PROCEDURAL JUSTICE IN PARALLEL LAWSUITS

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The American public places a high value on access to justice and having the opportunity to be heard. These values can either be upheld or diminished by routine procedural rules. The first-to-file rule is an example of an innocuous procedural rule that is a barrier to justice. Under the first-to-file rule, when two parallel suits are filed in different federal district courts, the first-filed suit will proceed, and the second-filed suit will ordinarily be dismissed or transferred to the venue of the other suit. Transfers often terminate an individual's case because most people cannot afford to litigate far from home. By contrast, wealthy corporate litigants are unbothered by transfers. So, although the first-to-file rule is facially neutral, its application favors sophisticated litigants who can file suit more quickly than unsophisticated litigants. Nonetheless, in a David versus Goliath situation, courts will not consider the relative size and financial ability of the parties in deciding whether to transfer a case.

Not only is the first-to-file rule biased toward sophisticated, wealthy litigants, it is out of step with other venue-transfer analyses. When federal district courts hear motions to transfer under the federal change-of-venue statute, 28 U.S.C. § 1404, or motions for forum non conveniens, they can consider the relative means of the parties. This Article therefore proposes eliminating the first-to-file rule and addressing parallel suits under the federal change-of-venue statute. This will allow courts to assess the relative financial means of the parties and, where there is a disparity, to prioritize the venue chosen by the party with lower means.

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INTRODUCTION

The first-to-file rule has been described as a traffic director.[1] Imagine the first-to-file rule standing sentry as two vehicles (dueling lawsuits) approach an intersection. The law requires the traffic director to wave ahead whichever vehicle gets to the intersection first.[2] To the second arriver, the traffic director will hold up a hand, signaling that the vehicle must stop.[3] Is this a fair rule?

If all litigants drove the same vehicles, perhaps the first-to-file rule would be fair. But that is not the case. Some drive new Aston Martins. Others rely

1. *See* Michael Cicero, *First-to-File and Choice-of-Forum Roots Run Too Deep for Micron to Curb Most Races to the Courthouse*, 90 J. PAT. & TRADEMARK OFF. SOC'Y 547, 562 (2008); *see also* Chavez v. Dole Food Co., 836 F.3d 205, 210 (3d Cir. 2016).
2. *See* Cadle Co. v. Whataburger of Alice, Inc., 174 F.3d 599, 603 (5th Cir. 1999).
3. *See id.*

on Toyotas or vintage Volkswagens, and some cannot afford a car at all. Which of these, do you imagine, will arrive first to the intersection? Surely the Aston Martin will obtain the traffic director's nod of approval every time, while the rest will only ever see an upheld hand: "sorry, too late."[4] The first-to-file rule mimics fairness, but in real life, it is procedurally unjust.

As this metaphor suggests, unsophisticated litigants will almost always lose a race to the courthouse against an experienced, wealthy litigant. One such case involved Harold Marquez, a sales representative for Berkshire International Corporation ("Berkshire International").[5] Berkshire International, based in Pennsylvania, assigned Mr. Marquez a sales territory of Puerto Rico and the Virgin Islands.[6] Mr. Marquez lived and worked in his sales territory.[7] Eventually, a dispute arose in the relationship.[8] Each party claimed the other had breached their contract.[9]

Berkshire International sued Mr. Marquez for breach of contract, filing in the U.S. District Court for the Eastern District of Pennsylvania.[10] Forty-six days later, Mr. Marquez filed a substantially similar lawsuit in the U.S. District Court for the District of Puerto Rico.[11] Only one suit could proceed.[12] Unsurprisingly, the behemoth Berkshire International got to choose the forum because it was the first to file suit.[13]

The Eastern District of Pennsylvania cared only about who won the race to the courthouse and found that "no extraordinary circumstances" warranted allowing the litigation to happen in Puerto Rico.[14] The court did not consider whether it might be difficult for Mr. Marquez to litigate in the continental United States while living in Puerto Rico, nor did the court consider whether Berkshire International could easily afford to litigate in Puerto Rico—both of which were obviously true.[15] Instead, the court chastised Mr. Marquez, stating that it was clear that his claims "should have been filed as a mandatory counterclaim" under Rule 13(a) of the Federal Rules of Civil Procedure (FRCP).[16]

After losing the first-to-file argument, Mr. Marquez moved to transfer the action from the Eastern District of Pennsylvania under 28 U.S.C. § 1404(a).[17]

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4. Surely the second arrivers will eventually stop trying to win the race at all. *Cf.* LEGAL SERVS. CORP., THE JUSTICE GAP § 4 (2022), https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1 [https://perma.cc/AH7C-YZ4P] ("While a significant majority of low-income Americans faced at least one civil legal problem in the past year, they rarely sought legal help.").
5. *See* Berkshire Int'l Corp. v. Marquez, 69 F.R.D. 583, 585 (E.D. Pa. 1976).
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.* at 585–86.
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *Id.* at 587.
15. *See id.*
16. *See id.* at 588.
17. *See id.* at 589.

The federal change-of-venue statute would have allowed the court to consider more nuanced arguments, such as the relative financial means of the parties.[18] Unfortunately, the court was unsympathetic and denied Mr. Marquez's § 1404 motion, too.[19] The court reasoned that transfer would "at best only shift the inconvenience from the defendant to the plaintiff."[20]

Although that case was decided in 1976, very little has changed in modern jurisprudence.[21] The first-to-file rule still requires courts to ignore the relative means of the parties.[22] Mr. Marquez's case likely would be treated the same way today, with zero consideration being given to the ability of the natural person to litigate so far from home.[23]

Mr. Marquez's circumstances resemble those of many civil litigants whose needs are subjugated to the needs of wealthier litigants under the fiction that it is no different to shift the inconvenience of litigation from one party to the other.[24] To be sure, courts need a way to decide which of two parallel suits should proceed. If both cases were litigated simultaneously, courts would face inconsistent outcomes, inefficiencies, and a race to final judgment with preclusive effect.[25] Allowing both cases to proceed would also undermine notions of comity and judicial legitimacy.[26]

To resolve the messy problem of duplicative suits, the federal courts developed the first-to-file rule, which prefers whichever action was filed earlier in time.[27] Ordinarily, the second-filed case should be transferred and

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18. *See id.* at 589–90.

19. *See id.* at 590.

20. *Id.*

21. *See, e.g.*, Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987); Colton v. Cont'l Res., Inc., No. 22-00208, 2022 WL 17486848, at *2 (E.D. Okla. Dec. 2, 2022) (applying first-to-file rule where plaintiff was an individual suing an oil and gas company in a class action lawsuit); Copple v. Arthur J. Gallagher & Co., No. C22-0116, 2022 WL 4446127, at *1 (W.D. Wash. Sept. 12) (transferring this case to Illinois under the first-to-file rule where an individual plaintiff sued in Washington state alleging corporate defendant mishandled a data breach), *report and recommendation adopted*, No. 22-cv-00116, 2022 WL 4448546 (W.D. Wash. Sept. 23, 2022).

22. *See, e.g.*, *Tempco Elec. Heater Corp.*, 819 F.2d at 749. The relative means of the parties refers to "determining whether the relative means of the parties weighs in favor of transfer[;] 'a court should determine whether a party's financial situation would meaningfully impede its ability to litigate this case in either forum.'" AIG Fin. Prods. Corp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 675 F. Supp. 2d 354, 371 (S.D.N.Y. 2009).

23. *See, e.g.*, *Tempco Elec. Heater Corp.*, 819 F.2d at 748–49; *Colton*, 2022 WL 17486848, at *2; *Copple*, 2022 WL 4446127, at *1–2.

24. *See Berkshire Int'l Corp.*, 69 F.R.D. at 590.

25. *See* Julie Vanneman, *Procedural Fencing in Retiree Benefits Disputes: Applications of the First-Filed Rule in Federal Courts*, 69 U. PITT. L. REV. 123, 129–30 (2007).

26. *See* Cadle Co. v. Whataburger of Alice, Inc., 174 F.3d 599, 603 (5th Cir. 1999); W. Gulf Mar. Ass'n v. ILA Deep Sea Loc. 24, 751 F.2d 721, 728 (5th Cir. 1985).

27. Other doctrines address duplicative litigation between state and federal courts. *See, e.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813–19 (1976). In addition, Congress has enacted statutory first-to-file rules in the context of the False Claims Act, ch. 67, 12 Stat. 696 (1863) (codified as amended in scattered sections of the U.S. Code), and the U.S. Court of Federal Claims. *See* 28 U.S.C. § 1500; 31 U.S.C. § 3730(b)(5). These rules are outside the scope of this Article. The common law doctrine of "abatement" is also outside the scope of this Article; although a duplicative suit is historically a reason for abatement, "neither the abatement case law nor *McIver* and its progeny appear to invoke or

consolidated with the first, but sometimes courts stay the second-filed suit pending resolution of the first-filed suit or outright dismiss the second-filed suit.[28] Regardless, chronology is given preference over any other consideration.[29] Though seemingly innocuous, chronology is often an inequitable decisionmaker in the modern world.[30]

This Article theorizes that because a chronology-based approach forces courts to transfer suits regardless of other considerations, transfer diminishes nonsophisticated litigants' abilities to continue litigating. Although it is difficult to assess nonparticipation,[31] some empirical data exists supporting the proposition that nonsophisticated litigants are unable to litigate after a transfer to an inconvenient forum.[32]

First, empirical research from Professors Roger Michalski and Andrew Hammond points to a correlation between a person pursuing litigation and the distance between where the person lives and the nearest federal courthouse.[33] Their findings suggest that the greater the distance between a person's home and the nearest federal courthouse, the less likely those individuals are to engage in litigation.[34] This finding is significant to the duplicative-suit context because disposal of a duplicative lawsuit using the

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reference the other in the discussion of their respective doctrines." Leo E. Strine, Jr., Lawrence A. Hamermesh & Matthew C. Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 48 n.168 (2013).

28. *See, e.g.*, Chavez v. Dole Food Co., 836 F.3d 205, 210 (3d Cir. 2016). Dismissal is probably an incorrect remedy. *Moore's Federal Practice* advises, "[i]f the first-filed action is vulnerable to dismissal on jurisdictional or statute of limitations grounds, the court in the second-filed action should stay it or transfer it, rather than outright dismiss it." 17 MOORE'S FEDERAL PRACTICE ¶ 111.13[1][o][ii][A], Lexis (database updated 2025). Some courts will not consider the remedy of dismissal. James George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 786 (1999) ("Most courts use all four remedies: transfer and consolidation, dismissal, stay, and injunction, although some have observed only three, omitting dismissal.").

29. *See* George, *supra* note 28, at 786 (noting the chronology-based approach is "fairly uniform").

30. *See* Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171, 207 (2022) ("[M]aking substantive law through seemingly 'neutral' issues of procedure changes the rhetorical terrain, and, as a result, may obscure the substantive stakes."); *see also id.* at 207–08 ("As Professor Ed Purcell explained, one advantage of making substantive changes through jurisdictional law is that 'almost any reform proposal . . . could and would be robed in eminently plausible and seemingly public-oriented raiments.' Judicial doctrine is especially likely to speak in the language of neutrality. Catch and kill decisions are routinely cloaked in neutral or impersonal language." (quoting Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1840 (2008))).

31. *See* LEGAL SERVS. CORP., *supra* note 4, §§ 3–4.

32. *See, e.g.*, Alexandra D. Lahav, Peter Siegelman, Charlotte S. Alexander & Nathan Dahlberg, *No Adjudication* (July 29, 2024), https://ssrn.com/abstract=4909655 [https://perma.cc/7XKR-SQ55] (discussing that 10 percent of federal cases end in remand or transfer, which the authors classify as "no adjudication cases").

33. *See* Roger Michalski & Andrew Hammond, *Mapping the Civil Justice Gap in Federal Court*, 57 WAKE FOREST L. REV. 463, 467 (2022) (addressing pro se litigants in federal courts).

34. *See id.* Further analysis would be needed to reveal patterns about duplicative litigation, specifically. Further analysis could also expand the distance-from-home analysis to include not just the nearest courthouse, but the location of the dispute. Professors Michalski and Hammond's analysis was limited to pro se litigants.

first-to-file rule often moves the litigation further away from the natural person's home.[35]

Second, scholars have shown that "[i]ndividual-plaintiff cases litigated against organizational entities are considerably more likely to end in a nonfinal termination (including voluntary dismissal, transfer, and remand)."[36] Disposal of duplicative suits involves dismissal or transfer,[37] and each remedy necessarily poses a risk of nonfinal termination. Taken together, these empirical findings support that handling duplicative suits via the first-to-file rule creates barriers to the civil courts because the first-to-file rule favors the corporate litigant and often results in litigation further from the individual litigant's home.

Sophisticated corporate litigants, who are favored by the first-to-file rule, have many advantages over unsophisticated individual litigants.[38] In his 1974 paper, Professor Marc Galanter divided sophisticated and unsophisticated litigants into two classes: "one-shotters" (OS) and "repeat players" (RP), highlighting the advantages of a litigant being more sophisticated than their opponent.[39] Professor Galanter argued that "[w]e would expect an RP to play the litigation game differently," meaning more skillfully, "than the OS."[40] In the context of parallel litigation, sophisticated

35. *See, e.g.*, Copple v. Arthur J. Gallagher & Co., No. C22-0116, 2022 WL 4446127, at *1–2 (W.D. Wash. Sept. 12) (transferring a class action filed by four Washington residents from Washington to Illinois), *report and recommendation adopted*, No. 22-cv-00116, 2022 WL 4448546 (W.D. Wash. Sept. 23, 2022); Motion to Transfer to the Northern District of Illinois at 5, *Copple*, 2022 WL 4448546, ECF No. 21 (identifying plaintiffs as "four Washington residents").

36. Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 105 (2008); *see also id.* at 135 ("The existing civil procedural regime overlooks the structural power disparities between different categories of litigants."). Transfers are thus an important weapon in defendants' arsenal. Indeed, "defendants appear likely to file a transfer motion almost as a matter of course when some colorable argument exists . . . ." David E. Steinberg, *Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 464 (1990); Robin Effron, Atlantic Marine *and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693, 708 (2015) ("[T]he Clermont and Eisenberg study that demonstrated that § 1404(a) transfers have can have (sic) a significant effect on case outcomes . . . ." (citing Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507, 1514 n.18 (1995))).

37. See discussion *infra* at Part III.A.2 regarding appropriate remedies following a first-to-file decision. *See also* Rosen-Zvi & Fisher, *supra* note 36, at 135.

38. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974) ("Because of differences in their size, differences in the state of the law, and differences in their resources, some of the actors in the society have many occasions to utilize the courts (in the broad sense) to make (or defend) claims; others do so only rarely."); *see also* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1008 (2016).

39. *See* Galanter, *supra* note 38, at 97 ("We might divide our actors into those claimants who have only occasional recourse to the courts (one-shotters or OS) and repeat players (RP) who are engaged in many similar litigations over time.").

40. *Id.* at 98; Rosen-Zvi & Fisher, *supra* note 36, at 105 ("[T]he gap in relative success rates between OSs and RPs has not diminished over the year—in fact, the difference has increased . . . . The OSs' unimpressive rates of success in litigation reflect also on their ability to succeed in out-of-court negotiations with RPs, for lack of a credible a priori threat to initiate litigation." (footnote omitted)).

litigants "play the litigation game"[41] better by mobilizing for litigation far more quickly than nonsophisticated litigants. Repeat players have lawyers who likely already know and understand their business. They may have already paid their retainers. They may already have a system for engaging in litigation, which they can initiate with a single message to their lawyer.[42] Someone who has never litigated before may need to first find a lawyer. It may take meeting with several lawyers to find a good fit. Because the attorney-client relationship will be new, the client will need to get their lawyer up to speed. It is easy to see why repeat players usually win the race to the courthouse—which is all that matters for the first-to-file rule.

To give low-sophistication "players" of the litigation game a chance at achieving a fair resolution on the merits, courts should make sure that the unsophisticated litigants can literally access justice by selecting a convenient forum.[43] This barrier can be removed easily by simply eliminating the first-to-file rule. By focusing on additional convenience-related facts and circumstances, such as the relative financial means of the parties, courts can select a venue suitable for both the sophisticated and nonsophisticated litigant.

Other scholars have similarly criticized the first-to-file doctrine[44] or have noted ways that courts inconsistently apply the rule and its broad exceptions.[45] This Article goes beyond the existing criticism by proposing that courts cease using the common-law doctrine altogether, and instead address duplicative suits in the same manner as they would address any other venue contest: the federal change-of-venue statute, 28 U.S.C. § 1404.[46] Under the convenience factors arising under this statute,[47] courts should give

41. Galanter, *supra* note 38, at 98.

42. *See id.*

43. *See* Rosen-Zvi & Fisher, *supra* note 36, at 105 ("[W]e should still care a great deal about the rules of procedure governing in-court litigation. These rules affect not only court proceedings but also the bargaining process that occurs outside the courtroom."); Galanter, *supra* note 38, at 135 ("We then come to four types of equalizing reform: (1) rule-change (2) improvement in institutional facilities (3) improvement of legal services in quantity and quality (4) improvement of strategic position of have-not parties.").

44. *See, e.g.*, Robert T. Sherwin, *Shoot First, Litigate Later: Declaratory Judgment Actions, Procedural Fencing, and Itchy Trigger Fingers*, 70 OKLA. L. REV. 793, 793 (2018) (discussing the anticipatory suit exception: "This Article attempts to bring some semblance of order to the 'anticipatory lawsuit' exception. It does so by proposing two radical suggestions: First, that courts should (for the most part) forget about 'races to the courthouse' and worry instead about factors that are easier to apply and anticipate."); Vanneman, *supra* note 25, at 128 ("When considering the application of the first-filed rule, courts should look for a natural plaintiff. If there is one, and that party is not the first-filer, courts should be especially wary of applying the first-filed rule."); Jean D. Renshaw, *Civil Procedure—Avoiding Duplicative Litigation—The "First-Filed" Rule*, 34 VILLANOVA L. REV. 583, 595 (1989) (The "first-filed rule should not be applied as rigidly . . . . Rather the rule should respond to the equities of the circumstances presented.").

45. *See* Sandra L. Potter, *The First-Filed "Rule" and Moving to Dismiss Duplicative Federal Litigation*, 33 REV. LITIG. 603, 609–14 (2014) (illustrating areas where courts appear to lack consensus with regard to the first-to-file doctrine).

