, as "promot[ing] economic growth while preserving and protecting the state's environmental and ecological integrity"); Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 784 (2004) (noting that New Hampshire "relied heavily on informal [environmental] enforcement practices and that penalties were sought against only a few of the worst violators each year").

214. *See, e.g.*, William A. Drennan, *Changing Invention Economics by Encouraging Corporate Investors To Sell Patents*, 58 U. MIAMI L. REV. 1045, 1136 (2004) (noting that "some states with particularly high corporate income tax rates are: Iowa 12%; North Dakota 10.5%; Pennsylvania 9.99%; and Minnesota 9.8%"); Carolyn Joy Lee, *Mergers and Acquisitions from A to Z: Overview of State and Local Tax Considerations*, PLI Order No. 5830, Jan. 2005, at 124 (noting that Florida has no state income tax, whereas New York imposes a "sizeable" state income tax). *See generally* STATE TAX GUIDE—ALL STATES (CCH) ¶ 15-100, at 3513–10 (stating that Texas has no state income tax).

215. *See* Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 1, 65 (1990) (discussing a Delaware statute limiting directors' liability and the resultant reincorporation of many businesses in Delaware).

216. *See, e.g.*, CAL. CIV. CODE § 3333.2 (West 1997) (imposing $250,000 cap on non-economic damages, such as pain and suffering, in medical malpractice cases); LA. REV. STAT. ANN. § 40:1299.42(b)(1) (2001) (limiting all damages except medical expenses in medical malpractice cases); S.D. CODIFIED LAWS § 21-3-11 (Michie Supp. 2003) (capping total general damages in medical malpractice cases).

217. *See* Darwin Farrar, *In Defense of Home Rule: California's Preemption of Local Firearms Regulation*, 7 STAN. L. & POL'Y REV. 51, 53 (1996) (noting that "well-funded special interest groups can play a significant role in the development or demise of state legislation").

218. *See* Ghei & Parisi, *supra* note 43, at 1368 ("[T]he fact that more than one state can legitimately exercise jurisdiction over the parties creates the possibility that the outcome depends on the choice of forum.").

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cases concluded that a plaintiff's rate of winning is fifty-eight percent in cases remaining in the forum where originally filed, but drops to twenty-nine percent in cases transferred to a different forum.[219] Thus, in some cases, forum selection may affect the litigation outcome.

The notion of forum "shopping" implies that some factors considered in deciding where to file an action are improper. In particular, shopping for favorable law carries a negative connotation, suggesting that a difference in law is an illegitimate, unfair consideration akin to dealing from the bottom of the deck. If the "law" was indeed "the law," rendering consistent findings of liability and consistent consequences, attempting to subvert the one appropriate outcome by seeking to obtain a more favorable outcome would suggest a form of "cheating" that would justify animosity toward forum shopping. This rationale is reminiscent of the theory underpinning *Swift v. Tyson*[220]—the now-repudiated notion that the law was "the law," unchanging and subject to only one proper interpretation.[221] Yet the remnants of that theory remain within the condemnation of forum shopping by suggesting that the potential for different outcomes is due to improper forum shopping rather than recognizing that the potential for different outcomes is inherent within our system of government.

The differences in state law are real—and the differences are expressly authorized by our form of government.[222] These differences

219. *See* Clermont & Eisenberg, *supra* note 7, at 1507; *see also* Cameron & Johnson, *supra* note 57, at 825–28 (employing a more limited sample of Supreme Court decisions, and concluding "the study suggests, at a bare minimum, that jurisdictional rules may have an impact on the substantive outcome of cases"); Clermont & Eisenberg, *supra*, at 1508 ("Venue is worth fighting over because outcome often turns on forum."); Frederick N. Egler, Jr., *The Fine Art of Forum Shopping*, LAW. J., June 18, 1999, 4, 4 ("As most courtroom veterans know, how a case ends is often determined by how it begins. Of the many considerations which surround commencement of a civil action, none is more important than the choice of forum.").

