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ARTICLE

GEOGRAPHY AS A LITIGATION WEAPON: CONSUMERS, FORUM-SELECTION CLAUSES, AND THE REHNQUIST COURT

Edward A. Purcell, Jr.*

INTRODUCTION

Last Term, in *Carnival Cruise Lines, Inc. v. Shute*,¹ the Supreme Court seemed to continue its recent efforts to confer on parties the power to establish by contract the procedural rights that they will have in subsequent disputes relating to their agreement. In a variety of areas the Court has manifested its desire to expand the realm of so-called "consensual adjudicatory procedure."² It

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1. 111 S. Ct. 1522 (1991). Several discussions of the case have already appeared. See Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992); Richard A. Gantner, Note, *Absent Bad Faith, Fraud, or Overreaching, A Reasonable Forum Selection Clause in a Commercial Cruise Form Contract Is Enforceable*, 22 SETON HALL L. REV. 505 (1992); John M. Kirby, Note, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in Carnival Cruise Lines v. Shute*, 70 N.C. L. REV. 888 (1992).

2. The Court's efforts have naturally attracted considerable scholarly attention. See, e.g., Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291 (1988).

has, for example, repeatedly enforced clauses that require parties to submit their claims to arbitration rather than bringing them to the courts.³ Perhaps most striking, at least prior to *Carnival Cruise*, in *Stewart Organization, Inc. v. Ricoh Corp.*,⁴ the Court gave effect to a forum-selection clause in a federal diversity action in spite of the fact that the substantive law of the forum state denied enforceability to such clauses.

In *Carnival Cruise* the Court reviewed and, with two Justices dissenting,⁵ reversed a Ninth Circuit decision⁶ holding that a forum-selection clause inserted in a form retail sales contract was invalid and unenforceable. The plaintiffs, Ms. Eulala Shute and her husband, residents of the state of Washington, purchased tickets from a local travel agent for a seven-day cruise on one of defendant's ships from Los Angeles to Puerto Vallarta, Mexico. While at sea, Ms. Shute "was injured when she slipped on a deck mat during a guided tour of the ship's galley."⁷ The Shutes subsequently brought a negligence suit in admiralty in federal district court in their home state. Defendant Carnival Cruise Lines, Inc. moved for summary judgment on the ground that a clause in the Shutes' form ticket contracts required them to bring their action in a court in the state of Florida, defendant's principal place of business.⁸ Rejecting the Ninth Circuit's reasoning that "a nonnegotiated forum-selection

3. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

4. 487 U.S. 22 (1988). For valuable discussions that differ from the approach taken in this article, see Allen R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935 (1991); Stephen R. Buckingham, Comment, *Stewart Organization v. Ricoh Corp.: Judicial Discretion in Forum Selection*, 41 RUTGERS L. REV. 1379 (1989).

5. Justice Stevens wrote a dissent in which Justice Marshall joined. 111 S. Ct. at 1529 (Stevens, J., dissenting).

6. *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991).

7. 111 S. Ct. at 1524.

8. Defendant also moved to dismiss on the ground that the district court lacked personal jurisdiction over it. After upholding the district court's jurisdiction, *Shute v. Carnival Cruise Lines*, 863 F.2d 1437 (9th Cir. 1988), the Ninth Circuit withdrew its opinion and certified to the Supreme Court of the State of Washington the question whether the state's long-arm statute applied to the facts of the case. *Shute v. Carnival Cruise Lines*, 872 F.2d 930 (9th Cir. 1989). The Washington Supreme Court answered the question in the affirmative. *Shute v. Carnival Cruise Lines*, 783 P.2d 78 (Wash. 1989). The Ninth Circuit then filed a "modified" opinion again upholding the lower court's jurisdiction. *Shute*, 897 F.2d at 377. Although the parties briefed the personal jurisdiction issue extensively, the United States Supreme Court did not reach it. 111 S. Ct. at 1525.

clause in a form ticket contract is never enforceable,"⁹ the Court ruled in an opinion by Justice Blackmun that, as a matter of federal admiralty law, the clause at issue was reasonable and therefore enforceable.¹⁰

The Court's decision is troublesome for several reasons. First, its reasoning is weak, arbitrary, and result-oriented. The Ninth Circuit relied on the Court's 1972 decision in *The Bremen v. Zapata Off-Shore Co.*¹¹—an admiralty suit holding that forum-selection clauses in bargained international commercial agreements are enforceable if "reasonable"—in ruling that such clauses were not enforceable in nonbargained consumer form contracts.¹² Although the Court accepts *The Bremen* as controlling, it stretches the earlier case to reach nonbargained consumer form contracts, and it does so without acknowledging or adequately justifying the stretch. Even more striking, in construing a federal statute on which the Shutes relied to invalidate the forum-selection clause, the Court resorts literally to altering the relevant statutory language in order to find the provision inapplicable.¹³ Second, the Court faults the Ninth Circuit for "ignoring the crucial differences in the business contexts in which the respective contracts" in *The Bremen* and *Carnival Cruise* were executed,¹⁴ but it then proceeds to ignore the paramount aspect of the "business context" that gives forum-selection clauses their practical significance in consumer form contracts. It fails to discuss either the fact that forum-selection clauses constitute a powerful litigation weapon for large-scale corporate defendants or the extent to which such clauses impact materially, adversely, and unfairly on the merits of consumers' substantive claims. Finally, the decision substantially expands the impact that geography—an arbitrary, extraneous, and distorting factor—has on the fair and orderly administration of the laws. In doing so, *Carnival Cruise* seems to defeat basic goals of federal forum control policy that Congress and the Court have recognized and sought to achieve for more than a century.

This article examines the reasoning of *Carnival Cruise* and the decision's broader social, economic, and political significance. Part I considers the reasons that the *Carnival Cruise* court advances to

9. 111 S. Ct. at 1527.

10. *See id.* at 1528.

11. 407 U.S. 1 (1972).

12. The Ninth Circuit's decision was consistent with what appeared to be the majority view in *The Bremen*. *See* Goldman, *supra* note 1, at 706-07.

13. *See infra* text accompanying notes 57-58.

14. 111 S. Ct. at 1527.

support its holding and examines how the opinion shapes the law to ensure that forum-selection clauses in consumer form contracts will be widely enforceable. Part II sketches the "business context" that gives rise to forum-selection clauses in consumer form contracts and explores the unfair way such clauses operate in the *de facto* claims-disputing process. Part III focuses on the efforts of both Congress and the Court for the past century to ensure the equitable administration of the law, and it traces the development of a basic federal forum control policy aimed at minimizing, rather than maximizing, the ability of parties to forge the burdens of geography into the weapons of litigation. Part IV returns to *Carnival Cruise* and, in light of the preceding discussion, considers more fully the nature of the social policies and values that underlie the decision. Part V suggests some of the ways the Court could alter its approach to forum-selection clauses in order to make the administration of the law more equitable. Finally, Part VI adds brief concluding remarks.

I. CARNIVAL CRUISE: ESTABLISHING SOCIAL POLICY

The Shutes challenged the forum-selection clause in *Carnival Cruise* on two grounds. They argued that *The Bremen* limited the enforceability of forum-selection clauses to those in bargained commercial agreements, and they maintained that the clause violated a federal statute¹⁵ that rendered provisions in ship-passenger contracts unlawful if they restricted the right of passengers to sue. The Court rejected both arguments.

A. *The Scope of The Bremen*

Both the Shutes and Carnival Cruise Lines accepted *The Bremen* as controlling,¹⁶ and the Court agreed that both sides found "ample support" in the decision's "broad-ranging language."¹⁷ The

15. 46 U.S.C. app. § 183c (1988).

16. 111 S. Ct. at 1526. The parties, of course, disagreed about the nature of *The Bremen*'s "principles" and the significance of "key factual differences." Carnival Cruise argued that *The Bremen* "held that admiralty law establishes a strong presumption in favor of enforcing a forum selection clause" and that the Shutes' grounds "for distinguishing *The Bremen* are insufficient." Pet'r's Br., at 105, 109, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file). The Shutes maintained that *The Bremen*, which "concerned a commercial towing contract between parties of approximately equal bargaining power, invalidates the forum selection clause in this case." Resp't's Br., at 145, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file). The clause, they insisted, "should not be enforced because it is contrary to the Court's holding in *The Bremen*." *Id.* at 155.

17. 111 S. Ct. at 1526. The Court's characterization here foreshadows its conclusion. Insofar as *The Bremen* supported Carnival Cruise's position, it was primarily on

Court found, however, that "key factual differences" between the two cases "preclude an automatic and simple application of *The Bremen*'s general principles to the facts here."¹⁸

Carnival Cruise briefly summarizes *The Bremen*. The earlier case addressed the validity of a forum-selection clause "in a contract between two business corporations," one German and one American.¹⁹ The German company agreed to tow the American company's ocean-going drilling rig from Louisiana to a location off the coast of Italy, and their agreement specified that any dispute under the contract would be decided by the London Court of Justice. When the rig was damaged by a storm in the Gulf of Mexico and towed into Tampa, Florida, the American company brought an admiralty suit in a Florida federal court seeking damages for negligence and breach of contract. Relying on the contract's forum-selection clause, the German company moved to have the suit dismissed. On appeal the Supreme Court upheld the enforceability

the basis of the opinion's "broad-ranging language." Insofar as it supported the Shutes, it was on the basis of its facts and its specific reasoning. By implying that both sides relied on "broad-ranging"—and, hence, presumably vague and imprecise—language, the Court obscured both the reasoning in *The Bremen* and the differences between the arguments of the parties.

18. *Id.* There is certainly broad language in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), that could be used to stretch its rule to reach all maritime contracts and even to reach nonmaritime contracts, too, including those that are "adhesive." *Id.* at 17. It is also true that some of the lower federal courts have used *The Bremen* to expand the areas in which forum-selection clauses are enforceable, including cases involving consumer form contracts. See, e.g., *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir.), *cert. denied*, 484 U.S. 852 (1987); *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983); *Carpenter v. Klosters Rederi, A/S*, 604 F.2d 11 (5th Cir. 1979).

As this article argues, however, the specific facts, the detailed analysis, and the dominant reasoning of *The Bremen* all seem more consistent with a narrower reading. Prior to *Carnival Cruise* most courts and commentators seemed to agree. See Goldman, *supra* note 1, at 706–07. More important, however, even assuming that *The Bremen* could be reasonably construed to reach consumer form contracts, two conclusions nevertheless remain standing. One is that as far as the controlling authority of *The Bremen* is concerned, the Court could have refused to make forum-selection clauses enforceable as easily as it made the decision it did. *Carnival Cruise*, in other words, represents a knowing choice between competing social values, not the result of clearly dispositive, authoritative precedent. The other conclusion is that the Court failed adequately to explain why it was making the fundamental value choice that it made.

For general discussions of *The Bremen* and its development, see Anne E. Covey & Michael S. Morris, *The Enforceability of Agreements Providing for Forum and Choice of Law Selection*, 61 DENV. L.J. 837 (1984); James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1 (1976–77); Phoebe Kornfeld, Note, *The Enforceability of Forum-Selection Clauses After Stewart Organization, Inc. v. Ricoh Corporation*, 6 ALASKA L. REV. 175 (1989).

19. 111 S. Ct. at 1526 (discussing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

of the clause, declaring that "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect."²⁰

Carnival Cruise then considers how the Ninth Circuit construed *The Bremen* to decide that the forum-selection clause in the cruise tickets was not enforceable. The appellate court distinguished the cases by both the nature of the parties and the nature of the transactions. The parties in *The Bremen* were sophisticated commercial actors who "negotiated with care in selecting a forum for the resolution of disputes,"²¹ the Ninth Circuit reasoned, while the Shutes were "not business persons and did not negotiate the terms of the clause."²² Further, the respective transactions in the two cases were fundamentally different. *The Bremen* involved a "far from routine transaction" between companies from two different nations and the transportation of "an extremely costly piece of equipment" nearly halfway around the globe.²³ In contrast, the Shutes' ticket agreement "was purely routine and doubtless nearly identical" to every other passenger contract the company issued.²⁴ While a negotiated forum-selection clause was reasonable in the context of *The Bremen*, the Supreme Court acknowledges, "it would be entirely unreasonable" to assume that the Shutes or any other passengers "would negotiate with [Carnival Cruise] the terms of a forum-selection clause."²⁵

20. *Id.* (quoting *The Bremen*, 407 U.S. at 12-13) (footnote omitted in original).

In its summary, *Carnival Cruise* calls attention to four specific points about *The Bremen*. First, the earlier decision considered the enforceability of the forum-selection clause "in the light of present-day commercial realities and expanding international trade." *Id.* (quoting *The Bremen*, 407 U.S. at 15). Second, it applied a "reasonableness" standard based on "a number of factors." *Id.* *Carnival Cruise* stresses in particular the weight *The Bremen* placed on the "strong evidence" that the forum selection clause was "a vital part of the agreement" and that its consequences figured prominently in the parties' negotiations. *Id.* (quoting *The Bremen*, 407 U.S. at 14). Third, it notes that *The Bremen* did not involve "two Americans" who were trying to resolve "essentially local disputes in a remote alien forum." *Id.* (quoting *The Bremen*, 407 U.S. at 17). If such had been the case, *Carnival Cruise* comments, *The Bremen* suggests that "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." *Id.* (quoting *The Bremen*, 407 U.S. at 17). Finally, *Carnival Cruise* declares, even where the forum selection clause required a remote forum, *The Bremen* imposes "a heavy burden of proof" on the party claiming unfairness. *Id.* (quoting *The Bremen*, 407 U.S. at 17).

21. *Id.* at 1527.

22. *Id.*

23. *Id.* (quoting *The Bremen*, 407 U.S. at 13).

24. *Id.*

25. *Id.*

In spite of the apparent soundness of the Ninth Circuit's analysis, however, the Supreme Court concludes that the lower court misconstrued *The Bremen*. "[B]y ignoring the crucial differences in the business contexts in which the respective contracts were executed," the Court explains, "the Court of Appeals' analysis seems to us to have distorted somewhat this Court's holding in *The Bremen*."²⁶ The statement is curious. Had the Ninth Circuit accomplished anything, one would have thought that it was to highlight quite effectively some "crucial differences in the business contexts" between the two cases.²⁷

1. Stretching *The Bremen*

Simply put, the Court chooses to make *The Bremen* stand for the broadest possible principle that its language can support and, thereby, to make "reasonable" forum-selection clauses enforceable in all contracts, including consumer form contracts. "As an initial matter," the Court states, "we do not adopt the Court of Appeals' determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."²⁸ Rather, "we must refine the analysis of *The Bremen* to account for the realities of form passage contracts."²⁹

The "refinement" consists in the straightforward elimination of any requirement of bargaining, or even of informed consent, and acceptance of the *de facto* practice that consumers generally must, if they wish to make purchases, accept whatever nonnegotiable terms a seller offers. The Court acknowledges, but renders irrelevant, the critical aspects of the "business context" on which *The Bremen* relied in finding a forum-selection clause reasonable: that the clause appeared in a "freely negotiated agreement,"³⁰ that it was "a vital part" of the agreement *for both parties*,³¹ and that the forum was selected "in an arm's-length negotiation by experienced and so-

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972). Two lines after the quoted phrase the Court repeats that the forum-selection clause was in "a freely negotiated private international agreement." *Id.*

31. *Id.* The full sentence reads: "There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that *the parties* did not conduct *their negotiations*, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in *their* calculations." *Id.* (emphasis added).

phisticated businessmen.”³² By sanctioning the use of forum-selection clauses in the radically different take-it-or-leave-it context of consumer form contracts the Court simply dispenses with the factors that *The Bremen* considered critical. “Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation,” the Court notes, “and that an individual purchasing the ticket will not have bargaining parity with the cruise line.”³³ Thus, *Carnival Cruise* “refines” *The Bremen* by uncoupling the criterion of reasonableness from the nature or even existence of any bargaining and from the relative sophistication, knowledge, or power of the respective parties.

2. Watering Down the “Reasonableness” Test

As *Carnival Cruise* stretches *The Bremen* to reach forum-selection clauses in consumer forum contracts, so it reduces the requirement of reasonableness to the mere presence of some arguably “rational” justification. The Court does not require evidence that a proposed justification is factually applicable to the case at hand, only that it has some level of surface plausibility. The undemanding nature of its reasonableness test appears clearly from the three separate grounds the opinion advances to show that “a reasonable forum clause in a form contract of this kind well may be permissible.”³⁴

The first ground for asserting that forum-selection clauses “of this kind” may be reasonable is that a cruise line has a “special interest” in restricting the places where suit may be brought against it because it “typically carries passengers from many locales.”³⁵ This reason fails to distinguish cruise lines from any other type of transportation company, from any business that regularly deals with travellers or tourists, or, for that matter, from any other business that sells goods or services in interstate or international commerce.³⁶ The established rules of personal jurisdiction, the doctrine

32. *Id.*

33. 111 S. Ct. at 1527.

34. *Id.*

35. *Id.*

36. The Court refers to no evidence supporting the “special” nature of cruise companies. *Id.* at 1522. Moreover, to the extent that the companies could make a convincing showing that they did face special litigation problems, forum-selection clauses that were far less oppressive could provide them ample protection. Such clauses could provide, for example, that a claimant must sue either in his or her home state, where the claim arose, or in the place where the company has its principal place of business. They could also provide—although the provision would surely be unnecessary—that plaintiffs’ forum choice could be altered pursuant to federal law if the claim arose out of a

of *forum non conveniens*, provisions for consolidating and transferring cases, and the procedures governing multi-district litigation all provide the cruise line with sufficient protections against inconvenient and multiple litigations, just as they protect everyone else from those same burdens.³⁷ The Court's first reason is makeweight.

The Court's second ground for concluding that forum-selection clauses in consumer form contracts may be reasonable is that they have "the salutary effect of dispelling any confusion about where suits arising from the contract must be brought" and thereby of "sparing litigants the time and expense of pretrial motions" and "conserving judicial resources that otherwise would be devoted to deciding those motions."³⁸ While those are laudable goals, it is highly questionable whether the Court's decision will serve them.³⁹ More important, conserving the resources of litigants and the judiciary should be subordinate to the more fundamental goal of enforcing rights and securing the equitable administration of justice. A rule contributing to the former is surely not "reasonable" if it impinges adversely and unnecessarily on the latter.⁴⁰ By failing to consider the practical function of forum-selection clauses in con-

mass tort disaster or similar event requiring multi-district consolidation under 28 U.S.C. § 1407 (1988).

37. In addition to asserting the defense of lack of personal jurisdiction, of course, the company could move under 28 U.S.C. § 1404(a) (1988) for a change of venue to a more convenient forum; it could move under FED. R. CIV. P. 42, to consolidate diverse suits filed in the same district; and it could move under 28 U.S.C. § 1407 (1988) to transfer diverse suits filed in different districts to the same district for consolidated pretrial proceedings.

38. 111 S. Ct. at 1527. More recently, the Court has disparaged what it terms the "wasteful side shows of venue litigation." *Burlington N. R.R. Co. v. Ford*, 112 S. Ct. 2184, 2187 (1992) (upholding against an equal protection challenge a Montana venue rule that allegedly disfavored foreign corporations).

39. For a discussion of the problems that underlie the Court's goal of conserving litigant and judicial resources, see *infra* text accompanying notes 241-245.

40. The question of whether and to what extent the federal docket should be restricted is a fundamental and pressing issue. Even more important and more pressing, of course, is the question where and how the restrictions should be made. Those questions are subject to intense debate and raise complicated and basic questions of federal jurisdiction and federal rights enforcement. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 130-66 (1985); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67; John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Thomas J. Miceli & Kathleen Segerson, *Contingent Fees for Lawyers: The Impact on Litigation and Accident Prevention*, 20 J. LEGAL STUD. 381 (1991); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3.

sumer form contracts, a subject examined in Part II,⁴¹ the Court arbitrarily limits its assessment of the overall consequences of such clauses. Unless the Court considers *all* the likely consequences of its decision, however, and explains why it chooses to give weight to some but not to others, it can neither know that generally "salutary" consequences will flow from enforcing forum-selection clauses nor claim to have shown that to be the case. The Court's second reason is both speculative and arbitrary.

The Court's third reason why forum-selection clauses in consumer form contracts may be reasonable is that passengers will "benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."⁴² Taken at its strongest, the claim seems to be that forum-selection clauses will increase economic "efficiency," enable the company to lower prices, and thereby maximize social wealth. For a number of reasons the Court's third claim appears highly doubtful. Principal among those reasons, as the article discusses in Part IV,⁴³ is that companies are able to impose forum-selection clauses on consumers only because of a massive market failure and, further, that sanctioning such market failures will lead to widespread inefficiencies, inequitable redistribution of wealth, and quite likely a reduction in total social wealth. Moreover, as discussed in Part II,⁴⁴ whatever "savings" companies gain from forum-selection clauses will result not from increased efficiencies but, on the contrary, from increased inefficiencies and higher transaction costs in the litigation process that serve to redistribute, not maximize, wealth. Thus, the Court's consideration of the economic impact of forum-selection clauses, like its consideration of their impact on pre-trial motion practice, is arbitrarily limited to one presumed benefit and ignores numerous other likely and highly undesirable consequences. The Court's third reason, then, is also speculative and arbitrary.

3. Minimizing the Idea of "Fundamental Fairness"

After bringing consumer form contracts within *The Bremen's* rule and then lowering the applicable standard of reasonableness, *Carnival Cruise* proceeds to ensure that few forum-selection clauses will be voided on equitable grounds. Although it acknowledges that

41. See *infra* text accompanying notes 90-138.

42. 111 S. Ct. at 1527.

43. For a more complete discussion of the problems with the Court's economic goal and assumptions, see *infra* text accompanying notes 246-268.

44. See *infra* text accompanying notes 73-138.

"forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness,"⁴⁵ it adopts a minimalist idea of what constitutes "fundamental fairness."

Carnival Cruise indirectly contracts the realm of fundamental fairness scrutiny by emphasizing both that the burden of proof is on the party claiming unfairness and that the burden is a particularly "heavy" one.⁴⁶ It considers and rejects the Ninth Circuit's alternate holding that the forum-selection clause should not be enforced because there "is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida."⁴⁷ The Court, instead, concludes that the Shutes "have not satisfied the 'heavy burden of proof,' [citing *The Bremen*] required to set aside the clause on grounds of inconvenience."⁴⁸

The care with which *Carnival Cruise* draws on and applies *The Bremen*'s "heavy burden of proof" rule stands in illuminating contrast to the alacrity with which it disregards *The Bremen*'s stress on the need for a bargained agreement between commercial equals.⁴⁹ While the decision adheres religiously to *The Bremen*'s language and supports the enforceability of forum-selection clauses, it jettisons that language easily when the language limits enforceability. The disjunction is arresting, and it suggests strongly that in *Carnival Cruise* the Court was simply determined to uphold forum-selection clauses in consumer form contracts.

The disjunction is also revealing because *The Bremen*'s heavy burden of proof rule seems tailored to the specific context of commercial agreements between relatively equal and sophisticated parties, not to the context of consumer form contracts. *The Bremen* justifies placing a heavy burden of proof on the party challenging the contractual forum, for example, by citing a comment in the Model Choice of Forum Act to the effect that suit in the contractual

45. 111 S. Ct. at 1528.

46. *Id.* at 1526 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972)).

47. *Id.* at 1527 (quoting *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 389 (9th Cir. 1990)).

48. *Id.* at 1528 (citing *The Bremen*, 407 U.S. at 17). The Court also rejects the Ninth Circuit's alternate holding on the ground that it need not defer to the appellate court's findings since they are "conclusory" and since the trial court had not made any findings about the Shutes' physical and financial inabilities. *Id.* at 1527-28.

49. The Court's application of a heavy burden of proof also stands in sharp contrast to the way it treats the "reasons" that make forum-selection clauses in consumer form contracts permissible. *Id.* at 1527. In accepting those reasons, the Court does not demand proof or even any relevant evidence in the record. Rather, it simply assumes both the validity of the reasons as well as their applicability to the Shutes' case.

forum—however inconvenient it might ultimately prove to be—is nevertheless appropriate because “[t]his result will presumably be in accord with the desires of the parties.”⁵⁰ That statement assumes the existence of meaningful negotiation and knowing consent on the part of both of the parties, conditions that *Carnival Cruise* expressly eliminates.⁵¹ Moreover, a “heavy burden of proof” on the issue of fairness seems warranted when the party carrying the burden is a large national or international business, as was the case in *The Bremen*. Such parties have relatively substantial resources to use in attempting to carry such a burden, and the fact that they possess such resources suggests that litigating in a distant forum would likely not impose an excessive burden on them. In contrast, the same burden would generally be oppressive, and in some cases unbearable, when applied to ordinary individuals like the Shutes.⁵²

In addition to shaping the burden of proof to strengthen the enforceability of forum-selection clauses, *Carnival Cruise* achieves the same result directly by shrinking to a minimum the idea of fundamental fairness itself. It seems to hold that forum-selection clauses do not violate fundamental fairness as long as they designate a forum that bears some rational relationship to the company’s business. The critical reasoning appears in the way that *Carnival Cruise* dismisses the Shutes’ contention that the company uses forum-selection clauses to discourage suits against it. “Any suggestion of such a bad-faith motive,” the Court declares, “is belied by two facts: [the cruise line] has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports.”⁵³

50. 407 U.S. at 17–18. Similarly, *The Bremen* justifies the “heavy burden” it imposes on the ground that litigation in the contractual forum was “clearly foreseeable at the time of contracting.” *Id.* Again, it declares that a claim of inconvenience is insufficient unless the challenging party can show that the contractual forum “will be so manifestly and gravely inconvenient” that the party “will be effectively deprived of a meaningful day in court.” *Id.* at 19. This, too, is a standard appropriate for a large commercial party which would in all but the most unusual situations be able to shoulder the burdens of conducting a distant litigation. It is an exceptionally harsh standard if applied to ordinary individuals who could *in theory* often conduct distant litigation, but who would be prevented from doing so in fact because the costs and burdens were simply too heavy for them to do so.