46. 28 U.S.C. § 1404.

47. Although the factors vary some between circuits, they generally include the interests of justice, the plaintiff's choice of forum, the convenience of parties and witnesses, the

great weight to the relative means of the parties when deciding between duplicative suits. This approach will promote uniformity, disincentivize litigation gamesmanship and bullying,[48] and facilitate more cohesive law and scholarship about duplicative litigation.

Part I of this Article discusses existing scholarship on "procedural justice," which to date has given little attention to the duplicative-suit context.[49] This part shows that the first-to-file rule impedes access to justice.[50]

Part II explores how federal district courts resolve venue contests under the first-to-file rule, the federal change-of-venue statute, and the doctrine of forum non conveniens.[51] In contrast to the latter two, under the first-to-file rule, courts engage in a narrower convenience analysis, and will not examine the relative financial means of the parties.[52] This part suggests that the duplicative-suit analysis has much in common with the federal change-of-venue statute and forum non conveniens analyses.[53]

Part III of this Article proposes a new framework for handling duplicative litigation.[54] This part first argues that the duplicative-suit analysis no longer needs the first-to-file rule. Instead, the duplicative-suit analysis should arise under the federal change-of-venue statute. Under § 1404, courts should first consider whether there is a disparity in the parties' relative financial means. If there is a disparity in the parties' financial abilities, the court should select the forum that will allow both parties to afford the litigation—likely the venue where the underresourced litigant is at home.[55] And although this

availability of witnesses and evidence, the parties' relative financial condition, the location of prior or pending actions, choice and conflict of law considerations, the localities' interest in having local disputes decided therein, etc. *See generally* 3 ELIZABETH M. BOSEK & ANNE E. MELLEY, CYCLOPEDIA OF FED. PROC. § 4:120, Westlaw (database updated Jan. 2025); *id.* §§ 4:121–:145.

48. *See* Elizabeth Chamblee Burch, *Calibrating Participation: Reflections on Procedure Versus Procedural Justice*, 65 DEPAUL L. REV. 323, 323 (2016) (arguing that "procedure is a prime target for strategic gamesmanship").

49. Professor Rebecca Hollander-Blumoff has considered the duplicative suit context where a federal and state suit overlap, but her analysis does not extend to duplicative suits in sister federal district courts. *See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 174–75 (2012).

50. *See infra* Part I.

51. *See infra* Part II.

52. *See, e.g.*, Boling v. Prospect Funding Holdings, LLC, 771 F. App'x 562, 572 (6th Cir. 2019) (approving the district court "not mak[ing] any findings on the equitable factors" and applying the first-to-file rule); Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 94 (9th Cir. 1982) (approving district court's dismissal of second-filed action even where the appellant claimed the district court did not consider the "comparative convenience of the parties").

53. *See infra* Part II.

54. *See infra* Part III.

55. Professor Roy L. Brooks would describe this proposal as being a "hybrid" of symmetrical and asymmetrical reconstruction theory. The hybrid approach "deconstruct[s] by asking whether the procedural matter under consideration adversely affects outsiders or an outsider group," and if so, the hybrid approach favors "culturally coded or insider/outsider-conscious rules designed to empower outsiders while remaining equally accessible to insiders." Roy L. Brooks, *A Critical Perspective on Personal Jurisdiction, in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 8 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022).

Article argues that courts should not give chronology any special weight or preference, chronology would still be an available factor for courts to rely on in their discretion. Part III also explains the policy advantages of this approach and responds to likely criticisms.[56]

I. THE ROLE OF PROCEDURAL JUSTICE IN VENUE DETERMINATIONS

In the civil justice system, procedural justice plays a critical role in shaping individuals' perceptions of fairness and legitimacy.[57] Procedural justice emphasizes the importance of the process by which decisions are made, rather than focusing solely on the outcomes of those decisions.[58] This perspective is essential when considering venue determinations, where the location of a legal proceeding can significantly impact a party's ability to effectively participate in litigation.[59] In a system that should strive to ensure fairness for all parties, procedural justice offers a lens through which the courts can evaluate the accessibility, neutrality, and respectfulness of venue-related decisions.[60]

This part explores how the principles of procedural justice apply to venue determinations in duplicative lawsuits, particularly focusing on the values underlying Professor Tom R. Tyler's framework of procedural fairness values: voice, trust, neutrality, and dignity.[61] Additionally, this part will highlight how these principles are especially vital for underresourced litigants who find themselves up against repeat, sophisticated players in the legal system.

A. Procedural Justice Defined

"Procedural justice" refers to the way in which civil justice is applied in particular cases and to the adjudicative methods by which legal norms are applied.[62] In other words, procedural justice is less concerned with substance or outcome than process.[63] A helpful analogy for understanding procedural

56. *See infra* Part III.
57. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 87 (2006) (ebook).
58. *See generally id.*
59. *See generally id.*
60. *See id.* at 137, 152, 174, 178.
61. *See* Tom Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 121–22 (2000).
62. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 238 (2004); *see also* Victor Quintanilla, *Taboo Procedural Tradeoffs: Examining How the Public Experiences Tradeoffs Between Procedural Justice and Cost*, 15 NEVADA L.J. 882, 889 (2015) ("Procedural justice research measures the extent to which the public experiences legal procedures and dispute resolution as fair and legitimate.").
63. Notably, however, there are two theories of procedural justice. The instrumental approach focuses on the outcomes that a given process will produce, whereas the dignitary approach focuses on process per se, irrespective of outcome. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666–67 (2d ed. 1988). Both, however, have a primary focus on procedure. This Article focuses more on the dignitary theory of procedural justice. For a more in-depth discussion of this theory, see Hollander-Blumoff, *supra* note 49, at 139; Solum,

justice is the common rule of cutting a cake among friends: I will cut, you pick the first piece.[64] The cake is the substance (and in the case of civil litigation, the outcome), but how the cake gets divided is the procedure.[65] This rule is an example of procedural fairness. Still, of course, both the substance and procedure inform the eater's experience of the cake. Procedural justice does not minimize the importance of outcome, it simply focuses on the whether the process was fair.

Professor Tyler theorizes that individuals experiencing the justice system form their opinions of fairness based on four values: (1) Voice: "whether they had a voice and opportunity to be heard"; (2) Trust: "whether they trusted the motives of the decision-maker"; (3) Neutrality: "whether the process was neutral and unbiased"; and (4) Dignity: "whether they were treated with courtesy, respect, and dignity during the process."[66] Notably, these factors are not outcome oriented; scholars broadly agree that people "do distinguish between losing and being treated unfairly."[67] "Unfair procedures have been labeled 'the single most important source of popular dissatisfaction with the American legal system.'"[68] These four factors, rather than outcome, shape individuals' perceptions of our civil courts.

Under Professor Tyler's model, the first factor contributing to procedural fairness is having a voice in the process, or as lawyers put it, having the opportunity to be heard.[69] Without a voice, an individual does not have their proverbial "day in court."[70] Notice and opportunity are the hallmarks of a fair process[71] and a chance for one to speak their voice. Indeed, many scholars have found that voice, also called participation, contributes significantly to the public's perception of procedural justice and the system's legitimacy.[72]

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supra note 62, at 273–75; JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 169 (1985).

64. *See* Solum, *supra* note 62, at 238 ("In the context of a modern nation-state, procedural justice is concerned with the adjudicative methods by which legal norms are applied to particular cases and the legislative processes by which social benefits and burdens are divided."); Tyler, *supra* note 61, at 121–22 (discussing what a fair procedure is).

65. *See* Solum, *supra* note 62, at 238.

66. Rebecca Hollander-Blumoff, *The Procedural Justice of Personal Jurisdiction*, 65 ARIZ. L. REV. 643, 645 (2023) (citing Tyler, *supra* note 61, at 121).

67. Solum, *supra* note 62, at 263 (quoting MASHAW, *supra* note 63, at 162–63).

68. Chamblee Burch, *supra* note 48, at 323 (quoting Jason Sunshine & Tom Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513, 517 (2003)).

69. *See* Tyler, *supra* note 61, at 121.

70. Solum, *supra* note 62, at 263 (quoting Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 598 (1993)); Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter, *Introduction*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 55, at 1.

71. *See* Coleman et al., *supra* note 70, at 1.

72. *See* Solum, *supra* note 62, at 285–86 ("Meaningful participation must be part of the process and not a wheel that turns but moves nothing else. Meaningful participation requires that your input to the proceeding be considered, that what you say plays a role in the deliberative process of the decisionmaker. In this sense, the value of participation is dependent on possible effects on outcomes, and, hence, is in some sense dependent on possible impacts

Professor Tyler uses the term "process control" to describe one way that people feel that they have been given a voice and a meaningful chance to participate.[73] To continue the cake analogy, process control is getting to select the first piece of cake. Professor Tyler's empirical research supports that people believe a process is fair if they had some measure of control over it, explaining that people "focus heavily on issues of process control, whether or not control over the procedure translates into control over outcomes. In other words, people value the opportunity to state their case to a third party, irrespective of whether what they say influences the decision made by the third party."[74] Experienced litigants know this, and they attempt to use process control to intimidate their opponents into dropping meritorious claims or defenses.[75]

The second and third factors are highly related: individuals highly value trust and neutrality in the adjudicative process.[76] These factors primarily reflect that processes should be fair to all parties and that the judge should be unbiased and have trustworthy motives.[77] Rules about jurisdiction and venue are "paradigmatic cases of procedure rules"[78] because such rules directly affect the neutrality of the process and the appearance of a trustworthy neutral.[79] Or, as Professor Judith Resnik has put it, "procedure is critical and constitutive."[80] "People may believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their offices and still

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on accuracy. Thus, there is good and sufficient reason to believe that the legitimacy of a procedure is not independent of its effect on outcomes. Put another way, the legitimacy of a procedure depends, at least in part, on its accuracy."); *see also* TYLER, *supra* note 57, at 87 ("Because the Chicago study focuses on the mundane, everyday experiences of citizens, it is especially important to demonstrate that these experiences do influence views about the legitimacy of legal authority."); *id.* at 126 ("This means that when respondents react to their experiences with legal authorities, they focus more on their opportunities to state their case than they do on their influence over decisions.").

73. TYLER, *supra* note 57, at 125 (citing JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975)).

74. *See id.* at 133 (summarizing studies from Professors John Thibaut and W. Laurens Walker III).

75. *See, e.g.*, Republic Techs. (NA), LLC v. BBK Tobacco & Foods, LLC, 240 F. Supp. 3d 848, 852 (N.D. Ill. 2016) ("Republic maintains that it brought the declaratory judgment action because HBI had used the specter of litigation as part of a campaign to intimidate Republic and its customers . . . .").

76. *See* Hollander-Blumoff, *supra* note 49, at 136 ("Neutrality and trust are distinct but related factors.").

77. *See id.* "An impartial decisionmaker is a key focus of procedural due process analysis in the federal courts. It is not an exaggeration to say that the amount of academic attention given to the topic of judicial impartiality is 'staggering.'" *Id.* at 156.

78. Solum, *supra* note 62, at 203.

79. *See* Hollander-Blumoff, *supra* note 49, at 165.

80. Judith Resnik, *Why Procedure Is Critical, Constitutive, and Vulnerable: A Reconstruction Foreword*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 55, at xiv.

continue to support the court if they respect it as an institution that is generally impartial, just and competent."[81]

Empirical data shows how deeply the values of trust and neutrality run in the American psyche.[82] Participants in a study were given two sets of procedures, one fair and one unfair.[83] They were asked to assume they would get the fair procedures for free, but that they would receive a monetary payment if they accepted unfair procedures instead.[84] When asked to state what dollar amount it would take to get them to accept the less fair procedures, the participants responded with emotionally charged statements such as, "I would rather be heard than [be] paid to be mistreated"; "no amount of money would make me want to take the risk I could lose custody of my kids because I took a payoff"; "no amount of money would make it okay for me not have a chance to explain why I should have custody of the children."[85] Remarkably, 40 percent of participants refused to follow instructions and assign a value—they would not accept any amount of money in lieu of fairness.[86] Of those that would accept a monetary amount for less fair procedures, the average willingness to accept unfair procedures was $98,836 in a landlord-tenant scenario, $160,806 in an employment dispute, and a stunning $1,201,685 in a child custody scenario.[87] In other words, many participants were unwilling to sell fairness.[88] Professor Victor D. Quintanilla explained that "members of the public experience procedural justice as sacred, an end that cannot be legitimately balanced away for money."[89]

Dignity—Professor Tyler's fourth and final factor—is degraded when outcomes neglect humanistic concerns, and "a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable."[90] Civil litigants "often regard the way in which they are treated by governmental institutions as at least as important as the extent to which they achieve their substantive goals."[91] To the public, it is unthinkable, taboo even, that fairness would fluctuate based

81. TYLER, *supra* note 57, at 73 (quoting Walter F. Murphy & Joseph Tanenhaus, PUBLIC OPINION AND THE UNITED STATES SUPREME COURT: MAPPING OF SOME PREREQUISITES FOR COURT LEGITIMIZATION OF REGIME CHANGES 275 (1969)).

82. *See* Quintanilla, *supra* note 62, at 906.

83. *See id.*

84. *See id.* at 905–06.

85. *Id.* at 906.

86. *See id.* at 909.

87. *See id.* at 908.

88. *See id.* at 909.

89. *Id.* at 915.

90. *Id.* at 916 (citing Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 39–57 (1976)).

91. TYLER, *supra* note 57, at 73; *see also* Solum, *supra* note 62, at 263 ("'[I]t is commonplace for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons.' Mashaw argues that his dignitary theory of procedural due process provides both a necessary and sufficient account of the Due Process Clauses.").

on the ability to pay for it.[92] It is all the more troubling, then, that most Americans believe that the civil justice system is a tool only available to the wealthy.[93] Only 28 percent of low-income Americans believe that people like them are treated fairly in the U.S. civil legal system.[94] In other words, a majority of citizens do not experience dignity in the U.S. civil legal system.

The four values do hold up for wealthy, sophisticated litigants.[95] In contrast to underresourced litigants, sophisticated litigants enjoy extreme privileges in litigation[96] and do not have a similar need for the judiciary to protect their voice, preserve neutrality and trust, or recognize their dignity. Professor Galanter has identified several privileges that often-wealthy "repeat players" enjoy.[97] First, repeat players learn from prior litigation and structure their ongoing transactions in a more advantageous manner.[98] Second, they are skilled at litigation because they are aided by specialists.[99] Third, they have low startup costs for any case.[100] Fourth, they have a "bargaining reputation" within the legal system and are able to maximalize relationships with players in the system.[101] Fifth, they can engage in strategies that are intended to maximize gains through a series of cases, rather than depending on the outcome of just one case.[102] Sixth, through both repeat litigation and lobbying efforts, they can influence the litigation framework itself.[103] For example, "[s]ophisticated litigants and interest groups carefully choose their federal district court, intra-district division, and corresponding circuit court, with an eye toward the courts most likely to be sympathetic to their claims."[104] Sophisticated litigants know how to play the game

92. *See* TYLER, *supra* note 57, at 73; Quintanilla, *supra* note 62, at 909.

93. Roderick B. Mathews & Juan Carlos Botero, *Access to Justice in the United States: Findings from the Newly Released Rule of Law Index of the World Justice Project*, 59 VA. LAW. 24, 25 (2010) ("The United States obtained low scores, however, in providing effective access to civil justice."); *Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/americans-views-of-government-decades-of-distrust-enduring-support-for-its-role/ [https://perma.cc/2M2B-GMVM] ("And when asked how much the federal government does to address the concerns of various groups in the United States, there is a widespread belief that it does *too little* on issues affecting many of the groups asked about, including middle-income people (69%), those with lower incomes (66%) and retired people (65%).").

94. *See* LEGAL SERVS. CORP., *supra* note 4, § 4.

95. *See* Solum, *supra* note 62, at 263.

96. *See* Galanter, *supra* note 38, at 98–101.

97. *Id.*; *see also* Rosen-Zvi & Fisher, *supra* note 36, at 104 (summarizing).

98. *See* Galanter, *supra* note 38, at 98.

99. *See id.*

100. *See id.*

101. *See id.* at 99.

102. *See id.* at 99–100.

103. *See id.* at 100.

104. Memorandum from the Off. Att'y Gen. to the Heads of Civ. Litigating Components, U.S. Att'ys, Dep't of Just. (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download [https://perma.cc/B3TA-DX84] (discussing injunctions among federal district courts generally).

successfully. Courts often insist on treating all parties exactly the same,[105] ignoring the very real disparities between human litigants and wealthy corporate repeat players. This can be dehumanizing, degrade trust, and give a perception of bias toward the repeat player.

When the public believes the civil litigation system is unfair, the repercussions are widespread.[106] Procedural justice buttresses democratic norms and promotes the legitimacy of democratic institutions.[107] Legitimacy refers to trust in government and willingness to abide by governmental authority.[108] Citizens develop their views of government legitimacy based on their own personal experiences, including experiences in the civil courts.[109] Legitimacy is "eroded if the legal system consistently fails to meet citizens' standards"[110]—standards about procedure, not just outcome.[111]

Without a sense of legitimacy, citizens resort to extrajudicial methods of problem-solving.[112] They neither respect nor rely upon the civil courts, jeopardizing the power of the judicial branch.[113] Low support for government procedures correlates with a willingness to engage in protest, a form of extrajudicial problem solving,[114] and aggressive political behavior.[115] The public's trust in governmental action, including actions taken by the courts, "has been linked to the fairness of the procedures used to distribute outcomes."[116] In order for the civil courts to retain their legitimacy in the eyes of the public, they must strive for procedural fairness.

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105. *See, e.g.*, Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987).

106. *See generally* TYLER, *supra* note 57.

107. *See* Quintanilla, *supra* note 62, at 892; Solum, *supra* note 62, at 274 ("The full answer to the hard question of procedural justice must include a normative theory of procedural legitimacy . . . . Procedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate.").

108. *See* Quintanilla, *supra* note 62, at 889 ("Over the past several decades, researchers have harvested empirical findings which demonstrate that procedural justice powerfully shapes the degree to which the public deems legal authorities legitimate and affects the public's acceptance and adherence to legal decisions."); TYLER, *supra* note 57, at 28.

109. *See* Solum, *supra* note 62, at 278–79; Elizabeth Andersen & Ted Piccone, *The Meaning, Measuring, and Mattering of the Rule of Law*, DEP'T JUST. J. FED. L. & PRAC., Nov. 2019, at 109.