220. 41 U.S. 1 (1842).

221. Ronald Dworkin refers to this concept as "mechanical jurisprudence."

> [The nominalists] think that when we speak of 'the law' we mean a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges, and that when we speak of legal obligation we mean the invisible chains these mysterious rules somehow drape around us. The theory that there are such rules and chains they call 'mechanical jurisprudence,' and they are right in ridiculing its practitioners .... A superficial examination of our practices is enough to show [that] we speak of laws changing and evolving, and of legal obligation sometimes being problematical. In these and other ways we show that we are not addicted to mechanical jurisprudence.

RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 15–16 (1978).

222. *See* Ryan, *supra* note 37, at 201 (noting that a potential "explanation for the

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in state law can and often do result in different outcomes. Accordingly, there is not merely one "right" result; the correct result will depend, at least in some cases, on the applicable law. With the litigation outcome potentially at stake, the lawyer must research which forums are lawfully and legitimately available, and, if a choice of forums exists, she must select the forum that will further her client's interests. Perhaps the particular approbation reserved for choices made due to differences in the law reflects disquiet at the not-so-secret point that there isn't one path to—or definition of—justice.

C. *The "Manipulable Justice" Myth*

Some find forum shopping as a litigation strategy offensive due to the implication that justice is thereby susceptible to strategy and manipulation. Surely we can all relate to this concern, but perhaps this initial reaction briefly blinds us to the reality that this is merely a variant of the prior two assumptions.

To say that our system of justice is subject to manipulation (although phrased in a pejorative manner, to be sure) is simply to acknowledge that more than one legitimate forum may be available and that laws vary from state to state. The so-called "manipulation" is, in actuality, merely the ability to choose among legitimate options, and thus is an extension of the "one proper forum" and "one proper law" myths.

> The perceived importance of uniformity and nonmanipulability derives from a popular version of legal positivism that sees the law as clearly and fully established by identifiable social rules .... Within the positivist framework, the set of valid rules exhaustively describes legal rights and duties, and judicial decisions outside these rules are purely discretionary and extralegal.[223]

Despite understanding that lawyers often have legitimate choices regarding where to litigate, and despite understanding that laws vary from state to state, thus affording the potential for differences in outcome, harsh reactions to forum shopping continue. The contradictions inherent in our legal system are especially pronounced in forum shopping, because the very act of selection takes notice of differences in laws, rules, and court systems. In addition, there is an insistence that justice requires impartiality, fairness, and

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toleration—or encouragement—of forum shopping is federalism").

223. Note, *supra* note 23, at 1685.

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consistency[224]—even though those idealistic attributes are far from fully integrated into all aspects of law and the legal system.[225] When laws vary from state to state, results may differ depending on the forum. When procedures and deadlines vary, results may differ depending on the forum. In close cases, results may differ depending on the forum. Forum shopping reminds us of these inconsistencies: a reminder of truths that many would rather ignore.

A more plausible, if more cynical, explanation for the current resistance to forum shopping can be found in the sphere of politics. The recent debates draw on resistance to plaintiffs' lawyers and are driven, at least in part, by defendant-oriented political interests.[226] Often overlooked in the political debates are countermeasures available to defendants, such as removal, the opportunity to bring a venue transfer motion, and the defendant's virtually complete control over the choice of forum in cases implicating a forum selection clause,[227] as well as other benefits to defendants more generally.

> [E]ven if forum shopping is relatively pro-plaintiff, it would be unrealistic to see it as a deviation from some baseline of neutrality. Other aspects of our system are distinctly pro-defendant and tend to counterbalance the pro-plaintiff attributes of forum shopping. That forum shopping may

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224. *See, e.g.*, RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 75 (1983) ("Insofar as the law has an implicit economic structure, it must be rational; it must treat like cases alike."); Note, *supra* note 23, at 1685 (noting that "[c]onsistency of outcomes is a fundamental tenet of virtually any legal system").