51. See 111 S. Ct. at 1527; *infra* text accompanying notes 255–257.

52. See *infra* text accompanying notes 90–105.

53. 111 S. Ct. at 1528 (emphasis added). It is worth recalling that the Shutes’ cruise left from and returned to Los Angeles, California. *Id.* at 1524.

On the contention that the company uses forum-selection clauses to discourage suit against it, *Carnival Cruise* appears to accept the company’s response.

Respondents do not refer to any record evidence for their assertion that the clause was intended to deprive passengers of the ability to pursue meritorious claims, nor could they do so. The forum selection clause in

This seems to mean that as long as there is some legitimate connection between a company and its chosen forum the clause does not violate fundamental fairness.⁵⁴ It seems to mean, further, that as long as some such connection exists it is irrelevant whether the individual consumer has any connection with the forum. Indeed, here the Shutes—residents of the state of Washington whose cruise departed from and returned to Los Angeles—had no connection whatever with the contractual forum state. Those considerations mean, in turn, that the immense practical litigation advantages that a company may reap by methodically forcing the burdens of geogra-

this case, like the limitation procedure established by 46 U.S.C. § 185 serves the legitimate purpose of setting forth a single forum where potentially numerous claims can be litigated.

Pet'r's Reply Br., at 166, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file) (citations omitted). If spokespersons can come up with some ostensibly "reasonable" justification for a forum-selection provision, in other words, then all merely "accidental" advantages that somehow just happen to result from it—no matter how important—are irrelevant to the issue of fairness.

The company identified the rational basis of its selection of Florida as the forum state as follows:

Moreover, the state selected—Florida—is where Carnival has its principal place of business and where many of its cruises arrive and depart. Such a forum bears a logical relationship to the likely location of documents and witnesses; there is no indication that it was chosen to prevent meritorious litigation from being conducted efficiently or fairly.

Pet'r's Br., at 111, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file).

54. In its *amicus* brief the International Committee of Passenger Lines provides a particularly revealing illustration of its views as to the standard that the courts should apply in scrutinizing the fairness of forum-selection clauses. The rule it contends for, the brief explains, "is not so mechanical or rigid that a party cannot avoid enforcement of the clause *where it would truly deprive that party of the opportunity to present its case.*" Br. of the Int'l Comm. of Passenger Lines, at 123, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file) (emphasis added). The brief then cites *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir.), *cert. denied*, 474 U.S. 948 (1985), as an example of a case where its proposed standard was applied and satisfied. The forum-selection clause at issue required suit to be brought in Iran, and the Passenger Lines' brief agreed that "post-revolutionary conditions in Iran, including the cessation of diplomatic relations between the United States and Iran, the state of war between Iran and its neighbor Iraq and the suspension of all commercial air flights to Iran" were sufficient to justify the court's refusal to enforce the clause. Br. of Int'l Comm. of Passenger Lines, at 123, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file).

Needless to say, the discussion seems to indicate that the industry group believes that only the most extreme and extraordinary situations should warrant a court's refusal to enforce a forum-selection clause. An international shooting war in the contractual forum may be a *sine qua non*.

phy onto its customers are irrelevant to the question of fundamental fairness.⁵⁵

While *Carnival Cruise* retains "fraud or overreaching" as grounds on which a consumer could block enforcement of a forum-selection clause,⁵⁶ in practical terms those grounds seem of little significance. The reason is apparent. The major and systemic problem with forum-selection clauses in consumer form contracts does not involve legal fraud or undue influence operating in individual cases. Rather, it involves the open, planned, and universal exploitation of the burdens of distance in a methodical manner against consumers as a class. That tactic is precisely what *Carnival Cruise* finds consistent with fundamental fairness.

B. The Statutory Restriction

Carnival Cruise disposes handily of the Shutes' second argument against enforcing the forum-selection clause: that it is unlawful under 46 U.S.C. § 183c. The statute provides:

It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation . . . (2) purporting in such event to *lessen, weaken, or avoid* the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury⁵⁷

Since the *de facto* function of the forum selection clause at issue is precisely to "lessen" and "weaken" the Shutes' right to seek redress

55. It is important to note that use of forum-selection clauses certainly does not reflect any "bad faith" on the part of the company. *Carnival Cruise Lines, Inc.* is quite open about using the clause in its passenger contracts and quite open about the fact that the clause serves its business and economic interests. See, e.g., Pet'r's Reply Br., at 164-65, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file) (Florida as forum serves Carnival's convenience). The problem that *Carnival Cruise* illustrates is surely not one of "bad faith" on the part of the company. The problem is that the United States Supreme Court has come to regard the methodical use of such *de facto* inequitable tactics as consistent with its idea of what constitutes "fundamental fairness."

56. Dismissing any possibility that the clause at issue conflicted with fundamental fairness, the Court noted that "there is no evidence that [the company] obtained [the Shutes'] accession to the forum clause by fraud or overreaching." 111 S. Ct. at 1528. Hence, proof of some extreme facts evidencing deceit or undue influence would be sufficient to bar enforcement of a forum-selection clause. The facts, however, would have to be quite extreme. See *infra* text accompanying notes 63-72.

Here, as elsewhere in its opinion, the Court seems to adopt assumptions and conclusions similar to those advanced by Judge Posner in his writings off the bench. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 80-88 (2d ed. 1977).

57. 111 S. Ct. at 1528 (quoting 46 U.S.C. app. § 183c) (emphasis added)).

in a court of competent jurisdiction, the statutory language seems quite directly to void the clause. To elude that result, *Carnival Cruise* resorts to a transforming paraphrase. "By its plain language," it asserts, "the forum-selection clause before us does not *take away* [the Shutes'] right to 'a trial by [a] court of competent jurisdiction' and thereby contravene the explicit proscription of § 183c."⁵⁸ The paraphrase literally erases "lessen" and "weaken" from the statute's express terms, substituting in their place the non-equivalent term "take away." Even more striking, it does so in the name of construing the provision's "plain language."

Understandably seeking to bolster its conclusion, *Carnival Cruise* adds that the Shutes failed to produce any evidence that Congress had intended in passing the statute "to avoid having a plaintiff travel to a distant forum in order to litigate."⁵⁹ While the Shutes may have failed to present such evidence, Justice Stevens' dissent does not. Focusing on two critical facts, it shows that the Court could easily have found that Congress intended to reach forum-selection clauses in consumer form contracts. First, the legislative history shows that the statute's purpose was to prevent carriers from restricting the ability of claimants to obtain effective judicial relief. While Congress sought specifically to eliminate clauses that compelled arbitration or limited claimants to stipulated amounts of damages, the House Report states that the statute was intended to "put a stop to all such practices *and practices of a like character*."⁶⁰ Second, Justice Stevens points to a convincing reason why Congress did not specifically proscribe forum-selection clauses in the statute. "The absence of a specific reference is adequately explained by the fact that such clauses were already unenforceable under common law."⁶¹ The Court itself has long been on record acknowledging that pivotal point. "Forum-selection clauses," *The Bremen* itself declared some thirty-five years after Congress enacted Section 183c, "have historically not been favored by American courts."⁶²

58. *Id.* (emphasis added).

59. *Id.* at 1529.

60. *Id.* at 1532 (Stevens, J., dissenting) (emphasis on entire quoted phrase in dissent; no emphasis in original report); see S. REP. NO. 2061, 74th Cong., 2d Sess. 6-7 (1936); H.R. REP. NO. 2517, 74th Cong., 2d Sess. 6-7 (1936).

61. 111 S. Ct. at 1532 (Stevens, J., dissenting).

62. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972); see Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 138-47.

C. *Ignoring Easily Dispositive Facts*

Considering the way *Carnival Cruise* treats both of the Shutes' arguments, the court's determination to make forum-selection clauses in consumer form contracts enforceable seems apparent. Indeed, the opinion announces at its very beginning that "this is a case in admiralty, and federal law governs."⁶³ Thus, it is clear that no state law constrains the Court in laying down whatever rule it regards as most fair and reasonable.

The Court's result-oriented approach is further illuminated by its treatment of two key facts involved in the case. First, the Court ignores the fact—highlighted by the dissent—that the Shutes did not receive notice of the forum-selection clause until after they paid for their tickets and made plans for the cruise. Thus, *Carnival Cruise* found it irrelevant that the company imposed the forum-selection clause on the Shutes only after the transaction was completed.

Second, *Carnival Cruise* also ignores the fact that the tickets contained another clause that provided that the "Carrier shall not be liable to make any refund to passengers" if they failed to use their tickets.⁶⁴ The Court dismisses the nonrefund clause and ignores the possibility that consumers could reasonably fear that the clause meant that they either had to use the tickets that contained the previously unknown forum-selection clause or forfeit both their tickets and their right to obtain a refund. The opinion merely asserts that the Shutes "presumably retained the option of rejecting the contract with impunity."⁶⁵ Content to rely on a mere presumption, the opinion shows no concern that an effort to obtain a refund might well have required a substantial amount of inconvenience, frustration, time, and cost. More particularly, the opinion also ignores the fact that the tickets contained provisions that imposed on purchasers who canceled penalties ranging from \$100 to \$200.⁶⁶

63. 111 S. Ct. at 1525.

64. *Id.* at 1529 (Stevens, J., dissenting). Justice Stevens stated:

Not knowing whether or not that provision is legally enforceable, I assume that the average passenger would accept the risk of having to file suit in Florida in the event of an injury, rather than canceling—without a refund—a planned vacation at the last minute. The fact that the cruise line can reduce its litigation costs, and therefore its liability insurance premiums, by forcing this choice on its passengers does not, in my opinion, suffice to render the provision more reasonable.

Id.

65. *Id.* at 1528.

66. *Carnival Cruise Lines, Inc.* described the ticket contract as containing the following provisions: "The final page of the brochure, captioned 'General Information,'

The Court was apparently determined not only to ignore the Shutes' arguments but also to use the extreme facts that the case presented to produce a decision that would make forum-selection clauses in consumer form contracts broadly and generally enforceable. Its orientation appears with particular clarity when its treatment of the facts is contrasted with Judge Richard A. Posner's view of the facts in *Carnival Cruise*. Judge Posner's attitude is particularly revealing in this instance because, in his nearly contemporaneous decision in *Northwestern National Insurance Co. v. Donovan*,⁶⁷ he seems fully sympathetic with both the goals and doctrine that the Court adopts in *Carnival Cruise*.⁶⁸ The Court, moreover, seems equally to approve of Judge Posner's views about the economics of forum-selection clauses.⁶⁹ Despite that deep mutual sympathy, however, when Judge Posner considered the facts of *Carnival Cruise* in his *Donovan* opinion—after the Supreme Court had granted *certiorari* but before its decision—he easily found them “special.”⁷⁰ He was struck in particular by the fact that the Shutes had no knowledge of the existence of the forum-selection clause until after they had bought their tickets and the transaction was complete. In *Carnival Cruise*, Judge Posner concluded, the forum-selection clause “plainly is neither intended nor likely to be read” by the consumer.⁷¹ “If ever there was a case for stretching the concept of fraud in the name of unconscionability, it was *Shute*,” he declared, “and perhaps no stretch was necessary.”⁷²

states that a seven-day cruise (such as the one taken by Respondents) can be cancelled between 16 and 45 days before sailing with a \$100 penalty, and between 3 and 15 days before sailing with a \$200 penalty.” Pet’r’s Br., at 164, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file).

67. 916 F.2d 372 (7th Cir. 1990).

68. Addressing the question of the validity of forum-selection clauses in several limited partnership agreements between an insurance company and individual defendants, *Donovan* applies *The Bremen* to uphold their enforceability. The facts in *Donovan* make it easily distinguishable from *Carnival Cruise* and far closer to *The Bremen*. Judge Posner, for example, describes the individual defendants as “millionaires” who “are wealthy tax-shelter investors.” *Id.* at 378. *Donovan* nevertheless makes clear its view that forum-selection clauses should be widely and generally enforceable. The proper approach, it states, “is to treat a forum selection [sic] clause basically like any other contractual provision.” *Id.* at 375.

69. *Carnival Cruise* cites Judge Posner’s *Donovan* opinion as its sole authority in support of its economic argument for the reasonableness of forum-selection clauses. 111 S. Ct. at 1527.

70. 916 F.2d at 376.

71. *Id.* at 377.

72. *Id.* at 376. Judge Posner’s statement is also noteworthy because, in his theoretical writings at least, he rejects “unconscionability” (as well as “inequality of bargaining power”) as a basis for invalidating contracts. To warrant refusal to enforce agreements

In *Carnival Cruise* the Court decided to make a major policy choice. Doctrinally, the decision means that forum-selection clauses in consumer form contracts are now highly-favored contractual provisions. In social, economic, and political terms, the decision has even broader significance. An examination of the burdens that geography imposes on litigation and claim-disputing practices, and a consideration of the ways that Congress and the Supreme Court have attempted over the years to lighten those burdens, help illuminate that broader significance.

II. GEOGRAPHY AS A LITIGATION WEAPON

The current Court harbors a noticeable fondness for the aphorisms of Justice Oliver Wendell Holmes, Jr. Dissenting in a decision handed down only a month before *Carnival Cruise*, for example, Chief Justice Rehnquist countered the majority's Holmesian invocation with one of his own, assuming *arguendo* that "we must choose among Justice Holmes' aphorisms to help decide this case."⁷³ It seems appropriate, then, to begin consideration of the practical significance of forum-selection clauses in consumer form contracts by plucking another plum from the rich Holmesian storehouse. Judges are apt to be somewhat "naïf," the Yankee from Olympus once declared, and to counter that tendency they "need something of Mephistopheles."⁷⁴ In dealing with legal rules, his image suggests, judges—and anyone else who would understand "the operations of the law"—need to include in their thinking a shrewd and realistic appraisal of the purposes and tactics of parties and of the non-ideal aspects of legal practice.

Judges, lawyers, and legal scholars, for example, persistently repeat the refrain that "parties seek predictability and certainty in their contractual relations." The statement is, in a general sense, true enough. At the same time, however, it is both misleading and

he believes that a specific showing of actual fraud or duress should be required. "Of course," Judge Posner writes, "if the purchaser does not understand the effect of such [contractual] provisions, he does not have a meaningful choice. This may be a problem but again it is one of fraud rather than of inequality of bargaining power." POSNER, *supra* note 56, at 86. Thus, when he suggests in *Donovan* that the Shutes may have been the subject of "fraud," he seems to be suggesting that their treatment by Carnival Cruise Lines may have gone well beyond what most courts would likely call "unconscionability."

73. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1226 (1991) (Rehnquist, C.J., dissenting). The six Justice majority, in an opinion written by Justice Blackmun, also invoked Holmes. *Id.* at 1218.

74. OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 295 (1920).

incomplete. The mere fact that forum-selection clauses may increase, or at least appear to increase, predictability is no reason to think that they do not serve other and far more important ends as well.⁷⁵ Nor, of course, is it any reason to think that predictability is the result that the parties actually value most highly or seek most intently to achieve.

A. *Forum-Selection Clauses: The Relevant Business Context*

Although *Carnival Cruise* emphasizes the importance of "business context" in evaluating forum-selection clauses, it fails to consider the importance of the claims-disputing context where forum-selection clauses actually affect human behavior.⁷⁶ In particular, it ignores three salient and quite obvious characteristics of that context. One is that most disputes are resolved by out-of-court settle-

75. See *infra* text accompanying notes 124–129. The extent to which courts will inquire into issues of "pretextuality" generally reflects commitments to basic policy choices. See, e.g., Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 PSYCHOL. L. BULL. 131 (1991).

76. Some lawyers and economists argue that the "efficiency" of legal arrangements should be judged "*ex ante*," that is, before anyone suffers injury and needs to invoke the law. The *ex ante* approach allows a theoretical evaluation of efficiency free from the need to consider *ex post* fairness problems. Whatever its virtues, however, the *ex ante* approach is not appropriate here.

First, the approach does not in its own terms purport to justify a legal arrangement unless that arrangement is wealth maximizing. Since forum-selection clauses in consumer form contracts seem likely to reduce aggregate wealth, as this article discusses in Part IV, *ex ante* analysis provides no basis either for defending such clauses or for ignoring their unfair *ex post* consequences.

Second, *ex ante* analysis is inappropriate here because the operation of forum-selection clauses in consumer form contracts is not *ex ante* random and unpredictable. With respect to the relationship between the company and its consumers, it is certain that the former will derive a substantial and regular benefit from the clauses and that the latter will, as a group, bear added risks and burdens. It is highly doubtful that the consumers will, as a group, receive the full amount of any company savings in the form of cheaper tickets, and it is equally doubtful that any savings that consumers as a class might obtain would equal the detriment incurred by those who suffer injury. With respect to the consumers considered among themselves, the social significance of forum-selection clauses is that they allow companies to use geography as a systematic claims-disputing weapon and thereby bring a variety of extraneous social factors to bear on the consumers' ability and willingness to litigate. The *de facto* result is that consumers are pressured more forcefully to discount their claims and settle them relatively cheaply. Those various social factors, however, do not affect all consumers or affect them randomly. Rather, they affect them in predictable and patterned ways, and consequently the provisions are not *ex ante* equally fair to all. Identifiable classes of consumers—those who live at greater distances from the chosen forum, those who lack interstate contacts and legal sophistication, and those who lack substantial personal and financial resources—will all be affected relatively more directly, adversely, and seriously. Because that unequal impact of forum-selection clauses is predictable *ex ante*—both between the com-

ments with little or no judicial involvement; the second is that geographical burdens place individual parties at a severe disadvantage when they have disputes with large national and international corporations; and the third is that corporate attorneys structure their clients' contracts and shape their litigation posture to maximize their clients' total leverage in the claim-disputing process.⁷⁷ Together, those three characteristics largely determine the *de facto* social function of forum-selection clauses in consumer form contracts.

1. The Nature of the Claims-Disputing Process

A simple and familiar fact is that the overwhelming majority of claims are never brought to court⁷⁸ and that an equally overwhelming majority of the claims that are brought to court are never brought to trial. The percentage of cases that are tried to judgment seems, in fact, to have declined significantly over the years.⁷⁹ A

pany and its customers on one hand and among the customers considered by themselves on the other hand—an essential presupposition of *ex ante* analysis is lacking.

Beyond those intrinsic reasons why an *ex ante* analysis of forum-selection clauses in consumer form contracts is inappropriate, the approach is also unsatisfactory for a more general reason: *Ex ante* analysis ignores questions of wealth redistribution, and this characteristic is particularly troublesome and unrealistic here because a principal *de facto* function of such clauses is precisely to externalize costs and thereby to redistribute wealth. *Ex ante* analysis embraces the distributively ambiguous concept of "Kaldor-Hicks" or "potential Pareto" efficiency (that is, efficiency that would allow the benefited parties to compensate the injured and still be better off, regardless of whether any such compensation occurs). See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 16-17 (1987). That standard disregards the distributive impact of legal rules and, as a practical matter, accepts the fact that those who are benefitted by a legal rule will not fully (or perhaps even partially) compensate those who are harmed by it. As Landes and Posner state candidly, under a Kaldor-Hicks or potential Pareto standard of efficiency it remains true that "the result is not efficient in the [actual] Pareto sense, because the victim is worse off." *Id.* at 17. The Kaldor-Hicks standard, in fact, is highly subjective. See *infra* note 251; see also Gregory S. Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231 (1991). Since the *de facto* function of forum-selection clauses in consumer form contracts is to externalize costs and redistribute wealth, it seems pointless to ignore that fact.

77. Some of the material in this section and in Section III(B) is drawn from EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958*, at 28-58, 177-99 (1992).

78. E.g., Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 448-52 (1987); Galanter, *supra* note 40; Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1183-85 (1992).

79. A study of litigation in a state court over the 150 years from 1820 to 1970 reached typical conclusions: "The proportion of cases resulting in contested judgments declined, voluntary dismissal and uncontested judgments increased." Wayne McIntosh,

study that examined two different state courts over the eighty-year period from 1890 to 1970, for example, found a marked decline in trials and final judgments and a corresponding rise in out-of-court settlements. While different factors may explain the trend for diverse types of litigants, the study noted that "ordinary people are deterred by the cost, the torpor, the technicality of court proceedings."⁸⁰ In the late twentieth century only a relatively small number of filed actions—generally less than ten percent—end in a final legal judgment after trial.⁸¹ Of a sample of 1,649 recent state and federal cases, for example, only eight percent went to trial, and some of that number settled before trial was completed.⁸² "One of the most striking aspects of our study of litigation," announced another analysis, "was that bargaining and settlement are the prevalent and, for plaintiffs, perhaps the most cost-effective activity that occurs when cases are filed."⁸³

If one considers the universe of all legal claims asserted, including those presented informally as well as those filed in court, final legal judgments probably account for the resolution of no more than one or two percent of the total.⁸⁴ Of approximately thirty-one million automobile accidents that occurred in 1984, for example, only 500,000—less than two percent—wound up in the courts. Of 362,000 automobile-related bodily injury claims submitted to one major insurance company in 1985 eighty-eight percent were settled without the initiation of a lawsuit. Even more striking, only one

150 Years of Litigation and Dispute Settlement: A Court Tale, 15 LAW & SOC'Y REV. 823, 847 (1980-81).

80. Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 300 (1976).

81. See, e.g., Stephen Daniels, *Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties*, 19 LAW & SOC'Y REV. 381 (1985); Patricia M. Danzon, *The Medical Malpractice System: Facts and Reforms*, in THE EFFECTS OF LITIGATION ON HEALTH CARE COSTS, 28, 30 (Mary Ann Baily & Warren I. Cikins eds., 1985); Richard Lempert, *More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts*, 13 LAW & SOC'Y REV. 91 (1978); Wayne V. McIntosh, *A State Court's Clientele: Exploring the Strategy of Trial Litigation*, 19 LAW & SOC'Y REV. 421 (1985).

82. Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162 (1986).

83. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 122 (1983).

84. H. LAWRENCE ROSS, SETTLED OUT OF COURT 216 (1970); see also Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81); Saks, *supra* note 78, at 1171-89.

percent of the claims reached trial and only half of one percent were actually tried to a verdict.⁸⁵

The business of resolving disputes, even those that become formal legal actions, is thus carried on outside of the courts. Although traditional legal theory conceives of litigation as a preparation for trial on the merits, its predominant *de facto* function in contemporary American society is to prepare the parties to settle. Litigation accomplishes this result by imposing various costs and burdens on the parties, by both creating and resolving various kinds of perceived risks and uncertainties, by gradually establishing certain mutually (if often covertly) accepted assessments of the relevant evidence and controlling law, and in some cases by obtaining judicial decisions that resolve critical "preliminary" issues and thereby narrow the range of disagreement between the parties. The term "litigation" is, of course, an abstraction. As a matter of actual human behavior, litigation comprises the sum total of actions that parties and their attorneys take to increase their convenience and strengthen their positions while forcing costs and burdens on their adversaries, generating risks and uncertainties that undermine their adversaries' determination to continue, and weakening and destroying as many as possible of the legal and factual foundations on which their adversaries' positions rest. As a matter of descriptive human dynamics, litigation is a socio-legal process in which parties and their attorneys labor to pry settlement values up or down and, in their efforts, research and sometimes ransack "the law"—but one of the possible sources of useful pressure—in a methodical search for potential fulcra of effective leverage.⁸⁶

The role that out-of-court settlements play in the litigation process is well known to lawyers and judges alike. In a recent survey of lawyers' forum preferences, for example, fifty-five percent of the defense attorneys who preferred a federal to a state forum did so because, among other reasons, they thought that the federal forum would lead to "faster settlement."⁸⁷ Recent amendments to the

85. Leo J. Jordan, *The Insurance Industry's Effect on Civil Litigation*, 29 JUDGES' J. 37, 37-38 (1990).

86. See, e.g., Kritzer, *supra* note 82, at 161; Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Legal scholars have also begun increasingly to emphasize the practical, "non-ideal," and strategic nature of litigation practice. For a description of some of the types of tactics that parties use, see Phillip G. Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115 (1969).

87. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 406 (1992).

Federal Rules of Civil Procedure are designed to encourage settlements,⁸⁸ and the Supreme Court has repeatedly manifested its desire to facilitate and encourage settlements.⁸⁹ The paramount consideration in understanding the significance of forum-selection clauses, then, is the role they play in the *de facto* process of disputing and settling claims out of court.