110. TYLER, *supra* note 57, at 106.

111. *See id.* at 97 (citing Tom Tyler, Kenneth A. Rasinski & Eugene Griffin, *Alternative Images of the Citizen: Implications for Public Policy*, 41 AM. PSYCH. 970 (1986)) ("[C]itizens' evaluations of the authorities are heavily influenced by their judgments about the fairness of the decision-making procedures used by the authorities . . . .").

112. *See* Solum, *supra* note 62, at 278–79; Quintanilla, *supra* note 62, at 922.

113. *See* Solum, *supra* note 62, at 278–79 ("As a pragmatic matter, it is important that citizens be able to regard procedures as legitimate so that we may secure their voluntary cooperation with the system of civil justice."); Quintanilla, *supra* note 62, at 922 (When a case "is harnessed to justify diminishing procedural safeguards, the public will likely perceive that downgrade as a taboo procedural tradeoff. In turn, the public may respond with moral outrage . . . [and] will likely respond with harsh dispositional attributions and anger.").

114. *See* TYLER, *supra* note 57, at 34–35.

115. *See id.* at 35.

116. *Id.*

In her article, "The Procedural Justice of Personal Jurisdiction," Professor Rebecca Hollander-Blumoff used Professor Tyler's four procedural justice factors to evaluate personal jurisdiction jurisprudence through a procedural justice lens.[117] This Article does the same with venue in the context of parallel lawsuits.

B. Venue and Procedural Fairness

The four criteria for fairness help illustrate deficiencies in a variety of procedural mechanisms.[118] Indeed, procedural fairness issues arise at every phase of litigation.[119] Legal scholars have argued for reform in various procedural mechanisms, including pleading and aggregation,[120] impleader and intervention,[121] class actions,[122] pro se litigation,[123] compelled arbitration,[124] certifying litigants to proceed in forma pauperis,[125] and leveling the discovery playing field.[126] This Article focuses on procedural fairness concerns in the context of venue contests in duplicative lawsuits. Venue considerations, like the duplicative suit analysis, implicate each of

117. *See* Hollander-Blumoff, *supra* note 66, at 645 ("I argue in this Article that courts have often implicitly relied on the core elements that form the basis of individuals' judgments about fair process according to psychology research . . . . [M]any decisions appear to reflect an implicit understanding of the subjective way that individuals decide whether a process is fair . . . . The Court's unanimous decision in *Ford* can be seen as an effort to reclaim the procedural justice of personal jurisdiction doctrine." (referring to *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021))); *see also* Tyler, *supra* note 61, at 121.

118. *See infra* notes 119–24.

119. *See id.*

120. *See* Chamblee Burch, *supra* note 48, at 326 ("Pleading is participating; it's the crucial first step.").

121. *See* Robin J. Effron, Deepak Gupta, Ayesha B. Hardaway, Monica Haymond, Caleb E. Nelson & Elizabeth Porter, *2024 Annual Meeting*, ASS'N OF AM. L. SCHS. (2024), https://membersaccess.aals.org/eweb/DynamicPage.aspx?webcode=SesDetails&ses_key=9DD71786-1E71-46C9-B67B-476AB82BC632 [https://perma.cc/TZV5-92Q8] (discussing Rule 24: The Power and Politics of Intervention). *See generally* Monica Haymond, *Intervention and Universal Remedies*, 91 U. CHI. L. REV. 1859 (2024); Caleb Nelson, *Intervention*, 106 VA. L. REV. 271 (2020).

122. *See* KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10091, HOW HARD SHOULD IT BE TO BRING A CLASS ACTION? (2018); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65 (2003); Chamblee Burch, *supra* note 48; Elizabeth Chamblee Burch & Abbe Gluck, *Plaintiffs' Process: Civil Procedure, MDL, and a Day in Court*, 42 REV. LITIG. 225 (2023).

123. *See generally* Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689 (2022).

124. *See generally* Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703 (2012); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011).

125. *See generally* Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019) (arguing for changes in proceedings related to in forma pauperis).

126. *See* Seth Katsuya Endo, *Discovery Hydraulics*, 52 U. CAL. DAVIS L. REV. 1317 (2019); Seth Katsuya Endo, *Technological Opacity & Procedural Injustice*, 59 B.C. L. REV. 821 (2018); Linda S. Mullenix, *Is the Arc of Procedure Bending Towards Injustice*, 50 U. PAC. L. REV. 611, 618–20 (2019); John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 509–10 (2000); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 563 (2001).

Professor Tyler's four values.[127] Venue affects whether or not the public is given a voice and opportunity to be heard; whether the public trusts the motives of the decision-maker; whether the process seems neutral; and whether the public is treated with courtesy, respect, and dignity.[128]

1. Voice and Opportunity to Be Heard

Where a suit proceeds impacts whether a person can meaningfully exercise their voice and opportunity to be heard, the first value of procedural justice.[129] Venue can be a major barrier to participation.[130] When physical presence is a challenge, litigants are deprived of opportunities like observing the proceedings and hearing the judge's decisions.[131] Although it is difficult to assess venue as a standalone barrier, certain statistics tend to support the claim that means (or lack thereof) play a significant role in whether and how natural persons and small businesses litigate.[132] For example, over the last several years, fewer people have used the courts for civil cases than before, despite rising need.[133]

Physical convenience impacts whether people litigate.[134] Individuals in rural areas are far less likely to be pro se litigants at all, and where they are involved in litigation, they are more commonly defendants (i.e., involuntary participants).[135] These findings are significant to the duplicative-suit context because disposal of a duplicative lawsuit using the first-to-file rule often moves the litigation further away from the natural person's home.[136] It is not

127. *See* Tyler, *supra* note 61, at 121.

128. *See id.*

129. *See* Hollander-Blumoff, *supra* note 66, at 650 ("Allowing a party to choose the forum where their action will be heard, then, may serve as a powerful indicator of process control.").

130. *See* Rosen-Zvi & Fisher, *supra* note 36, at 105 ("Individual-plaintiff cases litigated against organizational entities are considerably more likely to end in a nonfinal termination (including voluntary dismissal, transfer, and remand)."); *see also* Effron, *supra* note 36, at 708 ("§ 1404(a) transfers have can have (sic) a significant effect on case outcomes . . . ."); Clermont & Eisenberg, *supra* note 36, at 1508; Michalski & Hammond, *supra* note 33, at 467.

131. *See* Chamblee Burch, *supra* note 48, at 332 (listing ways apart from "presenting evidence and stating their case" that impacts litigants' perceptions of participation and control).

132. *See, e.g.*, LEGAL SERVS. CORP., *supra* note 4 (providing a variety of empirical findings about low-income Americans' access to justice).

133. *See* PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf [https://perma.cc/KJ53-ZFJL] ("Fewer people are using the courts for civil cases. Civil caseloads dropped more than 18 percent from 2009 to 2017. Although no research to date has identified the factors that led to this decline, previous Pew research shows lack of civil legal problems is not one of them: In 2018 alone, more than half of all U.S. households experienced one or more legal issues that could have gone to court, including 1 in 8 with a legal problem related to debt.").

134. *See* Michalski & Hammond, *supra* note 33, at 496.

135. *See id.* at 467.

136. *See, e.g.*, Berkshire Int'l Corp. v. Marquez, 69 F.R.D. 583, 585 (E.D. Pa. 1976).

complicated, really. Litigating somewhere other than where you live is harder and more expensive.[137]

On the one hand, where access to courts is geographically challenging, individuals are unlikely to bring claims; if they are involved in lawsuits, it is likely involuntarily, as a defendant.[138] On the other hand, large, sophisticated litigants have no trouble financing litigation away from their "home."[139] Empirical studies indicate that a transfer "rarely will deter government plaintiffs from pursuing a suit on the merits" and that "corporations have institutional resources and access to legal counsel that makes them less vulnerable to the potential downsides of transfers."[140]

2. Neutrality of Process

Venue also implicates the value of voice and opportunity because of process control. There is a direct link between process control and choice of forum; indeed, venue is often the first opportunity for a litigant to exercise control over the process.[141]

Although it is true that state courts may offer a more affordable forum to litigants, state courts are often not adequate substitutes for federal courts, and filing in state court does not guarantee remaining therein.[142] Arguably, the

137. *See* Roger Michalski, *Transferred Justice: An Empirical Account of Federal Transfers in the Wake of* Atlantic Marine, 53 HOUS. L. REV. 1289, 1306 (2016) ("Products liability cases and the specialized subset of pharmaceutical products liability cases typically pit individual plaintiffs against corporations. These suits can involve numerous witnesses and experts and require protracted litigation. The situs of such litigation is thus important to the parties."). Geography plays a major role in whether underresourced litigants participate in civil justice. Eleven percent of Americans have never left the state where they were born. *See* Lea Lane, *Percentage of Americans Who Never Traveled Beyond the State They Were Born?: A Surprise*, FORBES (May 2, 2019, 10:56 AM), https://www.forbes.com/sites/lealane/2019/05/02/percentage-of-americans-who-never-traveled-beyond-the-state-where-they-were-born-a-surprise/?sh=542e0bdd2898 [https://perma.cc/XJ9L-E47B].

138. *See* Michalski & Hammond, *supra* note 33, at 497.

139. *See* Rosen-Zvi & Fisher, *supra* note 36, at 105. "[P]roviding plaintiffs with increased participation rights need not detract from defendants' voice opportunities." Chamblee Burch, *supra* note 48, at 331. "Nevertheless, there is evidence supporting the notion that defendants are winning the procedure battle. And because procedure is often comparative, when people judge their circumstances vis-à-vis others, the relative deprivation theory suggests that recalibration may be in order." *Id.* at 331 n.44 (citing Hollander-Blumoff, *supra* note 49, at 150 n.125).

140. Michalski, *supra* note 137, at 1312 ("Some courts, seemingly, place efficiency arguments over participatory rights when transferring cases.").

141. *See* Hollander-Blumoff, *supra* note 66, at 650; Solum, *supra* note 62, at 305 ("The arrangements for the resolution of civil disputes should be structured to provide each interested party with a right to meaningful participation . . . ."); TYLER, *supra* note 57, at 137–38, 141 ("People also feel that procedures are fairer when they believe they have had some control in the decision-making procedure."); Norman W. Spaulding, Barbara Allen Babcock & Toni Massaro, *The Ideal and the Actual in Procedural Due Process*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 55, at 100–03 (illustrating in harrowing detail, in a section entitled "State Courts," why state court is often not a safe place for low-income litigants or litigants of color).

142. *See* Michalski & Hammond, *supra* note 33, at 469 ("[S]tate litigation is often an inadequate substitute for federal litigation."). Extensive scholarship exists discussing the parity between federal and state litigation. *See, e.g.*, Burt Neuborn, *The Myth of Parity*, 90

federal courts are needed now more than ever. Duplicative suits largely arise out of diversity jurisdiction, and such suits are likely to increase alongside the rise in nationwide commercial relationships,[143] remote work (for both employers and contractors),[144] out-of-state landlords,[145] climate change,[146] and access to consumer goods and products nationwide.[147] "If the federal courts are not accessible to these kinds of claims, the American public law system, reliant as it is on private litigation, cannot function properly."[148]

How are individuals expected be able to litigate out of state with software companies, out-of-state landlords, or out-of-state employers? Should a legal dispute arise in these situations, the unsophisticated litigant is likely to have to litigate in another forum, and they are unlikely to have the means to do so.[149] Even where an individual can scrape together the resources to bring suit, the suit is likely to be defeated by a procedural decision, rather than on the merits.[150] A transfer to a federal district away from the individual's home would be, in many cases, dispositive.

HARV. L. REV. 1105 (1977); Colleen F. Shanahan & Anna E. Carpenter, *Simple Courts Can't Solve Inequality*, 148 DAEDALUS 128, 133 (2019); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity & Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992); Scott DeVito, *Of Bias and Exclusion: An Empirical Study of Diversity Jurisdiction, Its Amount-in-Controversy Requirement, and Black Alienation from U.S. Civil Courts*, 13 GEO. J.L. & MOD. CRITICAL RACE PERSP. 1 (2021).

143. *See* Scott Dodson, *The Culture of Forum Shopping in the United States*, 57 INT'L L. 307, 307 (2024) ("Things are much more complicated today. Nations, societies, commerce, and even individuals are no longer local . . . . Commercial relationships involve intangible communications and services, artificial entities, and international transactions. Individuals travel freely, over great distances, often interacting with strangers."); Chamblee Burch, *supra* note 48, at 325 ("Now it is the rare plaintiff who sues a nationwide (or worldwide) corporation in her home jurisdiction and can litigate and resolve her claims there.").

144. *See, e.g.*, Tripp v. Ascentage Pharma Grp. Int'l, No. 22-5934, 2023 WL 5425506 (D.N.J. Aug. 23, 2023); Allen Smith, *Out of State Remote Workers Are Increasing Legal Risks for Employers*, SHRM (Jan. 11, 2022), https://www.shrm.org/topics-tools/employment-law-compliance/state-remote-workers-increasing-legal-risks-employers [https://perma.cc/RR6P-US25].

145. *See* Rabbi Dr. Aaron Spiegel, *Housing Is Not a Human Right in Indiana*, IND. CAP. CHRON. (Mar. 2, 2023, 7:00 AM), https://indianacapitalchronicle.com/2023/03/02/housing-is-not-a-human-right-in-indiana [https://perma.cc/4KM9-64KM].

146. *See* Clopton, *supra* note 30, at 173.

147. *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/HY9N-375C]; *see also* LEGAL SERVS. CORP., *supra* note 4, § 3 (explaining that 50 percent of low-income households experienced a problem related to consumer issues).

148. Michalski & Hammond, *supra* note 33, at 469.

149. *See* Rosen-Zvi & Fisher, *supra* note 36, at 104–05; Galanter, *supra* note 38, at 124–25 ("Inaction—'lumping it' not making a claim or complaint. This is done all the time by 'claimants' who lack information or access or who knowingly decide gain is too low, cost too high (including psychic cost of litigating where such activity is repugnant). Costs are raised by lack of information or skill, and also include risk."); *see also id.* at 125 ("'Exit'—withdrawal from a situation or relationship by moving, resigning, severing relations, finding new partners, etc.").

150. *See* Rosen-Zvi & Fisher, *supra* note 36, at 105.

3. Fairness and Neutrality

In venue decisions, the public has good reason to be skeptical that the procedures are fair and neutral, implicating the second and third values of procedural fairness. The U.S. Supreme Court's most recent decisions about venue "benefit corporate defendants and adversely affect individuals whose cases are transferred far away from their chosen forum."[151] Corporations, who are repeat players in the system, weaponize transfers.[152] Indeed, "corporate defendants initiate most nonprisoner transfers," and "most transfers affect individual plaintiffs."[153] "Institutional actors typically initiate transfers at the expense of individual litigants."[154]

Venue is not a barrier for the sophisticated, wealthy litigant, who likely has one or more national law firms on retainer.[155] Wealthy and sophisticated litigants can proceed in just about any federal jurisdiction with relative ease, but unsophisticated litigants take considerably longer to mobilize for litigation.[156] The result is that many individuals' cases end without ever being heard on the merits.[157] Moreover, a move from the individual's chosen forum may promote a belief that the new decision-maker is less neutral and unbiased, and may decrease the plaintiff's sense of voice.[158] When gamesmanship appears to carry the day, the public is unlikely to view processes as neutral or fair.

Judges do not appear neutral and fair when they render decisions that ignore the lived realities of everyday Americans. For example, when deciding which of two lawsuits should proceed, courts have been known to express that "from society's point of view it is essentially irrelevant which [party] bears the expense and inconvenience of litigating in a distant forum—someone must."[159] In light of the statistics about how greatly venue affects individuals and how little it affects corporations, this type of assertion is hardly neutral and unbiased. To a corporation, perhaps litigating in a distant

151. Michalski, *supra* note 137, at 1289.

152. *See* Galanter, *supra* note 38, at 97–101 (discussing the advantages experienced litigants have over less experienced claimants).

153. Michalski, *supra* note 137, at 1313.

154. *Id.* at 1314.

155. *See id.* at 1312 & n.67.

156. *See id.* at 1312–14; Hammond, *supra* note 125, at 1527; Galanter, *supra* note 38, at 97–98.

157. *See* Rosen-Zvi & Fisher, *supra* note 36, at 105. This is arguably another form of what Professor Zachary Clopton refers to as "catch and kill jurisdiction." Clopton, *supra* note 30, at 174 (discussing scenarios where "nonmerits dismissals [] deny adjudication formally or functionally on the merits"); Lahav et al., *supra* note 32, at 21, 43, 48.

158. *Cf.* Hollander-Blumoff, *supra* note 49, at 165 (discussing the analogous scenario of a plaintiff filing in state court and the defendant removing to federal court). She goes on to explain that "individuals do not evaluate situations from a neutral reference point, but rather from the perspective of losses or gains, even when the federal court might otherwise have been perceived as trustworthy, neutral, or voice-providing, the loss of the plaintiff's original forum may suggest to the plaintiff that lower degrees of these factors will be found in the new forum." *Id.* at 166 n.201 (citing Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263 (1979)).

159. Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987).

forum is an "inconvenience."[160] To an individual, litigating in a distant forum is dispositive.[161] Resource-deficient litigants commonly drop meritorious claims, abandon legitimate defenses, or accept unfair settlement offers, simply because litigating is too burdensome.[162] This matters because "there [are] fundamental difference[s] between deciding a case on the merits and deciding the case on another basis. This distinction implicates the day-in-court ideal, the dignitary interests of the parties, the accuracy of the adjudication, and the community interests . . . ."[163]

Representation is another factor that impacts fairness.[164] Indeed, access to representation touches on many of the values of procedural fairness. Representation improves voice and opportunity, allows litigants to advocate for fair and neutral processes, and helps an individual litigate with dignity.[165] Unfortunately, fewer than one in five underresourced persons in the United States obtain the legal assistance that they need.[166] Pro se representation remains high,[167] despite courts' efforts to promote pro bono and low-bono service.[168] Fifty-three percent of Americans did not know if they could find

160. *See id.*

161. *See* Rosen-Zvi & Fisher, *supra* note 36, at 105.