225. *See* J. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS, at x (1986) (noting "the American habit of shopping for favorable laws, first in local legislatures, then in Congress, and finally in courts"); *see also* Note, *supra* note 23, at 1686 (noting that "dominant American legal ideology continues to deny the political aspects of law"); *id.* ("Squeamishness about forum shopping ... can be seen as part of society's continuing unwillingness to abandon its transparently unfulfillable ideal of the pure rule of law.").

226. *See* Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 LA. L. REV. 907, 916 (1994) (noting that "[a]gitation for 'tort reform' has produced a motley array of laws lobbied by powerful and well-organized special interest groups" and has led to, among other things, "arbitrary caps on damages, stunted limitation periods, [and] 'statutes of repose' that ban actions before they arise"); Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 724 (1996) (noting that "[t]he lobbying campaign by tort reform special interest groups has been especially effective in the states"); Georgene M. Vairo, *Class Action Fairness Act of 2005* 1 (Loyola-LA Legal Studies Paper No. 2005-22, 2005), *available at* http://ssrn.com/abstract=806405 ("The political nature of [the Class Action Fairness Act] cannot be disputed.").

227. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (upholding a standard forum selection clause appearing in small print on the back of a cruise ship ticket); *see also* Brown, *supra* note 17, at 688 (noting that the Supreme Court "has taken a markedly pro-defendant stance" with respect to forum selection clauses).

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> marginally assist plaintiffs is certainly no more unfair than the fact that litigation costs present barriers to plaintiffs. The policy against forum shopping does not eliminate unfair advantages within the legal system.[228]

Measures such as the current proposed congressional legislation seek to change the rules of the forum game by circumscribing plaintiffs' forum options.[229] The proposed legislation, however, would merely exchange one perceived imbalance for another. Placing a congressional "thumb on the scales" does not create equality,[230] but instead merely shifts the power to the other side due to the zero-sum nature of the forum game. There is no such thing as leveling the playing field in litigation.[231] The inability to—and perhaps the actual undesirability of—striking a perfect balance for both sides at every moment in litigation leads to choices, and our system creates lawful forum choices while simultaneously creating lawful counterbalances for those circumstances when initial forum choices are genuinely unfair.

Of course, the law is not static and shifts in policy can be the motivation for legal reform.[232] However, the criticisms of forum

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228. Note, *supra* note 23, at 1688–89; *see id.* at 1689 n.91 (noting that "[a]spects of the legal system that are biased toward, or generally improve the position of, the defendant include the cost, time, and informational barriers to access to the legal system, difficulties in obtaining proof that may be in the defendant's possession, and, in some cases, the slow progress of legislatures in enacting remedies for widely-perceived wrongs").

229. *See supra* notes 14–15 and accompanying text (discussing the Lawsuit Abuse Reduction Act of 2005, now pending in Congress).

230. The notion of "leveling the playing field" is more of the same forum game. "Leveling" the playing field suggests, of course, that an imbalance exists—an imbalance created by the availability of choices that potentially may affect the outcome, thus bringing us back to the "one proper forum" and "one proper result" myths. A "level playing field," like the other myths discussed in this section, is the chasing of a chimera. There isn't one proper result. Parties litigate cases precisely because the outcome is uncertain—because the plaintiff(s) and the defendant(s) do not see only one possible outcome (or at least do not see the same sole possible outcome). The potential differences in outcome resulting from forum selection have nothing to do with cheating or unfairness, and instead have everything to do with our system of government, which gives each of our fifty states constitutionally-authorized lawmaking powers. *See infra* notes 236–37 and accompanying text (discussing federalism concerns).

231. *See* Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 71 (1991) ("It would be comforting to believe that taking a litigational advantage from plaintiffs simply levels the playing field. But we have seen that litigation has little neutral ground. A single litigation is a zero-sum game.").