2. The Impact of Geography on Claim Disputes

Forcing an adversary to litigate in a distant forum can impose substantial and sometimes unacceptable costs, risks, delays, and uncertainties. In a recent case, Justice Scalia noted that "[v]enue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue."⁹⁰ The reasons he gave were forceful and (in the Holmesian sense) eminently Mephistophelean. "Suit might well not be pursued, or might not be as successful, in a significantly less convenient forum."⁹¹ In 1990, the Court emphasized the impact of geographical burdens when it noted that "some plaintiffs would not sue these defendants for fear that they would have no choice but to litigate in an inconvenient forum."⁹² A recent study found that, in one of the four federal judicial districts examined, "the burden and expense of travel" *within the single district* was sufficiently heavy that local attorneys considered geographic factors "the most significant variable in forum choice" between the local state and federal courts.⁹³

If geography can be burdensome to corporations, it can weigh even more heavily on individuals. The fewer the resources a litigant has or the greater the disparity between her resources and those of

88. See, e.g., FED. R. CIV. P. 16; see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

89. E.g., *Evans v. Jeff D.*, 475 U.S. 717 (1986); *Marek v. Chesny*, 473 U.S. 1 (1985).

90. *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 39-40 (1988) (Scalia, J., dissenting).

Professor Charles Alan Wright noted the importance of venue in litigation when he discussed the federal change-of-venue statute: "Section 1404(a) has given rise to a veritable flood of litigation. Probably no issue of civil procedure gives rise to so many reported decisions, year after year, as does this seemingly simple statute." CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* 260 (4th ed. 1983).

91. *Ricoh Corp.*, 487 U.S. at 39-40 (Scalia, J., dissenting). Justice Scalia stated: "It is difficult to imagine an issue of more importance, other than one that goes to the very merits of the lawsuit, than the validity of a contractual forum-selection provision." *Id.* at 40 (Scalia, J., dissenting).

92. *Ferens v. John Deere Co.*, 494 U.S. 516, 526 (1990).

93. Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 LAW & SOC'Y REV. 749, 771 (1980-81) (emphasis in original deleted).

her adversary, the heavier the burdens of geography. As a general matter, the burdens are at their most oppressive when an individual plaintiff is forced to seek redress against a large national corporation in the latter's distant home state.⁹⁴ As the district court explained in *Yoder v. Heinold Commodities, Inc.*,⁹⁵ "where the [forum-selection] clause requires the filing of a suit in a distant state it can serve as a large deterrent to the filing of suits by consumers against large corporations."⁹⁶

The deterrent effects of geography are numerous and weighty.⁹⁷ The threshold task of merely retaining counsel in a distant location, which may seem routine to attorneys and judges, is profoundly daunting to ordinary people. The very decision to retain an attorney is so troublesome, in fact, that most claimants are content to accept a settlement without one. The result of that commonplace decision, as numerous studies have repeatedly shown, is that such claimants almost invariably obtain much less from their adversaries than they otherwise would.⁹⁸ If claimants learn, per-

94. Geography is only one of the extra-legal factors that can help dissuade a claimant from bringing suit. A great many other social factors—delay, distrust of lawyers and legal system, cultural attitudes of a sub-group or location that disfavor personal injury claims, lack of understanding of or access to legal institutions, and even simple fear—may prevent individuals from effectively seeking legal relief. See, e.g., Elvia R. Arriola, "What's the Big Deal?" *Women in the New York City Construction Industry and Sexual Harassment Law, 1970–1985*, 22 COLUM. HUM. RTS. L. REV. 21 (1990); David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984).

95. 630 F. Supp. 756 (E.D. Va. 1986).

96. *Id.* at 759.

97. The burdens can be so heavy that often even relatively small distances are sufficient to discourage or disable individual litigants, especially those who lack either resources or sophistication. See, e.g., *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976); *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140 (Mass. 1978); *Barquis v. Merchants Collection Ass'n*, 496 P.2d 817 (Cal. 1972); John J. Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEX. L. REV. 269 (1973); Craig Karpel, *Ghetto Fraud on the Installment Plan*, N.Y. MAG., May 2, 1969, at 41.

98. Cf. ROSS, *supra* note 84, at 69–70 (summarizing several studies that show that only between 15 and 30% of claimants obtain legal representation and that only approximately half of those who are "seriously injured" do so); Jordan, *supra* note 85, at 38 (noting that 62% of 362,000 automobile personal injury claimants were unrepresented in their negotiations with the insurance company the author represented); Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283, 284–85 (1992) (summarizing results of American Bar Association and American Bar Foundation surveys suggesting that slightly more than 80% of Americans agree that it is difficult for many people to find a competent lawyer when they need one).

For the economic consequences of a claimant's failure to obtain legal representation, see, e.g., ROSS, *supra* note 84, at 69–70, 116–21, 142–43, 167, 193–98; JOEL SEIDMAN, *THE BROTHERHOOD OF RAILROAD TRAINMEN* 157 (1962); 1 U.S. RAILROAD

haps from company representatives they contact, that they must retain an attorney in a distant contractual forum in order to initiate a legal action on their claims, that information alone may dissuade a significant number from proceeding and lead them to accept whatever offer, if any, the company might make.

If a claimant does eventually retain an attorney, he may likely begin by securing counsel who resides near his home and outside of the contractual forum state. In such a case, his hopes are immediately subject to two related risks that geography creates. First, the claimant's leverage in negotiating a settlement is minimized because he has not yet established his willingness or capacity to bring suit in the contractual forum, or even to hire an attorney in the forum state. Second, his local attorney has a strong incentive to arrange an out-of-court settlement—especially if she is acting, as she most probably is, under a contingent fee agreement—in order to maximize her return and prevent the great bulk of the fee from eventually going to an attorney in the contractual forum state.⁹⁹ Those facts by themselves increase the likelihood that the claimant will wind up with a relatively low and unfavorable out-of-court settlement.

If the claimant does secure representation in the distant contractual forum, he begins to shoulder other and more palpable burdens. He may, for example, wind up with two attorneys, one local and one in the contractual forum, an arrangement that can complicate the representation and drive up his costs. Further, his need to rely on a distant attorney compounds his anxieties and uncertainties. The distant attorney is an unknown quantity. The claimant has fewer reasons to trust her, and the possibility that some subtle conflict of interest might emerge between the client and his distant

RETIREMENT BD., *WORK INJURIES IN THE RAILROAD INDUSTRY, 1938–40*, *passim* (1947); Engel, *supra* note 94; Marc A. Franklin et al. *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, in *DOLLARS, DELAY AND THE AUTOMOBILE VICTIM* 27, 42–44, 46–47 (1968).

99. Scholars are increasingly recognizing and exploring the extent to which the economic and other interests of lawyers may diverge from those of their clients and lead the attorney to accept settlements less favorable to the client than might have been obtained. See, e.g., ROSS, *supra* note 84, at 82–83; PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* 192–223 (1986); Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 *STAN. L. REV.* 497 (1991); George W. Shadoan, *Pressure Points in Settlement Negotiations*, *TRIAL*, Aug. 1991, at 36; Terry Thomason, *Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process*, 20 *J. LEGAL STUD.* 187 (1991); Trubek, *supra* note 83, at 123; see also Earl Johnson, Jr., *Lawyer's Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 *LAW & SOC'Y REV.* 567 (1980–81).

attorney increases.¹⁰⁰ The claimant can scarcely monitor the distant attorney's performance closely, and any attempt to do so would drive up his costs yet again.¹⁰¹ For her part, the attorney in the contractual forum is not particularly concerned with her reputation in the relatively remote town where her client lives, and she most likely does not represent or hope to represent other individuals or organizations from her client's distant home town.¹⁰²

Once litigation begins, the process quickly piles on additional burdens. One is the obvious need to travel and communicate over long distances, which makes the suit more costly as well as more inconvenient in terms of both litigation planning and client-attorney consultation. Another is the compounded costs and risks created by the attorney's need to communicate with the client's witnesses and to prepare them for depositions and trial testimony. The party may either have to pay additional travel costs for in-person meetings or risk the creation of potentially discoverable documents that could spur additional and costly motion practice and, if disclosed, weaken the party's position in negotiations and at trial.¹⁰³ A third burden is the likely additional delays involved in prosecuting the case, as distance and inconvenience combine to complicate various pretrial events and to remove from the attorney the spur of a human client who can or does present himself in person at his attorney's office. A fourth burden is the added cost of participating in a distant trial, including the costs and risks involved in securing the attendance of witnesses at such a location. All of these burdens will be especially heavy if the plaintiff's claim arises from events in his home state and many or all of his witnesses reside there.

Yet another burden is the fact that, whatever else happens, psychologically the claimant feels more cut off, more vulnerable,

100. See *supra* note 99.

101. To the extent that plaintiff has his local counsel monitor the work of the out-of-state attorney, for example, he will almost certainly incur added legal costs.

102. Numerous pressures may induce an attorney to press a client's claim with less than his or her greatest effort or determination. See, e.g., Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149 (1986).

103. Documents used to prepare witnesses for trial might be discoverable, for example, under FED. R. EVID. 612 (allowing discovery of "a writing" used to refresh the memory of a witness prior to testifying), or, in the case of an expert witness such as a physician, under FED. R. EVID. 705 (allowing discovery of material on which expert witness relies in forming his opinion). Another great danger is that any document shown to a nonparty witness might be found to have lost whatever privilege protection it could otherwise claim.

and even more anxious than he otherwise would.¹⁰⁴ That burden is magnified by the fact that the attorneys representing his corporate adversary feel relatively comfortable and secure litigating in their home court. Those attorneys are, moreover, fully aware of the extra-legal burdens the plaintiff is facing. Consciously or unconsciously, they will tend to drive a harder bargain, hold off settling for a longer period in the hope of obtaining increasingly more favorable terms, and drag their feet while forcing the out-of-state litigant continually to press for action at each stage of the litigation.¹⁰⁵

A final burden is the risk that the cumulative effect of some or all of the preceding complications may combine to so hamper the party's trial preparations that he will ultimately feel compelled to "cave" on the courthouse steps or end up putting on a materially weaker case than he otherwise would have. If settlement comes after full pretrial discovery and motion practice, costs will consume a larger proportion of any settlement payment. If trial presentation is weak, the party may win little or nothing. The risks of geography increase the likelihood of such unfavorable outcomes, and that ultimate concern further compounds the pressures that push nonresident claimants toward earlier and less favorable settlements.

The burdens of geography are thus numerous and heavy. They are emotional as well as financial. Some are readily apparent, while others are subtle and surely unmeasurable. When placed on individuals who lack relevant interstate connections and experience or who lack extraordinary personal or financial resources, however, their *de facto* impact as a general matter is severe and certain. They impose sharp discounts on the value of the claims involved and discourage large numbers of plaintiffs from attempting to enforce their legal rights.

3. The Role and Duty of the Corporate Attorney

With respect to the claims-disputing process, the role of corporate attorneys is apparent. They seek to gain the most satisfactory results possible for their clients. The testimony that an attorney for

104. In some contexts, of course, the Court takes note of the importance of such personal and psychological impediments to litigation. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 n.22 (1984) (noting that the fear of "unwanted publicity" could discourage plaintiffs from bringing actions for defamation).

105. Although sometimes ignored or downplayed by professional spokespersons, and clearly raising ethical questions, delay as a litigation tactic is commonly used. See, e.g., LOIS G. FORER, *MONEY AND JUSTICE: WHO OWNS THE COURTS?* 96-99 (1984).

the New York Central System gave to Congress some eighty years ago seems as straightforward and unexceptional today as it did then: "The lawyer for the railroad company is trying to [settle cases] from an economical standpoint," he explained.¹⁰⁶ The goal is "to bring about the end of the year with the smallest amount possible to be paid in the aggregate so far as his company is concerned."¹⁰⁷ Indeed, the unquestioned ethical duty of lawyers who represent corporations is to search out every possible way in which they can legitimately strengthen their clients' legal positions.¹⁰⁸ "In the realm of practice," a recent study of attorneys in large firms concluded, "these lawyers enthusiastically attempt to maximize the interests of clients."¹⁰⁹

In the context of litigation planning, moreover, corporate attorneys plan to win the actions they must defend. Justice Robert H. Jackson, one of the legal profession's more outspoken members, both before and after he ascended to the bench of the United States Supreme Court, vouched for the power of the litigator's individual competitive drive in intensifying the desire for forensic victory regardless of the merits of the dispute at issue. "[W]e abhor," Justice

106. S. Doc. No. 338, 62d Cong., 2d Sess., vol. II, at 756-57 (1912) (statement of Robert J. Cary, Attorney, New York Central System).

107. *Id.* The point is not that lawyers are cruel or do not seek "fair" settlements. It is, rather, that ideas of "fairness" diverge drastically and that the lawyer's job is generally to get the most, or give up the least, possible in the circumstances. Compare the complexities of settlement negotiating practices described in Ross, *supra* note 84.

108. In protecting their clients interests to the fullest extent possible, of course, corporate attorneys are fulfilling their highest professional obligations. See *infra* text accompanying note 137; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

109. The dominance of client interests in the practical activities of lawyers contradicts the view that large-firm lawyers serve a mediating function in the legal system. . . . Both the direction of their law reform activities and their approach to the issues that arise in ordinary practice ultimately are determined by the positions of their clients.

ROBERT L. NELSON, PARTNERS WITH POWER 232 (1988); see, e.g., Robert A. Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 LAW & SOC'Y REV. 323 (1984).

For studies of the development of the bar and of corporate legal practice, see Richard L. Abel, *Comparative Sociology of Legal Professions*, in LAWYERS IN SOCIETY 80, 121-35 (Richard L. Abel & Philip S.C. Lewis eds., 1988); JOEL F. HANDLER, THE LAWYER AND HIS COMMUNITY (1967); JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS 365-73 (1982); JAMES W. HURST, THE GROWTH OF AMERICAN LAW (1950); ERWIN O. SMIGEL, THE WALL STREET LAWYER 1-14 (1964); JAMES B. STEWART, THE PARTNERS 13-17 (1983); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 70-110 (Gerald L. Geison ed., 1983); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115 (1979).

Jackson declared while still in practice, "a proceeding where two and two must always make four—we want a chance by forensic skill to build two and two up to six or hold them down to three, and now and then to get two and two returned by a jury as a cipher."¹¹⁰ Judge Marvin Frankel, one of the leaders of the federal bench prior to his return to private practice, acknowledged that "[t]he business of the advocate, simply stated, is to win."¹¹¹ To understand modern litigation, he explained, "[w]e should face the fact that the quality of 'hired gun' is close to the heart and substance of the litigating lawyer's role."¹¹² Often glorying in such descriptions, litigators plan their efforts strategically and attempt to exploit whatever tactical opportunities appear in order to ensure their clients the greatest possible leverage in litigating and settling disputes. Always eager to exploit an opening, they share the attitude of the partner at a prominent New York firm who "delights in thinking up new wrinkles to throw into a situation."¹¹³

Among the tactics that such practitioners value and use, of course, are those that allow them to control forum choice and to secure the most favorable court possible in which to confront their adversaries.¹¹⁴ In any particular case or type of case the rewards of forum control might include helpful procedural rules, favorable statutes of limitations, or less formal but nevertheless acutely felt leverage stemming from the structure, personnel, or docket of the chosen forum. The ability to control forum choice may also enable a party to control the substantive law that will govern the case.¹¹⁵

110. Robert H. Jackson, *Trial Practice in Accident Litigation*, 15 CORNELL L.Q. 194, 197 (1930).

111. The entire quote is as follows: "The business of the advocate, simply stated, is to win if possible without violating the law. (The phrase 'if possible' is meant to modify what precedes it, but the danger of slippage is well known)." Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1037 (1975).

Naturally, "winning" can mean a variety of different things and have a range of different forms in any given context. In the overwhelming majority of disputes, in fact, it would have no connection with any final legal judgment on the merits. Ordinarily, "winning" would refer to the conclusion of a favorable out-of-court settlement in which, for example, a party either paid substantially less than the amount of its estimated liability on the merits or obtained significant collateral concessions (waiver of other claims, agreement not to disclose information developed during discovery, etc.) from the other party.

112. *Id.* at 1055 (footnote omitted).

113. NANCY LISAGOR & FRANK LIPSUS, *A LAW UNTO ITSELF* 252 (1988).

114. See, e.g., Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11.

115. Control of the forum will in many cases determine which state's substantive law will be applied. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985);

Perhaps most important from the practitioner's point of view, the choice of forum may make a drastic difference in the amount of damages likely to be recovered at trial and, consequently, a drastic difference in the settlement value that attorneys place on a case. To whatever extent the size of jury verdicts may have changed over time, studies show that they vary markedly and relatively consistently by location, differing both from state to state and among counties within the same state. A study of forty-three counties in ten states, for example, found that the median jury verdict was more than \$50,000 in fourteen counties and more than \$100,000 in four, while it was less than \$25,000 in twenty-three other counties and less than \$15,000 in ten. In California the highest and lowest counties studied had median jury verdicts of \$122,580 and \$51,800 respectively; in Washington the numbers were \$64,800 and \$17,719; in Illinois they were \$24,920 and \$10,382.¹¹⁶ "These large differences," concluded another scholar, "suggest that differences in the *milieu externe* or the local legal culture may have an equal or greater impact in determining awards than differences in the substantive law."¹¹⁷ Whatever the explanations, the ability to control forum choice is a pivotal and distinctly bottom-line power.

While litigation planners might seek a variety of possible advantages from the ability to control forum choice, they would invariably recognize the significance of geography and readily appreciate the benefits of being able to force heavy and disproportionate practical burdens on their adversaries. A recent survey of attorneys in a sample of 600 cases removed to federal court, for example, found that 14.9 percent of plaintiffs' counsel and 17.9 per-

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Goldman, *supra* note 1, at 712. In some instances, of course, a party may control substantive law directly by means of an express choice-of-law provision.

116. Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 JUST. SYS. J. 321, 336-38 (1986). The numbers for the states cited represent neither the highest nor the lowest numbers found in the 10 states.

A recent study by the General Accounting Office has found evidence suggesting that arbitration may provide a more favorable forum than courts for securities firms defending against claims filed by investors. The study found, for example, that the approximately 60% of claimants who were victorious recovered only 60% of their claimed losses and that claimants were more likely to obtain above-average awards if they retained attorneys and were able to have formal hearings rather than being confined to written submissions. The findings suggest, of course, that those firms that are increasingly forcing arbitration clauses on their customers are making a decisions that is, for them, economically rational. See Henriques, *Wall St. Arbitration Programs Criticized*, N.Y. TIMES, May 12, 1992, at D1. The Supreme Court has made such arbitration clauses enforceable on a "consent" theory. See *supra* text accompanying note 3.

117. Saks, *supra* note 78, at 1252.

cent of defendants' counsel were willing to admit that they considered the extent to which a forum would impose geographical and financial inconveniences on their opponents as a factor in determining their forum preference.¹¹⁸ Since most attorneys would likely be unwilling to acknowledge publicly that they used such "hardball" tactics,¹¹⁹ the study's findings almost certainly underrepresent the number of those who in practice attempt to exploit the burdens of cost and convenience.

Evidence has repeatedly shown that some companies use inconvenient venues methodically to discourage individuals from appearing in debt collection and other similar types of actions.¹²⁰ In New York, for example, merchants and finance companies have used the state's liberal venue rules to bring collection suits in counties distant from the debtor's home—a practice that frequently rewarded them with quick default judgments.¹²¹ A study of consumer collection practices in Texas found that several large re-

118. Miller, *supra* note 87, at 403. The results of the survey also illustrate some of the ways that defense attorneys attempt to use procedural devices—plaintiffs' attorneys, of course, have their own special tactics—to gain advantages over their adversaries.

[T]hree defense attorneys reported removing in the hope that their less-experienced opposing counsel would be unfamiliar with the federal rule requiring a written demand for jury trial. Four other defense attorneys reported that they removed simply to annoy opposing counsel or because filing in federal court would remove whatever advantage plaintiff counsel thought would come from filing in state court. Finally, one plaintiff attorney reported that the defendant used removal to gain time to become judgment proof.

Id. at 404. Such admissions by defense attorneys are especially noteworthy because, as the author points out, some of the tactics described "may, of course, violate professional ethics." *Id.* at 404 n.136.

119. In private, of course, the situation is quite different. In the right circumstances, few attorneys can resist the opportunity to recount a colorful "war story." Auditors often note some discrepancy between the tactics described in such tales and the highest ethical standards of the organized bar.

120. See, e.g., *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976); *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140 (Mass. 1978); *Barquis v. Merchants Collection Ass'n*, 496 P.2d 817 (Cal. 1972).

121. Karpel, *supra* note 97. The article, focusing on practices in New York City, reported the following:

Of the 53 per cent who are warned they're being sued [*i.e.*, who received actual notice], most of them are done in by improper venue. Under New York's rules of civil practice, any county civil court has jurisdiction on a case that arose anywhere in the state. So merchants and finance companies often sue, not in the county where they reside or in the county where the defendant resides, but in some other county which is likely to be inconvenient for ghetto consumers to get to. Under the rules, the consumer can have venue changed to the county where he resides. If he is being sued in a court that is inconvenient for him to get to, all he has to do is go to the court that is inconvenient for him to get to and ask for a change of

tail and finance companies used form contracts to obtain the same results. Their agreement forms allow creditors to bring collection suits in counties distant from the borrowers' places of residence. The study found that "those creditors act upon the venue advantage gained and file a significant number of lawsuits in the distant forum against out-of-county residents."¹²² Equally important, the study found that the practice paid off. "[D]efendants sued in a distant forum are more likely to have default judgments entered against them than are county resident defendants."¹²³ Such venue provisions, of course, are the functional equivalent of forum-selection clauses in consumer form contracts, and both bring the same result to companies able to use them—the ability to force their adversaries to abandon their suits or to accept relatively unfavorable out-of-court settlements.

While corporate lawyers may defend forum-selection clauses on the ostensibly "neutral" ground that they increase "predictability" in the legal process, the significance of predictability as such is trivial compared to the importance of the powerful litigation leverage that companies can obtain by controlling forum choice. If forum-selection clauses merely increased predictability, that benefit would accrue to all parties equally; however, in litigation planning and claims disputing a benefit that accrues equally to all parties are seldom an advantage to anyone.¹²⁴ In sharp contrast, however, the burdens of geography—which forum-selection clauses impose regardless of the formal purposes that purportedly explain their use—often fall heavily, and usually either disproportionately or exclusively, on one side only. That, of course, is a substantial litigation advantage for the nonburdened party.

How would Mephistopheles evaluate the utility of forum-selection clauses?

venue. He would also be well advised to bring his lawyer with him, because getting a venue shifted is a rather tricky procedural maneuver.

The result was unsurprising.

The poor defendant gets either no summons, or one telling him he must report to another county. The result is almost invariably the same in either case: He doesn't show up. So a "judgment in default" is entered against him by the clerk of the court.

Id. (emphasis in original).

122. Sampson, *supra* note 97, at 281–82.

123. *Id.*

124. The practical significance of predictability as such, as well as the more partisan advantages to be gained through forum control, suggest some of the reasons why forum-selection clauses may be reasonable when they are freely negotiated between knowledgeable and sophisticated parties.

B. *Forum-Selection Clauses: The Function and the Future*

While the role of forum-selection clauses may differ dramatically depending on the nature of the parties and issues, in disputes involving consumer form contracts their real-world function is clear: they have little to do with choosing a convenient litigation forum and less to do with limiting pretrial venue motions; they have almost nothing to do with choosing a forum that will actually adjudicate a claim. Conversely, they have everything to do with the out-of-court process of negotiating, litigating, and settling claims.¹²⁵ Forum-selection clauses are tactical devices that enable companies to cast heavy burdens and costs on consumers while conserving their own resources and guaranteeing themselves an unrelenting leverage against their adversaries. Because approximately ninety percent of all claimants refrain from bringing suit and approximately ninety-eight percent settle out of court with or without bringing suit, the paramount and unrivalled *de facto* function of forum-selection clauses in consumer form contracts is to compound disincentives to suit and to press consumers to reduce their claims steeply and settle them quietly and quickly. In economic terms, forum-selection clauses may be understood as a rational method whereby companies multiply the transaction costs that litigation imposes on those with claims against them in order to force such claimants to discount or abandon their claims, thereby enabling the companies to externalize a higher percentage of their overall costs of operation.¹²⁶

125. Forum-selection clauses are facially neutral devices that serve in practice as a partisan weapon. They are analogous, for example, to the clauses that cruise lines use to impose time limitations or notice provisions on passengers who wish to bring suits. The companies tend to require that notice of claims be given within six months and that suits be brought within one year, the bare minimum amount of time that Congress has mandated they allow. See 46 U.S.C. app. § 183b (1988). The time limitations and notice provisions are defended on ostensibly neutral and "reasonable" grounds, such as allowing defendants to secure relevant evidence while it remains available. Regardless of theory, the fact remains that such provisions function to give the companies significant advantage over individual claimants, especially those individual claimants who lack resources and sophistication. Moreover, such provisions serve to bar claims that would otherwise have been maintainable. Several circuits have upheld such clauses: e.g., *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983); *Carpenter v. Klostors Rederi, A/S*, 604 F.2d 11 (5th Cir. 1979); *Geller v. Holland-America Line*, 298 F.2d 618 (2d Cir.), *cert. denied*, 370 U.S. 909 (1962).

126. Forum-selection clauses cannot properly be understood simply as devices that reduce a company's overall costs. Such an approach begs a critical social question by assuming implicitly a particularly narrow definition of "cost" (and perhaps even a tautological one as the amount of money that a company pays to claimants). Considered fairly and fully, the total "costs" of a company's operations includes all of the injuries, losses, and deprivations that the company's operations cause. Given a definition that

Given the social function of forum-selection clauses in consumer form contracts, the "predictability" they create takes on a new significance that is neither trivial nor neutral. The fact that the forum is predictable means, as a practical matter, two things: First, that nonresidents and their attorneys will quickly learn that they have been placed at a substantial disadvantage, and second, that the company's lawyers know that they will be able successfully to stonewall large numbers of nonresident claimants. Predictability, in short, means that before any litigation begins both sides will *know* that the settlement value of the claim has already been pushed below what it otherwise would have been. In this context, then, predictability is anything but a neutral and even-handed simplifying factor.