162. *See* LEGAL SERVS. CORP., *supra* note 4, § 4 (identifying barriers preventing persons from filing suit); Michalski, *supra* note 137, at 1307 (explaining that "litigation costs play an important role in settlement negotiations" (citing Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL L. STUD. 459, 515–16 (2004))); *see also* Rosen-Zvi & Fisher, *supra* note 36, at 105 ("Individuals are also more likely to abandon their cases . . . individual-plaintiff cases are less likely to survive pretrial motions to dismiss or for summary judgment."); *id.* at 107 ("In negotiations, the individual plaintiff subject to this regime would be willing to settle for much less than he actually deserves because the cost of litigation would be insurmountable and the stakes at risk in the event of defeat extremely high."); Michalski & Hammond, *supra* note 33, at 472 ("Others worry about the unequal bargaining power of represented litigants over their unrepresented adversaries.").

163. Clopton, *supra* note 30, at 180.

164. *See* Galanter, *supra* note 38, at 114 ("Parties who have lawyers do better.").

165. *See id.*

166. *See* Mathews & Botero, *supra* note 93, at 25 ("Several reputable organizations have found that fewer than one in five low-income persons in America obtain the legal assistance they need." (first citing The Rule of Law Index; then citing the Institute for Survey Research and American Bar Association, 1994; then citing the National Center for State Courts, 2006; then citing Legal Services Corporation, 2005 and 2009; and then citing the American Bar Association, 2010)); Michalski & Hammond, *supra* note 33, at 467 ("Though often located close to federal courthouses and in metropolitan areas with lawyers nearby, these pro se litigants seem unable to find representation, perhaps because of a discounting of their narratives.").

167. *See* Michalski & Hammond, *supra* note 33, at 464 ("In recent years, more than a quarter of nonprisoner civil cases filed in federal district courts were filed pro se.").

168. *See id.* at 476 ("First, and by far the most common, federal courts have responded to pro se litigants by trying to appoint more lawyers to represent them."); *id.* at 507; LEGAL SERVS. CORP., *supra* note 4, § 6 ("LSC's 2021 Intake Census data indicate that LSC-funded organizations are able to provide legal help for one-half (51%) of the eligible problems low-income individuals bring to them."); Mark D. Gough & Emily S. Taylor Poppe, *(Un)Changing Rates of Pro Se Litigation in Federal Courts*, 45 L. & SOC. INQUIRY 567, 568 (2020) ("Around the same time, the Long Range Plan for the Federal Courts named pro se litigation more generally among its top priorities and recommended improved case

or afford a lawyer if they needed one—a problem exacerbated when litigation is somewhere other than where the litigant resides.[169] Would-be litigants lack the ability to find affordable representation in their own communities, and finding those resources in another state poses an even greater challenge: "Distant proceedings are, of course, always a practical concern," though less so in "non-pro se litigation . . . because parties can hire attorneys located wherever the proceedings take place, knowing that often there is little need for represented parties to be physically close to court proceedings."[170] Often, out-of-state litigants do not qualify for low-income legal services somewhere other than where they reside.[171] The travel involved for hearings, depositions, and mediation is logistically difficult. It is easy to see why Americans choose not to seek legal solutions to fewer than 75 percent of their civil legal problems.[172]

4. Dignity

The representation gap creates a dignity problem in a few different ways. First, representing oneself can feel exasperating, confusing, and demeaning. Second, by definition, the pro se litigant has no counsel to protect them from abusive discovery, hostile depositions, and cross-examinations, or to help assess settlement offers. The representation gap also diminishes dignity because when lawyers are unwilling to accept pro bono or even reduced-rate work, it sends the message that the legal industry does not care about the person's plight.[173] Although individuals view procedural fairness as "sacred" and view it as taboo to forfeit fairness for profit, lawyers are unwilling to represent clients who cannot pay full price.[174] To an individual, a legal battle is often acutely personal. To the legal community, the legal battle is a line item, one of many such line items which must be efficiently managed. Many of the ways the judicial system chooses to manage the

management, increased staffing, and jurisdictional reforms." (citing JUDICIAL CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995))).

169. *See* LEGAL SERVS. CORP., *supra* note 4, § 3.

170. Michalski & Hammond, *supra* note 33, at 496.

171. *See, e.g.*, *Legal Access for All*, CMTY. LEGAL SERVS., https://www.clsmf.org/eligibility/ [https://perma.cc/3ARY-TNV9] (last visited Apr. 2, 2025) (residency requirement limited to Central Florida); *FAQ*, RIVER VALLEY LEGAL AID, PRO BONO IND., INC., https://www.legalaidpbi.org/faq [https://perma.cc/GB3T-YVXU] (last visited Apr. 2, 2025) (limiting services to residents of an eight-county area); LAND OF LINCOLN LEGAL AID, https://lincolnlegal.org/ [https://perma.cc/ABC4-2RM7] (last visited Apr. 2, 2025) (limiting services to Illinois residents); *Brooklyn Legal Services*, LEGAL SERVS. NYC, https://www.legalservicesnyc.org/our-program/brooklyn [https://perma.cc/56TW-38W7] (last visited Apr. 2, 2025) (limiting services to residents of specific parts of New York City).

172. *See* LEGAL SERVS. CORP., *supra* note 4, § 4 ("Low-income Americans sought legal help for 19% of their collective civil legal problems in the past year.").

173. *See id.*

174. *See* Quintanilla, *supra* note 62, at 915 ("[W]hen the public believes that decisionmakers have contemplated fixing dollar values to sacred values, the public will direct moral outrage at those who contemplated taboo tradeoffs, for taboo tradeoffs undermine core assumptions central to our conceptions of self and our social relationships . . . particularly when this cost-benefit analysis is used to rationalize diminishing, downgrading, and denying the procedural justice furnished . . . ." (footnotes omitted)).

volume of cases incorrectly "assume[] a context of fairly matched adversarial encounters," and, arguably, the system does not function as intended when adversaries are mismatched.[175]

In sum, jurisdiction and venue are "paradigmatic cases of procedure rules"[176] because such rules directly affect individuals' ability to litigate and the fairness of the litigation. Procedural jurisprudence has a pervasive impact "on the ability of aggrieved individuals or entities to pursue legal relief."[177] Scholars have bemoaned "the seeming lack of attention paid by the media and the general academic community to major procedural decisions issued by the Supreme Court"[178] and the "the pervasive lack of participatory parity."[179] In 1990, Professor David E. Steinberg argued that scholars have ignored transfer motions altogether, stating that the state of the law of transfer is in "chaos."[180] Although criminal defendants are afforded "sweeping" procedural protections, the law is "tightfisted with regard to similar guarantees for civil defendants."[181] And yet, "[w]herever procedural issues have been studied they have emerged as an important concern to those affected by the decisions."[182] There is much work to be done to improve civil access to justice, but ensuring that underresourced litigants can litigate in their home forum is low-hanging fruit.

II. RESOLVING VENUE DISPUTES USING THE RELATIVE MEANS OF THE PARTIES

In venue contests, courts can, and often do, minimize the burden on individual and underresourced litigants by factoring in the relative financial means of the parties.[183] The "relative means of the parties" refers to

175. Rosen-Zvi & Fisher, *supra* note 36, at 92–93. In fact, fairness in a matchup between a corporation and an individual is especially important in the courts. "In most government branches, corporations easily have the upper hand. The average American cannot demand an audience with the President or lobby Congress with any real hope. But she can sue in hopes of bringing corporate wrongdoing to justice . . . ." Chamblee Burch, *supra* note 48, at 323.

176. Solum, *supra* note 62, at 273–75; *see also* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 121 (2002) ("Forum is worth fighting over because outcome often turns on forum . . . .").

177. Mullenix, *supra* note 126, at 613.

178. *Id.* at 611; *see also* Mathews & Botero, *supra* note 93, at 25 ("The United States obtained low scores, however, in providing effective access to civil justice.").

179. Resnik, *supra* note 80, at xv.

180. *See* Steinberg, *supra* note 36, at 446.

181. Rosen-Zvi & Fisher, *supra* note 36, at 81. Though it is too early to understand the full implications of the Supreme Court's recent decisions in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), and *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023), these cases could signal greater protections for individuals in litigation. Arguably, the first-to-file rule undercuts the personal jurisdiction considerations in these cases.

182. TYLER, *supra* note 57, at 74 (referencing studies of procedural effects in trials, plea bargaining, and mediation, and also the workplace, politics, interpersonal relations, and police decision-making).

183. *See, e.g.*, Tross v. Ritz Carlton Hotel Co., 928 F. Supp. 2d 498 (D. Conn. 2013); Race Safe Sys., Inc. v. Indy Racing League, 251 F. Supp. 2d 1106 (N.D.N.Y. 2003); Dwyer v. Gene.

circumstances "[w]here a disparity between the parties exists, such as an individual plaintiff suing a large corporation."[184] In short, courts assess asymmetry between the parties.[185] There is good precedent for this under the federal change-of-venue statute, 28 U.S.C. § 1404, and under the doctrine of forum non conveniens. Duplicative suits resemble these two doctrines because (1) all three require that courts exercise judicial discretion and choose between forums with concurrent jurisdiction,[186] and (2) all three doctrines advance similar public policy goals.[187] This part will explain whether and how courts consider the relative means of the parties works under each analysis: (A) duplicative lawsuits, (B) forum non conveniens, and (C) the federal change-of-venue statute, with a note about (D) forum selection clauses.

A. Duplicative Lawsuits

When forced to choose which of two duplicative lawsuits should proceed, courts undertake a narrow analysis. First, courts assess redundancy: a suit is redundant, or duplicative, if there is similarity between (1) the claims and issues and (2) the parties.[188] The first-to-file rule prescribes that the suit filed first will proceed, and the second-filed suit will yield to that suit.[189] The rule is usually applied in a bright-line manner, and chronology is rarely the subject of major dispute.[190] Some litigants have tried to argue that a particularly small gap in time (for example, a three-day delay) was not enough to trigger the rule, but these attempts have been fruitless.[191]

Motors Corp., 853 F. Supp. 690 (S.D.N.Y. 1994); Dorfman v. Marriott Int'l Hotels, Inc., No. 99 CIV. 10496, 2001 WL 69423 (S.D.N.Y. Jan. 29, 2001).

184. Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 989 (E.D.N.Y. 1991).

185. *See* Rosen-Zvi & Fisher, *supra* note 36, at 85 (arguing for a set of procedural rules governing symmetrical litigation and a second set of procedural rules to govern asymmetrical litigation, "or litigation involving an individual on one side and an institutional entity on the other").

186. *See* W. Gulf Mar. Ass'n v. ILA Deep Sea Loc. 24, 751 F.2d 721, 730 (5th Cir. 1985) ("[T]he court which first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a second action." (quoting Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982))); Boling v. Prospect Funding Holdings, LLC, 771 F. App'x 562, 568 (6th Cir. 2019) (holding that the forum non conveniens analysis requires an adequate alternative forum).

187. *See W. Gulf Mar. Ass'n*, 751 F.2d at 728–29.

188. *See* Alltrade, Inc. v. Uniweld Prods., Inc., 946 F.2d 622, 625 (9th Cir. 1991); Baatz v. Columbia Gas Transmission, LLC, 814 F.3d 785, 789 (6th Cir. 2016); Michael Cavendish, *Understanding the First-to-File Rule and Its Anticipatory Suit Exception*, 75 FLA. B.J. 24, 24 (2001).

189. *See W. Gulf Mar. Ass'n*, 751 F.2d at 728–29; N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102, 113 (2d Cir. 2010).

190. There are exceptions. *See, e.g.*, Scarola Ellis LLP v. Skyworks Ventures, Inc., No. 09 Civ. 10003, 2010 WL 3452381 (S.D.N.Y. Sept. 1, 2010) (requiring a more than usual discussion of chronology where a case was filed preemptively, then abandoned, and then another suit was re-filed).

191. *See, e.g.*, Barrett v. USA Serv. Fin., LLC, No. 18-CV-155, 2019 WL 1051177, at *6 (E.D.N.C. Mar. 5, 2019) ("The court recognizes that 19 days is a relatively short time period separating the two actions, but the court declines to find this factor determinative to application of the first-filed rule, where the timing requirement of the rule is straightforward."); *see also*

There are only a few exceptions to the first-to-file rule, but they have ballooned to such a degree that at times they seem to "swallow the rule."[192] The circuits label the exceptions differently, but broadly speaking, the exceptions fall into the following categories: (1) anticipatory suits, (2) forum shopping, (3) convenience, and (4) other equitable considerations.[193]

The most widespread exception to the first-to-file rule is the anticipatory suit exception.[194] Ironically, even in the context of the first-to-file doctrine, courts are reticent to incentivize a "race to the courthouse."[195] Courts are more likely to a prefer a second-filed suit where the first action (particularly a declaratory action) is deemed "anticipatory," or filed for the purpose of winning the race to the courthouse.[196] Declaratory judgment actions are sometimes referred to as "procedural fencing"[197] for this reason, and courts tend to be more skeptical of such filings.[198] Courts disfavor anticipatory suits in an attempt to deter bad faith or "irresponsible" litigation.[199] Common examples of bad-faith tactics include filing a lawsuit in response to receiving

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Catanese v. Unilever, 774 F. Supp. 2d 684, 688 (D.N.J. 2011) (Where the first-filed suit was filed only three days before the present action, the court said, "Plaintiffs do not dispute, however, that *Thurston* was filed *first*, and that is all that matters for purposes of the rule.").

192. Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 203 (2000) ("Inconsistent judicial decisions, or exceptions that threaten to swallow the rule, can often be explained as the result of courts' applying different principles to similar situations."); *see also* Cavendish, *supra* note 188, at 24 ("The rule and its great anticipatory suit exception, which is almost as widely applied as the rule itself, can mean the difference between the success or failure of one of two competing suits.").

193. *See* Ryan, *supra* note 192, at 203.

194. *See* Cavendish, *supra* note 188, at 24.

195. Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 750 (7th Cir. 1987). This puts litigants in the silly position of needing to file first to choose the jurisdiction but also needing to make it appear as though they were not trying to. *See id.* ("[T]he court is not called upon merely to say which side won the hundred yard dash to some courtroom . . . . Although a 'first-to-file' rule would have the virtue of certainty and ease of application, thus eliminating some of the waste referred to *supra* section A, the cost—a rule which will encourage an unseemly race to the courthouse and, quite likely, numerous unnecessary suits—is simply too high." (quoting Tech. Tape Corp. v. Minn. Mining & Mfg. Co., 135 F. Supp. 505, 509 (S.D.N.Y. 1955))).

196. Boling v. Prospect Funding Holdings, LLC, 771 F. App'x 562, 572 (6th Cir. 2019) ("[The Sixth] Circuit has considered that a first-filed declaratory judgment action weighs somewhat against the application of the first-to-file rule." (citing Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp., 511 F.3d 535, 552 (6th Cir. 2007))); *see also Catanese*, 774 F. Supp. 2d at 689 (discussing "an exception to the rule where declaratory judgment actions were brought as pre-emptive strikes to avoid the second forum").

197. *Tempco Elec. Heater Corp.*, 819 F.2d at 750 ("As we have noted before, 'The wholesome purpose of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.'" (quoting Am. Auto. Ins. Co. v. Freundt, 103 F.2d 613, 617 (7th Cir. 1939))); Vanneman, *supra* note 25, at 127.

198. *See* Russell B. Hill, *Should Anticipation Kill Application of the Declaratory Judgment Act?*, 26 T. JEFFERSON L. REV. 239, 239 (2004) ("Now, in some jurisdictions, the 'anticipatory lawsuit' factor returns full control to plaintiffs allowing them to dangle the Damoclean threat of litigation over putative defendants with no defined temporal limits. In those jurisdictions, the result is a sharply narrowed Declaratory Judgment Act that arguably does not fulfill its intended purposes.").

199. Hunt Mfg. Co. v. Fiskars Oy AB, No. Civ.A. 97–2460, 1997 WL 667117, at *4 (E.D. Pa. Oct. 2, 1997).

a demand letter, misleading the other party by pretending to negotiate in good faith while actually filing suit, or expressly agreeing to wait to file on or after a certain date, but violating the agreement by filing preemptively.[200]

Declaratory actions are sometimes viewed as robbing the rightful plaintiff of the opportunity to initiate the lawsuit in their chosen venue.[201] Often, a declaratory action is brought by the party who is not the "natural plaintiff,"[202] that is, the party (whether a natural person or an entity) who would seek traditional relief in the form of damages.[203] A natural plaintiff seeks redress for past wrongs, whereas a plaintiff who has filed an anticipatory suit might, for example, seek the court's affirmative approval of their ongoing behavior.[204] For this reason, the first-to-file rule much more often than not "gives way in the context of a coercive action filed subsequent to a declaratory action."[205]

The second exception to the first-to-file rule is when courts do not wish to encourage forum shopping. Although forum shopping is often the underlying reason for a race to the courthouse, it implicates more than mere chronology. "Forum shopping occurs when a litigant selects a forum with only a slight connection to the factual circumstances of his action, or where forum shopping alone motivated the choice."[206] Courts have described forum shopping as "opportunistic and parasitic behavior," and they try to prevent gamesmanship like this whenever possible.[207]

Thirdly, courts will depart from the first-to-file rule where other special circumstances favor the second-filed suit.[208] This is the narrowest exception.[209] Sometimes, this exception resembles the convenience factors

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200. *See* Cavendish, *supra* note 188, at 26, 28.

201. *See* Vanneman, *supra* note 25, at 127–28.

202. *Id.* ("The concept of the 'natural plaintiff' has informed district court rulings . . . . Under a traditional conception of a party-initiated pleading system, the natural plaintiff is the aggrieved party who chooses when, where, and how to go about bringing suit to seek redress for her injuries.").

203. *See id.* at 128.

204. *See* Sherwin, *supra* note 44, at 793.

205. *See* NanoLogix, Inc. v. Novak, No. 13–CV–1000, 2013 WL 6443376, at *2 (N.D. Ohio Dec. 9, 2013) (quoting AmSouth Bank v. Dale, 386 F.3d 763, 791 n.8 (6th Cir. 2004)).

206. Schnabel v. Ramsey Quantitative Sys., Inc., 322 F. Supp. 2d 505, 513 (S.D.N.Y. 2004) (quoting Everest Cap. Ltd. v. Everest Funds Mgmt., 178 F. Supp. 2d 459, 470 (S.D.N.Y. 2002)).

207. Bailey v. Shell W. E&P, Inc., 609 F.3d 710, 721 n.3 (5th Cir. 2010) (noting the False Claims Act seeks to avoid this behavior).