232. *See* T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915, 919 (1995) (documenting welfare reform package as a "dramatic shift in national policy"); Iris Geva-May & Allan Maslove, *What Prompts Health Care Policy Changes? On Political Power Contests and Reform of Health Care Systems (The Case of Canada and Israel)*, 25 J. HEALTH POL. POL'Y & L. 717, 727 (2000) (noting that, generally

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shopping are not formulated in terms of shifts in policy. Arguments are not posed in terms of the desired ability to shift the balance in favor of corporate interests and against individuals harmed by those corporations.[233] Forum shopping is characterized as a form of cheating rather than a legitimate, authorized option. The blatant inaccuracy of this characterization demands correction—and if the underlying motive is to shift policies to favor corporate defendants, this underlying motive should be stated directly and publicly.

VI. FEDERALISM CONCERNS INHERENT IN ATTEMPTS TO RESTRICT THE FORUM GAME

Thus far, this Article has discussed the kinds of choices that constitute forum shopping, legal and ethical guidance, and the consistency of forum shopping with the economic theories of rational choice and game theory. This Article has argued that the availability of more than one lawfully-authorized forum creates legitimate choice, and that lawyers ethically and rationally are compelled to seek the most favorable forum to further their clients' interests. Every available indication is that forum shopping is a legitimate practice. But what if, nevertheless, Congress acts to limit the availability of, and to sanction the practice of, forum shopping? It is to this potential forum game that this final Part turns.

Calls for tort reform manifest themselves in periodic congressional proposals, variants of which emerge on a regular basis. As noted at the outset of this Article, one current proposal seeks to sanction forum shopping[234] and to federalize venue by limiting forum

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speaking, some reform occurs in response to a crisis, and other reform through "slowly emerging, incremental policy shifts").

233. *See* Timothy L. O'Brien & Jonathan D. Glater, *Robin Hoods or Legal Hoods?, The Government Takes Aim at a Class-Action Powerhouse*, N.Y. TIMES, July 17, 2005, at A1 (noting that class actions have been the subject of "partisan legislative battles for more than a decade," and that "Republicans, heavily financed by corporate coffers, have sought to rein in the plaintiffs' bar"); *see also* Michele Heller, *Next in Line on Senate Panel, a "Catalyst" for Bills, Deals*, AM. BANKER, June 3, 2005, at 4 (noting that the Class Action Fairness Act "mov[es] more cases from state to federal courts, which generally pose higher hurdles for plaintiffs"); *Phillip Morris Sued for False Advertising*, KAN. CITY STAR, July 26, 2005, at D16 (reporting that "[b]usiness interests lobbied heavily for the [Class Action Fairness Act] .... Federal courts are generally seen as less hospitable to class actions than state courts.").

234. The Lawsuit Abuse Reduction Act of 2005 would amend Rule 11 of the Federal Rules of Civil Procedure to return the rule to its 1983 version. *See* H.R. REP. No. 109-123, § 2, (2005), *available at* http://frwebgate.access.gpo.gov/cig-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h420rh.txt.pdf. Interestingly, the 1983 version of Rule 11 was widely regarded as ineffectual. *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1933 (1989) (stating that,

options in both federal and state court.[235] Overlooked in Congress's zeal are several important considerations.

Federalizing venue eliminates choices created by the states themselves. Congress should undertake to subvert intentionally crafted state legislation only with the utmost caution, and only under compelling circumstances. The Constitution expressly limits Congress's incursions into states' powers to those specifically enumerated.[236]

The drafters of the Constitution were faced with two competing

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with respect to the 1983 version of Rule 11, which provided for mandatory sanctions, "so long as abuses at which Rule 11 is directed are defined to include papers deemed legally frivolous, the detection of violations will be as determinate, and hence as uniform, as the notion of frivolousness itself"); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 516 (2004) (noting that the 1983 version of Rule 11, providing for mandatory sanctions, contained the potential for chilling vigorous advocacy and stating that, "[m]any lawyers were so chilled in the 1980s and early 1990s: A 1980s American Judicature Society study found that almost one-third of lawyers representing civil rights plaintiffs reported that they had declined a present a claim they believed to be meritorious"); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1324 (1986) (discussing the 1983 version of Rule 11, setting forth empirical information, and concluding that "[a]ggressive use of Rule 11 sanctions to punish lawyers threatens to chill vigorous advocacy and restrict access to the courts in ways that do not appear to have been intended by the drafters").