Such predictability may, in some cases, even defeat a meritorious claim if it dissuades plaintiffs' attorneys from accepting a potential client's case. Numerous studies have shown that personal injury lawyers tend to be highly selective in choosing which plaintiffs they will represent.¹²⁷ Operating for the most part on a contingent fee basis, they carefully evaluate the relative strengths and weaknesses of a case, the time and costs involved in pursuing it, and the likelihood of obtaining a settlement or judgment sufficient to repay their efforts. "Cases that are more expensive to litigate," concluded one scholar after an extensive review of the available empirical evidence, "will be accepted less readily and will require a higher expected return before they will be litigated."¹²⁸ Even without forum-selection clauses, the evidence suggests that attorneys screen out a large number of meritorious claims from the claims-asserting process and that the tort system as a whole undercompensates injured persons by many billions of dollars.¹²⁹ When forum-selection clauses make it clear to plaintiffs' attorneys that additional costs

encompasses all costs, it is apparent why and how forum-selection clauses contribute to a process by which a substantial part of a company's total costs of doing business are externalized—that is, displaced without adequate compensation onto those who suffer the injuries, losses, and deprivations. From its inception, the economic analysis of tort law has urged the elimination or minimization of externalities as a principal goal of tort reform. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 144–50 (1970).

127. Saks, *supra* note 78, at 1190–91 and works cited therein.

128. *Id.* at 1192. "Well," explained one personal injury attorney, acknowledging that his firm refused to accept cases that did not promise substantial payoffs, "it's a very imperfect world." JOHN A. JENKINS, *THE LITIGATORS: INSIDE THE POWERFUL WORLD OF AMERICA'S HIGH-STAKES TRIAL LAWYERS* 302 (1989).

129. Keith W. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111, 112–13 (1991); Saks, *supra* note 78, at 1196, 1226.

and risks will burden a potential client's case, the predictability the provisions offer will likely lead the attorneys to screen out a larger number of such cases.

The cruise industry has already taken full advantage of forum-selection clauses. The International Committee of Passenger Lines, an industry group representing sixteen passenger lines operating eighty-one vessels in and around North America, submitted an *amicus* brief in *Carnival Cruise* arguing that the clause should be enforced. "The use of forum selection clauses in passenger ticket contracts, designating a single venue for resolution of legal actions," it stated, "is a universal practice."¹³⁰ In fact, it continued, "each member cruise line relies on a forum selection clause in its ticket contract."¹³¹ The numbers affected by the clauses are large. Sales of passenger cruise tickets had grown "to over 3.3 million in 1989," the group stated, while the industry expected sales to reach 10 million tickets within the decade.¹³²

The impact of forum-selection clauses in consumer form contracts will be far broader, and the numbers affected multiplied geometrically, if other companies begin generally to adopt the same tactic with a similar degree of industry-wide uniformity.¹³³ Although *Carnival Cruise* construes federal admiralty law, its approach seems applicable to all forum-selection clauses. Some of the lower federal courts have already taken the position that the validity of such clauses is a matter of federal common law.¹³⁴ They rely in particular on the Court's recent decision in *Stewart Organization*,

130. Br. of the Int'l Comm. of Passenger Lines as Amicus Curiae, in Support of Petition for Writ of Certiorari, at 61, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file).

131. *Id.*

132. *Id.*

133. Forum-selection clauses have come into increasing use during the past two decades. The reported cases suggest that such clauses are used most commonly—or at least that they are contested most commonly—in general commercial contexts and to a lesser extent in franchise and employment contexts. They are, however, beginning to appear more frequently in consumer form contract cases, and the courts seem increasingly willing to enforce them in such consumer cases. See, e.g., *American Performance, Inc. v. Sanford*, 749 F. Supp. 1094 (M.D. Ala. 1990) (clause enforced); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F. Supp. 563 (S.D.N.Y. 1987) (clause enforced); *Coldwell Banker & Co. v. Eyde*, 661 F. Supp. 657 (N.D. Ill. 1986) (clause enforced); *Friedman v. World Transp., Inc.*, 636 F. Supp. 685 (N.D. Ill. 1986) (clause enforced); *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756 (E.D. Va. 1986) (clause not enforced); *Fustok v. Conticommodity Servs., Inc.*, 618 F. Supp. 1082 (S.D.N.Y. 1985) (clause not enforced); *Sall v. G.H. Miller Co.*, 612 F. Supp. 1499 (D. Colo. 1985) (clause not enforced); cf. *Goldman*, *supra* note 1, at 706–07.

134. See, e.g., *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988).

Inc. v. Ricoh Corp.,¹³⁵ which has the effect of making forum-selection clauses generally enforceable in federal diversity actions even when the suit is heard in a state whose law refuses to enforce such clauses.¹³⁶ Together, *Carnival Cruise* and *Ricoh* threaten to extend the use of forum-selection clauses far beyond admiralty jurisdiction, to multiply the situations where corporate parties can exploit geography as a litigation weapon, and to transform various federal procedural devices—removal, declaratory judgment, and transfer under 28 U.S.C. section 1404(a)—into tactical devices that would enable companies methodically and regularly to impose the burdens of geography on their unsuspecting customers.

It is essential to note, too, that in using forum-selection clauses in consumer form contracts corporate attorneys are performing skillfully and properly. They have every right to utilize whatever tactics the law sanctions.¹³⁷ For the law to allow corporations to

135. 487 U.S. 22 (1988). In *Carnival Cruise* the company cited *Ricoh* in support of its position. "With respect to non-admiralty cases, this Court indicated a policy in favor of forum selection [*sic*] clauses in *Stewart Organization, Inc. v. Ricoh Corp.*" Pet'r's Br., at 106, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 59-1647) (LEXIS, Genfed library, Briefs file).

It is important to note that *Carnival Cruise* goes well beyond *Ricoh*. The latter case presented a commercial dispute that grew out of a dealership arrangement between two corporations. Throughout its analysis, moreover, *Ricoh* assumes that the forum-selection clause at issue represented a known and understood part of the agreement between the two knowledgeable commercial parties. Finally, unlike *Carnival Cruise*, *Ricoh* expressly states that in evaluating the significance of a forum-selection clause a court deciding a motion to transfer should consider "the parties' relative bargaining power." 487 U.S. at 29. While *Ricoh* is essentially compatible with *The Bremen*, *Carnival Cruise* represents a leap beyond both.

For discussions of *Ricoh*, see Julia L. Erickson, Comment, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization v. Ricoh Corporation*, 72 MINN. L. REV. 1090 (1988); Eric Fahlman, Note, *Forum-Selection Clauses: Should State or Federal Law Determine Validity in Diversity Actions?*, 64 WASH. L. REV. 439 (1989).

136. *Ricoh* held that in diversity cases a motion to transfer under 28 U.S.C. § 1404(a) is "procedural" and hence governed by federal law and that as a matter of federal procedural law forum-selection clauses, constituting "the parties' private expression of their venue preferences," 487 U.S. at 30, may properly be given weight in evaluating the "convenience" and "fairness" of a proposed transfer. *Id.* at 29.

In *Ricoh* the law of the forum state declined to enforce such forum-selection clauses. *Id.* at 24, 30.

137. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

While the rules of professional responsibility make certain tactics unethical, the realities of litigation practice as well as the lawyer's inventiveness mean that one can usually, if not always, come up with some "legitimate" cover explanation for a tactical choice, regardless of the true motives for adopting it. To take any action for the sole

maximize their own "convenience" while at the same time imposing severe practical hardships on individual consumers seems, it is true, inconsistent with notions of fairness and with the basic ideal of the equitable administration of the law. As long as the Supreme Court's decision in *Carnival Cruise* stands, however, corporate attorneys certainly have the right, and probably the professional ethical duty, to inform their clients of the advantages such clauses offer and to urge them to seize the opportunity presented.

A recent article directed to insurance counsel seems to illustrate both the lawyering process and the likely trend in drafting consumer form contracts. In the policies they write, the article recommends, "insurers hopefully will make strides toward greater certainty and predictability by incorporating more explicit and clear forum selection clauses."¹³⁸

III. GEOGRAPHY AND THE DEVELOPMENT OF FEDERAL FORUM CONTROL POLICY

Throughout the nation's history, enterprising and resourceful litigants have sought advantages from the opportunities that geography and federalism created,¹³⁹ and Congress and the Supreme Court have repeatedly sought to counter their efforts in the service of two compelling and compatible goals: Minimizing the unfairness in the litigation process that results from the burdens of geography, and countering systematic efforts by organized groups of litigants to exploit those burdens. *Carnival Cruise* conflicts with both of those fundamental policies.

A. *Constitutional Control over Forum Choice*

Since the late nineteenth century, when the adoption of the Fourteenth Amendment coincided with the rise of the modern busi-

purpose of causing delay, for example, is unethical. Most litigators, however, can imagine some other purpose that can plausibly explain a delaying tactic (obtaining more complete discovery, ensuring that all of the client's legal contentions receive a hearing, etc.). Hence, litigators can justify the tactic on one of those other grounds and receive the advantage of the delay merely as a kind of accidental and unintended result.

138. W. Michael Jacobs, *Rules and Procedures: Annual Survey of the Law of Civil Procedure*, 27 TORT & INS. L.J. 437, 443-44 (1992). The article does not discuss *Carnival Cruise* and may have been written before it came down. The author, fully aware of the bar's ethical requirements, explicitly notes that "the ancient concept of fair play and substantial justice must be the touchstone for extensions of the law of jurisdiction and venue beyond their current limits." *Id.* at 444.

139. See, e.g., Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 LAW & SOC'Y REV. 57 (1975).

ness corporation, the Due Process Clause has served as the fundamental constitutional basis for controlling interstate forum use.¹⁴⁰ On the one hand, the Court has construed the clause to impose restrictions on the ability of states to assert personal jurisdiction over nonresident parties. This application of the Due Process Clause prevents plaintiffs from forcing their adversaries to defend in unfairly burdensome forums. On the other hand, the Court has construed the clause flexibly, to allow the states to exercise jurisdiction over nonresident parties who transact business or perform injurious acts within their borders. This application of the Due Process Clause ensures that states are able to protect their citizens by providing them with convenient local forums in which to seek remedies.¹⁴¹

140. The classic case, of course, is *Pennoyer v. Neff*, 95 U.S. 714 (1877). Though it relied on "principles of public law," *id.* at 722, and because the events that it addressed arose prior to the ratification of the Fourteenth Amendment, *Pennoyer* noted the relevance of the Due Process Clause, *id.* at 733, and quickly became the fountainhead of due process analysis concerning the limits of state power in asserting personal jurisdiction over nonresidents.

Subsequently, the Court has made it clear that the Due Process Clause imposes much sharper restrictions on the ability of states to assert personal jurisdiction over nonresident defendants than it does on another important aspect of interstate forum choice, the determination of applicable substantive law in actions with multi-state contacts. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *cf.* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

141. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

In *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957), the Court upheld jurisdiction by the state of California over an out-of-state insurance company, noting the importance of the state's "manifest interest in providing effective means of redress for its residents." *Id.* at 223. Were jurisdiction not available in California, individual California residents

would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable.

When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof.

Id.; *see* Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67 (1988).

Even in *Pennoyer*, 95 U.S. 714 (1877), the Court recognized the counterbalancing right of the states to protect their own citizens in their dealings with nonresidents. The appropriate method open to the states was to assert jurisdiction over any of the defendant's property located within their borders, regardless of whether the property was in any way related to the dispute at issue.

Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and

While the Due Process Clause applies to all litigants,¹⁴² the Court developed its jurisprudence for the most part in addressing the problems that arose from a centralizing national economy and the emergence of the modern business corporation.¹⁴³ In the last third of the nineteenth century the states began to enact statutes designed to subject out-of-state residents, particularly foreign corporations, to local jurisdiction.¹⁴⁴ Recognizing the powerful new demands for expanded jurisdiction,¹⁴⁵ the Court found a variety of ways to uphold the use of such statutes and allowed the states broad leeway in providing local forums for their residents.¹⁴⁶ Then, facing mounting doctrinal complexities and the challenge of ever more sophisticated corporate operations, the Court in 1945 reconceived the due process law of personal jurisdiction. In *International Shoe Co. v. Washington*¹⁴⁷ it placed the law on a coherent theoretical basis and dealt directly with the artificial and complex nature of the modern corporation. Focusing on "the quality and nature" of defendant's in-state activity,¹⁴⁸ *International Shoe* held that parties are constitutionally subject to suit in any forum where they or their activities "establish sufficient contacts" with a state to make the assertion of jurisdiction "reasonable and just, according to our traditional conception of fair play and substantial justice."¹⁴⁹ Clever lawyering, the Court in effect decided, should not enable corpora-

the inquiry can then be carried only to the extent necessary to control the disposition of the property.

Pennoyer, 95 U.S. at 723. The Court has subsequently modified the law on this point. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

142. *E.g.*, *Shutts*, 472 U.S. at 811.

143. *See, e.g.*, Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958).

144. William L. Walker, *Foreign Corporation Laws: The Loss of Reason*, 47 N.C. L. REV. 1 (1968).

145. As the Court explained in *World-Wide Volkswagen*, 444 U.S. at 292-93:

The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. As we noted in *McGee v. International Life Ins. Co.*, this trend is largely attributable to a fundamental transformation in the American economy.

The Court noted further that the "historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided [in 1957]." *Id.* at 293.

146. Classic examples include *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917) ("doing business") and *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) ("consent").

147. 326 U.S. 310 (1945).

148. *Id.* at 319.

149. *Id.* at 320.

tions to structure their businesses in ways that allowed them systematically to profit from activities within a state while at the same time avoiding jurisdiction in that state.¹⁵⁰

In construing the Due Process Clause, the Court has consistently recognized both the practical difficulties that ordinary individuals would face if they were denied the opportunity to bring suit in their home states and the relative ease with which corporations conducting interstate operations could generally shoulder the burdens of out-of-state litigation. That basic social calculus means, of course, that the rights of all parties are generally best protected, and the legal system most likely to address the substantive merits of disputes, if ordinary individuals are able to sue interstate corporations in forums near their homes. The basic constitutional policy is compelling: The very "purpose of the due process clause," *International Shoe* declared, is to ensure "the fair and orderly administration of the laws."¹⁵¹ As the states universally enacted long-arm statutes and began extending them to the outer constitutional limits,¹⁵² the Court has without exception upheld their use whenever the non-resident performed some relevant and sufficient action directed toward the forum state.¹⁵³

More important, when the Court has found that the nonresident's alleged contacts with the distant forum were insufficient to

150. In *International Shoe* the company had very carefully structured its business operations to avoid suit in Washington, the forum state. It had succeeded in marketing its products within the state on a regular and continuous basis, but it had also tailored its activities in a way that seemed to prevent it from being "present" in the state and therefore subject to personal jurisdiction there. For example, the company maintained no office and no inventory in the state. It operated through approximately a dozen local salesmen who were paid on a commission basis and who carried only single shoe samples of the company's products. The company finalized all sales contracts in its home state (Missouri), and it sent all of its products into the forum state f.o.b. from points outside of the state (*i.e.*, in interstate commerce). In *International Shoe* the Court essentially ruled that if a company intentionally carried on meaningful business activities within a state it should be subject to suit in that state regardless of the technical way it structured those business activities.

151. *International Shoe*, 326 U.S. at 319.

152. See, *e.g.*, *Hall v. Helicopteros Nacionales de Colombia, S.A.*, 638 S.W.2d 870 (Tex. 1982), *rev'd*, 466 U.S. 408 (1984).

153. See, *e.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). When the Court has enforced the limits imposed by the due process clause, it has made it clear that purposeful acts by a defendant directed toward the forum state continue to be sufficient to subject the defendant to personal jurisdiction in that state. Conversely, jurisdiction is improper when the defendant's alleged "contact" with the forum state arises only from another party's activities, when, that is, defendant's alleged contact with the forum state arises from the other party's "unilateral activities" directed toward the forum state. See, *e.g.*, *Asahi*

allow jurisdiction, it has done so because the contacts were largely or exclusively the result of actions taken by other parties and because the nonresident derived no benefit from its alleged contacts with the forum state.¹⁵⁴ The Court has, in fact, recently demonstrated a special sensitivity to the unfair burdens that state long-arm statutes can impose on relatively small and local commercial actors when their products move between states and threaten to subject them to personal jurisdiction in distant forums. In *World-Wide Volkswagen Corp. v. Woodson*,¹⁵⁵ for example, plaintiffs purchased an automobile from a local New York retail dealer and shortly thereafter drove westward toward Arizona. Plaintiff's car caught fire, badly burning three family members, when it was struck in the rear while passing through Oklahoma. Plaintiffs brought a products liability action in an Oklahoma state court and named four defendants: the automobile's German manufacturer, its American importer, its New York area regional distributor, and the local New York dealer from which they had purchased the car. The Court held that Oklahoma could not assert personal jurisdiction over the latter two, the regional distributor and the local retailer. Both were incorporated in New York, had their business offices there, and operated only in that local area.¹⁵⁶ The fact that one of their automobiles was involved in an accident in Oklahoma, the Court pointed out, was merely a "fortuitous" and "isolated occurrence."¹⁵⁷ There was "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction."¹⁵⁸ Whatever relationship the accident created be-

Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

Recently the Court has given somewhat greater emphasis to the "rights of defendants" half of the balance. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 (1982). The earlier law, and the earlier balance described in the text, however, still remains firmly in place. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("So long as a commercial actor's efforts are 'purposely directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").

154. E.g., *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Hanson v. Denckla*, 357 U.S. 235 (1958).

155. 444 U.S. 286, 296 (1980).

156. The local retailer, Seaway Volkswagen, Inc., was located in Massena, New York. The regional distributor, World-Wide Volkswagen Corp., operated only in the states of New York, New Jersey, and Connecticut. *Id.* at 288-89. Defendants did not challenge jurisdiction in Oklahoma against two other defendants who operated on a national scale.

157. *Id.* at 295.

158. *Id.*

tween the two local New York businesses and Oklahoma was due solely to "the mere 'unilateral activity'" of the purchasers and, in any event, neither of the two New York businesses derived any profit from Oklahoma.¹⁵⁹

In *World-Wide Volkswagen* the Court declared emphatically that the mere foreseeable possibility that products would find their way into distant states is not sufficient to allow those states to exercise personal jurisdiction over out-of-state businesses. The court explained:

If foreseeability were the criterion a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there . . . a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey . . . or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there . . .¹⁶⁰

World-Wide Volkswagen thus demonstrated that the Due Process Clause protects relatively small-scale and local commercial actors who are swept up in the broader currents of modern-day transportation and commerce. Such local actors will not be subject to personal jurisdiction in distant states, absent their consent, if they derive no direct financial benefit from those states and if they are brought into contact with them through the activities of others.

Because plaintiffs normally enjoy the initial choice of forum, the constitutional law of personal jurisdiction has focused on the rights of defendants.¹⁶¹ The Due Process Clause, however, safeguards nonresident plaintiffs as well as nonresident defendants. "The Fourteenth Amendment does protect 'persons,' not 'defendants,'" Justice Rehnquist explained for the Court in *Phillips Petroleum Co. v. Shutts*.¹⁶² Consequently, "absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdic-

159. *Id.* at 298 (quoting *Hanson v. Denckla*, 357 U.S. at 253).

160. *Id.* at 296 (citations omitted). Four Justices, including three members of the current Court, would expand the limitations imposed by the due process clause even further. In *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), Justice O'Connor—joined by Chief Justice Rehnquist and Justices Powell and Scalia—maintained that the Due Process Clause prevented states from exercising jurisdiction over producers whose goods were swept into a distant state by the "stream of commerce," if the producers had not in any way "purposely directed" their activities toward that distant forum state. Mere "awareness that the stream of commerce may or will sweep the product into the forum State," the four Justices declared, should not be sufficient to subject the producer to jurisdiction in that distant forum. *Asahi*, 480 U.S. at 112.

161. *E.g.*, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

162. 472 U.S. 797, 811 (1985).

tion of a forum State which seeks to adjudicate their claims."¹⁶³ In cases like *Carnival Cruise* consumer-plaintiffs should receive the full protection that the Due Process Clause guarantees for a simple but compelling reason: the function of forum-selection clauses in consumer form contracts is precisely to reverse the standard position of the parties with respect to forum selection. Such clauses preempt the right of unknowing or uncomprehending consumer-plaintiffs to select the forum, and they confer that right on company-defendants. Although the consumers appear in the posture of plaintiffs, with respect to the critical issue of forum choice, they are in the *de facto* position of defendants.

Indeed, with respect to the substantive rights and policies that underlie the Court's application of the Due Process Clause, the Shutes in *Carnival Cruise* are in essentially the same position as the two local defendants in *World-Wide Volkswagen*. Both sets of parties were swept into contact with distant states through their involvement with interstate commerce and by virtue of the actions of others. The principal *de facto* differences between their positions with respect to the distant forum is that, unlike the defendants in *Volkswagen*, the Shutes were not engaged in any commercial enterprise and received no profit from the transaction at issue. The Shutes were brought into contact with Florida solely by—and solely in the interest of—Carnival Cruise Lines, Inc. They neither derived any benefit from Florida nor developed any "affiliating circumstances" with the state. Further, even if one assumes that the Shutes derived an economic benefit in the form of a reduced fare because Florida was the contractual forum, the Court's decisions establish that such an assumed benefit would not be sufficient to subject them to jurisdiction in Florida. The benefit accrued to them, not in Florida, but in Washington, their state of residence.¹⁶⁴

163. *Id.* *Shutts* dealt with the problem of nonresident and known class members in a class action suit brought in a Kansas state court. It ruled that states must give such absent plaintiffs "minimal procedural due process protection" that included notice, an opportunity to be heard, an opportunity to opt out of the suit, and (following *Hansberry v. Lee*, 311 U.S. 32, 42–45 (1940)) class representatives who would adequately represent their interests. *Id.* at 811–12.

164. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court rejected plaintiffs' contention that jurisdiction over the local companies was proper in Oklahoma because they derived economic benefits from the fact that the automobile manufacturer encouraged interstate travel by operating "service centers throughout the country," *id.* at 298, and that the opportunities for interstate travel enhanced the value of the automobiles they sold. The Court ruled that whatever economic benefit the two local companies might derive from such factors accrued to them in New York, not in Oklahoma. *Id.* at 298–99; accord *Kulko v. California*, 436 U.S. 84, 94–98 (1978).

Carnival Cruise implicitly responds to this analysis, of course, by relying on the fact that the Shutes entered into an agreement in which they "consented" to Florida as the exclusive forum. Under the Court's due process decisions, however, that response seems insufficient. First, the Shutes' consent was neither knowing nor informed, and *Carnival Cruise* does not attempt to assert the contrary. To rely on such "consent" in dealing with consumer form contracts is to embrace a fiction, not to provide a reason.¹⁶⁵ Moreover, reliance on such uninformed and unknowing "consent" is inconsistent with the Court's traditional analysis under the Due Process Clause. There, the Court has repeatedly abjured arid formalities and stressed the need for a specific, factually detailed, and "realistic" examination of "minimum contacts."¹⁶⁶ It has consist-

165. The Court has, of course, relied on the fiction of "implied" consent in the past. See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927). Reliance on implied consent, however, only focuses attention on the underlying policy considerations at issue.

In fact, *Carnival Cruise* does not seem seriously to advance the idea of "consent" as the basis of its decision. It seems, rather, to rest on three factors: that forum-selection clauses are reasonable, that corporate form contracts are necessary for economic efficiency, and that the Shutes bought cruise tickets with forum-selection clauses.

166. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 318-19 (1945); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316-17 (1943).

Justice Scalia's plurality opinion in *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990), might be taken to support the validity of the "consent" in *Carnival Cruise*. The *Burnham* plurality reasoned that a "minimum contacts" analysis was not appropriate when the asserted basis for personal jurisdiction was the "presence" of the nonresident defendant in the forum state. "Presence," the plurality maintained, was a "traditional" basis for asserting jurisdiction that remained valid independent of any "minimum contacts" analysis. Since "consent" is also a "traditional" basis for asserting jurisdiction, one could argue that it, too, remains valid regardless of a "minimum contacts" analysis.

This argument, however, seems unpersuasive. *Burnham* differs drastically from *Carnival Cruise* in the extent to which the asserted jurisdictional basis was real, knowing, and informed. In *Burnham* the nonresident defendant went to the forum state knowingly and intentionally, and he was actually physically in the state when he was served with process. In *Carnival Cruise* the "consent" was uninformed and unknowing. The Shutes were apparently aware of neither the existence nor the significance of the forum-selection clause. Thus, while the "presence" in *Burnham* was real and undeniable, the "consent" in *Carnival Cruise* is fictitious and unreasonable.

In addition, of course, the plurality opinion in *Burnham* does not represent a majority view. Six Justices expressed various disagreements or reservations with it. See *id.* at 2119 (White, J., concurring in part and concurring in the judgment); *id.* at 2120 (Brennan, J., joined by Marshall, Blackmun, and O'Connor, JJ., concurring in the judgment); *id.* at 2126 (Stevens, J., concurring in the judgment). Moreover, the reasoning of the Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977), seems inconsistent with the plurality's approach.