208. *See, e.g.*, Cadle Co. v. Whataburger of Alice, Inc., 174 F.3d 599, 603 (5th Cir. 1999) (explaining that "[t]he rule rests on principles of comity and sound judicial administration"); Intersearch Worldwide, Ltd. v. Intersearch Grp., Inc., 544 F. Supp. 2d 949, 962–63 (N.D. Cal. 2008).

209. *See* Emps. Ins. of Wausau v. Fox Ent. Grp., Inc., 522 F.3d 271, 275 (2d Cir. 2008) ("[T]he 'special circumstances' in which a district court may dismiss the first-filed case without this analysis are quite rare."); Choice Hotels Int'l, Inc. v. Jai Sai Baba LLC, No. 23-146, 2023 WL 5509211, at *4 (D. Md. Aug. 25, 2023) ("Therefore, the Traditional Factors should not prevent a court from applying the Rule unless it finds that the interests pertinent to the Traditional Factors outweigh the interests in comity, e.g., all the witnesses familiar with a particular case live in the state where the second filed litigation is taking place."); *see also* W. Gulf Mar. Ass'n v. ILA Deep Sea Loc. 24, 751 F.2d 721, 729 (5th Cir. 1985) ("The concern

that courts commonly consider under § 1404.[210] Available factors include the location of witnesses,[211] "judicial and litigant economy," "the just and effective disposition of disputes,"[212] and court congestion.[213] The exception allows courts to consider practical considerations, such as whether either case has substantially progressed[214] or whether either case has any pending jurisdictional issues (whether subject matter or personal jurisdiction).[215] Lastly, courts will consider the local interest in deciding the case, including the court's relative familiarity with the law, the desirability of resolving controversies in each locale, and the interest of having a local jury resolve the dispute.[216]

However, § 1404 also allows courts to consider a broader set of convenience factors than does the first-to-file rule.[217] Courts will consider litigant economies, however, in the duplicative-suit context, this is narrowly construed to mean the costs of attendance for witnesses and does not usually including party witnesses.[218] Despite the breadth of the convenience exception, very few courts opt to examine "litigant economy" in the ways that matter to litigants—financial ability to litigate in a forum.[219]

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manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result."); Bashiri v. Sadler, No. CV 07–2268, 2008 WL 2561910, at *2 (D. Ariz. June 25, 2008) ("In the interest of efficiency and to avoid duplicate efforts, the first-to-file rule should not be disregarded in this case.").

210. *See Emps. Ins. of Wausau*, 522 F.3d at 275; *Choice Hotels Int'l, Inc.*, 2023 WL 5509211, at *4 (listing factors); *see also* Auto. Serv. Ass'n of New Jersey, Inc. v. Rockland Exposition, Inc., No. 08–3186, 2008 WL 5244282, at *3 (D.N.J. Dec. 12, 2008); Winterthur Int'l Am. Ins. Co. v. Bank of Montreal, No. 02 Civ. 6889, 2002 WL 31521102, at *3–5 (S.D.N.Y. Nov. 13, 2002); *cf.* 28 U.S.C. § 1404(a).

211. *See Choice Hotels Int'l, Inc.*, 2023 WL 5509211, at *4; Gibbs v. Haynes Invs., LLC, 368 F. Supp. 3d 901, 919 (E.D. Va. 2019), *aff'd*, 967 F.3d 332 (4th Cir. 2020).

212. *See* Hunt Mfg. Co. v. Fiskars Oy AB, No. Civ.A. 97–2460, 1997 WL 667117, at *3 (E.D. Pa. Oct. 2, 1997) (quoting Serco Servs. Co. v. Kelley Co., 51 F.3d 1037, 1039 (Fed. Cir. 1995)).

213. *See In re* Nitro Fluids LLC, 978 F.3d 1308, 1312 (Fed. Cir. 2020); *In re* Adobe Inc., 823 F. App'x 929, 932 (Fed. Cir. 2020) (finding "an appreciable difference in docket congestion"); Broussard v. First Tower Loan, LLC, 135 F. Supp. 3d 540, 548 (E.D. La. 2015); Mandan, Hidasta & Arikara Nation v. U.S. Dep't of the Interior, 358 F. Supp. 3d 1, 10 (D.D.C. 2019); Andrew J. Fuller, *A "Procedural Nightmare": Dueling Courts and the Application of the First-Filed Rule*, 69 FLA. L. REV. 657, 662 (2017) (providing a general discussion of factors).

214. *See* Potter, *supra* note 45, at 610–11 (highlighting an example of a court discussion regarding the substantial progress of one of the dueling cases).

215. *See* George, *supra* note 28, at 787 (listing "having jurisdiction over necessary or desirable parties" as a factor).

216. *See Broussard*, 135 F. Supp. 3d at 547–48; *Mandan, Hidasta & Arikara Nation*, 358 F. Supp. 3d at 6; George, *supra* note 28, at 782–84; Fuller, *supra* note 213, at 666.

217. *See, e.g.*, *Broussard*, 135 F. Supp. 3d at 546–49 (discussing private, followed by public, interest factors).

218. *See id.* at 547 ("While the cost of attendance for party witnesses can be considered, the cost of attendance for nonparty witnesses is entitled to greater weight.") (collecting cases).

219. *See, e.g.*, Young v. L'Oreal USA, Inc., 526 F. Supp. 3d 700, 708 (N.D. Cal. 2021); Alchemist Jet Air, LLC v. Century Jets Aviation, LLC, No. 08 C 5386, 2009 WL 1657570, at *2 (N.D. Ill. June 12, 2009).

Sometimes, courts will consolidate an analysis of § 1404 factors with the first-to-file rule.[220] Most courts, however, resolutely keep the inquiries separate and will not consider the relative means of the parties in applying the first-to-file rule.[221] As explained later in this part, this is different than how courts evaluate transfers under the doctrine of forum non conveniens and under the federal change-of-venue statute.[222] Only the U.S. Court of Appeals for the Seventh Circuit has taken issue with this arbitrary difference. In the Seventh Circuit's view, the first-to-file rule should be subsumed within the analysis required by the federal change-of-venue statute.[223] The federal change-of-venue statute allows transfer to any district court where a claim might have been brought "[f]or the convenience of parties and witnesses" and "in the interest of justice."[224] The Seventh Circuit approves "uph[olding] the use of the same factors" courts utilize under § 1404, "without giving the first-filed case any supplementary weight."[225] In other words, the Seventh Circuit expressly disapproves of elevating chronology of the filings above other considerations allowed by § 1404.[226] Instead, chronology is "among the factors" that the Seventh Circuit will consider under § 1404.[227] The

220. *See* Everest Cap. Ltd. v. Everest Funds Mgmt., LLC, 178 F. Supp. 2d 459, 465 (S.D.N.Y. 2002) ("Because the factors to consider are substantially identical in weighing the balance of convenience for application of the first-filed rule and in ruling on a motion to transfer venue, a single analysis of the factors will resolve both issues.").

221. *See, e.g.*, Scarola Ellis LLP v. Skyworks Ventures, Inc., No. 09 Civ. 10003, 2010 WL 3452381, at *5 (S.D.N.Y. Sept. 1, 2010); Schnabel v. Ramsey Quantitative Sys., Inc., 322 F. Supp. 2d 505, 516 (S.D.N.Y. 2004); Berkshire Int'l Corp. v. Marquez, 69 F.R.D. 583, 589–90 (E.D. Pa. 1976); Essex Grp., Inc. v. Cobra Wire & Cable, Inc., 100 F. Supp. 2d 912, 916 n.2 (N.D. Ind. 2000); Halbert v. Credit Suisse AG, 358 F. Supp. 3d 1283, 1288 (N.D. Ala. 2018) ("The relative means of the parties is also a neutral factor here, where there is no evidence concerning the parties' financial positions."); Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 989 (E.D.N.Y. 1991) ("Here, while the defendant Graebel is a corporation and the plaintiff is an individual, no showing has been made that litigating this action in the Southern District of Florida would impose an undue hardship upon the plaintiff."); Frasca v. Yaw, 787 F. Supp. 327, 332 (E.D.N.Y. 1992) ("Here, several of the defendants are municipal entities, while the remaining six are individuals. No sufficient showing has been made by the plaintiffs that litigating this action in the Northern District of New York would impose an undue hardship upon the plaintiffs."); Rexam, Inc. v. United Steelworkers of Am., AFL-CIO-CLC, No. Civ. 03–2998, 2003 WL 22477858, at *7–8 (D. Minn. Oct. 30, 2003).

222. *See infra* Parts II.B–C.

223. *See* Rsch. Automation, Inc. v. Schrader-Bridgeport Int'l, Inc., 626 F.3d 973, 982 (7th Cir. 2010) ("Where a case is filed first should weigh no more heavily in the district court's analysis than the plaintiff's choice of forum in a section 1404 (a) calculation.").

224. 28 U.S.C. § 1404(a).

225. *Rsch. Automation*, 626 F.3d at 982.

226. *See id.* ("We hold that where a district court faces one of two identical lawsuits and one party moves to transfer to the other forum, the court should do no more than consider the order in which the suits were filed *among the factors* it evaluates under 28 U.S.C. § 1404(a)." (emphasis added)).

227. *Id.* The U.S. Court of Appeals for the District of Columbia Circuit has expressed similar ideas, stating, "[w]e do not regard an injunction favoring the first-filed action as a mandatory step in all instances because countervailing equitable considerations, where present, cannot be ignored." Columbia Plaza Corp. v. Sec. Nat'l Bank, 525 F.2d 620, 627 (D.C. Cir. 1975); *see also* Handy v. Shaw, Bransford, Veilleux & Roth, 325 F.3d 346, 349 (D.C. Cir. 2003) (citing *Columbia Plaza Corp.* with approval). However, the D.C. Circuit still

Seventh Circuit has acknowledged that its stance does "not find as strong support among [its] sister circuits."[228]

The majority of circuits regard the first-to-file rule as at least a strong presumption,[229] with exceptions that only apply under compelling circumstances—that is, one of the recognized categories of exceptions—and a disparity in the relative financial means of the parties is not one such exception.[230] Taking a very different approach from the Seventh Circuit, these courts would likely consider it an error for a district court to put chronology on equal footing with other § 1404 factors.[231]

B. Forum Non Conveniens

The doctrine of forum non conveniens allows for a much a broader convenience inquiry than that allowed by the first-to-file rule.[232] The

views the first-to-file rule as the "usual" approach. UtahAmerican Energy, Inc. v. Dep't of Labor, 685 F.3d 1118, 1124 (D.C. Cir. 2012).

228. *Rsch. Automation*, 626 F.3d at 981.

229. *See* Cicero, *supra* note 1, at 554 ("That emphasis closed the 1970's line of cases and heralded the increased significance that the FTF Rule was to enjoy in ensuing decades.").

230. The rule "'require[s] that the party objecting to jurisdiction . . . carry the burden of proving compelling circumstances to warrant an exception' to the rule." *Rsch. Automation*, 626 F.3d at 981 (quoting Manuel v. Convergys Corp., 430 F.3d 1132, 1135 (11th Cir. 2005)); *see also* Cong. Credit Corp. v. AJC Int'l, Inc., 42 F.3d 686, 689 (1st Cir. 1994); N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102, 112 (2d Cir. 2010) (finding that the "special circumstances" exception can apply only "when 'the balance of convenience favors the second-filed action'" (quoting Emps. Ins. of Wausau v. Fox Ent. Grp., Inc., 522 F.3d 271, 275 (2d Cir. 2008))). Some courts within the Second Circuit are even more rigid. *See, e.g.*, Citigroup Inc. v. City Holding Co., 97 F. Supp. 2d 549, 555 (S.D.N.Y. 2000) (holding that "departure from the well-settled 'first-filed' rule is justified by neither special circumstances nor the balance of convenience" and limiting deviation for anticipatory suits or where suit was motivated by forum shopping); Cadle Co. v. Whataburger of Alice, Inc., 174 F.3d 599, 604 (5th Cir. 1999). The U.S. Court of Appeals for the Eighth Circuit has also used "absent compelling circumstances" language, but it still treated timing of filing as an element "to be applied in a manner best serving the interests of justice." Nw. Airlines, Inc. v. Am. Airlines, Inc., 989 F.2d 1002, 1005 (8th Cir. 1993); Quint v. Vail Resorts, Inc., 89 F.4th 803, 814–15 (10th Cir. 2023) ("[T]he first-to-file rule . . . permits, but does not require, a federal district court to abstain from exercising its jurisdiction in deference to a first-filed case in a different federal district court.").

231. *See, e.g.*, Boling v. Prospect Funding Holdings, LLC, 771 F. App'x 562, 572 (6th Cir. 2019) (approving the district court "not mak[ing] any findings on the equitable factors" and applying the first-to-file rule); Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 94 (9th Cir. 1982) (approving district court's dismissal of second-filed action even where the appellant claimed the district court did not consider the comparative convenience of the parties); Wash. Metro. Transit Auth. v. Ragonese, 617 F.2d 828, 831 n.3 (D.C. Cir. 1980) (The court approved of the district court's dismissal of the second-filed action, stating, "[w]e are aware of the potential financial gain WMATA has lost because of Judge Smith's ruling . . . . Nevertheless, if WMATA wishes to eliminate this problem, it can negotiate the terms of its future construction contracts accordingly."); Triangle Conduit & Cable Co. v. Nat'l Elec. Prods. Corp., 125 F.2d 1008, 1009 (3d Cir.) (holding it is the district court's duty to enjoin the second-filed action), *cert denied*, 316 U.S. 676 (1942); Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 929 (3d Cir. 1941) (finding that the district court abused its discretion when it refused to enjoin the second-filed suit).

232. *See* Effron, *supra* note 36, at 712 ("[B]oth § 1404(a) and forum non conveniens account for convenience, but in notably different ways.").

doctrine of forum non conveniens grants federal courts the discretion to dismiss a case when an alternative, foreign forum has jurisdiction.[233] In federal cases, the doctrine correctly applies where the alternative forum is abroad.[234] Where a party seeks to move the case to a sister federal court, on the other hand, Congress has codified the applicable doctrine at 28 U.S.C. § 1404(a), as discussed below.[235] Although a successful motion under § 1404 would result in the transfer, not dismissal, of a case, the doctrine of forum non conveniens mandates the remedy of dismissal.[236]

Under the doctrine of forum non conveniens, dismissal is appropriate where (1) trial in the chosen forum would be oppressive or vexatious to a defendant disproportionate to the plaintiff's convenience, or (2) where the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems.[237] The Supreme Court has explained that of the array of considerations a court may consider on a motion for forum non conveniens, the most notable are "the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality."[238]

Convenience to the parties, including attendant practical difficulties, has always been of paramount concern under the doctrine of forum non conveniens. Particularly "[i]n earlier stages of the evolution of the federal forum non conveniens doctrine, justice for the parties was a major animating concern."[239] In the forum non conveniens context, courts routinely consider the relative means of the parties and the costs to litigants—which naturally relate to residence.[240]

Most states follow the federal approach very closely, but some states have taken an even narrower view in order to protect in-state litigants.[241] About one-third of the states deviate from the federal doctrine of forum non

233. *See* Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 429–30 (2007) (citing Am. Dredging Co. v. Miller, 510 U.S. 443, 447–48 (1994)); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981); Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex., 571 U.S. 49, 60 (2013).

234. For a discussion of state court use of the doctrine, see William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. 1163, 1190–91 (2023).

235. *See* Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955); *see also infra* Part II.C.

236. *See* Boling v. Prospect Funding Holdings, LLC, 771 F. App'x 562, 567 (6th Cir. 2019); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 910 (1947) (discussing the history of the forum non conveniens doctrine).

237. *See Sinochem Int'l Co.*, 549 U.S. at 429 (quoting *Am. Dredging Co.*, 510 U.S. at 447–48).

238. *Id.* at 423 (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723 (1996)).

239. Dodge et al., *supra* note 234, at 1231.

240. *See, e.g.*, *Boling*, 771 F. App'x at 571 ("The Western District of Kentucky is Boling's home forum . . . . Prospect had entered into loans with Kentucky residents, that 'negate[d] any argument of oppression or vexation in this case remaining in this forum.'" (alteration in original)).

241. *See* Dodge et al., *supra* note 234, at 1236 (explaining that some states diverge from the federal forum non conveniens model to better protect their own citizens, inter alia); *id.* at 1232–33 (indicating that tort reform efforts have sought to make these rules more favorable to in-state defendants).

conveniens.[242] Texas is a good example.[243] Texas has codified its forum non conveniens rule in statute.[244] To mitigate the risk to natural-person plaintiffs, the statute expressly carved out claims "brought by Texas residents, prohibiting dismissal of their personal injury or wrongful death claims for forum non conveniens."[245] Six other states have similarly created exceptions for resident plaintiffs.[246] In some instances, scholars have criticized the fact that courts distinguish between foreign and local plaintiffs and have suggested instead that the courts consider the convenience of all parties.[247] The federal approach differs.

Unlike Texas's statutory forum non conveniens doctrine, the federal doctrine (a common law doctrine) does not include an express exclusion for local plaintiffs, local defendants, or local causes of action.[248] Nevertheless, federal courts can still, in their discretion, protect natural persons and underresourced litigants when fundamental fairness so requires, as shown by *Dorfman v. Marriott International Hotels, Inc*.[249]

In the *Dorfman* case, Laura Dorfman, a self-described "youthful octogenarian," was injured at a Marriott hotel in Budapest, Hungary.[250] She brought suit against Marriott in the U.S. District Court for the Southern District of New York, and Marriott moved to dismiss on the basis of forum non conveniens in favor of proceeding in Hungary.[251] The court denied Marriott's motion, noting that Marriott was a corporate defendant with its principal place of business in the United States and that the inconvenience of litigating a "relatively simple tort violation" was minor.[252] Laura, an older woman, would face a "serious burden" if required to travel to Hungary where she had experienced traumatic events.[253] Even though the evidence, witnesses, and locations of sources of proof all weighed in favor of the case proceeding in Hungary, the court held that Marriott did not show that litigating in the Southern District of New York was "oppressive or vexatious."[254]

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242. *See id.* at 1198 ("[A] full one-third of the states . . . diverge from the federal model in one or more significant ways"; "Delaware and Virginia emphasize private interest factors.").

243. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2023).