> [The 1983 version of Rule 11 was] designed to reduce the number of frivolous lawsuits and motions, by requiring the lawyer to refrain from taking positions that reasonable investigation would have shown to be unfounded. The goal appears modest enough, and laudable. Yet the threat of sanctions may deter not only frivolous cases, but also potentially meritorious cases from being filed and pursued.

Nelken, *supra*, at 1340. The Lawsuit Abuse Reduction Act of 2005 would render sanctions mandatory rather than discretionary, would eliminate the twenty-one day safe harbor, and would extend Rule 11's reach to include "any civil action in State court . . . affect[ing] interstate commerce." H.R 420 §§ 2–3 (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h420rh.txt.pdf; *see also* H.R. Rep. 109-123, at 4 (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr123.109.pdf (expressly noting the intent of the Lawsuit Abuse Reduction Act to eliminate the twenty-one-day safe harbor); McMillion, *supra* note 14, at 62 ("If passed, the Lawsuit Abuse Reduction Act would replace judicial discretion with mandatory sanctions against attorneys for frivolous filings in federal cases and eliminate the safe harbor provision.").

235. *See supra* note 14 and accompanying text (setting forth the pertinent provisions of the Lawsuit Abuse Reduction Act of 2005); *see also* McMillion, *supra* note 14, at 62 (noting that the Lawsuit Abuse Reduction Act "also would apply those Rule 11 provisions to civil cases related to interstate commerce that are in state courts").

236. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

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> considerations. On one hand, the framers sought to establish a government that was strong enough to serve certain important purposes. On the other hand, they were concerned about the potential dangers of centralizing too much power at the national level, fearing that such a concentration would unduly reduce the authority of the state governments and generally threaten the liberty of the citizenry. In an effort to accommodate both concerns, the drafters created a federal government of enumerated powers and, in the tenth amendment, reserved all residual authority to the states. Madison emphasized this point in The Federalist No. 46, noting that under the Constitution, "all the more domestic and personal interests of the people will be regulated and provided for" by the state governments. In other words, the existence of the federal government was not intended to change the legal incidents and consequences of normal, day-to-day relationships between citizens.[237]

Over time, Congress learned it could skirt this limitation by interpreting broadly its power to regulate interstate commerce.[238]

> [F]or much of the late 20th century Congress has been able to do almost anything under an expansive reading of the power to regulate interstate commerce. The durability of this expansive reading of the commerce power owes a great deal to the prestige of the civil rights acts of the 1960s, upheld as a legitimate congressional regulation of interstate commerce. Thankfully, few modern lawyers wish to argue that federal antidiscrimination law exceeds congressional authority. And, perhaps as a consequence, until recently modern courts have by and large accepted the truism that almost any activity, anywhere, potentially affects interstate commerce and is subject to congressional regulation, provided that Congress makes a symbolic gesture at its potential interstate effects.[239]

The proposed congressional legislation currently pending invokes interstate commerce with respect to extending Federal Rule of Civil Procedure 11 to apply to state court, as well as federal court,

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237. Maltz, *supra* note 16, at 239.

238. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes ....").

239. Richard Thompson Ford, *The New Blue Federalists*, SLATE, Jan. 6, 2005, http://slate.msn.com/id/2111942.

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proceedings,[240] but does not take such care with the venue provision. Even assuming, however, that the interstate commerce clause can constitutionally support the federalization of venue, the more important question is whether Congress should take such a step.[241] Congressional tinkering with forum selection stomps squarely on states' toes. Congress should tread more carefully.