The Court has dealt with related but distinguishable issues in several other cases. See, e.g., *Swarb v. Lennox*, 405 U.S. 191 (1972); *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174 (1972); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

ently stressed that "isolated" or "attenuated" contacts are insufficient to establish jurisdiction.¹⁶⁷ Realistically considered, the "consent" at issue in *Carnival Cruise* is nothing if not "attenuated."¹⁶⁸ Indeed, as Judge Posner observed in *Donovan*, the forum-selection clause in *Carnival Cruise* "plainly is neither intended nor likely to be read" by the consumer.¹⁶⁹

Second, ruling in an analogous situation in *Burger King Corp. v. Rudzewicz*,¹⁷⁰ the Court announced a fundamental rule of construction that seems fairly applicable here: When a contractual relationship is advanced as the basis for asserting jurisdiction over a nonresident, the mere fact that a contract exists is not, by itself, dispositive.¹⁷¹ The controlling issue is not the formal existence of a contractual relationship between the parties but rather the nature of the "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing."¹⁷² On the facts of *Burger King* the Court found the relationship sufficient to allow long-arm jurisdiction in Florida over a nonresident defendant from Michigan who had entered into an agreement with Burger King, a Florida corporation headquartered in Miami. The Court found a sufficient relationship for a number of weighty reasons going to the substance of the commercial relationship at issue: The nonresident defendant had entered into the contract knowingly; he had accepted a closely-supervised, twenty-year-long franchise relationship that required close supervision by and consultations with the company's Miami office; and he had entered

167. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) ("Such regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated or fortuitous"); *World-Wide Volkswagen*, 444 U.S. at 299 ("In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that state's exercise of *in personam* jurisdiction over them.").

168. As the Court stated in *World-Wide Volkswagen*, the "foreseeability" that is critical to due process analysis is "not the mere likelihood" that contacts will arise with the forum state but rather the existence of such substantive contacts that the person "should reasonably anticipate being haled into court there." 444 U.S. at 297. The issue, in other words, is not determined by the mere fact that a forum-selection clause makes a forum legally "foreseeable." The question, rather, is whether the use of a forum made legally foreseeable by such "consent" should be regarded as reasonable. For the reasons adduced in this article, such use—however "foreseeable" it might be on the basis of the formal "consent"—remains unreasonable.

169. *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 327, 377 (7th Cir. 1990). For a thoughtful analysis, see Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981).

170. 471 U.S. 462 (1985).

171. *Id.* at 478.

172. *Id.* at 479.

the relationship for business purposes and received various commercial advantages from establishing the relationship. Moreover, the course of negotiations and subsequent dealings brought the nonresident into continuous contacts with the Miami office on major issues relating to the operation of the franchise, and the contract documents tied the parties' relationship to Florida through a choice-of-law clause and other provisions.¹⁷³

In *Carnival Cruise*, of course, the Shutes' relationship with the company was not long-term; it was not continuing; and it was not commercial. Indeed, there were no "prior negotiations" and no "course of dealing" at all. The simple transaction between the parties in *Carnival Cruise* constituted, at most, only an "isolated occurrence" and an "attenuated" contact between the Shutes and the contractual forum state. On the basis of the Court's reasoning in *Burger King*, then, the contractual "consent" on which *Carnival Cruise* relies is a fiction unrelated to any meaningful negotiations or course of dealing between the parties. Under *Burger King* that consent would not be sufficient to give Florida jurisdiction over the Shutes, and in *Carnival Cruise* it should not be sufficient to compel the Shutes to bring their action in that state.

Indeed, the reasoning in *Burger King* makes it clear that enforcement of the forum-selection clause in *Carnival Cruise* is inconsistent with the Court's use of the Due Process Clause to balance geographical hardships and thereby ensure "the fair and orderly administration of the laws."¹⁷⁴ In *Burger King* the Court specifically addressed the contention that jurisdiction should be denied because a contractual arrangement that allowed large companies to compel small businesses to litigate away from home could become abusive. It also addressed the added contention that such contractual arrangements could allow companies to impose forum choices on consumers who would then be particularly vulnerable if consigned by contract to distant and inconvenient forums. Announcing that it recognized and "share[d]" those "broader concerns,"¹⁷⁵ *Burger King* nevertheless found them inapplicable on the facts. It did so for sound reasons that distinguish the case sharply from *Carnival Cruise*. The nonresident defendant and his partner, the *Burger King* Court explained, "'were and are experienced and sophisticated businessmen.'" ¹⁷⁶ The nonresident defendant was, in fact, a

173. *Id.* at 479-81.

174. *Id.*

175. *Id.* at 485.

176. *Id.* at 484 (quoting the findings of the district court).

professional accountant and a senior partner in a Detroit accounting firm who "reach[ed] out" to Burger King in Florida and entered into the franchise agreement not merely to invest in a commercial enterprise but also to obtain tax-deferral advantages.¹⁷⁷ He was represented by counsel throughout his dealings with the company; he negotiated over the terms of his franchise agreement for five months; he succeeded in securing from the company "a modest reduction in rent and other concessions";¹⁷⁸ and he agreed to purchase \$165,000 worth of restaurant equipment and to make payments in excess of one million dollars over the twenty-year period. The agreement in *Burger King*, thus, was a bargained commercial transaction between "experienced and sophisticated" parties.¹⁷⁹

Not surprisingly, *Burger King* cites *The Bremen* repeatedly in support of its ruling.¹⁸⁰ Clearly, the underlying and "realistic" situations in the two cases are similar. Equally clearly, the situations in both contrast sharply with the situation in *Carnival Cruise*. The constitutional policy that informed the Court's views in *Burger King*, like the similar policy that inspired *The Bremen*, calls for a different result in *Carnival Cruise*.¹⁸¹

The Court's reasoning in *Phillips Petroleum Co. v. Shutts*, where it held that the Due Process Clause protects nonresident plaintiffs, confirms that conclusion.¹⁸² When the issue is whether a plaintiff has consented to jurisdiction in a forum where she is a non-resident, the Court explained in *Shutts*, the "essential question" is

177. *Id.* at 466, 479.

178. *Id.*

179. *Id.* at 466, 484-85.

180. *Id.* at 472 n.14, 478, 486.

181. It is worth noting that the position taken by the four Justices in Justice O'Connor's plurality opinion in *Asahi* would seem to strengthen the argument that the enforcement of the forum-selection clause in *Carnival Cruise* was inconsistent with general federal forum control policy under the Due Process Clause. In *Asahi* those four Justices would have protected the defendant even though its contacts with the forum developed as an integral part of its business operations, it contributed knowingly to the stream of commerce, and it profited regularly and substantially from its participation in the stream. The *Shutts*, of course, developed their contact with Florida only as an *ad hoc* incident of their desire to take a vacation; they were apparently unaware of the existence or import of the forum-selection provision; and they derived no commercial gain from either the contractual forum state or from the transaction as a whole.

182. The Court in *Shutts* stated that nonresident plaintiffs were entitled to "minimal procedural due process protection." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The argument here is that, for the reasons developed in the text, the Due Process Clause should provide a substantial protection against forum-selection clauses in consumer form contracts and that, applied to the different factual situation presented in *Carnival Cruise*, the Court's own reasoning in *Shutts* supports that conclusion.

"how stringent the requirement for a showing of consent will be."¹⁸³ When the basis of jurisdiction is consent the necessary inquiry is not a mere mechanical search for evidence of something that might formally constitute consent. Rather, the proper inquiry is contextual and practical, and different situations require the use of more or less "stringent" standards to determine whether any particular alleged consent is constitutionally sufficient. Further, *Shutts* also makes it clear that a court pursuing that inquiry should consider the nature of the nonresident's legal interests, the extent to which she made a knowing and informed decision, and the likelihood that finding "consent" to jurisdiction will facilitate the nonresident's efforts to seek an appropriate remedy. In conducting its inquiry in *Shutts* the Court upheld the constitutional sufficiency of "opt out" consent by nonresident plaintiffs in a class action. It did so on the ground that the "opt out" procedure would ensure an effective judicial forum for class members who were unlikely to bring separate actions while, at the same time, providing a meaningful opportunity to make a knowing and informed withdrawal to those likely to prefer their own independent suits.¹⁸⁴ That analysis is consistent with the reasoning in *Burger King* and *The Bremen*, but foreign to the approach in *Carnival Cruise*.

For more than a century the Court has used the Due Process Clause to control forum use involving nonresident parties. Allowing the states great latitude in providing their citizens with convenient forums and protecting nonresidents who have not developed

183. *Id.* at 812.

184. The Court based its reasoning on the nature of the nonresident class members and on evidence in the record. With respect to class members, the Court considered two typological groups: first, those who had small claims or who were "unfamiliar with the law," and, second, those whose claims were "sufficiently large or important" that they would wish to litigate them on their own. The Court reasoned that those in the first group were unlikely to bring suit on their own and that requiring them to "affirmatively request inclusion would probably impede prosecution" of their claims. *Id.* at 812-13. An "opt out" consent was constitutionally sufficient with respect to those in the first group, then, because it promised most effectively to ensure that their claims would actually be heard in a proper forum. The Court reasoned that those in the second group would "likely have retained an attorney or have thought about filing suit." *Id.* at 813. An "opt out" consent was constitutionally sufficient for those in the second group, then, because they would most likely be "fully capable" of making a knowing and informed decision about exercising their right to withdraw from the suit. *Id.* at 812.

With respect to the record, the Court cited and relied on evidence showing that class members understood the "opt out" procedure and used it in a meaningful way. Some 3400 class members (approximately 12% of those who received notice) had, in fact, chosen to opt out of the suit. On that record, the Court concluded, it was clear that the "opt out" consent was "by no means *pro forma*." *Id.* at 813.

contacts with other states, the Court has sought within the limits of fairness to place the burdens of geography on the parties who are most able to bear it. That policy best serves the ultimate mandate of due process because it provides the parties a relatively equal opportunity to seek the judgment of the law and to have their rights determined, not by their comparative social and economic resources, but by the substantive merits of their underlying legal claims. *Carnival Cruise* conflicts with that policy.

B. *The Quest for General Federal Forum Control: The Origins of Section 1404 and the Federal Law of Forum Non Conveniens*

Within the limits set by the due process clause, both Congress and the Supreme Court have repeatedly sought to minimize the burdens that geography imposes on litigation.¹⁸⁵ While they dealt only sporadically with the burdens of distance throughout the nineteenth century and into the first decades of the twentieth, the new century brought drastic changes in American society that led both to rethink their approaches to the problems that geography presented to the legal system.¹⁸⁶ In the years after 1910, tort and contract litigation became increasingly volatile and dynamic. Though the great majority of individual plaintiffs continued to sue near their homes, sizeable numbers began, for the first time, to bring their suits in out-of-state forums that offered them special tactical advantages.¹⁸⁷

The changes that the twentieth century wrought guaranteed that multiplying numbers of plaintiffs would attempt to exploit the advantages of interstate litigation tactics. With the advent of progressivism, the general political climate changed profoundly, generating a strong sympathy for individuals who were injured by corporations and a new admiration for those who fought back. The political rhetoric of progressivism etched the image of injured workers and consumers as corporate victims, and it exhorted them to use every legal weapon at hand to force the corporations to do justice.

185. The pages of the *United States Reports* and of the *United States Statutes at Large* are full of such efforts. The Court took geographical burdens into account, for example, in *Parsons v. Chesapeake & O. R.R. Co.*, 375 U.S. 71, 73 (1963); *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 492 (1927); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 513 (1900). Similarly, Congress sought to minimize those burdens, for example, in cases brought under the Federal Employers' Liability Act, ch. 143, sec. 1, § 6, 36 Stat. 291, 291 (1910) (current version at 45 U.S.C. §§ 51-60 (1988)), and in cases involving workmen's compensation awards. Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (codified at 28 U.S.C. § 1445 (1988)).

186. Terry S. Kogan, *Geography and Due Process: The Social Meaning of Adjudicative Jurisdiction*, 22 RUTGERS L.J. 627 (1991).

187. See PURCELL, *supra* note 77, at 177-78.

The Federal Employers' Liability Act ("FELA")¹⁸⁸—which offered new opportunities and incentives for interstate forum shopping in its special provisions granting claimants a wide choice of venues and an absolute prohibition on removal¹⁸⁹—was a major accomplishment of progressivism, and it seemed only proper that its intended beneficiaries take full advantage of the rights it conferred.

Improvements in interstate transportation and communications were essential to the process, as was the ability of growing numbers of Americans in the early years of the twentieth century to put them to use. Ethnic and immigrant aid societies, settlement houses, and labor unions grew in significance and sophistication, and increasingly they provided wider social contacts for workers and their families, spread information about the legal system, and guided those with potential claims to legal specialists who would represent them.¹⁹⁰ After 1910, for example, the railroad brotherhoods expanded their efforts to help members and their families when injury or death forced them to seek compensation. They recognized that the problem with obtaining such compensation was two-fold: Their members needed protection against railroad claim agents on the one side and against dishonest "ambulance chasers" on the other.¹⁹¹ The brotherhoods began to assist injured workers or their families in attempting to settle claims, and they began more actively to identify personal injury attorneys who were both able and honest and who were willing to give "assurances against overcharging."¹⁹²

The personal injury bar, too, which had been developing since the late nineteenth century, began producing imaginative interstate entrepreneurs. In the years after 1910, successful urban tort specialists developed reputations and contacts that brought them out-

188. 35 Stat. 65 (1908) (current version at 45 U.S.C. §§ 51-60 (1988)).

189. Congress amended the FELA two years after its passage to add a special venue provision allowing plaintiffs to bring suit under the act in any federal judicial district where the claim arose or where a defendant railroad resided or did business. See S. REP. NO. 432, 61st Cong., 2d Sess. 4 (1910); H.R. REP. NO. 513, 61st Cong., 2d Sess. 6 (1910).

190. For the developing relations between the settlement movement and workers, see ALLEN F. DAVIS, *SPEARHEADS FOR REFORM: THE SOCIAL SETTLEMENTS AND THE PROGRESSIVE MOVEMENT, 1890-1914* (2d ed. 1967).

191. *Employers' Liability and Workmen's Compensation: Hearings Before the House Committee on the Judiciary on H.R. 20,487*, 62d Cong., 2d Sess. 196, 197-98 (1913) (statement of T.J. Hoskins, member of the Brotherhood of Locomotive Engineers).

192. *Limitation of Venue in Certain Actions Brought Under the Employers' Liability Act: Hearings Before Subcommittee No. 4 of the Committee on the Judiciary on H.R. 1639*, 80th Cong., 1st Sess. 91 (1947) (statement of A.E. Lyon, Executive Secretary, Railway Labor Executives Association).

of-state business, and some attorneys and firms began to solicit distant clients actively and methodically.¹⁹³ By the beginning of the twenties "ambulance chasing," especially in serious tort cases where damage claims ranged from \$10,000 to \$50,000 or more, had become the newest form of interstate commerce.

While several states seemed particularly attractive forums, Minnesota was among the most widely used. The state offered favorable substantive and procedural law, juries notorious for their generosity, and an exceptionally enterprising plaintiffs' bar that actively solicited cases from Indiana to the Pacific Ocean. A partial count of cases docketed in the state's courts in February 1923, for example, identified more than a thousand personal injury actions brought by nonresident plaintiffs against foreign railroad corporations that did not even operate lines within the state.¹⁹⁴ "It is more or less an open secret," noted the *Minnesota Law Review* in 1929, "that a plaintiff who has a cause of action against a railway company, no matter where he resides, may find it to his advantage to try the case in Minnesota."¹⁹⁵

The railroads, the principal victims of such interstate forum shopping, protested vigorously against the burden of distance that the suits cast upon them. In a 1924 action the Chicago, Milwaukee & St. Paul Railway Co. submitted an affidavit challenging what it regarded as abusive litigation tactics. It stated that in the prior four years nonresident plaintiffs had brought numerous freight-related, personal injury, and wrongful death actions against it in Minnesota on causes of action that arose outside the state. The use of forums distant from the place of injury had forced it in some cases to transport its witnesses for more than a thousand miles to the trial site. Protesting the altered balance of power that interstate forum shopping effected in the process of out-of-court negotiation, the railroad's affidavit affirmed that

a considerable number of such imported actions against the defendant have been settled, and that in the settlement thereof the defendant has been induced to pay sums larger than would be

193. See the interesting and sometimes elusive testimony of E. Burk Finnerty, a New Jersey attorney, who acknowledged representing clients from a number of states, and the unflattering portrayal of interstate solicitation by D. Lindley Sloan, a Maryland attorney. *Id.* at 39, 97 (Sloan statement beginning at 39; Finnerty statement beginning at 97).

194. *Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312, 316 n.2 (1923).

195. Note, *Action Against Foreign Carrier for Cause Arising Outside of State as Burden upon Interstate Commerce*, 13 MINN. L. REV. 485, 485 (1929).

otherwise warranted, on account of the difficulties of defending such actions under the circumstances above set forth.¹⁹⁶

The railroad's affidavit also suggested the extent to which geographical burdens on a defendant might contribute to a plaintiff's claim and to its settlement value. The 191 personal injury actions brought against it by those residing in Minnesota at the time of injury or filing sought an average of less than \$16,000 each; the 224 personal injury suits brought by out-of-state residents sought damages that averaged in excess of \$40,000 each.¹⁹⁷

The economic value of the FELA's broad venue rights was so substantial and well-recognized, in fact, that the railroads began literally to attempt to buy the rights from potential claimants. They did so through varieties of what the railroad brotherhoods called the "Rock Island release," a contract in which an injured worker agreed to try to negotiate a settlement of his claim in exchange for a monetary payment. The key was that the agreements provided that, in the event negotiations failed and the worker decided to bring suit, he could file his action in only one or two specified forums. The devices proved of considerable use, especially when railroad claim agents were able to speak to workers before the latter had consulted an attorney and learned the practical importance of their special venue rights. The courts split on the enforceability of such agreements for two decades until the Supreme Court held them unlawful in 1949.¹⁹⁸

Although as late as 1948 a spokesman for the Illinois Central Railroad still regarded Minnesota as "the most outrageous example" of an importing state,¹⁹⁹ New York, California, Missouri, and Illinois also served as similar centers. A survey conducted by the

196. *Weinard v. Chicago, M. & St. P. Ry. Co.*, 298 F. 977, 983 (D. Minn. 1924).

197. *Id.* at 982. A sample of 133 cases brought against another railroad in Minnesota during 1927 and 1928 on out-of-state causes of action sought an average of almost \$31,000 each. Note, *Discretion to Dismiss Actions Between Non-Residents on Causes of Action Arising Outside the State*, 15 MINN. L. REV. 83, 94 n.44 (1930).

198. *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263 (1949). Prior to *Boyd* such agreements were upheld in, e.g., *Herrington v. Thompson*, 61 F. Supp. 903, 905 (W.D. Mo. 1945). Such agreements were voided in, e.g., *Sherman v. Pere Marquette R.R. Co.*, 62 F. Supp. 590, 593 (N.D. Ill. 1945). For general background on such agreements, see *Limitation of Venue in Certain Actions Brought Under the Employers' Liability Act: Hearings Before Subcommittee No. 4 of the Committee on the Judiciary on H.R. 1639*, 80th Cong., 1st Sess. 68 (1947) (statement of Warren H. Atherton, Esq., member of the Brotherhood of Railroad Trainmen).

199. *Limitation of Venue in Certain Actions Brought Under the Employers' Liability Act: Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 1567 and H.R. 1639*, 80th Cong., 2d Sess. 14, 20 (1948) (statement of John W. Freels, attorney for the Illinois Central Railroad Co.).

railroads for the years 1942 to 1946 showed that those four states, together with Minnesota, accounted for 2319 suits that the railroads classified as imported; 92.3 percent of the cases they identified.²⁰⁰ By World War II, the importing was concentrated in five cities: New York, Chicago, Oakland, St. Louis, and Minneapolis-St. Paul. Each was a rail center; each was home to one of the seasoned personal injury firms that worked closely with the railroad brotherhoods; and each provided the kind of jurors and size of verdicts that personal injury victims and their attorneys avidly sought.²⁰¹

The railroads, insurance companies, and other businesses fought the interstate forum shopping tactic persistently and broadly. In addition to using the Rock Island release, they organized campaigns and associations to fight ambulance chasing and

200. *Limitation of Venue in Certain Actions Brought Under the Employers' Liability Act: Hearings Before Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 1639, 80th Cong., 1st Sess. 31 (1947)* (statement of John W. Freels, attorney for the Illinois Central Railroad Co., representing the law committee of the Association of American Railroads).

201. *Id.* at 29. The supporters and defenders of interstate forum shopping traded numerous charges and countercharges. The former offered a number of reasons for the emergence of the five major cities as importing centers (the plaintiffs' attorneys were experts; the cities were headquarters for many railroads; the railroads brought large number of their seriously injured workers to the hospitals in those cities; medical experts were more readily available; it was necessary to avoid many localities where the railroads were a dominant force). The latter denied those claims and explained the development on the basis of the unlawful and unethical practices that they alleged were common (organized solicitation; champerty and maintenance; misleading and deceiving clients; and unethical cooperation with the brotherhoods' legal aid department). See *supra* notes 199-200; H.R. REP. NO. 613, 80th Cong., 1st Sess. (1947) (Part 1, Majority Report; Part 2 Minority Report; Part 3 Minority Views of Mr. Feighan).

By the thirties and forties representatives of the railroads and the brotherhoods agreed on two points. Large verdicts generally came in large cities, and interstate forum shopping was costly to the railroads. See *Limitation of Venue in Certain Actions Brought Under the Employers' Liability Act: Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 1567 and H.R. 1639, 80th Cong., 2d Sess. 37, 85, 169-70 (1948)* (statements of John W. Freels, attorney for the Illinois Cent. R.R.; Floyd E. Thompson, Esq.; Samuel D. Jackson, representing the Indiana State Bar Association); *Limitation of Venue in Certain Actions Brought Under the Employers' Liability Act: Hearings on H.R. 1639 Before Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 1639, 80th Cong., 1st Sess. 7, 101-02, 109 (1947)*, (statements of the Hon. John Jennings, Jr., U.S. Rep. from Tenn.; E. Burke Finnerty, a New Jersey attorney; Jonas A. McBride, Vice President and National Legislative Representative, Brotherhood of Locomotive Firemen and Enginemen). In the past 18 years, explained a representative of the Railroad Trainmen in 1948, "the average amount paid to victims of railroad negligence in settlement out of court has substantially increased and the average amount of the verdicts recovered has risen." *Limitation of Venue in Certain Actions Brought Under the Employers' Liability Act: Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 1567 and H.R. 1639, 80th Cong., 2d Sess. 215, 232 (1948)* (statement of Warren H. Atherton, Esq., representing the Brotherhood of Railroad Trainmen).

other unethical practices, sought to improve the "character" of the bar by raising educational and admission standards, persuaded the American Bar Association to sponsor helpful law reform proposals, and urged legislatures throughout the nation to pass restrictive legislation. As litigants, they engaged in their own preemptive counter forum shopping, sought injunctions in plaintiffs' home states that would prevent them from prosecuting their out-of-state actions, and urged courts across the nation to dismiss actions brought in "remote" and "inconvenient" forums.²⁰²

Their efforts met with mixed success. A few state legislatures passed statutes designed to prevent citizens from suing out of state or to make interstate solicitation unlawful, and some courts began haltingly to shape doctrines that would allow them to dismiss suits brought in "burdensome" or "vexatious" forums. Although prior to 1910 the doctrine of *forum non conveniens* was largely unknown to American courts outside of admiralty, in the years after World War I a few state courts began to discuss the doctrine and give it effect.²⁰³ The federal courts, however, refused to recognize the doctrine. To make matters worse, for the railroads at least, in actions brought under the FELA—the primary arena of systematic interstate forum shopping—the federal courts held that they had no discretion to refuse to hear cases over which Congress had specifically given them jurisdiction.²⁰⁴

Beginning in the twenties, however, a variety of considerations made the federal courts increasingly concerned with the problems of interstate forum shopping. In some instances federal judges were probably influenced by their resentment at plaintiffs' calculated efforts to manipulate jurisdiction, the unethical and unlawful tactics that some personal injury attorneys utilized, or even a general ideological sympathy with national business. In any event, the use of geography to impose heavy burdens on defendants seemed obviously unfair, even when a remote venue was unquestionably proper

202. See PURCELL, *supra* note 77, at 187–90.

203. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Roger S. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41 (1930); Roger S. Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217 (1930); Granger Hansell, *The Proper Forum for Suits Against Foreign Corporations*, 27 COLUM. L. REV. 12 (1927); Comment, *Progress in Interstate Adjustment of the Place of Trial of Civil Actions*, 45 YALE L.J. 1100, 1235 (1936).

204. Cf. *Southern Ry. Co. v. Cochran*, 56 F.2d 1019, 1020 (6th Cir. 1932); *Schendel v. McGee*, 300 F. 273, 278 (8th Cir. 1924); Comment, *The Exercise of Jurisdiction Over Foreign Causes of Action Based on the Federal Employers' Liability Acts*, 39 YALE L.J. 388 (1930).

under the controlling statutes. Further, under the pressure of a rapidly expanding caseload that resulted in large part from the advent of Prohibition, the federal courts were increasingly forced to confront the problems of docket control and case management. As judges, lawyers, scholars, and government officials sought methods of dealing with the growing caseload, interstate forum shopping actions stood out ever more sharply as examples of particularly unreasonable forum use. Finally, as the legal profession came increasingly to think of the state and federal courts not simply as the separate judicial arms of independent sovereigns but as interrelated parts of a national judicial system, the propriety of establishing rational and comprehensive rules of forum choice seemed ever more obvious and necessary.