244. *See id.*

245. Dodge et al., *supra* note 234, at 1194 (citing CIV. PRAC. & REM. § 71.051(e)).

246. *See id.* at 1193 (Alabama, Colorado, Louisiana, South Carolina, Texas, and Virginia); *see also* ALA. CODE § 6-5-430 (1987); COLO. REV. STAT. ANN. § 13-20-1001 (West 2025); LA. CODE CIV. PROC. ANN. art 123 (1999); CIV PRAC. & REM. § 71.051; VA. CODE ANN. § 8.91-265 (2022); Braten Apparel Corp. v. Bankers Tr. Co., 259 S.E.2d 110, 112 (S.C. 1979).

247. *See* Dodge et al., *supra* note 234, at 1238 (discussing forum non conveniens and stating under the heading "The Lessons of Procedural Federalism," "the underlying concern[s] can be better addressed—again, as some states have shown—by considering the convenience of *all* parties as part of the multi-factor balancing test").

248. *See id.* at 1208.

249. No. 99 Civ. 10496, 2001 WL 69423 (S.D.N.Y. Jan. 29, 2001).

250. *See id.* at *1.

251. *See id.*

252. *See id.* at *8 (quoting Guidi v. Inter-Continental Hotels Corp., 224 F.3d 142, 147 (2d Cir. 2000)).

253. *Id.*

254. *Id.* at *9 (quoting DiRienzo v. Phillip Serv. Corp., 232 F.3d 49, 67 (2d Cir. 2000)).

The first-to-file rule is very similar to the forum non conveniens doctrine. Both deal with concurrent jurisdiction, and both seek to advance the goals of efficiency, convenience, and avoiding duplicative lawsuits.[255] Although the first-to-file rule sounds like it only considers chronology, its exceptions allow for limited consideration of certain convenience factors and "practical difficulties"[256] of litigating in a certain forum, such as location of witnesses and access to evidence.[257] There is no meaningful reason that courts should consider the relative means of parties under forum non conveniens but not under the duplicative-suit analysis.

C. Federal Change-of-Venue Statute

The federal change-of-venue statute, 28 U.S.C. § 1404, was enacted in 1948.[258] The statute is essentially a federal codification of the domestic forum non conveniens rule, allowing courts to transfer cases to other federal district courts on similar grounds.[259] Some courts refer to it as the forum non conveniens statute, though this is not entirely accurate.[260] Although the statute "was drafted in accordance with the doctrine of forum non conveniens, it was intended to be a revision rather than a codification of the common law."[261] It is a revision and not a codification because under forum non conveniens, courts should dismiss, but under § 1404, courts should transfer.[262] As the Supreme Court put it, "When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification."[263]

Under the federal statute, compared to the doctrine of forum non conveniens, courts have broader discretion to consider equitable factors; although the factors used in a § 1404 motion are "essentially the same as those considered in determining whether an action should be dismissed for forum non conveniens . . . section 1404(a) vests courts with power to exercise broader discretion to grant transfers upon a lesser showing of

255. *See* W. Gulf Mar. Ass'n v. ILA Deep Sea Loc. 24, 751 F.2d 721, 728–29 (5th Cir. 1985).

256. *See* Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 429 (2007) (quoting Am. Dredging Co. v. Miller, 510 U.S. 443, 447–48 (1994)).

257. *See W. Gulf Mar. Ass'n*, 751 F.2d at 728–29.

258. 28 U.S.C. § 1404.

259. Dodge et al., *supra* note 234, at 1186.

260. *See, e.g.*, Drago v. Mandarich L. Grp. LLP, No. CV 21-2606, 2022 WL 1731439, at *2 (C.D. Cal. Mar. 4, 2022) (analyzing transfer under 28 U.S.C. § 1404 and stating that "the Ninth Circuit has explained that district courts may also consider factors used in the forum non conveniens context"); Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex., 571 U.S. 49, 60 (2013); Effron, *supra* note 36, at 694 ("Reflecting either sloppiness in research or vocabulary usage, the *Atlantic Marine* Court conflated the doctrines of § 1404(a) transfer and forum non conveniens dismissal.").

261. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981); *see also* Boling v. Prospect Funding Holdings, LLC, 771 F. App'x 562, 567 (6th Cir. 2019) ("Section 1404(a) codifies 'the doctrine of forum non conveniens for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer.'").

262. *See Boling*, 771 F. App'x at 567; *Piper Aircraft Co.*, 454 U.S. at 252–55 (citing Van Dusen v. Barrack, 376 U.S. 612 (1964)).

263. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955).

inconvenience than is required under the forum non conveniens analysis."[264] Relatedly, the Supreme Court has clarified that § 1404 is an easier standard to meet than forum non conveniens because transfer is a less drastic remedy than dismissal.[265]

Though it is distinct from forum non conveniens and from the first-to-file analysis, which both predate it, § 1404 has become a bit of a catch-all mechanism, under which parties bring many types of venue motions.[266] In other words, parties will file a motion related to venue citing multiple doctrines in the alternative.[267] Where both the first-to-file factors and the § 1404 transfer factors are in play, courts often (but not always)[268] keep their analyses separate.[269] However, most courts will not allow the first-to-file rule to negate § 1404's limiting requirement that an action may be transferred only to a district where it "might have been brought."[270]

Advocates invite courts to override the first-to-file rule with a § 1404 analysis because under the statute, courts can consider equitable factors, like the relative means of the parties as part of this analysis.[271] Because the federal change-of-venue statute allows consideration of relative means, litigants will sometimes try to argue the first-to-file doctrine and relative means analysis together in hopes that the court will merge the analyses.[272] Courts will generally decline to do so, directing instead that arguments related to party finances should be made "in the form of a motion to transfer pursuant to 28 U.S.C. § 1404(a)."[273] Indeed, under the first-to-file rule, even the Seventh Circuit (which has backed away from the first-to-file rule) has historically declined to engage in a conversation about financial means,

264. Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 987 (E.D.N.Y. 1991).

265. Dodge et al., *supra* note 234, at 1186 (citing *Norwood*, 349 U.S. at 32).

266. *Boling*, 771 F. App'x at 567.

267. *See, e.g.*, Everest Cap. Ltd. v. Everest Funds Mgmt., LLC, 178 F. Supp. 2d 459, 462 (S.D.N.Y. 2002) (also including a motion to dismiss).

268. *Id.* ("Because the factors to consider are substantially identical in weighing the balance of convenience for application of the first-filed rule and in ruling on a motion to transfer venue, a single analysis of the factors will resolve both issues.").

269. *See, e.g.*, Berkshire Int'l Corp. v. Marquez, 69 F.R.D. 583, 585 (E.D. Pa. 1976); *see also* Essex Grp., Inc. v. Cobra Wire & Cable, Inc., 100 F. Supp. 2d 912, 916 n.2 (N.D. Ind. 2000) ("[Defendant] makes the argument that Indiana is inconvenient and would result in a tremendous financial burden to the business if Indiana were found to be a proper forum . . . . To the extent Plaintiffs wish to pursue these arguments in the Pennsylvania court in the form of a motion to transfer pursuant to 28 U.S.C. § 1404(a), nothing in this order forecloses it."); Fuller v. Abercrombie & Fitch Stores, Inc., 370 F. Supp. 2d 686, 690–91 (E.D. Tenn. 2005) ("It is important to clarify that Fuller's action is not being transferred under 28 U.S.C. § 1404(a). Rather, this case is being transferred pursuant to the Court's inherent authority under the first-to-file rule.").

270. *In re* Bozic, 888 F.3d 1048, 1054 (9th Cir. 2018) (quoting 28 U.S.C. § 1404).

271. *See, e.g.*, *Everest Cap. Ltd.*, 178 F. Supp. 2d at 465; *Berkshire Int'l Corp.*, 69 F.R.D. at 587.

272. *See, e.g.*, NYC Vision Cap., Inc. v. C21FC, LLC, No. 22-cv-3071, 2022 WL 2527611, at *4–5 (S.D.N.Y. July 7, 2022) (first-to-file, § 1404, and forum selection clause); Cedarstone Indus., LLC v. C4, LLC, No. 21-CV-02719, 2022 WL 369830, at *3, 6 (S.D. Tex. Feb. 7, 2022) (first-to-file rule and § 1404); Choice Hotels Int'l, Inc. v. Jai Sai Baba LLC, No. 23-146, 2023 WL 5509211, at *4 (D. Md. Aug. 25, 2023) (first-to-file rule and § 1404).

273. *Essex Grp., Inc.*, 100 F. Supp. 2d at 916 n.2.

stating, "[w]hile we do not mean to fault the parties for their attempts to protect themselves, from society's point of view it is essentially irrelevant which one of them bears the expense and inconvenience of litigating in a distant forum—someone must."[274] However, it simply is not true that inconvenience to one is the same as inconvenience to another. Courts must move away from this legal fiction. The reality is that considering the relative financial means of the parties results in a venue that is not dispositively burdensome to either party.

When courts do consider the parties' relative financial means, the factor can play a significant role in the courts' analyses.[275] Below are three cases illustrating how courts have denied transfer motions due to (in whole or in part) a disparity in financial means.

1. *Tross v. Ritz Carlton Hotel Co.*

First, in *Tross v. Ritz Carlton Hotel Co.*,[276] Jonathan and Theresa Tross sued The Ritz-Carlton Hotel located in the U.S. Virgin Islands after a tile fell on Mr. Tross's head, causing injury.[277] The Trosses, residents of Connecticut, sued in the U.S. District Court for the District of Connecticut.[278] The defendants, including the hotel, the hotel's owners and managers, and a construction firm responsible for the hotel's renovation, were all Delaware entities.[279] The defendants moved to transfer pursuant to § 1404[280] because they wanted the case to proceed in the Virgin Islands.[281]

274. Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987).

275. *See infra* Parts II.C.1–3. The relative means factor is not always dispositive, though, and to be clear, it does not apply in every case. *See, e.g.*, Zaltz v. JDATE, 952 F. Supp. 2d 439, 464 (E.D.N.Y. 2013); Halbert v. Credit Suisse AG, 358 F. Supp. 3d 1283, 1288 (N.D. Ala. 2018) ("The relative means of the parties is also a neutral factor here, where there is no evidence concerning the parties' financial positions."); Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 989 (E.D.N.Y. 1991) ("Here, while the defendant Graebel is a corporation and the plaintiff is an individual, no showing has been made that litigating this action in the Southern District of Florida would impose an undue hardship upon the plaintiff."); Frasca v. Yaw, 787 F. Supp. 327, 332 (E.D.N.Y. 1992) ("Here, several of the defendants are municipal entities, while the remaining six are individuals. No sufficient showing has been made by the plaintiffs that litigating this action in the Northern District of New York would impose an undue hardship upon the plaintiffs."); U.S. Fid. & Guar. Co. v. Republic Drug Co., Inc., 800 F. Supp. 1076, 1081 (E.D.N.Y. 1992) ("The parties concede, and the Court finds, that as both parties are corporations, the relative means of the parties is irrelevant."); Aquatic Amuse. Assocs., Ltd. v. Walt Disney World Co., 734 F. Supp. 54, 59 (N.D.N.Y. 1990) ("[T]his factor is usually only applicable to situations where an individual is suing a large corporation and thus would not be applicable here.").

276. 928 F. Supp. 2d 498 (D. Conn. 2013).

277. *See id.* at 501.

278. *See id.* at 505.

279. *See id.*

280. *See id.* at 501 n.1. Originally, the defendants' motion sought dismissal for forum non conveniens, but they agreed that it was inappropriate and instead pursued transfer under 28 U.S.C. § 1404. *See id.*

281. *See id.* at 504.

The court denied the defendants' motion.[282] The court first noted that the Trosses filed the lawsuit and that, as the plaintiffs, their choice of forum carried significant weight.[283] This alone was not enough, however. The court, on the one hand, also considered the convenience factors, noting that "[t]ransferring the case would result in significant inconvenience for the Trosses."[284] Litigating in Connecticut, on the other hand, did not seem to be burdensome to the defendants.[285] The court specifically noted that "[t]he financial means of the defendants, who are large corporations, are likely higher than that of the Trosses."[286] Although the relative means of the parties only "slightly" weighed in favor of the Trosses, it was nevertheless one of the main factors the court considered, and it contributed to the denial of the transfer motion.[287]

2. *Race Safe Systems, Inc. v. Indy Racing League*

In *Race Safe Systems, Inc. v. Indy Racing League*,[288] a company called Race Safe Systems, Inc. filed suit in New York against an Indiana racing company and an automotive parts manufacturing company.[289] Although the plaintiff was a business entity, the company was essentially just two family members operating out of a home, and the court found it to have "limited financial resources."[290] The court, on the one hand, considered very human aspects of the litigation, explaining that the individuals "[we]re both married, raising families, and ha[d] full time jobs in the medical and sales fields. They ha[d] counsel in the Northern District of New York, but ha[d] no funds to obtain counsel in the Southern District of Indiana."[291] On the other hand, the defendant was "a very large corporation which, by its own characterization, maintain[ed] a global presence."[292] The defendant never suggested "that the cost of litigating this action in the Northern District of New York would present an undue financial burden."[293] The court feared that compelling the individuals "to travel to Indiana to go forward with their lawsuit would merely increase the financial burden they already face[d], and might well compel them to abandon the litigation."[294] Thus, the court denied the motion for transfer, holding that "[a] court should not find that transfer to a forum which is financially out of reach of a plaintiff in strained pecuniary circumstances to be in the interest of justice . . . ."[295]

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282. *See id.* at 508.
283. *See id.* at 504–05.
284. *Id.* at 505.
285. *See id.*
286. *Id.* at 506.
287. *See id.*
288. 251 F. Supp. 2d 1106 (N.D.N.Y. 2003).
289. *See id.* at 1108–09.
290. *Id.* at 1112.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*

3. *Dwyer v. General Motors Corp.*

A third example comes from *Dwyer v. General Motors Corp.*,[296] in which a representative of the estates of Victor and Mary Jane Ridder sued General Motors Corporation (GM) for wrongful death under several products liability theories.[297] Mr. and Mrs. Ridder had been driving their car north on a Maryland interstate highway when another car crossed over the center line and struck their vehicle.[298] Mr. Ridder died at the scene, and Mrs. Ridder died shortly after arriving at the hospital.[299] Their estates brought suit in the Southern District of New York, as the Ridders were residents of New York state.[300] GM was a Delaware corporation with its principal place of business in Michigan, but it conducted business in both Maryland and New York.[301] The accident occurred in Maryland, however, and GM moved to transfer the case to the U.S. District Court for the District of Maryland pursuant to 28 U.S.C. § 1404(a).[302]

The Southern District of New York denied GM's motion.[303] Most factors were neutral and did not strongly favor New York or Maryland.[304] However, the residence of the plaintiffs and the relative means of the parties favored the Southern District of New York.[305] GM would have had to travel regardless of whether the action proceeded in New York or Maryland, but the plaintiffs would have been significantly inconvenienced if required to travel to Maryland.[306] Moreover, the plaintiffs were "individuals who [we]re suing a large corporation which possesses considerably greater financial assets."[307] Although forcing the plaintiffs to travel from New York to Maryland would "increase the financial burdens they already face[d]," the added expense to GM in having to litigate in New York was comparatively small.[308] The court concluded that because of these factors, transfer was "not favored."[309]

These cases illustrate that the relative means factor allows the courts to make venue decisions that best fit the needs of the litigants. It seems arbitrary and outdated that courts cannot use the same factors in the duplicative-suit analysis and § 1404 context; the analyses are so similar already. For example, the change-of-venue statute begins, "[f]or the convenience of parties . . . ."[310] The first-to-file doctrine also allows the courts to consider

296. 853 F. Supp. 690 (S.D.N.Y. 1994).
297. *See id.* at 691.
298. *See id.*
299. *See id.*
300. *See id.*
301. *See id.*
302. *See id.*
303. *See id.* at 695.
304. *See id.* at 693–95.
305. *See id.* at 693–94.
306. *See id*. at 693.
307. *Id.*
308. *Id.* at 694.
309. *Id.*
310. 28 U.S.C. § 1404(a).

convenience.[311] But when applying the first-to-file rule, courts try to distance the first-to-file convenience analysis from that associated with the change-of-venue statute.[312] As the Seventh Circuit acknowledges, there seems to be no meaningful reason for this.[313]

In sum, the duplicative-suit analysis overlaps considerably with the § 1404 analysis. Both concern themselves with forum shopping, anticipatory filings, comity, and concurrent jurisdiction. It is arbitrary that courts can consider the relative financial means of the parties under § 1404, but not under the first-to-file rule.

D. A Note About Forum Selection Clauses

A forum selection clause is a contractual provision preselecting a court in the event a dispute arises between parties.[314] Such clauses can be classified as "outbound," meaning used to direct litigation from one state to another, or "inbound," meaning used to consent to personal jurisdiction in a forum.[315] Courts often consider challenges to the enforceability of such clauses, but in modern jurisprudence they rarely decline to enforce them.[316] The Restatement of the Law Second, Conflict of Laws aptly summarizes the law: courts should enforce a forum selection clause unless it is "unfair or unreasonable" to do so[317]—a very high bar under modern jurisprudence.

Historically, courts disfavored forum selection clauses.[318] However, four cases significantly changed the federal judiciary's treatment of forum selection clauses in what some scholars deem to be a very procorporation way.[319] First, in 1972, the Supreme Court held in *The Bremen v. Zapata Off-Shore Co.*[320] that a forum selection clause should be enforced unless "the party seeking to escape his contract [can] show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all

311. *See, e.g.*, Choice Hotels Int'l, Inc. v. Jai Sai Baba LLC, No. 23-146, 2023 WL 5509211, at *4 (D. Md. Aug. 25, 2023); Emps. Ins. of Wausau v. Fox Ent. Grp., Inc., 522 F.3d 271, 275 (2d Cir. 2008).

312. *See, e.g.*, Scarola Ellis LLP v. Skyworks Ventures, Inc., No. 09 Civ. 10003, 2010 WL 3452381, at *4 (S.D.N.Y. Sept. 1, 2010).

313. *See* Rsch. Automation, Inc. v. Schrader-Bridgeport Int'l, Inc., 626 F.3d 973, 982 (7th Cir. 2010) ("Where a case is filed first should weigh no more heavily in the district court's analysis than the plaintiff's choice of forum in a section 1404(a) calculation.").

314. *See* John Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L.J. 65, 65 (2021).

315. *See id.* at 73–74.

316. *See id.*; Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex., 571 U.S. 49, 63 (2013) (A forum selection clause "should be 'given controlling weight in all but the most exceptional cases,'" and "the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." (quoting Stewart Org. Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring))).

317. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (AM. L. INST. 1971).

318. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

319. *See, e.g.*, Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 423 n.8 (1991).