The congressional proposal to limit forum options is founded on a misguided underlying premise—the assumption that there is only one proper result, which is a corollary of the "one proper forum" and "one proper law" myths explored earlier. Restricting forum options is, of course, aimed at limiting forum shopping and assumes that such forum limitations will ensure consistent verdicts, which in turn assumes that there is one proper result. As we have seen, however, if the law provides for more than one legitimate forum, and if different states legitimately have different laws due to our governmental structure, these different laws potentially will lead to different outcomes, at least in some circumstances. The notion of "one proper result" is an erroneous premise in light of the potential differences in the applicable law, the vagaries of fact investigation and discovery, the potential for lawyer error or poor tactical choices, and the necessity in fully litigated cases for formal factfinding—factual determinations that shape both liability and damage outcomes. Accordingly, the proposal reflects Congress's attempt to declare that there is one proper result, when one proper result does not, and cannot, exist.

If congressional action were necessary in order to remedy flaws

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240. *See* H.R. 420, 109th Cong. § 3, (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h420rh.txt.pdf.

> In any civil action in State court, the court, upon motion, shall determine within 30 days after the filing of such motion whether the action affects interstate commerce. Such court shall make such determination based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted. If the court determines such action substantially affects interstate commerce, the provisions of Rule 11 of the Federal Rules of Civil Procedure shall apply to such action.

Id.

241. *See* Ford, *supra* note 239 ("Sensible federalism has its limits: It must not allow states to limit the enjoyment of important rights, and it must allow for federal regulation of activities with significant interstate effects."); *see also* McMillion, *supra* note 14, at 62 (reporting that the American Bar Association opposes the Lawsuit Abuse Reduction Act of 2005 "because it seeks to circumvent the process for amending federal court procedures set forth in the Rules Enabling Act. The ABA also opposes the bill on grounds that it would violate principles of federalism by imposing the changes in Rule 11 on certain cases filed in state courts.").

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within the practice of forum shopping, the proposed legislation could be justified. But this is not the case. Instead, congressional proposals would take extreme action in an area where procedures and remedies are already in place to correct genuine abuses. "Cheaters" certainly can create problems—that is a truism applicable in every area. Forum shopping, however, is not in and of itself "cheating," and the broad-brush attack on forum shopping is merely an ill-disguised attempt to shift the existing litigation balances to favor defendants.

The states clearly do not believe congressional intervention is necessary. Obvious remedies are available if states believe that litigants are illegitimately filing lawsuits in their state to tap into more favorable law. States can amend their long-arm statutes to exercise personal jurisdiction over nonresident defendants under narrower, more limited circumstances. States can enact more restrictive venue statutes. States can shorten limitations periods, restrict remedies, and cap damages. If states have not chosen to take these steps, it would appear that they do not view forum shopping within their state as a significant issue. Absent significant, widespread state concern, Congress should refrain from such an overreaching intrusion into states' constitutionally-authorized lawmaking powers.

CONCLUSION

The attempt to criticize and trivialize forum selection through the label of forum "shopping" misapprehends the forum game by treating forum selection as a parlor trick—as unfair and abusive—rather than as a lawful, authorized strategy. Forum shopping is not a form of "cheating" by those who refuse to play by the rules. Playing by the rules includes the ability of plaintiff's counsel to select—and defense counsel to attempt to counter—the set of rules by which the litigation "game" will be played. The availability of more than one legally-authorized forum results in legitimate choice, and lawyers ethically are compelled to seek the most favorable forum to further their clients' interests. Selecting the most favorable forum is a rational strategy under law and economics' rational choice theory and game theory. The widespread criticism of forum shopping simply does not withstand scrutiny. Accordingly, current congressional proposals aimed at limiting and sanctioning forum shopping unnecessarily threaten to intrude upon states' legitimate, constitutionally-conferred lawmaking powers.

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