For almost three decades the Supreme Court experimented with a variety of doctrines to give the federal courts more direct control over parties' forum choices. It tried out the Commerce Clause,²⁰⁵ the Full Faith and Credit Clause,²⁰⁶ the Privileges and Immunities Clause,²⁰⁷ the Equal Protection Clause,²⁰⁸ the Due Process Clause,²⁰⁹ and the federal judicial code.²¹⁰ Further, the Court explored the possibilities inherent in such discretionary techniques as dismissals without prejudice,²¹¹ abstention,²¹² and *forum non conveniens*.²¹³

In the twenties, for example, the Court tried out the commerce clause and held that a suit brought in a "remote" forum could impose such inconvenience on a corporation's business operations that it constituted a burden on interstate commerce.²¹⁴ The Court sought in particular to counter FELA plaintiffs who were not only methodically exploiting their broad venue options under the statute, but who had also begun to take up residence in distant forum states as a method of eluding the Court's tightening strictures on out-of-state forum use. To meet the latter ploy, the Court refused to rely

205. *Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312 (1923).

206. *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932).

207. *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377 (1929).

208. *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923).

209. *E.g.*, *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923); *Missouri Pac. R.R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533 (1922).

210. *Lee v. Chesapeake & O. Ry. Co.*, 260 U.S. 653 (1923).

211. *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932).

212. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

213. *Broderick v. Rosner*, 294 U.S. 629 (1935).

214. *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284 (1932); *Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312, 315 (1923); *see also*, *Michigan Cent. R.R. Co. v. Mix*, 278 U.S. 492 (1929).

on the fact that a plaintiff was a "bona fide" resident of the forum if the cause of action had accrued prior to the time plaintiff took up his new residence. The Court's residence rule under the commerce clause venue doctrine avoided the result that obtained under the analogous rule in diversity actions that accepted a party's change of residence after a cause of action arose but prior to suit as altering the party's citizenship.²¹⁵ The commerce clause venue doctrine and its special residence rule made it clear that the Court regarded interstate forum shopping—though expressly authorized by statute—as sufficiently unfair to justify the creation and application of new and more stringent rules to control the power of parties over forum choice.

Gradually, however, the Court abandoned its commerce clause doctrine and most of its other efforts to use the Constitution as a routine method of forum control. The constitutional clauses were too broad and cumbersome for such relatively individualized and pragmatic decisionmaking. Finally, in 1947, the Court accepted the doctrine of *forum non conveniens* in actions at law in the federal courts as a practical, discretionary, and overtly case-by-case approach to forum control.²¹⁶ As a result the national judiciary obtained the express authority to control forum choice by dismissing actions which seemed, in the court's judgment, to be brought in "inconvenient" forums. The new doctrine authorized the national courts to base their judgments on an evaluation of all the relevant practical factors that affected the litigants and the court in each individual case, and to determine whether the chosen forum was fair and convenient.

Although Congress left the growing problem of interstate forum shopping to the courts for some thirty-five years, it finally addressed the issue the following year when it enacted a comprehensive new judicial code. The Revised Judicial Code of 1948 added an innovative new Section 1404 that adapted the *forum non conveniens* idea to the structure of an integrated federal judicial

215. The Court refused to draw on the established rule in diversity actions that a change of residence prior to suit though after the cause of action had arisen was sufficient to change a party's citizenship. *Compare Terte*, 284 U.S. 284 (refusing to weigh FELA plaintiff's residence in the forum state taken up after the cause of action arose though prior to suit) and *Mix*, 278 U.S. 492 (same) with *Williamson v. Osenton*, 232 U.S. 619 (1914) (applying established rule in diversity action).

216. *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

system.²¹⁷ The new provision authorized the national courts to transfer cases to any other appropriate federal judicial district upon a showing that such a change of venue would serve the "convenience of the parties and witnesses" and be in "the interest of justice."²¹⁸ The official Reviser's notes stated simply that the new provision "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper."²¹⁹

The statement of "legislative purpose" that accompanied Section 1404 was concise if elliptical. Submitted by a panel of experts who produced the code,²²⁰ the Reviser's notes and the new provision reflected a combination of forces. The growing pressures of interstate forum shopping on the courts, decades of lobbying by railroads determined to restrict the FELA's venue provision, the pleas of bar associations seeking to restrict unethical practices and to stop the loss of lucrative local business to big-city tort specialists, and the rationalizing drive of law professors and legal reformers joined to convince both Congress and most of the profession that some such change was necessary. The Reviser's notes distilled those varied elements to their essence and identified the fundamental congressional intent behind the new Section 1404 when it cited but a single case as its only "example of the need of such a provision."²²¹

The case, *Baltimore & Ohio Railroad Co. v. Kepner*,²²² decided in 1941, involved a typical instance of interstate forum shopping under the FELA. Plaintiff, an Ohio citizen injured in Ohio, brought suit in a New York federal court where venue was proper under the FELA. The railroad responded by filing suit in a local Ohio equity court seeking to enjoin plaintiff from prosecuting the

217. The code was enacted on June 25, 1948. See Judiciary and Judicial Procedure, ch. 87, 62 Stat. 869 (1948) (codified as amended at 28 U.S.C. § 1404 (1988)). For congressional reports on the proposed new Section 1404, see H.R. REP. NO. 308, 80th Cong., 1st Sess., app., at 132 (1947); H.R. REP. NO. 2646, 79th Cong., 2d Sess., app., at 127-28 (1946).

218. 28 U.S.C. § 1404 (1988).

219. The Reviser's notes are printed in H.R. REP. NO. 308, 80th Cong., 1st Sess., app., at 132 (1947).

220. The Chief Reviser stated that there was "no purpose on the part of the Revision staff to effect any change in existing law," and he acknowledged only that certain inconsistencies and ambiguities "not correctable by mere codification" had required "a few such changes." William W. Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 441 (1948). For a brief history of the revision and a description of the participants, see H.R. REP. NO. 2646, 79th Cong., 2d Sess. 1-7 (1946).

221. H.R. REP. NO. 308, 80th Cong., 1st Sess., app., at 132 (1947) (reviser's notes).

222. 314 U.S. 44 (1941).

New York action. The railroad pointed out that both federal and state courts were available to hear the action in Ohio, that the New York court was seven hundred miles from plaintiff's residence, and that a trial in New York would force the railroad to transport some twenty-five Ohio witnesses to New York at an extra cost of \$4,000. The Ohio courts denied the injunction, and the railroad appealed to the United States Supreme Court. "The real contention of petitioner," the Court explained, "is that, despite the admitted [proper] venue [in New York], respondent is acting in a vexatious and inequitable manner" since "a convenient and suitable forum is [available] at respondent's doorstep."²²³ Affirming the Ohio courts, the Supreme Court held that the states could not deny plaintiff an express statutory venue right regardless of the extent to which that right subjected the railroad to "harassing incidents of litigation."²²⁴

Splitting the New Deal Court, *Kepner*²²⁵ and a follow-up case decided the next year²²⁶ deprived the railroads of their most powerful legal weapon against interstate forum shopping. The decisions spurred the railroads' intensified drive in the late forties to persuade Congress to amend the FELA. Indeed, passage of the Revised Judicial Code with its new Section 1404 helped sidetrack a railroad-sponsored amendment restricting venue rights under the FELA that had passed the House the previous year.²²⁷

Given the rise of interstate forum shopping and the history of litigation under the FELA, the citation to *Kepner* in the Reviser's notes points directly to the two particular types of abuse that the new provision was intended to remedy. First, Section 1404 was intended to counter the use of forums that were unrelated to either the plaintiff's residence or the cause of action. The Reviser's notes identified the salient factors in *Kepner* that made the venue practically undesirable, even though legally proper: The action "was pros-

223. *Id.* at 51.

224. *Id.* at 54.

225. Justice Reed wrote for the Court. Justice Frankfurter, joined by Chief Justice Stone and Justice Roberts, dissented.

226. The following year, in *Miles v. Illinois Cent. R.R. Co.*, 315 U.S. 698 (1942), a more badly split Court applied the same bar to injunctions sought against FELA suits filed in state courts. Justice Reed wrote the plurality opinion, joined by Justices Black, Douglas, and Murphy. Justice Frankfurter dissented, joined by Chief Justice Stone and Justices Roberts and Byrnes. Justice Jackson concurred in the plurality's result in a separate opinion. Jackson expressed sympathy for the dissenters' wish that the courts had greater control over forum choice, and he explained clearly why the ostensibly abstract issue of desirable forum use involved substantial and practical questions of litigation advantage.

227. 93 CONG. REC. 9193-94 (1947).

ecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio."²²⁸ Second, and more broadly, Section 1404 was intended to limit the methodical exploitation of the burdens of geography by organized classes of litigants. It was aimed directly and purposely at actions under the FELA where the organized and systematic use of geography as a litigation weapon had become both widespread and notorious.

Events immediately following passage of the Revised Code confirmed the intended purpose of the new provision. The Chief Reviser, William W. Barron, highlighting the section as a "very important change" in federal law, noted that "there have been already determined efforts to limit the power of transfer."²²⁹ On the theory that Section 1404 conflicted with the broad venue provisions of the FELA, plaintiffs argued that the new section applied only to actions brought pursuant to the general federal venue statute, not to those brought under statutes that contained their own special venue provisions. They pressed their position so aggressively, and the Supreme Court was so eager to rule on their contention, that the Justices decided the issue on a petition for mandamus and prohibition barely seven months after Congress enacted the new code. In *Ex parte Collett*²³⁰ and a companion case,²³¹ which both presented standard examples of interstate forum shopping under the FELA, the Court rejected "special venue provision" arguments and held that Section 1404 applied to any civil action. More revealing, the Court devoted the bulk of its opinion, ten full pages, to a detailed legislative history of the provision in order to refute petitioner's contention that the revisers had concealed it in the massive new code, "obscured" its relation to the FELA, and induced Congress to enact it in ignorance and by mistake. The Court gathered the evidence relevant to the provision's legislative history and showed that individual members of the Revision committee, the official Reviser's notes printed with the Code, reports of the Senate and House Committees, and general legal periodicals had all repeatedly stressed the significance of Section 1404 and stated explicitly that it would apply

228. H.R. REP. NO. 308, 80th Cong., 1st Sess., app., at 132 (1947).

229. Barron, *supra* note 220, at 442.

230. 337 U.S. 55 (1949).

231. *Kilpatrick v. Texas & Pac. R.R. Co.*, 337 U.S. 75 (1949). The Court similarly decided that Section 1404 applied to actions brought under the federal antitrust laws which also contained their own special venue provisions. See *United States v. National City Lines, Inc.*, 337 U.S. 78 (1949).

to actions under statutes with special venue provisions, most particularly the FELA.²³²

The legislative history of Section 1404 and the Reviser's notes establish that the purpose of the provision was not simply to allow the federal courts to transfer individual cases in the interests of some generalized and socially abstract goal of judicial economy. The provision had a more specific and more fundamental purpose, a purpose that was rooted in the same policies and values that animated the Court in developing its Commerce Clause venue doctrine, its doctrine of *forum non conveniens*, and its construction of the Due Process Clause relating to personal jurisdiction. The intent was to ensure "the fair and orderly administration of the laws"²³³—to serve, in the statute's language, "the interest of justice"—by limiting the ability of parties to exploit geography as a litigation weapon. It sought, in particular, to restrict those who selected forums with little or no substantial connection to either the parties or the claim, and to block organized classes of litigants who attempted systematically to use the weapon of geography. Accordingly, the House report on the new code made it clear that Section 1404 required the federal courts to consider the "interest of justice" factor separately and independently from the "convenience" factor. "The new subsection," it explained carefully, "requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, *and further*, that it is in the interest of justice to do so."²³⁴

Although Section 1404 created a number of doctrinal problems for the federal courts, the Supreme Court has construed it in light of

232. *Collett*, 337 U.S. at 61–71. The Court again noted in 1964 that abuse of the venue provisions of the FELA "was the subject of special concern" when Congress enacted Section 1404. *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964).

233. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

234. H.R. REP. NO. 308, 80th Cong., 1st Sess., app., at 132 (1947) (emphasis added).

In this regard, it is important to note the substantial difference between the legislative purpose behind Section 1404 and that behind a superficially similar provision enacted two decades later. 28 U.S.C. § 1407 (1988). The latter section provides for the consolidation for purposes of pretrial proceedings of factually related actions brought in different federal judicial districts. In practice, the section is frequently used in conjunction with Section 1404.

In adopting Section 1407, Congress made it clear that the provision was intended to serve the goal of judicial economy and administrative convenience. The interests of the parties, while relevant, are distinctly secondary. Indeed, Section 1407 authorizes consolidations in federal judicial districts where the parties are not otherwise subject to personal jurisdiction and where original venue would be improper. In construing Section 1407 the courts have made the goal of judicial economy their dominant considera-

its mandate that transfers must serve "the interest of justice."²³⁵ With that requirement in mind, the Court has evaluated motions under Section 1404 with close attention to the practical significance that its decisions will have both on the specific parties before it as well as on litigation practice in general. It has sought, in particular, to prevent litigants from utilizing sophisticated tactics that would allow them to turn the statute itself into an instrument of forum shopping or unfair jurisdictional manipulation.²³⁶ "The Section exists to eliminate inconvenience," the Court stated in 1990, "We think it not the purpose of the section to protect a party's ability to use inconvenience as a shield to discourage or hinder litigation otherwise proper."²³⁷

Thus, when plaintiffs began systematically using interstate forum shopping tactics, Congress and the Court both found it necessary to respond. The Court was particularly inventive and persistent in its efforts, in part no doubt because forum choice and "the fair and orderly administration of the laws" seemed inherently a special concern of the judiciary.²³⁸ Ultimately, however, both decided that the law had to control the weapon of geography and prevent its methodical exploitation by organized classes of litigants.

tion. See, e.g., Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711 (1991).

In contrast, the purpose of Section 1404 is quite different. Though judicial economy may be a relevant factor, in Section 1404 Congress expressly made the interests of the parties and witnesses and the interest of justice in the individual case the controlling factors.

235. "Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice." *Van Dusen*, 376 U.S. at 616. Stressing the need to ensure that transfers under Section 1404 served the interest of justice and did not "prejudice" plaintiffs, *Van Dusen* held that transferee courts were obliged to apply the state law that transferor courts would have applied had there been no transfer. *Id.* at 639.

236. See, e.g., *Van Dusen*, 376 U.S. at 623-24; *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 24-25 (1960); *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960).

237. *Ferens v. John Deere Co.*, 494 U.S. 516, 525 (1990). *Ferens* holds that the *Van Dusen* rule—that the law the transferor court would have applied must be applied by the transferee court—controls even when the plaintiff has clearly engaged in interstate forum shopping and is also the moving party on the transfer motion. That decision seems highly questionable since it will likely encourage the use of unfair and manipulative tactical devices by sophisticated plaintiffs. Justice Scalia, joined by Justices Brennan, Marshall, and Blackmun, dissented in *Ferens* largely on that ground. *Id.* at 533-40.

238. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

IV. WHY *CARNIVAL CRUISE*?

The examination in Part II of the business context in which forum-selection clauses operate and the survey in Part III of the evolution of federal forum-control policy suggest that there is far more wrong with *Carnival Cruise* than its unpersuasive reasoning, its dubious construction of *The Bremen*, and its rewriting of a federal statute in the name of "plain meaning." *Carnival Cruise* is an unsatisfactory decision because it magnifies rather than minimizes the impact on the nation's judicial system of the arbitrary and inequitable burdens of geography. The decision is unsatisfactory because it facilitates rather than counters a tactical device that enables an organized class of litigants to exploit those burdens methodically and systematically. It is unsatisfactory because it ignores the sensible and just public policy, which both Congress and the Court have sought to implement, of minimizing the impact of geography on the judicial system "in the interest of justice" and of "the fair and orderly administration of the laws."²³⁹ It is unsatisfactory, finally, because it imposes the burdens of geography on the weaker and more vulnerable party and thereby increases the likelihood that disputes will be resolved on the basis of the relative social resources of the adversaries rather than the substantive merits of their legal claims.

A. *Understanding Carnival Cruise: Venue and Public Policy*

Given the way that forum-selection clauses disadvantage individual claimants and the recurring efforts of both Congress and the Court to limit the impact of geography in federal litigation, the decision in *Carnival Cruise* seems arresting. Though its reasoning is unpersuasive, its determination to uphold forum-selection clauses in consumer form contracts is quite clear. It seems important, then, to attempt to identify more carefully the values and policies that undergird the decision.

The opinion's express references to the conservation of litigation resources and the creation of economic benefits²⁴⁰ surely isolate two fundamental policy goals that helped guide the Court to its decision. Indeed, it seems probable that the Court's desire to conserve judicial and litigant resources and to implement certain ideas of economic efficiency and wealth-maximization are primary determinants of the reasoning and result in *Carnival Cruise*. With respect

239. *Id.*; see also 28 U.S.C. § 1404(a) (1988).

240. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1527 (1991).

to both goals, however, *Carnival Cruise* seems dubious in theory and unfairly biased in practice.

With respect to the first goal, two serious problems challenge *Carnival Cruise*'s assumption that forum-selection clauses will reduce the burdens of litigation by eliminating the need for litigants to make, and the courts to decide, preliminary pretrial motions concerning jurisdiction and venue.²⁴¹ The first problem is that *Carnival Cruise* might actually increase the federal caseload. The decision promises to compound the impact of *Ricoh* and magnify the incentives for defendants to remove state court actions to the federal courts. Even more, the two decisions will presumably encourage a growing number of industries to insert forum-selection clauses in their consumer form contracts. Such clauses will likely appear far more frequently in cases involving consumer disputes, and they will appear even more commonly in federal question and diversity cases as well as in admiralty suits. It seems probable, then, that *Carnival Cruise* will multiply removals and transfer motions in the federal courts. In addition, since removed cases remain in the federal system after transfer, the decision could also increase the overall federal trial docket. Finally, in the event that the Court's "fundamental fairness" scrutiny proves to establish any meaningful limit on the use of forum-selection clauses,²⁴² the opportunity it would offer to void such clauses would encourage consumers to challenge them on the specific facts of their cases. More pretrial motions, raising a wide range of relatively complicated and individualized factual questions, could easily result.

The second problem with *Carnival Cruise*'s goal of conserving litigation resources by minimizing pretrial motions is both more serious and more certain. Simply put, if the decision does succeed in cutting the burden of litigation, it will do so inequitably with respect to the parties and, with respect to the judiciary, for a reason materially different from the one the Court advances. For the parties,

241. See *supra* discussion in text accompanying notes 38–41. The current Court's efforts to use procedural devices to cut the federal caseload threaten to become legendary, however questionable they might seem. From the same term in which the Court decided *Carnival Cruise*, see *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700 (1991) (adding that the statute authorizing removal of state suits by federal officers does not permit removal by federal agencies); *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991) (holding that federal appellate courts must review *de novo* district courts' determinations of state-law issues on the ground, *inter alia*, that the result would foster "economy of judicial administration").

242. See *supra* text accompanying notes 45–56.

Carnival Cruise will prove inequitable because the decision does not, as the Court seems to imply, simply reduce litigation burdens in some general and mutually shared way. Rather, it substantively redistributes those burdens, lifting them from companies that do interstate and international business and imposing them on relatively vulnerable and uninformed consumers. For the judiciary, *Carnival Cruise* will not reduce the burdens of litigation so much by cutting pretrial motions relating to jurisdiction and venue as by discouraging claimants from filing suit or from litigating the suits that are filed and transferred to distant contractual forums. The primary result of *Carnival Cruise*, in other words, will most likely be to eliminate suits, not motions, and to deny forums, not make them merely predictable.²⁴³

The likely results of *Carnival Cruise* raise troubling questions about the extent to which the Court is willing to transform its legitimate desire to control the federal docket into a judicial master policy that threatens to undermine other and more fundamental goals of the nation's legal system. Encouraging settlements may be both wise and necessary, but doing so in ways that substantially alter the litigation balance between the parties—especially when the *de facto* result is to further handicap the weaker party—seems inconsistent with “the fair and orderly administration of the laws.”²⁴⁴ Indeed, it is troubling that the Court, which in recent years has repeatedly shaped legal rules to encourage out-of-court settlements, would in *Carnival Cruise* consider only the impact that its decision would have on formal pretrial motions and ignore its likely impact on the out-of-court settlement process. If the federal docket is to be controlled, as it should be, there are surely better and fairer ways to do it.²⁴⁵

With respect to the decision's second goal, enhancing economic efficiency and maximizing wealth, *Carnival Cruise* raises a number of serious problems.²⁴⁶ The first is that the decision accepts and sanctions a massive market failure. The companies' ability to impose forum-selection clauses on consumers arises from two economic factors. One is that it would be irrational for consumers to absorb the costs of identifying and evaluating such technical con-

243. Even if “fundamental fairness” scrutiny proves to have some substance, its narrowness and the burdens of proof it carries with it will dissuade some claimants from trying to invoke it.

244. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

245. See, e.g., the works cited *infra* note 293.

246. For a general discussion of *Carnival Cruise* focusing on its law and economics underpinning, see Goldman, *supra* note 1.

tractual provisions.²⁴⁷ Consumers are unable, on their own, to recognize and understand the full significance of the numerous technical provisions that companies insert in their form contracts. Because consumers must continually enter into such agreements as a normal and unavoidable part of their daily lives and because each individual consumer bears only a slight risk that he or she will be affected by such provisions in any particular agreement he or she enters into, spending time and money to obtain full information is not a rational investment. The other economic factor is that transaction costs prevent consumers from joining together to collect the requisite information, evaluate their options, and bargain for efficient contractual terms. Economic rationality, then, leads consumers to remain both uninformed and disaggregated. The market failure arises from the fact that economic rationality leads the companies in the opposite direction. Because the companies deal with millions of consumers they have the economic incentives to gain whatever information seems useful, and they know that over the aggregate of their consumer sales they will derive substantial benefits from various advantageous and arcane contractual provisions that they incorporate, even though such provisions will become useful in only a small percentage of their total transactions. Hence, given rational economic behavior by both consumers and companies, the incentive structure prevents the parties from reaching terms that are, in the aggregate, economically efficient.

The resulting inefficiencies appear on two levels. At the level of accident prevention, companies are almost certainly the least

247. There is a large literature dealing with the economic rationality of not incurring information costs when the costs would exceed the probable benefits of the information. See, e.g., Melvin A. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1474 (1989) ("For many shareholders, the cost of reading and understanding each proposal in the proxy materials will exceed the likely economic effect of any given proposal. For such shareholders, it is rational not to read any proposals."). Richard A. Posner states the point more broadly. The "economist's basic analytical tool," he writes, "is the assumption that people are rational maximizers of their satisfactions." RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 1 (1981). With respect to forum-selection clauses, of course, it is rational maximizing behavior that leads the companies to learn about and use such clauses and leads consumers, conversely, to overlook or ignore them. See also POSNER, *supra* note 56, at 81-84; Goldman, *supra* note 1, at 716-17; Michael T. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 596-608 (1990).

Of course, the "rationality" assumption that marks the work of most law and economics scholars is itself unrealistic and subject therefore to criticism—as is *Carnival Cruise*—on that ground. See, e.g., Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989).

costly implementers of efficient safety precautions. Forum-selection clauses—which enable companies to exploit geography to avoid or minimize the liabilities they would otherwise incur—reduce the companies' incentives to implement the efficient level of safety precautions. The result is an increased number of negligent injuries, a result that is inconsistent with the wealth-maximization goal.²⁴⁸ At the level of claim disputing, the companies, not their customers, are certainly the least costly litigators. Their economies of scale, litigation learning curves, and other similar institutional advantages enable them to conduct numerous litigations scattered throughout the various places they do business far more efficiently than the corresponding plaintiffs would be able to conduct the same litigations concentrated at varying but significant distances from their homes. Once again, forum-selection clauses—assuming that the same universe of claims would still be brought to court—increase total costs and defeat the wealth-maximization goal. In terms of the Court's economic goals, then, it would almost certainly be more efficient for the companies—the least-costly accident avoiders as well as the least-costly litigators—to bear the burden of distance.²⁴⁹ *Carnival Cruise* thus does not serve its economic goal because forum-selec-

248. It is generally efficient and desirable for the law to impose liability on the least costly accident avoider. See, e.g., CALABRESI, *supra* note 126; Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13 (1972); Hylton, *supra* note 129; Keith N. Hylton, *Costly Litigation and Legal Error under Negligence*, 6 J.L. ECON. & ORG. 433 (1990). Since the forum-selection clause is a procedural device that serves in practice to prevent the rules of substantive law from properly and fully applying to disputes which they are supposed to control (whether that legal control would come through a final legal judgment or a "rational" settlement based on the parties' evaluation of the merits of a claim), it is a device that allows the advantaged party to avoid paying the full price that the law would otherwise require. Hence, to the extent that substantive tort law properly identifies the least costly accident avoider, forum-selection clauses prevent it from controlling cases and hence frustrate its purpose.

249. This theoretical point assumes that the same set of claims would be litigated whether forum-selection clauses in consumer form contracts are enforceable or not. Although the Court seems to adopt this assumption, it is almost certainly false. See *infra* text accompanying notes 251–253.