320. 407 U.S. 1 (1972).

practical purposes be deprived of his day in court."[321] The Court later extended this rule beyond the admiralty context to consumer form contracts in *Carnival Cruise Lines, Inc. v. Shute*,[322] a case involving a forum selection clause printed on a passenger ticket.[323] A third case, *Stewart Organization, Inc. v. Ricoh Corp.*,[324] rejected the notion of a bright-line rule favoring enforcement from *The Bremen* and directed that courts evaluate a forum selection clause under 28 U.S.C. § 1404.[325] The Court narrowed the analysis again in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*[326] when it barred courts from considering private-interest factors under § 1404 because, in the Court's view, the parties would have negotiated about convenience while contracting.[327] The Court left room for a narrow exception in "extraordinary circumstances" but did not explain what might qualify as such.[328] Per *Atlantic Marine*, a forum selection clause should be "'given controlling weight in all but the most exceptional cases,' and the plaintiff bears the burden of proving why it should not be enforced."[329]

Some federal courts have sought to carve out circumstances where *Atlantic Marine* does not apply. For example, "courts across the country have generally limited the *Atlantic Marine* framework to situations where the forum selection clause is mandatory," as opposed to permissive.[330] Some scholars view cases brought under the Employee Retirement Income Security

321. *Id.* at 18.

322. 499 U.S. 585 (1991).

323. *See id.* at 587–88.

324. 487 U.S. 22 (1988).

325. *See id.* at 29. In general, scholars have criticized the federal courts as moving in a probusiness direction, especially procedurally. *See, e.g.*, Michalski & Hammond, *supra* note 33, at 515 nn.217–18 (collecting cases) (first citing Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 (2013); and then citing Lee Epstein, William M. Landes & Richard A. Posner, *When It Comes to Business, the Right and the Left Sides of the Court Agree*, 54 WASH. U. J.L. & POL'Y 33, 33 (2017)); *see also* Chamblee Burch, *supra* note 48, at 324–25 (analogizing recent procorporation procedural protections to acceptance of the wolf's account of the story of the three little pigs).

326. 571 U.S. 49 (2013).

327. *See id.* at 64; *see also* Baga v. ePlus Tech., Inc., No. C17-693, 2017 WL 2774088, at *3 (W.D. Wash. June 27, 2017) (stating that courts should not consider private-interest factors).

328. *See Atl. Marine Constr. Co.*, 571 U.S. at 52; *see also* Cream v. N. Leasing Sys., Inc., No. 15–cv–01208, 2015 WL 4606463, at *5 (N.D. Cal. July 31, 2015).

329. BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin., 884 F.3d 463, 471 (4th Cir. 2018) (quoting *Atl. Marine Constr. Co.*, 571 U.S. at 63).

330. Scepter, Inc. v. Nolan Transp. Grp., 352 F. Supp. 3d 825, 832 (M.D. Tenn. 2018) (quoting Waste Mgmt. of La., LLC v. Jefferson Parish, 48 F. Supp. 3d 894, 909 (E.D. La. 2014)); *see also* Weber v. Pact XPP Techs., A.G., 811 F.3d 758, 770 (5th Cir. 2016) ("But, as several circuits have explicitly recognized, the question of enforceability is analytically distinct from the issue of interpretation: Only after the court has interpreted the contract to determine whether [the forum selection clause] is mandatory or permissive does its enforceability come into play.").

Act[331] (ERISA) as exceptions to the rule of general enforceability.[332] Some also believe that *Atlantic Marine* carves out room for courts to look to state law to first determine enforceability of a forum selection clause.[333] But now, circuit courts uniformly apply federal law rather than state law to resolve the enforceability of forum selection clauses.[334]

Without a doubt, the federal common law mandating nearly universal enforcement of forum selection clauses conflicts with certain state doctrines. In Illinois, for example, before *Atlantic Marine*, the federal courts routinely discussed the relative means of the parties because Illinois state contract law called for this consideration.[335] The Southern District of New York also routinely took the relative means of the parties into account.[336] Other states have historically considered relative-means-like factors by a different route. Ohio state law, for example, is less likely to enforce forum selection clauses against consumers.[337] Kentucky state law assesses the disparity of bargaining power between the parties.[338] Prior to *Atlantic Marine*, federal courts would look to state law and, where appropriate, consider state law factors.[339]

Horning v. Sycom[340] presents an example of a court exercising a state-law approach. In *Horning*, the plaintiff was a solo practitioner dentist who had purchased certain software, a computer, and related services from Sycom.[341] The computer system did not work properly and, after ten months, Dr.

331. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered titles of the U.S. Code).

332. *See, e.g.*, Christine P. Bartholomew & James A. Wooten, *The Venue Shuffle: Forum Selection Clauses and ERISA*, 66 UCLA L. REV. 862, 909 (2019) (concluding that "ERISA invalidates venue-selection clauses across the board").

333. *See, e.g.*, Adam Steinman, Atlantic Marine *Through the Lens of* Erie, 66 HASTINGS L.J. 795, 796 (2015) ("Properly understood, *Atlantic Marine* opens the door for state law to play a more significant role than many anticipated in the wake of *Stewart* . . . . There are strong arguments that state law should govern the question of whether a forum-selection clause is contractually valid . . . .").

334. *See* Effron, *supra* note 36, at 717–18 ("It turns out that with respect to forum-selection clause enforcement, the 'balancing tests' of 1404(a) and forum non conveniens are a sham, a bit of distraction from the main show of applying a substantive contract rule that forum-selection clauses are presumptively enforceable under federal law.").

335. *See, e.g.*, IFC Credit Corp. v. Aliano Bros. Gen. Contractors, 437 F.3d 606, 611 (7th Cir. 2006) ("[T]he Illinois law on validity is more lenient toward the defendant than the federal law when there is a significant inequality of size or commercial sophistication between the parties, especially if the transaction is so small that the unsophisticated party might not be expected to be careful about reading boilerplate provisions that would come into play only in the event of a lawsuit . . . .").

336. *See, e.g.*, Schnabel v. Ramsey Quantitative Sys., Inc., 322 F. Supp. 2d 505, 519–20 (S.D.N.Y. 2004); Scarola Ellis LLP v. Skyworks Ventures, Inc., No. 09 Civ. 10003, 2010 WL 3452381, at *5 (S.D.N.Y. Sept. 1, 2010); Am. Eagle Outfitters, Inc. v. Tala Bros., 457 F. Supp. 2d 474, 478 (S.D.N.Y. 2006).

337. *See, e.g.*, Preferred Cap., Inc. v. Power Eng'g Grp., Inc., 860 N.E.2d 741, 745 (Ohio 2007).

338. *See* Aries Ent., LLC v. Puerto Rican Ass'n for Hisp. Affs., Inc., 591 S.W.3d 850, 856–57 (Ky. Ct. App. 2019).

339. *See* Lederman, *supra* note 319, at 444–45.

340. 556 F. Supp. 819 (E.D. Ky. 1983).

341. *See id.* at 820.

Charles Horning and his wife filed suit in Kentucky state court.[342] Sycom removed the action to the U.S. District Court for the Eastern District of Kentucky and thereafter moved to dismiss or transfer based on a forum selection clause, which designated Wisconsin as the chosen forum for any dispute.[343] Applying Kentucky substantive law, the district court considered four factors: (1) whether the clause was freely negotiated, (2) whether the selected forum was a seriously inconvenient place for trial, (3) whether enforcement of the clause would contravene a strong public policy of the forum in which suit was brought, and (4) whether Kentucky had more than a minimal interest in the lawsuit.[344] The court's primary discussion, however, related to the power imbalance between Dr. Horning and Sycom.[345]

The court first noted that Dr. Horning, "a solo dental practitioner, would be seriously inconvenienced by being required to litigate this matter in Wisconsin, whereas the defendant would not be inconvenienced by being required to litigate here."[346] The court found that the clause was not quite unconscionable, but that it was "bordering on" it due to the "sale of an important piece of office machinery to a small businessman for the substantial purchase price involved."[347] It therefore opined that "there was a disparity of bargaining power with regard to the particular clause of the contract in question."[348] The court denied the motion to dismiss or transfer.[349]

It is disappointing that district courts have been hamstrung in their ability to curb predatory behavior where a significant disparity exists between the parties. Nevertheless, that is the current state of the federal common law with respect to forum selection clauses.

The Supreme Court's approach to forum selection clauses suggests that the Court would also approve of the recommendations in this Article. The Court has signaled a preference for consolidating all venue analyses under § 1404.[350] This is true even though § 1404 is silent about forum selection clauses.[351] Prior to the Court's directive to consider forum selection clauses under § 1404, parties seeking enforcement of their forum selection clauses "typically invoke[d] an array of procedural remedies and defenses in the hope that one [would be] appropriate," which made for "interesting lawyering and

342. *See id.*
343. *See id.* at 820–21.
344. *See id.* at 821 (citing Prudential Res. Corp. v. Plunkett, 583 S.W.2d 97, 99–100 (Ky. Ct. App. 1979)).
345. *See id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. *See id.*
350. *See, e.g.*, Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex., 571 U.S. 49 (2013); *see also* Effron, *supra* note 36, at 700 ("This is what made § 1404(a) an appealing choice for enforcing a forum-selection clause; so long as the Court *gave a broad reading to the statute as one that covered everything about transferring venue* . . . ." (emphasis added)).
351. *See* Lederman, *supra* note 319, at 452; *see also* Michalski, *supra* note 137, at 1302 ("In [*Atlantic Marine*], the Supreme Court encouraged the inclusion of forum-selection clauses in contracts by making enforcement quicker and more predictable.").

bad law."[352] The proposal to consider duplicative suits using § 1404 has many parallels, with one important exception: the private convenience factors. The Supreme Court removed private convenience factors from the forum selection clause analysis in favor of "respecting freedom of contract by upholding freely bargained-for agreements, limiting pretrial struggles over where to litigate, and honoring the expectations of parties."[353] Unlike in the forum selection clause context, the parties in duplicative suits will not have selected venue or negotiated about private conveniences in advance,[354] and so all factors under § 1404 should apply.

One way the courts can begin to promote civil access to justice is to move away from arbitrary procedural rules. The duplicative-suit analysis closely resembles the doctrine of forum non conveniens and the analysis under the federal change-of-venue statute and so should expand to include all of the same discretionary factors as those closely related analyses.

III. A NEW APPROACH

The primary reason for the first-to-file rule was practicality.[355] Confronted with two parallel proceedings, federal district courts needed a clear, predictable way to choose which case would progress.[356] Courts also expressed that the rule saved the federal courts from "embarrassing inconsistencies."[357] Courts hoped that the rule would serve the policy ends of comity, judicial efficiency, and uniformity.[358] And, of course, courts wanted to minimize "forum shopping" for favorable law, factfinders, or courts.[359] Courts have also acknowledged private interests supporting the rule, including that "'the settlement process can be complicated and made burdensome, and even frustrated, if two courts are attempting to deal with'

352. Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 327 (1988).

353. Lederman, *supra* note 319, at 431 (footnotes omitted); *Atl. Marine Constr. Co.*, 571 U.S. at 64.

354. *See Atl. Marine Constr. Co.*, 571 U.S. at 66 ("When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations . . . . In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain.").

355. *See* Asset Allocation & Mgmt. Co. v. W. Emps. Ins. Co., 892 F.2d 566, 572 (7th Cir. 1989) ("The real basis for the power, it seems to us, is practical.").

356. *See* W. Gulf Mar. Ass'n v. ILA Deep Sea Loc. 24, 751 F.2d 721, 729 (5th Cir. 1985) ("The concern manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result.").

357. Cadle Co. v. Whataburger of Alice, Inc., 174 F.3d 599, 604 (5th Cir. 1999).

358. *See* Vanneman, *supra* note 25, at 130. Critics note, however, that "airy values such as 'comity,' 'judicial economy,' or 'institutional competence' . . . further insulate[] judicial decisions from popular criticism." Clopton, *supra* note 30, at 208 (footnotes omitted). As Professor Resnik and several authors document in *A Guide to Civil Procedure: Integrating Critical Legal Perspectives*, "the inequalities in courts are problems that not all want to solve." Resnik, *supra* note 80, at xv.

359. *See Cadle Co.*, 174 F.3d at 604.

the same subject matter."[360] Another justification for the rule was the desire to give weight to the plaintiff's choice of forum.[361] This justification, however, relied upon circular reasoning. The whole problem in the duplicative-suit context is that both cases have a plaintiff. The rule only rewards one plaintiff: the faster litigant, who typically is the wealthy, sophisticated one.

This part argues that rather than using chronology to resolve duplicative suits, courts should consider all relevant venue factors with an emphasis on the parties' relative means. Comity and uniformity are equally served under either approach, as, in either case, only one suit would proceed. But the first-to-file rule incentivizes forum shopping, is not uniformly applied, and often results in needless inefficiencies. The rule does not promote settlement but instead promotes litigation bullying. A rule that is no longer serving its intended purposes should evolve.[362]

A. Expanding the Duplicative-Suit Analysis to Include Relative Means of the Parties

Courts should dispense with the first-to-file rule.[363] Instead, where duplicative suits are filed in parallel federal district courts, § 1404 should control the procedure and the outcome.[364] When deciding between duplicative suits, courts should give weight to the relative financial means of the parties. Where there is a disparity of financial means, courts should select the venue preferred by the underresourced litigant (especially if that venue is where the litigant is at home). In cases where there is no disparity and the parties' relative means are balanced, courts should follow the approach applied by the Seventh Circuit[365] and consider chronology along with the other discretionary factors available.

The language of § 1404 is broad enough to encompass duplicative suits as is.[366] Indeed, the first-to-file analysis and the analysis called for by § 1404 substantially overlap. This would be a small expansion. Section 1404 is also useful because it will provide clear and uniform direction about the preferred

360. Jimenez v. Kohl's Dep't Stores, Inc., 480 F. Supp. 3d 305, 306 (D. Mass. 2020) (quoting Waithaka v. Amazon.com, Inc., 404 F. Supp. 3d 335, 350 (D. Mass. 2019)).

361. *See* Michalski, *supra* note 137, at 1314.

362. *See* Rosen-Zvi & Fisher, *supra* note 36, at 132 ("[T]he 'constitutional role in fashioning civil procedure should be expanded' to 'guarantee equally to plaintiffs and defendants fair and accessible procedures' for resolving their disputes." (quoting John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 580 (1984))).

363. Rosen-Zvi & Fisher, *supra* note 36, at 88 ("It is critical, in other words, not to essentialize legal categories or accept them as givens but rather to engage in an ongoing process of reexamination in which the values underlying these categories are identified and taxonomies that best promote these values are sought.").

364. Where one suit is filed in a federal district court and another is filed internationally, the doctrine of forum non conveniens should control.

365. *See* Rsch. Automation, Inc. v. Schrader-Bridgeport Int'l, Inc., 626 F.3d 973, 982 (7th Cir. 2010).

366. The Supreme Court directs that the forum selection clause analysis should now arise under § 1404, even though the statute is "devoid of any reference to forum-selection clauses." Lederman, *supra* note 319, at 452.

method of handling duplicative suits: transfer. (Of course, courts will retain their inherent power to stay proceedings in circumstances that, for one reason or another, do not cleanly fit into this framework.)[367] This change will reconcile the arbitrary difference between the first-to-file rule, the existing § 1404 analysis, and the common law doctrine of forum non conveniens.[368]

Notably, the Hague Conference on Private International Law (the "Hague Conference")[369] is considering making a similar change to its rules about international parallel proceedings.[370] The Hague Conference has convened a working group focused specifically "on developing binding rules for concurrent proceedings."[371] In March 2021, the working group created a draft rule outlining factors to define the "more appropriate forum," which "relat[ed] to the practical realities of the litigation, burdens of litigation," and other factors typical to a forum non conveniens analysis.[372] "The Hague Draft departs from the rigid first-in-time rule . . . and borrows from common law traditions to offer greater flexibility."[373] In its most recent draft, the working group listed the following two factors: "(a) [The burdens of litigation on the parties,] [the convenience of the parties], including in view of their habitual residence;" and "(b) [t]he [relative] ease of accessing evidence or preserving evidence."[374] The working group's proposed rule resembles the recommendations in this Article.

Similarly, in crafting the Conflict of Jurisdiction Model Act, the American Bar Association Section on International Law and Practice focused on comity and convenience to parties, keeping in line with the doctrine of forum non conveniens. Scholar and professor Louise Ellen Teitz criticized the implications of a chronology-only rule as follows:

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367. For example, the district courts might disagree as to which should hear the case. Rather than concede its position, one federal court might choose to stay the case on its docket rather than transferring. The court can do so under its inherent authority to manage its docket. Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

368. *See supra* Part II.

369. *See About the HCCH*, HCCH, https://www.hcch.net/en/about [https://perma.cc/6582-L5FC] (last visited Apr. 2, 2025) ("The HCCH . . . is an intergovernmental organisation the mandate of which is 'the progressive unification of the rules of private international law' . . . ." (quoting Statute of the Hague Conference on Private International Law, art. 1 (July 15, 1955)).

370. *See* Louise Ellen Teitz, *Tying Parallel Proceedings to Judgment Recognition: Harmonizing Cross-Border Dispute Resolution*, 56 N.Y.U. J. INT'L L. & POL. 399, 417 (2003).

371. *Id.* (citing *Conclusions & Decisions (C&D)*, HCCH ¶ 9b (Mar. 2021), https://www.hcch.net/en/governance/council-on-general-affairs/archive/2021-council [https://perma.cc/UC7H-CPB7] (click on "Conclusions & Decisions")).

372. Teitz, *supra* note 370, at 419.

373. *Id.* at 411 n.35 (quoting Linda Silberman, *A Proposed Lis Pendens Rule for Courts in the United States: The International Judgments Project of the American Law Institute*, *in* INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER E. NYGH 341, 354 (Talia Einhorn & Kurt Siehr eds., 2004)).

374. HCCH, WORKING GROUP ON JURISDICTION: REPORT OF 2024, at Annex I, art. 10 (2024), https://assets.hcch.net/docs/dc1c8d98-6303-438e-8f16-b1013ef71bdc.pdf [https://perma.cc/XQ72-92B2] (Brackets indicate alternative wordings being considered.).

> On the other hand, such a rule would merely exacerbate the race to the courthouse that the Model Act sought to reduce. In addition, a "first-filed" rule fails to incorporate system concerns or appreciate changes in proceedings that may occur. Such a rule is also too easily manipulated. Ultimately, it would encourage plaintiffs to go on a forum-shopping spree, filing multiple suits for fear that one might be dismissed or filing in the most inconvenient forum for the defendant. Such a rule of "first-filed" would leave no room for the common law tradition of forum non conveniens if the first-filed action is in an inconvenient forum.[375]

The common-law first-to-file rule suffers from the very problems Professor Teitz describes.

Abandoning the singular focus on chronology will promote access to justice in the civil courts. This change will also lead to more uniform and predictable analyses across all venue disputes while still maintaining the first-to-file rule's policy goals.[376] Moreover, eliminating the supremacy of chronology will promote settlement and better behavior between asymmetrical litigants.

1. Access to Justice

Courts should address venue contests in duplicative suits via § 1404 and give weight to the relative means of the parties to promote access to justice. The first-to-file rule is a barrier to justice because wealthy litigants will almost always be able to win in a race to the courthouse. If instead of preferring chronology, courts preferred accessibility, our civil justice system would function as intended. After all, "[t]he civil paradigm assumes a context of fairly matched adversarial encounters."[377]

Access to justice is often sacrificed due to judicial economies. Judge Richard A. Posner has argued that the economic objective of civil procedure "is to minimize the sum of two types of costs. The first is the cost of erroneous judicial decisions," and the second is "the cost of operating the procedural system."[378] The costs of operating the procedural system include, inter alia, costs borne "by the parties in the form of court fees, attorneys' fees, and litigation costs."[379] "A proper allocation of a case to an appropriate forum furthers values shared between the system and the parties: efficiency, cost control, and results that are accurate, consistent, and predictable."[380] The stark truth is that "any balance between procedural justice and cost will turn on whether a decisionmaker characterizes procedural justice as a

375. *See* Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21, 43 (1992).

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

377. Rosen-Zvi & Fisher, *supra* note 36, at 92.

378. Solum, *supra* note 62, at 254 (quoting RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 549 (4th ed. 1992)).

379. *Id.*

380. Dodson, *supra* note 143, at 308.

minimum default guaranteed to the American public, versus a contested baseline that the public must pay for."[381]

Although common law has evolved in a way that fairly accounts for judicial economies, the common law has not been as attentive to litigant economies. In particular, the common law ignores that costs are not born equally among litigants.[382] This is why procedural reconstructionists advocate for evaluating civil procedure "from the bottom up"—looking at the everyday procedures that define civil adjudication in the federal courts for normal Americans.[383] Professor Hammond argues that this perspective "demands that we not lose sight of how people with few resources access systems of adjudication" and "expose[s] cracks in adjudicatory systems."[384] As is relevant to the duplicative suit context, Professor Hammond notes that "[t]hose who lack resources are often unable to seek out a different forum."[385] In shining a light on the experiences of the most resource-poor litigants, we should "resist the instinct in the academy and the judiciary to equate federal courts with the big case and parties with deep pockets."[386]

The first-to-file rule is a crack in the adjudicatory system. Courts proclaim the fiction that inconvenience to one party is no better than inconvenience to another. The Seventh Circuit, for example, has said, "[F]rom society's point of view it is essentially irrelevant which one of them bears the expense and inconvenience of litigating in a distant forum—someone must."[387] This statement seems to embody Professor Hammond's warning against equating the federal judiciary with big cases and deep pockets,[388] which the public does.[389] Cost to individual litigants should be highly relevant when an avoidable expense will be dispositive for one party, as it often is.[390] This Article suggests an approach that prefers the equitable distribution of costs through a relative-means analysis.

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381. Quintanilla, *supra* note 62, at 917.
382. *See supra* Part II.A.
383. Hammond, *supra* note 125, at 1526.
384. *Id.*
385. *Id.* at 1527.
386. *Id.*
387. Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987).
388. Hammond, *supra* note 125, at 1527.
389. *See* LEGAL SERVS. CORP., *supra* note 4, § 4 (Only 28 percent of people believe "[p]eople like me are treated fairly in the civil legal system," and only 39 percent of people agree that "[p]eople like me are able to use the civil legal system to protect and enforce their rights."); *see also* DeVito, *supra* note 142, at 1 ("Empirical studies find that Black Americans distrust the U.S. justice system because they believe that it will not treat them fairly . . . those Black claimants willing to trust the federal courts are told that federal court is not for people like them.").
390. *See* Quintanilla, *supra* note 62, at 920–21 ("[W]hen the state's procedural safeguards are so deficient that the public experiences manifest procedural injustice, this manifest injustice should be granted legal significance by invoking a lexical, threshold rule that diminishes other considerations . . . . [T]he process applied should be presumed deficient and unconstitutional under the Due Process Clause."); Rosen-Zvi & Fisher, *supra* note 36, at 105 ("Individual-plaintiff cases litigated against organizational entities are considerably more likely to end in a nonfinal termination (including voluntary dismissal, transfer, and remand).").

2. Policy Benefits

Dispensing with the first-to-file rule and consolidating the analysis under the federal change-of-venue statute better achieves the policy goals[391] underlying the rule and promotes uniformity of procedure across the various venue analyses. First, by consolidating the analysis under § 1404, parties will know the correct procedural mechanism for bringing their motion and courts will know the proper remedy—transfer. Second, the existing first-to-file rule could provide a loophole for evading personal jurisdiction rules. Third, the proposed change would promote consistency.

First, there is a frustrating lack of clarity about the correct procedural mechanism for bringing a first-to-file motion. Currently, parties bring first-to-file motions in a variety of ways: pursuant to Rule 12 of the FRCP, under the court's inherent authority, under the federal change-of-venue statute, or under some combination of these.[392] Dismissal is probably not an appropriate remedy in the duplicative-suit context, yet some courts will entertain this remedy.[393] Consolidating the duplicative-suit analysis under the § 1404 analysis would help clarify the best-practice procedure. It would also bring the duplicative-suit context into line with courts' preference for not disposing of cases on nonmeritorious grounds. It will promote efficiencies because courts will not transfer cases based on chronology only for those cases to be dismissed on jurisdictional grounds in the first-filed forum.[394] Moving away from dismissal as a remedy will, on its own, improve access to justice and improve efficiency.[395]

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391. *See supra* Part III.

392. *See, e.g.*, Fuller v. Abercrombie & Fitch Stores, Inc., 370 F. Supp. 2d 686, 690–91 (E.D. Tenn. 2005).

393. *Moore's Federal Practice* states that "[i]f the first-filed action is vulnerable to dismissal on jurisdictional or statute of limitations grounds, the court in the second-filed action should stay it or transfer it, rather than outright dismiss it." 17 MOORE'S FEDERAL PRACTICE ¶ 111.13[1][o][ii][A], Lexis (database updated 2025). Professors Charles Alan Wright and Arthur R. Miller advised that "if the same issues are presented in an action pending in another federal court, one of these courts may stay the action before it or even in some circumstances enjoin going forward in the other federal court." 17A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4247, Westlaw (database updated Nov. 11 2024). Professors Wright and Miller did not suggest that dismissal is "advisable or even appropriate." 15 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3854 & n.12, Westlaw (database updated July 12, 2024).

394. Molander v. Google LLC, 473 F. Supp. 3d 1013, 1019 (N.D. Cal. 2020) ("Further, courts should not outright dismiss a second-filed action if jurisdictional uncertainty over the second-filed action exists." (citing Alltrade, Inc. v. Uniwield Prods., Inc., 946 F.2d 622, 628–29 (9th Cir. 1991))); *see also* Smith v. S.E.C., 129 F.3d 356, 361 (6th Cir. 1997) (not expressly disapproving, but not identifying dismissal as an option).

395. Moreover, addressing duplicative suits via § 1404 will allow for a more cohesive body of law to develop around transferring duplicative suits. Currently, courts use a variety of language to discuss duplicative lawsuits: parallel litigation, duplicative suits, dueling suits, first-to-file rule or doctrine, and first-filed rule or doctrine. *See, e.g.*, Everest Cap. Ltd. v. Everest Funds Mgmt., 178 F. Supp. 2d 459, 465 (S.D.N.Y. 2002) ("the first-filed rule"); Boling v. Prospect Funding Holdings, 771 F. App'x 562, 572 (6th Cir. 2019) ("the first-to-file rule"). It is a disperse body of law which is difficult to research. *Cf.* Michalski, *supra* note

The second policy advantage is that the proposed change diminishes the risk that the first-to-file rule will undermine personal jurisdiction doctrine. The personal jurisdiction doctrine balances the dignity and opportunity of both the plaintiff and the defendant.[396] It protects the plaintiffs harmed in the forum by ensuring that they have an opportunity to be heard at home if the defendant's contact with the plaintiff's home state is so ubiquitous that requiring the plaintiff to travel would increase a perception of disrespect or discourtesy.[397] Under the Court's recent personal jurisdiction decisions in *Ford Motor Co. v. Montana Eighth Judicial District Court*,[398] and *Mallory v. Norfolk Southern Railway Co.*,[399] individuals may have an even greater ability to sue corporations in forums convenient to the individuals. The first-to-file rule arguably undercuts these personal jurisdiction considerations. Even where a plaintiff would otherwise be able to sue in their home state under the personal jurisdiction rules, a defendant could force an out-of-state lawsuit by filing suit first in another forum where personal jurisdiction technically exists.[400] In circumstances like *Mallory*, where a would-be defendant corporation is registered in the would-be plaintiff's home state, the first-to-file rule offers that corporation an alternative route to succeed in selecting the venue. Had Norfolk Southern Railway simply filed first in another jurisdiction, that jurisdiction likely would have been the venue (assuming personal jurisdiction existed)[401] due to the first-to-file rule.

137, at 1302 (explaining the Supreme Court's decision to include the forum clause analysis under § 1404 "making enforcement quicker and more predictable").

396. *See* Hollander-Blumoff, *supra* note 66, at 652.

397. *Id.* ("A more nuanced perspective might suggest instead that the totality of the circumstances of the case must be considered before deciding whether permitting a case to go forward in a particular jurisdiction manifests respect and courtesy, or conversely disrespect and discourtesy, towards any one litigant.").

398. 141 S. Ct. 1017 (2021).

399. 143 S. Ct. 2028 (2023).

400. Dodson, *supra* note 143, at 308 ("Perhaps painter Bob knows that shopkeeper John's business is strapped for cash, and so Bob strategically decides to sue John in California to impose cost and burden on John to defend in a faraway court. That doesn't make much sense from any perspective, except one: Bob's desire to put pressure on John to win.").

401. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981) ("Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums."). Some scholars believe that in a § 1404 analysis, courts need not consider personal jurisdiction over the plaintiff in the second forum. *See* Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1463 (2019). Professor Scott Dodson explains that this view arises from two foundations: (1) that 28 U.S.C. § 1404 grants blanket, nationwide personal jurisdiction over plaintiffs or (2) that plaintiffs consent to federal jurisdiction in any district by filing suit. *Id.* at 1472–78. Professor Dodson disputes both, arguing "that transfer to a court that lacks personal jurisdiction cannot be just and that such a transfer would be an abuse of discretion." *Id.* at 1482. Professor Dodson's view, correct in the author of this Article's opinion, it is even more poignant in the context of duplicative litigation, where following transfer the plaintiff *is* the defendant. The plaintiff-turned-defendant in a transfer due to parallel suits is not a true "involuntary party" and may very well be responding to a declaratory action. *See id.* at 1478–79; *see also* Steinberg, *supra* note 36, at 516 (arguing transfer should only be granted to a district with which the defendant has minimum contacts).

The third and final policy benefit of the proposed change is that allowing duplicative suits to arise under § 1404 would promote consistency in the analyses among federal transfers, forum non conveniens, and the duplicative suit context. If the rule for duplicative cases is to evolve to encompass the relative means of the parties, lawyers will need access to a pool of cases and opinions developing that rule, which § 1404 cases can provide.[402] Presently, duplicative suits are the odd ones out, and for no apparent reason. The analyses already closely resemble one another and permitting the duplicative suits to enjoy the full range of judicial discretion available under § 1404—most notably including the relative means of the parties—serves a host of policy goals.

3. Promoting Settlement and Reducing Gamesmanship

Moving away from the first-to-file rule will have significant implications for promoting settlement and reducing gamesmanship. Where wealthy, sophisticated litigants know that the underresourced person's venue will be preferred, the wealthy litigant will be far more likely to engage in meaningful prelitigation settlement discussions.[403] The advantages parties enjoy in legal proceedings directly impact their ability to secure favorable settlements outside of the courtroom; "fair and just settlements are to a large extent dependent on fair and just rules of procedure."[404]

Absent the threat of having to litigate in a faraway locale, corporations will have less of an ability to bully the underresourced party into dropping meritorious claims or accepting unfair settlement offers. Finally, and not inconsequentially, considering the relative means of the parties will elevate the public's regard for the civil judicial system, which is widely viewed as unfair to people of low to average means.[405]

4. Exceptions Still Apply

If courts were to take the approach suggested by this Article, courts would retain the ability to apply the existing considerations and exceptions to the first-to-file rule.[406] Courts could still consider the equitable implications of anticipatory filings and forum shopping, which often go hand in hand with the relative means of the parties.

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402. *Cf.* Nancy Gertner, *Losers' Rules*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 55, at 119 (discussing the disadvantage lawyers face in representing employees in discrimination suits given the "asymmetry" in available authority).

403. Rosen-Zvi & Fisher, *supra* note 36, at 107 (arguing that equalizing the bargaining power will yield a significant effect on bargaining outcomes).

404. *Id.* at 108.

405. *Id.* at 133; *see also supra* notes 192–93 and accompanying text (identifying the exceptions).

406. *See* 28 U.S.C. § 1404.

Courts would not lose any level of discretion under the proposed approach. The other exceptions to the first-to-file rule are already contemplated by the convenience factors associated with the federal change-of-venue statute.[407]

B. Potential Criticisms

A common criticism of procedural-reform efforts posits that such measures will add even more of a load to the already strained judiciary. Here, however, where the first-to-file rule is already a discretionary consideration, expanding the scope of that discretion as suggested would not add any steps or processes that the courts are not already undertaking. Moreover, moving duplicative suits under the umbrella of § 1404 would eliminate confusion about the procedure associated with duplicative suits and would streamline research of these types of issues.

Next, critics may also argue that allowing courts to consider the relative means of the parties will cause unpredictable outcomes. Chronology is, after all, a fairly bright-line rule. It is important to remember, however, that a value does not exist in a vacuum. Certainly, predictability is good in jurisprudence. But is predictability more important than access to civil justice? Moreover, in the context of the first-to-file rule, predictability (here meaning certainty that the first-filed suit will win) incentivizes bad behavior. Because of their certainty of winning, bad actors file first in locales inconvenient to their underresourced opponents, knowing that the latter will never be able to afford litigation there. These bad actors are thus able to bully lower-means litigants into dropping meritorious claims or defenses and settling for less than suits are worth. The lower-means litigant may not even be able to raise the defense of forum shopping and so draw the court's attention to the bad behavior. Is this the kind of predictability the judiciary should promote? Predictability is good and fine, but not when held up against the realities of litigation gamesmanship and bullying. Predictability should not be weaponized to prevent others from accessing civil justice, and yet that is precisely how the first-to-file rule is being used.

Critics may also argue that the change-of-venue statute does not contemplate duplicative lawsuits. It is true that the statute does not expressly address the duplicative context. However, some courts already reference the statute when discussing parallel suits, with the Seventh Circuit expressly preferring utilizing § 1404.[408] Moreover, the Supreme Court approved of using § 1404 to address forum selection clauses, though the statute is also silent as to contracted-for venue.[409]

Finally, critics will likely argue that underresourced litigants, who cannot afford to litigate away from home, may not be any more able to afford litigation just because it is geographically closer. That may be true. But

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407. *See id.*

408. *See* Lederman, *supra* note 319, at 452 (noting that the statute is "devoid of any reference to forum-selection clauses"); Rsch. Automation, Inc. v. Schrader-Bridgeport Int'l, Inc., 626 F.3d 973, 982 (7th Cir. 2010).

409. *See Rsch. Automation*, 626 F.3d at 982.

trying to promote litigation in the most affordable venue is still a worthy goal. The proposed approach is merely one tool in what should be a larger access-to-justice toolkit. Promoting litigation in affordable forums lays the groundwork for other resources to be able to close the rest of the gap. For example, pro bono representation and litigation funding is ordinarily only available to underresourced litigants in the places where those litigants live.[410] By preferring that more suits happen where underresourced litigants live, those individuals have a better chance at qualifying for legal aid.

CONCLUSION

The first-to-file rule no longer serves the modern judiciary and should be abandoned. As the Seventh Circuit has suggested, mere chronology should not be elevated above all other considerations. Instead, federal courts should address venue contests in the duplicative suit context via the federal change-of-venue statute, 28 U.S.C. § 1404. Under § 1404, courts already consider the relative financial means of the parties. In the context of duplicative suits (and arguably in all suits), courts should consider this factor of significant importance. The suit should proceed where both parties can afford to litigate. If there is no disparity in financial means, then courts should look to the many other factors available under § 1404, which would still include chronology.

It is pragmatic to allow the duplicative suit analysis to expand to the fullness of available factors under § 1404. There is no meaningful distinction between an ordinary transfer analysis and the duplicative suit analysis that would preclude this consideration, and doing so has significant access-to-justice benefits. Courts would retain the discretion to disfavor anticipatory suits and forum shopping and to stay proceedings when necessary. Courts would also retain the discretion to use chronology as a factor, but it would not be elevated above all other factors. This approach better serves the public policy aims underpinning the first-to-file rule. Comity is equally served by this rule, as only one suit will proceed.

The proposed approach better protects access to civil justice, promotes settlement, and is likely to minimize litigation bullying and abuse of the court systems. This approach would also clarify the preferred procedural mechanism: litigants would raise the duplicative-suit issue in a transfer motion, and the court would decide between the first and second-filed suit based on the transfer factors. In this way, the proposed approach would eliminate problematic dismissals. Finally, courts and scholars alike would better be able to study the body of law surrounding duplicative suits because all such discussions would arise under § 1404.

The federal courts should be accessible to more than just wealthy, sophisticated litigants. The first-to-file rule is currently a barrier to justice for ordinary individuals and small businesses. By removing the barrier, the federal judiciary will take one step toward accessible justice for all.

410. *See* Michalski & Hammond, *supra* note 33; *supra* note 33 and accompanying text.