If *Carnival Cruise* drives a substantial number of claims from the judicial system, then concededly it will eliminate substantial litigation transaction costs. Holding aside the wealth-destroying effects that arise from the disincentives that *Carnival Cruise* creates for companies to invest in efficient levels of accident prevention, the "litigation efficiencies" that result will be redistributive (*i.e.*, assuming that wealth will be increased, the companies will gain the benefit while claimants receive less than they otherwise would have). Since some individuals will be worse off (claimants driven from the judicial system), the result will not be "Pareto efficient." Since claimants will not be fully compensated, the result will at best be only "Kaldor-Hicks efficient" (*i.e.*, the saved transaction costs would *in theory* allow the claimants to be fully compensated while at the same time increasing the wealth of the companies). This increased "efficiency" will have been purchased at the cost of depriving many claimants of meaningful

tion clauses in consumer form contracts are likely to be wealth-destroying, not wealth-maximizing.²⁵⁰

The analysis, however, must be carried further. Although *Carnival Cruise* seems to assume that the same universe of claims will still be brought to court, that assumption is certainly false. The companies save money with forum-selection clauses not, for the most part, because it is more "efficient"²⁵¹ for them to defend the identical universe of suits in the same forum, but because forum-selection clauses discourage suits and pressure claimants to accept relatively unfavorable out-of-court settlements.²⁵² Thus, because forum-selection clauses decrease the number of suits brought to court, they decrease the litigation costs of the companies and of

access to a judicial forum and of severely reducing or eliminating whatever compensation the law would otherwise have allowed them.

At this point, the Court's assumption that consumers will benefit from lower prices becomes relevant. That assumption cancels, in theory, the possibility of economically redistributive results. As the text notes, it is an assumption.

For the aggregate result of forum-selection clauses to be wealth-maximizing, the total "costs" to individuals and society of uncompensated injuries—multiplied due to the lack of incentives to invest in an efficient level of safety prevention—must be less than the gain in the companies' wealth. It seems highly doubtful that this result would obtain. In any event, there is no proof that it does.

250. Goldman, *supra* note 1, at 721–30.

251. It might be relatively more efficient in the Kaldor-Hicks sense, *see supra* note 76, because that standard allows for externalities. Under Kaldor-Hicks, it does not make any difference how many individuals would take losses or how serious their losses would be as long as those who gain from them somehow gain "more" than the others lost.

The extent to which the Kaldor-Hicks standard allows externalities is vastly magnified in the area of tort law because there is no accurate or objective method of quantifying the total real-world losses incurred by tort victims and the society as a whole. Even limiting losses to those for which claimants are compensated, the discrepancies between amounts of compensation received shows that the legal system provides no "objective" measure of such loss. *See, e.g., Daniels & Martin, supra* note 116, tbl. 3, at 336–37. More broadly, uncompensated losses—though theoretically accounted for by the Kaldor-Hicks standard—may in practice be easily ignored or minimized. Thus, highly inefficient arrangements may appear to be Kaldor-Hicks efficient for the simple reason that a substantial part of the relevant costs are externalized, unquantified, and ignored.

The inability to identify and quantify total real-world losses leads to two specific conclusions with respect to the practical utility of the Kaldor-Hicks standard in tort analysis. One is that Kaldor-Hicks analysis fails to distinguish between efficient arrangements and inefficient arrangements that allow for nonquantifiable (or nonquantified) externalities. The other is that, in this context at least, the Kaldor-Hicks analysis lacks substantive content. To say that forum-selection clauses promote Kaldor-Hicks efficiency would, as a practical matter, be meaningless.

252. *See Hylton, supra* note 129; *see also supra* text accompanying notes 118–126; *infra* text accompanying notes 269–276.

those consumers who settle quickly,²⁵³ and they might also reduce the docket burdens of the courts as well.

That result, however, does not support the further and critical assumption on which *Carnival Cruise* implicitly relies: that forum-selection clauses will also decrease aggregate litigation and related social costs. First, under the rule of *Carnival Cruise*, aggregate litigation costs could increase. Even if large numbers of consumers are driven from the judicial system, the increase in litigation costs imposed on those claimants who remain—multiplied as they will be by efforts to overturn the clauses on “fundamental fairness” grounds, by the burdens of litigating in distant forums, and by their relative inefficiency in carrying those burdens—might equal or exceed the savings that accrue to the companies, the courts, and the claimants who settle quickly. Second, and regardless of whether aggregate litigation costs increase or decrease, total social costs could well increase. Driving large numbers of claimants into unfavorable out-of-court settlements will increase the number of individuals who receive inadequate compensation and, further, increase the amounts by which their compensation is inadequate. The costs of such increasingly widespread and more seriously inadequate compensation—fewer and less successful rehabilitations, more seriously damaged family relationships and structures, lowered aggregate social and economic productivity, reduced faith in the nation’s legal institutions, and added burdens of care directly and indirectly imposed on governments, private institutions, and the public at large—will likely outweigh whatever “savings” otherwise result. Contrary to the Court’s assumption, then, forum-selection clauses—expanding the areas in which inefficient social arrangements may flourish—seem likely to be wealth-destroying rather than wealth-maximizing.

In addition, the wealth-maximizing assumptions that *Carnival Cruise* seems to adopt also raise other fundamental problems.²⁵⁴

253. Although forum-selection clauses will reduce the settlement costs of companies, that reduction will not reduce the aggregate costs of injuries. Rather, a decrease in settlement payments will simply mean that those who suffer losses will bear higher percentages of the costs of those losses.

254. There is a large body of literature criticizing the legitimacy and coherence of the wealth-maximization goal. See, e.g., JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 95–132 (1988); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 237–66 (1985); Jules L. Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 *ETHICS* 649 (1984). Other critics have focused on the artificial and narrow concept of “efficiency” that underlies wealth-maximization theory. See, e.g., Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 *YALE L.J.* 1211 (1991). The wealth-maximization goal is restated and defended in

Apparently embracing the economic views of Judge Posner,²⁵⁵ *Carnival Cruise's* wealth-maximizing rationale assumes that a modern mass economy requires nearly universal use of standard clauses and form contracts in order to eliminate what would otherwise be excessive transaction costs.²⁵⁶ Its theory replaces the market pressures of individual bargaining with the market pressures of economic competition between companies, and it assumes that the latter will generally force companies to pass on to consumers the savings that result from the reduced transaction costs that form contracts allow.²⁵⁷ Those competitive pressures, then, are the forces that pur-

LANDES & POSNER, *supra* note 76; Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85 (1985).

255. See *supra* notes 56, 69, 72; *infra* notes 257-259. In two passages in his opinion in *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990) from which *Carnival Cruise Lines* quoted in its reply brief before the Court, Pet'r's Reply Br., at 9-10, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file), Judge Posner sets forth his wealth-maximizing rationale for the use of consumer forum contracts:

Ours is not a bazaar economy in which the terms of every transaction, or even of most transactions, are individually dickered; even where they are, standard clauses are commonly incorporated in the final contract, without separate negotiation of each of them. Form contracts, and standard clauses in individually negotiated contracts, enable enormous savings in transaction costs

. . . We may assume, since the market in surety bonds is a competitive one, that the cost savings that accrue to [the insurance company] from contractual terms that facilitate the enforcement of one of its bonds will be passed on, in part anyway, to the purchaser of those bonds—the enterprise in which the defendants invested—in the form of a lower premium.

Donovan, 916 F.2d at 377-378. Judge Posner makes the same point in his book. POSNER, *supra* note 56, at 68-69.

256. Both the original defendant, *Carnival Cruise Lines, Inc.*, and the industry group, the International Committee of Passenger Lines, seemed to adopt the same theory. In its brief, *Carnival Cruise Lines* stated: "Like many consumer contracts, passenger tickets are rarely, if ever, 'freely bargained for,' nor would it be practical for carriers to engage in such negotiations with every consumer." Pet'r's Br., at 109, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file). The industry group made the same point: "This Amicus does not dispute the underlying assumption that a passenger rarely engages in actual bargaining for a particular forum clause in the ticket contract. Indeed, present day [*sic*] travel and commercial reality render such bargaining impractical, if not impossible." Br. of the Int'l Comm. of Passenger Lines as Amicus Curiae, in Support of Pet'r, at 120, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file).

257. See *Carnival Cruise*, 111 S. Ct. at 1527. "Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line." *Id.* Judge Posner has stated similar views in POSNER, *supra* note 56, at 84-88.

portedly increase efficiency, maximize wealth, and benefit everyone.²⁵⁸

The assumption about competition raises several substantial problems. First, it requires that courts decide whether a particular industry is economically competitive as well as what such a criterion means in the context of evaluating consumer form contracts.²⁵⁹ The difficulty of answering such questions raises the danger that courts might be induced to rely on arbitrary or formal, and from an enforcement point of view self-defeating, assumptions. They might, for example, be led to assume that the mere existence of two or more firms in an industry establishes the fact of competition.²⁶⁰ The Court's assumption, in other words, could lead to the almost automatic conclusion that competition exists and to a resulting tendency simply to accept as valid whatever form contracts an industry offers.

Second, the Court's assumption overlooks the fact that industries can be competitive in some ways, such as pricing or puffing, but not in others. Because some contractual provisions may serve to enhance the profitability of all competing firms and nevertheless remain beyond the understanding of consumers, those provisions would tend to become uniform throughout an industry. In such a

258. This conclusion constitutes a classic example of the ideological function of wealth-maximization theory. It bypasses and "transcends" the analysis of the unfair and economically redistributive consequences of legal rules in any given time and place or in any particular case or group of cases by shifting the level of analysis to an ostensibly "comprehensive" theoretical level. At that level, of course, it invokes the Kaldor-Hicks standard, ignores nonquantified or nonquantifiable externalities, and thus purports to justify economically redistributive rules as objectively "wealth-maximizing" and "efficient."

259. Judge Posner elaborated his reasoning elsewhere as follows:

If one seller offers unattractive terms to a purchaser, a competing seller, desiring to obtain the sale for himself, will offer more attractive terms. The process should continue until the terms are optimal from the purchaser's standpoint. Thus, the purchaser who is offered a printed contract on a take-it-or-leave-it basis does have a real choice: he can refuse to sign, knowing that if better terms are possible another seller will offer them to him. All of the firms in the industry may find it economical to use standard contracts and to refuse to negotiate with purchasers. But what is important is not whether there is haggling in every transaction but whether competition forces sellers to incorporate in their standard contracts terms that maximize the purchaser's benefits from transacting.

POSNER, *supra* note 56, at 85.

260. If they did not make such a simplifying assumption, of course, the courts would have to engage in a relatively sophisticated economic analysis of the industry that would place substantial evidentiary burdens on the parties and transform relatively simple contract or tort actions into something akin to antitrust suits. It seems highly doubtful that the courts would follow such a course.

case, consumers would find themselves at the same contractual disadvantage regardless of which of the industry's competitors they chose to deal with and regardless of whether the industry was, in some other respect, competitive.²⁶¹ Forum-selection clauses seem, quite understandably, to be just such a provision. As the brief for the International Committee of Passenger Lines noted, "the use of forum selection clauses in passenger ticket contracts" in the industry "is a universal practice."²⁶²

Third, the Court's assumption overlooks the fact that even in "competitive" industries companies may develop institutional methods of reducing or deflecting the press of competition. With respect to the cruise industry, for example, one such method is the cultivation of travel agents. A common and sometimes critical source of information and advice for consumers, travel agents generally work on a commission basis and often receive special bonuses or "overrides" from carriers to whom they steer agreed-upon amounts of business. The senior vice president for sales and marketing of Carnival Cruise Lines, in fact, recently defended the override system, and a survey conducted by *Tour & Travel News* identified Carnival Cruise as one of the four companies with the highest number of such special arrangements with travel agencies.²⁶³ Such relationships between carriers and travel agents, especially when not fully disclosed to customers, create a variety of risks to both individual consumers and the market as a whole, and competition provides relatively little protection against them.

Finally, the Court's assumption is highly dubious for the basic reason that savings resulting from the use of forum-selection clauses may well not be passed on to customers.²⁶⁴ It seems highly prob-

261. Goldman, *supra* note 1, at 718-19; cf. POSNER, *supra* note 56, at 80-84.

262. Br. of the Int'l Comm. of Passenger Lines as *Amicus Curiae* in Support of Petition for Writ of Certiorari at 61, *Carnival Cruise*, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file).

263. Betsy Wade, *Cruises: Do Travel Agents Steer Clients Straight?* N.Y. TIMES, June 7, 1992, at E3.

264. The Court's wealth-maximization assumption is also dubious for another reason. It is based on an unstated—and certainly unsupported—judgment of policy. The Court assumes that the value of the hoped-for reduced fares to all customers, which would likely amount to at most a few dollars apiece, is greater than the value of more substantial recoveries to those relatively few individual passengers who are injured by the company or its employees. That judgment might conflict with the choice that at least many passengers would make if they knew of and understood the significance of forum-selection clauses. The Shutes' brief on appeal, for example, called the Court's attention to a California case that refused to enforce a forum-selection clause in another one of Carnival Cruise's tickets. The California court stated that only one of 288 passengers claimed to have known of the forum-selection clause. Resp't's Br., at 156, *Car-*

able, in fact, that some or all of such savings will be funneled to the companies and their shareholders.²⁶⁵ Indeed, in *Northwestern National Insurance Co. v. Donovan*, Judge Posner himself noted specifically that even "competitive" industries might pass on their savings to customers only "in part."²⁶⁶ *Carnival Cruise* ignores the likelihood that its decision would cause such a patterned redistribution of wealth.

Regardless of the extent to which competition exists, therefore, the Court's assumption does not justify the judicial practice of generally accepting whatever provisions the companies in an industry put in their form contracts. The fact that specific provisions happen to appear in the contracts, after all, is the result of nothing necessarily other than consumer ignorance and the common interests of the companies. The rational economic need for mass bureaucratized form contracts does not determine the proper substantive terms that such contracts should include. The law regularly and, in economic theory, properly seeks to force companies to take account of externalities.²⁶⁷ Because a principal *de facto* function of forum-selection clauses is to create externalities,²⁶⁸ economic theory suggests that the courts should subject them to close scrutiny.

Unlike a free-market theory based on rational bargaining between equals, the Court's theory of corporate-managed form contracts requires a far higher level of scrutiny than the minimalist standards of "reasonableness" and "fundamental fairness" that *Carnival Cruise* adopts. That an industry finds a certain contractual provision useful demonstrates that it serves some practical purpose and is therefore "rational." Actual and legally demonstrable "fraud" is presumably involved in ordinary consumer transactions relatively rarely. Absent the sound check provided by the requirement of knowing consent obtained from knowledgeable bargainers, however, mere compliance with such minimal standards can hardly

nival Cruise, 111 S. Ct. 1522 (1991) (No. 89-1647) (LEXIS, Genfed library, Briefs file) (citing *Carnival Cruise Lines v. Superior Court*, 272 Cal. Rptr. 515 (1990)). The Court's unstated policy judgment surely conflicts, too, with the fundamental idea that the legal system exists to compensate tort victims for their injuries.

265. Assuming that not all of the customers will be shareholders, the result would be economically redistributive, essentially taking money from injured customers and transferring it to shareholders.

266. 916 F.2d 372, 378 (7th Cir. 1990).

267. See, e.g., CALABRESI, *supra* note 126, at 144-50; WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS 11-22 (2d ed. 1988).

268. See *supra* text accompanying notes 117-126.

constitute an adequate basis for accepting the provision as either desirable for the society as a whole or fair to its individual members.

Some forty years ago, Judge Learned Hand exemplified such heightened and realistic scrutiny when he gave judicial recognition to the fact that ordinary persons cannot be expected to read, understand, and adequately evaluate the significance of forum-selection clauses. Judge Hand's remarks are particularly trenchant in connection with *Carnival Cruise* because his concurring opinion in *Krenger v. Pennsylvania Railroad Co.*²⁶⁹ is often cited by those who advocate the reasonableness rule that the Supreme Court subsequently adopted in *The Bremen* and purported to apply in *Carnival Cruise*. At a time when forum-selection clauses were still generally unenforceable in American courts, Judge Hand stated the advanced view that such clauses were no longer barred by any "absolute taboo" but rather were "invalid only when unreasonable."²⁷⁰ In *The Bremen*, the Supreme Court used Judge Hand's *dictum* in support of the reasonableness rule it set forth.²⁷¹ Given the remarks in his opinion and the fact that those who support the enforceability of "reasonable" forum-selection clauses frequently cite them, it is illuminating to note that in *Krenger* Judge Hand ruled that the contract at issue—a "Rock Island release" in an FELA action—was unreasonable and therefore unenforceable. It is even more illuminating to note that he refused to base his ruling on the protective provisions of the FELA.²⁷² Instead, Judge Hand rested on the fact that the railroad held an unfair advantage over the worker in inducing him to sign the agreement:

Moreover, [the claimant] is at a much greater disadvantage in estimating the effect of the contract upon his rights, than when he settles the claim. He is likely to suppose that one court is like another; and certainly he cannot be deemed to be acquainted with those differences between them which may in fact vitally affect his recovery.²⁷³

269. 174 F.2d 556, 560 (2d Cir.) (Hand, J., concurring), *cert. denied*, 338 U.S. 866 (1949).

270. *Id.* at 561.

271. *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 10 n.10 (1972) ("As Judge Hand noted in *Krenger v. Pennsylvania R.R. Co.*, 174 F.2d 556 (2d Cir. 1949), even at that date there was in fact no 'absolute taboo' against such clauses").

272. Judge Charles E. Clark, the author of the majority opinion, also agreed that the contract was invalid, but he rested on the restrictive provisions of the FELA. *Krenger*, 174 F.2d at 559. When the Supreme Court invalidated the "Rock Island release" in *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263 (1949), it did so on the basis that such agreements contravened the provisions of the FELA.

273. *Krenger*, 174 F.2d at 561 (Hand, J., concurring).

Since ordinary claimants could not evaluate the significance of such forum-limitation clauses, Judge Hand concluded that he "would hold such contracts unenforceable unless the [defendant] shows that the employee was fully advised of their effect upon his rights."²⁷⁴ On the petition for rehearing, he suggested that such agreements should be enforced only if the claimant had given his consent after consulting with "someone who adequately informed him of the effect of the contract upon his rights."²⁷⁵ Judge Hand was even more specific: "Certainly that person must be someone not in the defendant's employ;" he declared, "and, indeed, I am inclined to say that he must be a lawyer, though I should not wish to make that an inflexible condition."²⁷⁶

In *Krenger*, Judge Hand had "something of Mephistopheles" about him.²⁷⁷ He recognized the true nature of the dispute before him and understood its relation to the formal rules of the law. He responded by setting forth an approach designed to protect substantive legal rights and claims from the arts of procedural cleverness used against the uninformed in the interests of the powerful. In sharp contrast, *Carnival Cruise*—in theory purporting merely to apply the same reasonableness test that Judge Hand bequeathed to *The Bremen*—sets forth a rule that diminishes or precludes the very kinds of substantive rights and claims that Judge Hand sought to protect.

Granting the need for corporate-managed form contracts, then, the economic assumptions behind *Carnival Cruise* still seem inadequate. Insofar as they promise increased economic efficiency, they do so doubtfully and only at serious costs that may well be wealth-destroying rather than wealth-maximizing. As implemented in *Carnival Cruise*, they do not seem likely to protect the legitimate interests of consumers, society, or the judicial process itself. The economic assumptions behind the decision are also inadequate because they fail to square the Court's acceptance of the need for form contracts with the minimalist level of scrutiny it sees as appropriate for such agreements.²⁷⁸

274. *Id.*

275. *Id.* at 562 (Hand, J., denying reh'g).

276. *Id.*

277. *Id.*

278. Judge Posner would certainly disagree with the above. Among the relevant responses he would presumably make would be that other "social costs," however real and bad they might be, would most likely be less than the costs of government intervention and more rigorous judicial scrutiny. He states, for example:

Beyond the two express goals of conserving litigation resources and maximizing wealth, *Carnival Cruise* also might be thought to reflect the Court's growing commitment to "consensual adjudicatory procedure," the idea that parties should be free to determine by private agreement where and how their disputes are to be resolved.²⁷⁹ "Consensual adjudicatory procedure" is an enticing idea—free individuals rationally selecting the location, procedural style, and controlling law which seem to them most suited to satisfactorily resolve their disputes. The idea suggests the political ideal of free choice and individual self-determination. It evokes hopes for minimizing preliminary motion practice by eliminating disputes over forum choice, thereby conserving judicial resources.²⁸⁰ It implies the all-encompassing rationality of market economics, promising increased social efficiency from the free actions of individuals rationally seeking their own self-interest.

Carnival Cruise, however, neither serves nor adopts that ideal. Rather than allowing freely negotiating parties to protect their interests by selecting mutually satisfying procedural provisions, it allows stronger parties to force inequitable procedures onto weaker ones. More to the point, *Carnival Cruise* expressly rejects any meaningful theory of *consensual* adjudicatory procedure. As it rejects the need for free bargaining in favor of corporate-managed contracts, so it rejects the need for knowing consent in favor of corporate-required adjudicatory procedure. Indeed, the reason *Carnival Cruise* does not expressly invoke the idea of consensual

In the wealth-maximization approach the only basis for interference with economic and personal liberty is such a serious failure of the market to operate that the wealth of society can be increased by public coercion, which is itself costly. Although economists differ as to when markets fail to operate effectively and how costly it is to rectify those failures, at least these are empirical rather than value questions. Some libertarians worry that the economist will exploit the measurement problems inherent in the use of a hypothetical-market criterion to impose all sorts of duties on people in the name of efficiency. But to repeat, imposing duties is appropriate in the economic view only in the exceptional case where market transaction costs are prohibitive.

POSNER, *supra* note 247, at 80. Here, assuming the adoption of rules along the lines suggested in Part V, and for the economic reasons given in Part IV, the costs of judicial intervention seem likely to be less than the costs that will result from the rule adopted in *Carnival Cruise*.

279. See, e.g., Mullenix, *supra* note 2.

280. The evocation on this level appeals to an ideal. On a nonideal level, sometimes unmentioned, "consensual adjudicatory procedure" offers a significant likelihood of actually reducing caseloads when it is taken to countenance agreements that require the use of nonjudicial forums, impose restrictive time limitations or notice provisions, or contain other similar limitations on forum choice that bar or effectively discourage suit.

adjudicatory procedure is, presumably, the Court's awareness that its reasoning contradicts the most basic assumptions that underlie and confer legitimacy on that idea.

B. *Understanding Carnival Cruise: Venue and Social Values*

To the extent that *Carnival Cruise* seeks to conserve litigation resources and maximize wealth, it seems ill-conceived and probably dysfunctional. That conclusion, together with the incessantly result-oriented nature of the opinion's reasoning, suggests ultimately the presence of additional—if perhaps unrecognized and only partially conscious—informing social values and goals. That inference receives further support and sharper focus from the decision's other characteristics: Its effort to give corporations the broadest possible leeway in structuring their relationships with their customers, its willingness to cast potentially massive risks on uninformed consumers, its refusal to consider openly the *de facto* impact of forum-selection clauses on the claims-disputing process, and its determination to transform judicial scrutiny of consumer form contracts into a one-eyed judicial glance. The presence of other values is also suggested by the fundamental inconsistency that undergirds the Court's reasoning: *Carnival Cruise* accepts the critical importance of transaction costs in justifying the imposition on consumers of corporate-managed form contracts that contain forum-selection clauses, but it refuses to consider the equally critical role such transaction costs play in the claims-disputing process where forum-selection clauses have their impact. If transaction costs are relevant to the Court's analysis on the first point, they are surely relevant on the second.²⁸¹

Ultimately, *Carnival Cruise* may perhaps be fully understood only by recognizing its congruence with two additional, unarticulated, and somewhat inchoate goals, one institutional and primarily pragmatic, and the other moral and essentially didactic. The first is the goal of protecting American business institutions in the face of perceived national economic decline and the rigors of sharpening foreign competition. The second is the goal of disciplining litigation behavior in the face of perceived national moral decline and a docket crisis attributed to a rush of "undeserving" plaintiffs into the courts.

281. See Hylton, *supra* note 129, at 119–31. The situations cannot be distinguished on the ground of *ex ante* analysis. See *supra* note 76.

Those two additional goals are highly controversial and political, implicating a broad range of assumptions about the nature of American society and our current social and economic problems.²⁸² The two goals are also, of course, consistent with the efforts of the Reagan and Bush administrations to restructure the American legal system. Charles Fried, who served as Solicitor General from 1985 to 1989, captured the social attitudes that underpin both goals when he outlined the "legal philosophy" that he envisioned "at the heart of the Reagan Revolution."²⁸³ Central to that philosophy was a challenge to the destructive "left-liberal" orthodoxy "that the prosperous had not earned their prosperity and that the poor were the victims of everyone else."²⁸⁴ When the courts adopted that orthodoxy,²⁸⁵ the result was social and economic disaster. "Egged on by aggressive litigators, the legal professoriate, and the liberal press," Fried explained, "the courts had become a principal engine for redistributing wealth and shackling the energies and enterprise of the productive sector."²⁸⁶ The goal of the Reagan Revolution was to reform the legal system in order to prevent it from "distorting the system of opportunity and reward for merit on which the morale of a free-enterprise system depends."²⁸⁷ The Reagan message, in short, was that judicial reform was essential because the courts were handicapping "meritorious" entrepreneurs and workers while funnelling undeserved wealth to the economically, and morally, non-meritorious.²⁸⁸

More recently, under the Bush administration, the President's Council on Competitiveness issued its *Agenda for Civil Justice Re-*

282. Vice President Dan Quayle, for example, has repeatedly declared that the nation's civil justice system overburdens American corporations and places them at a "competitive disadvantage" in the world market, and his comments have just as repeatedly drawn criticism. See, e.g., Douglas Jehl, *Administration Calls for Wide Legal Reforms*, L.A. TIMES, Aug. 14, 1991, at A1.

283. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 14–16 (1991).

284. *Id.* at 15.

285. "[T]he left-liberal orthodoxies embraced the premise that the federal judiciary should be the engine for realizing their values," Fried wrote. *Id.* at 16. To a large extent, he continued, the courts agreed to accept that task. "In many respects the courts themselves had become major bureaucratic actors, enthusiastically, self-consciously enlisting in the movement to substitute the judgments and values of the non-productive sector of society—lawyers, judges, bureaucrats, politicians—for the self-termination of the entrepreneurs and workers who create wealth." *Id.* at 17.

286. *Id.* at 17.

287. *Id.* at 17–18.

288. That message, in turn, was a corollary of the administration's banner theme that the courts were disrupting American society in general and that government "inter-

form in America, a compilation of fifty law-reform proposals aimed overtly at assisting American business by restricting tort suits. "Unrestrained litigation," it proclaims on its first page, "necessarily exacts a terrible toll on the U.S. economy."²⁸⁹ The *Agenda* supports that allegation by noting, among other things, that "47 percent of U.S. manufacturers have withdrawn products from the market."²⁹⁰ The use of such a "fact"—meaningless at best—suggests the extent to which political and ideological commitments

ference" of any kind in social and economic areas was usually, if not always, fruitless and destructive.

Among lawyers and judges, Robert H. Bork has been one of the most prominent voices drawing out these lines of argument. Announcing that "antitrust is a subcategory of ideology," for example, he attacked what he saw as "a movement away from the ideal of liberty and reward according to merit toward an ideal of equality of outcome and reward according to status." ROBERT H. BORK, *THE ANTITRUST PARADOX* 408, 419 (1978). He subsequently developed his thinking further in ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

Charles Murray, a scholar whose work was termed the "bible" of the Reagan administration, advanced similar views in his study of welfare policy. "The unwillingness to acknowledge moral inequality," Murray wrote, "was a hallmark of Great Society social programs and persisted throughout the 1970s." CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY* 183 (1984). Those programs failed because they denied the fundamental truth that practical merit exists. "Some people are better than others. They deserve more of society's rewards, of which money is only one small part. A principal function of social policy is to make sure they have the opportunity to reap those rewards." *Id.* at 233-34.

David Stockman, President Reagan's Director of the Office of Management and Budget, captured much of the same attitude when he explained that the "real Reagan supply-side program would embody a solid and sweeping anti-free lunch plan, based on unprecedented retrenchment of federal entitlement, subsidy, and cheap credit programs." DAVID STOCKMAN, *THE TRIUMPH OF POLITICS* 72 (1986). The "central idea of the Reagan Revolution," Stockman continued, was to establish a "minimalist government" whose "vision of the good society rested on the strength and productive potential of free men in free markets." *Id.* at 8.

This is not the place to evaluate these ideas and attitudes either in theory or in practice. Suffice it to say two things. First, while rewarding merit is, as a general matter, an unexceptionable and desirable goal, relying on implicit assumptions about the merits of litigants to shape procedural and jurisdictional rules is dubious and dangerous. The very purpose of the legal process is, after all, to determine properly the substantive merits of disputes, not to find indirect or covert methods of prejudging them. Second, a political or legal philosophy that merges the economic and the moral, identifies wealth with virtue, and minimizes or disregards the complex role that cultural and institutional forces play in structuring social relationships may become an explosive, dangerous, and destructive force when transformed into an aggressive political ideology. It can arm its adherents (who assume, of course, that they are among the meritorious) with strength and determination, and it can endow them with the presumed moral authority to deal harshly and effectively with the claims of those whom they regard as fundamentally "nonmeritorious."

289. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* 1 (1991) [hereinafter *AGENDA*].

290. *Id.* at 3.

shaped the administration's approach to "Civil Justice Reform."²⁹¹ Indeed, the report relies heavily on evidence that would seem, at a minimum, gravely partisan. "In a survey of over 250 American companies," the report announces, "more than three-quarters of the executives said they believe that the United States will be increasingly disadvantaged in world markets unless modifications are made in the liability system."²⁹² In contrast, the *Agenda* cites no testimony from labor unions, tort plaintiffs, consumer groups, or public interest organizations. Neither does it discuss the analyses of economists and businesspersons who see factors other than excessive litigation costs as the causes of the nation's current economic problems. Nor, finally, does it discuss the analyses of the economists, sociologists, historians, and legal scholars who have examined changing litigation patterns and raised serious questions about the nature, causes, and existence of the alleged "litigation explosion."²⁹³

291. Another rough measure of the extent to which political and ideological concerns animated the *Agenda* may be obtained by comparing its proposals, documentation, and analysis with those of the nearly contemporaneous (and also controversial) Final Report (1990) of the congressionally sponsored Federal Courts Study Committee, which, of course, was available for use by the authors of the *Agenda*. The first two parts of the Final Report are reprinted in *Report of the Federal Courts Study Committee*, 22 CONN. L. REV. 733 (1990).

The ideological and partisan nature of the administration's efforts are perhaps nowhere more arrestingly illustrated than in one of Vice President Quayle's recent speeches defending the *Agenda*'s proposals. There, in adding up the harmful costs that the litigation explosion has allegedly imposed on American business, he refers to the sum of \$300 billion, the purported total of *all* costs "indirectly" incurred as a result "of efforts to avoid liability." Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 560 (1992).

292. *AGENDA*, *supra* note 289, at 3.

293. There is an immense and increasingly complex and sophisticated literature on the relationship between the legal system and the economy as well as on the so-called "litigation explosion." Considering the scope and quality of the literature, the premises and assertions of the *Agenda* are, at the very most, unproven, oversimplified, and partisan.

There is, of course, little consensus on many of the most basic factual and theoretical issues, let alone on any solutions that might seem necessary. Further, the observations and prescriptions of many commentators seem not unrelated to their political and social views. Some, for example, question the existence of a "litigation explosion," e.g., Galanter, *supra* note 40, while others regard it as threatening to destroy the entire federal judicial system, e.g., POSNER, *supra* note 40.

For a few of the most recent contributions to the discussion, see WAYNE V. MCINTOSH, *THE APPEAL OF CIVIL LAW: A POLITICAL-ECONOMIC ANALYSIS OF LITIGATION* (1990); Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645 (1992); James A. Henderson, Jr., *The Efficacy of Organic Tort Reform*, 77 CORNELL L. REV. 596 (1992) (reviewing W. KIP VICUSE, *REFORMING PRODUCT LIABILITY* (1991)); Saks, *supra* note 78.

While some of the *Agenda's* proposals seem reasonable, many would unfairly burden plaintiffs and create heavy disincentives to sue regardless of the underlying merits of a claim. Those functionally inhibiting proposals include a "pre-complaint notice" requirement,²⁹⁴ wider use of summary judgment,²⁹⁵ restrictions on expert witness testimony,²⁹⁶ and tight limitations on punitive damages.²⁹⁷ Perhaps most notable, the inhibiting proposals include several that would purposely increase the costs of litigation, directly handicapping claimants who do not possess substantial financial resources and tilting the litigation balance even further in favor of those who do.²⁹⁸

The *Agenda's* proposals, too, contain revealing curiosities. Focusing on the need for procedural reform, the *Agenda* includes a somewhat surprising provision aimed at protecting trade secrets; stressing the need to limit discovery, the *Agenda* includes three provisions aimed at expanding discovery.²⁹⁹ In spite of the superficial incongruity, however, the three proposals are integral parts of the administration's approach. The purpose of the *Agenda*, after all, is not merely to simplify procedure or to develop more equitable rules for resolving disputes. Instead, its overriding purpose—heralded on its first page—is to reduce drastically the litigation and liability costs of business by forcing up the litigation costs of plaintiffs and thereby driving large numbers of them from the courts. All three of the seemingly out-of-place proposals would contribute to that broader political and social goal.

294. *AGENDA*, *supra* note 289, at 15–16.

295. *Id.* at 20.

296. *Id.* at 21–22.

297. *Id.* at 22–23.

298. *See, e.g., id.* at 17 (requiring payment to obtain certain "additional discovery"), 19 (losing party to pay costs and fees on discovery motions), 24–25 (losing party to pay winner's attorneys' fees), 25 (restricting or abolishing statutes that allow only plaintiffs to win attorneys' fees).

299. The proposals are:

1) that courts retain the authority "to preserve confidential and trade secret information" and that legislatures "resist efforts to limit the ability of courts" to issue protective orders safeguarding such information, *id.* at 19;

2) that discovery rules permit "more comprehensive inquiries of proposed 'expert' witnesses," *id.* at 21; and

3) that the rules allow "[a]dditional expert discovery such as depositions for expert discovery." *Id.* at 22.

The first proposal would provide added protection for business, and the latter two would allow defendant companies to increase plaintiff's costs and to enjoy additional opportunities to discredit testimony that is often required and critical to plaintiff's claim.

The *Agenda* attempts to justify its proposals on the ground that a relatively high percentage of lawsuits are abusive and "frivolous."³⁰⁰ In his letter of transmission accompanying the *Agenda*, Vice President Dan Quayle stresses the widespread "abuse of the legal system" and the need to eliminate "excessive, needless litigation."³⁰¹ He urges the adoption of rules that would eliminate "a lot of frivolous claims and specious defenses."³⁰² The *Agenda* announces that the legitimate costs of "meritorious lawsuits" account for only "some" of the heavy burdens on the legal system.³⁰³

Although the *Agenda* makes no effort to provide any relevant analysis, its political and rhetorical centerpiece is the claim that its proposals would restrict or eliminate only those frivolous suits. "[N]one of the proposals by the Council," the Vice President asserts, "is designed to close the courthouse doors to any meritorious claim."³⁰⁴ Quite the contrary, he contends. Their purpose is "to open those doors" to persons seeking to vindicate rights "by clearing court dockets to hear truly meritorious claims."³⁰⁵

The Vice President's insistence that the *Agenda* would facilitate the course of meritorious suits only highlights the fundamental questions: Why, and on what basis, does the administration think that a significant percentage of lawsuits are "frivolous"; and, more important, why and on what basis does it think that the *Agenda*'s proposals would restrict only the "frivolous" while assisting the "truly meritorious"? The Vice President proffers no answer to the former, and his only response to the latter is both formalistic and disingenuous. "It bears emphasis that these reforms are procedural in nature—directed at reforming the process of resolving disputes," he states.³⁰⁶ "They are not intended to affect substantive rights."³⁰⁷

The *Agenda*'s approach is, of course, based on far more than such a scarcely veiled tautology. Explicitly, and in the first in-

300. The report's general emphasis on "market discipline," *id.* at 9, implies this, as do many of its other comments and recommendations. See, e.g., *id.* at 8, 21, 24, 25, 27.

Needless to say, under FED. R. CIV. P. 11, and the cases that construe it, existing law already provides an appropriate sanction for lawsuits that are, in fact, "frivolous."

301. Dan Quayle, *Memorandum for the President*, reprinted in *AGENDA*, *supra* note 289, first unpaginated page.

302. Dan Quayle, Prepared Remarks of the Vice President at the Annual Meeting of the American Bar Ass'n 4 (Aug. 13, 1991) (transcript available in the Office of the Vice President).

303. *AGENDA*, *supra* note 289, at 3.

304. Quayle, *supra* note 291, at 560.

305. *Id.*

306. *Id.*

307. *Id.*

stance, it rests on the sleek logic of abstract market theory. Its goal, the *Agenda* announces, is to "impose market discipline on the litigation process."³⁰⁸ Increases in the costs and risks of litigation, its theory holds, would automatically turn economically marginal (*i.e.*, frivolous) claims into economically irrational claims but would not affect economically non-marginal (*i.e.*, nonfrivolous) claims. Assuming that claimants and their attorneys would act in an economically rational manner, the *Agenda* assumes that claimants would drop the former while pursuing only the latter.

That market rationale, of course, is *a priori* and prescriptive, and it ignores both the complexities of human motivation and behavior and the social realities of contemporary litigation and settlement practices.³⁰⁹ The rationale, however, seems persuasive to those who share the deeply-rooted moral assumptions that undergird the Reagan-Bush ideology of merit. Indeed, at the *Agenda*'s emotional and intellectual core lies a fundamental politico-moral premise: Legally nonmeritorious suits are brought by individuals who are morally nonmeritorious. Who else, after all, would bring a "frivolous" lawsuit?³¹⁰ Identifying nonmeritorious suits with the

308. AGENDA, *supra* note 289, at 9. The market image recurs in several places. See *id.* at 21-22. As the Reagan administration insisted that its social policy was to maintain a minimum "safety net" for the truly deserving poor, so the AGENDA refers to the need "to safeguard equal access to the courts." *Id.* at 9.

309. See, e.g., *supra* Part II.

310. A parallel and functionally-equivalent charge can be made explicitly, with much greater political freedom, and without compromising campaign rhetoric: That venal and unprincipled attorneys are responsible for the frivolous cases. AGENDA, *supra* note 289, at 8-9. This charge has the advantage of being able to exploit popular hostility toward lawyers and to obscure implications concerning both the role and fate of claimants. For a general discussion, see Cross, *supra* note 293.

Attributing frivolous suits to the greed and irresponsibility of attorneys allows for the development of a handy political demonology, but it does not provide a response to the substantive problems that the administration's law reform effort raises. That failing is understandable, of course, because the purpose of the anti-lawyer tactic is precisely to shift the focus of discussion away from such substantive problems and onto an easily-recognizable and unpopular scapegoat. The administration's demonology, for example, does not begin to address such important questions as:

1. How are we to determine which suits are "frivolous" and which "nonfrivolous" without knowledge of the relevant facts and applicable substantive law in each?
2. How are we to measure or otherwise evaluate the number of "frivolous" lawsuits that are brought, their relative size and type, and the overall impact they have on the judicial system?
3. How are we to measure or otherwise determine how various changes in the law will affect "frivolous" and "nonfrivolous" suits respectively?
4. How are we to measure or otherwise determine the number of "nonfrivolous" claims that are *not* brought to the courts because "technical" legal factors (*i.e.*, formal and procedural rules unrelated to the merits that operate in practice to unfairly handi-

greed, folly, indolence, and corruption of morally culpable individuals, the Reagan-Bush ideology conceives of a "litigation explosion" that results from a rapid increase in "frivolous" suits, and it understands that rapid increase, in turn, as the result of a wide-ranging and accelerating moral decline in American society as a whole.

Those implicit assumptions provide the theoretical links that give the *Agenda* its ideological as well as its programmatic coherence. On the level of social theory, the assumptions justify the belief that a large part of the caseload is made up of frivolous suits and also explain why such frivolous suits have proliferated so rapidly during recent decades. On the level of economic theory, they justify the use of market mechanisms to control access to the courts. Since those who pursue nonmeritorious suits prove themselves to be rationally nonmeritorious, their behavior deserves to be sanctioned. The increased costs and risks that the *Agenda* would place on them would thus be merely rationally appropriate penalties for irrational behavior. On the level of politico-legal theory, the assumptions resonate within the Reagan-Bush ideology of merit to suggest two fundamental reasons why the *Agenda's* proposals would restrict only the frivolous while assisting the meritorious. First, they evoke the pseudo-Darwinistic belief that "meritorious" individuals overcome social hardships while "nonmeritorious" ones do not. Increased litigation costs would not deter meritorious claims, therefore, because the meritorious individuals who assert them possess (by definition) the strength of character necessary to prevail over whatever obstacles confront them. In contrast, increased costs would deter nonmeritorious claims because the nonmeritorious individuals who

cap those who lack sophistication and resources) block the access of deserving would-be plaintiffs?

5. How are we to measure or otherwise determine the number of "nonfrivolous" claims that are *not* brought to the courts because extra-legal social factors block the access of deserving would-be plaintiffs?

6. How are we to remove those legal and nonlegal obstacles and increase the ability of deserving would-be plaintiffs to bring legal actions and thereby obtain in practice the remedies the law provides in theory?

7. How are we to alter or regulate the private bar to ensure that attorneys—not innocent clients—are responsible for the abuses that the administration alleges they cause?

8. How are we to alter or regulate the private bar to ensure that all deserving would-be parties are able to obtain the services of a competent and honest attorney to represent them?

The Reagan and Bush administrations also attribute the "litigation explosion" to dangerous expansions of regulatory laws and individual legal rights. To the extent that they attack and attempt to change such substantive laws and rights, they are trying openly and directly to accomplish their goals.

assert them lack (by definition) the strength of character necessary to overcome such obstacles. Second, the moral assumptions behind the *Agenda* also evoke the related belief that hard work and economic success naturally bring their own just rewards. Those with financial resources sufficient to guarantee access to the courts have simply earned their right to a hearing. In contrast, those with few resources have not earned such a right and may, therefore, legitimately be screened from the courts. Thus, by alleging the existence of large numbers of frivolous claimants and identifying them with moral fault, the assumptions underlying the Reagan-Bush ideology of merit justify the *Agenda* by transforming its proposed *de facto* denial of court access into a just punishment for moral failure.

Those and other cognate attitudes have helped animate the efforts of the Reagan and Bush administrations to restrict tort actions (and other disfavored types of claims as well) for the declared purpose of freeing American business from unwise competitive burdens and safeguarding the wealth of the economically and morally meritorious.³¹¹ The Reagan-Bush entrancement with the amorphous, value-laden, and politically-charged concepts of markets and merit has thus inspired a powerful use for the ideologically implicit con-

311. George Gilder, who chaired the Economic Roundtable at the Lehrman Institute and was one of the early publicists of Reaganomics, stressed the moral necessity of allowing the meritorious to amass their wealth. "They deserve what they win." GEORGE GILDER, *WEALTH AND POVERTY* 58 (1981). Moreover, Gilder declared, the wealthy are also morally meritorious because they are inevitably self-sacrificing, giving up their wealth in the service of progress. "It is the rich who by risking their wealth ultimately lose it, and save the economy," he explained. *Id.* at 63. The wealthy as a class are a natural elite, essential to society's welfare: "Material progress is ineluctably elitist: it makes the rich richer and increases their numbers, exalting the few extraordinary men who can produce wealth over the democratic masses who consume it." *Id.* at 259.

It is important to note that echoes of the indirect but fundamental equation of merit and money also sound in the Kaldor-Hicks standard of efficiency and in the theory of wealth maximization. In both, interpersonal value comparisons are supposedly avoided by allowing buyers' varying abilities to pay for goods to establish what is defined as "objective" value. In according equal weight to each monetary unit, Kaldor-Hicks and wealth maximization commit the standard of objective value to the control of those with the most money. *See, e.g.,* Calabresi, *supra* note 254; Crespi, *supra* note 76.

Judge Posner has made the point clearly:

Another implication of the wealth-maximization approach, however, is that people who lack sufficient earning power to support even a minimum decent standard of living are entitled to no say in the allocation of resources unless they are part of the utility function of someone who has wealth.

POSNER, *supra* note 247, at 76. Judge Posner would, however, limit the consequences of this view when the issue is access to the courts. *See* POSNER, *supra* note 40, at 10, 131-39.

cept of the "non-meritorious." The latter concept, stretching out to encompass and then to merge the presumed frivolous nature of many lawsuits with the presumed moral nature of their instigators, provides both a compelling inducement and a valid warrant for urging ostensibly rational rules to deprive large numbers of claimants of access to the courts.

Given the fissures in its reasoning and the social results it promises, *Carnival Cruise* seems fully explicable only in light of the influence of some such informing political and social attitudes.³¹² The Court's decision fits the Bush administration's *Agenda*. Both embrace "market discipline" as the proper method of controlling access to the judicial system.³¹³ Both advance rules that substantially raise the costs and risks that claimants must incur if they wish

312. The theory of "liberty of contract" that flourished in the Court's decisions in the late nineteenth and early twentieth centuries presents a curious and ironic parallel to its current theory of corporate-managed form contracts. The two theories are in some ways quite different. The current theory rejects the idea that contract requires free bargaining between equal and rational individuals, the fundamental idea on which the earlier theory rested. Further, the current theory embraces the idea that contractual principles must be molded to changing social and institutional conditions, an approach that seemed suspect to most of those who spoke for the earlier theory. And yet, in spite of the differences that separate the two theories, they do seem to accomplish the same generic social result. Privileging a particular view of the bases of national economic power and assuming the innocence of private social power, both have led the Court to sanction the efforts of stronger parties to impose unfavorable contractual provisions on weaker ones. See PURCELL, *supra* note 77, at 264-65.

Although the earlier Court usually ignored many of the *de facto* social consequences of its liberty of contract decisions, on occasion it did acknowledge them.

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

Coppage v. Kansas, 236 U.S. 1, 17 (1915).

313. Although Judge Posner has urged that some market pressures be used to limit the number of suits filed, he has approached the problem with more care and also emphasized the need to limit such pressures in the broader interests of justice. See POSNER, *supra* note 40, at 10-11, 131-39.

to seek judicial relief. Both agree implicitly that it is legitimate to protect business and the judiciary by compounding the likelihood that those with few resources will be unable to pursue their claims. And, finally, both promise the same result: To drive large numbers of claimants from the courts.

From the most general perspective, then, *Carnival Cruise* seems to stand as a defining ideological marker for the current Supreme Court. Since the reasoning in the opinion is at best result-oriented and the decision could easily have gone the other way, its holding necessarily constitutes the majority's purposeful value choice. The decision's expected social consequences, too, are apparent and consistent with those of many of the Court's other recent decisions. The current Court has tended to burden individual litigants who seek relief against large private and governmental institutions, and it has strengthened the ability of those institutions to defeat such suits and to do so relatively easily and relatively early in the litigation process.³¹⁴ While there is broad public recognition that the current Court's criminal law rulings are directed toward

314. Among recent examples are the following:

1. The Court engaged in the most vigorous type of judicial activism to defeat tort actions against military contractors and protect the federal treasury by providing a special defense (which Congress had repeatedly refused to enact) under the federal common law. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); see Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from Boyle's Government Contractor Defense*, 63 S. CAL. L. REV. 637 (1990); Terrie Hanna, Note, *The Government Contract Defense and the Impact of Boyle v. United Technologies Corporation*, 70 B.U. L. REV. 691 (1990).

2. The Court lowered the threshold required to succeed on motions for summary judgment, significantly improving defendants' chances of prevailing at an early stage of a litigation. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

3. The Court restricted the doctrine of implied constitutional causes of action, refusing to allow recovery against the federal government even on facts establishing the most outrageous governmental abuse of its citizens. See *United States v. Stanley*, 483 U.S. 669 (1987).

4. The Court loaded heavy new burdens on those who sought to enforce their rights under the federal civil rights laws, particularly in protesting against employment

such ends,³¹⁵ there seems to be somewhat less awareness that a similar pattern marks its civil law rulings as well.³¹⁶ Although the civil and criminal law patterns are somewhat different, their similarities nevertheless seem broad, fundamental, and hardly accidental.³¹⁷

Carnival Cruise confers on national corporations the power to summon up the burdens of geography and cast them on their adversaries. It thereby institutionalizes a powerful litigation tactic and

discrimination. See *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

5. The Court made it more difficult for those challenging the constitutionality of government actions to establish standing to sue. See *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Allen v. Wright*, 468 U.S. 737 (1984).

6. The Court allowed an Alabama county commission to alter its internal operations in a way that deprived elected black officials of the authority that had previously been placed in their offices. *Presley v. Etowah County Comm'n*, 112 S. Ct. 820 (1992).

7. The Court strengthened the ability of employers to force their employees to sign employment contracts that deprive them of the right to bring legal actions against their employers and compel them to submit their claims to arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

8. The Court chose to proceed on its own and to limit federal *habeas corpus* jurisdiction severely, even though Congress has refused to limit that jurisdiction as Chief Justice Rehnquist repeatedly requested. In effect, the Court rewrote the controlling federal statute. See 28 U.S.C. § 2254 (1988); *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992); *Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *Butler v. McKellar*, 494 U.S. 407 (1990); *Teague v. Lane*, 489 U.S. 288 (1989).

315. The Court's rulings restricting individual rights in the criminal law area are numerous. For decisions from one recent Term, see *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991); *Florida v. Bostick*, 111 S. Ct. 2382 (1991); *California v. Hodari D.*, 111 S. Ct. 1547 (1991); *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991).

316. The Court's decisions relating to the federal civil rights laws, for example, helped prevent untold numbers of individuals from bringing or maintaining their claims in court. The exceptionally burdensome proofs that the Court required in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), for example, where it essentially overruled its earlier landmark decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), increased substantially the time, expense, and expertise necessary to establish a *prima facie* case under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253, as amended by 42 U.S.C. §§ 2000e-2000e-17 (1988). The combination of practical and legal obstacles forced many employment discrimination complainants to abandon their hopes of obtaining judicial redress. "What happens," one specialist in the field explained, "is that they end up not being able to enforce their rights." Steven A. Holmes, *Workers Find It Tough Going Filing Lawsuits over Job Bias*, N.Y. TIMES, July 24, 1991, at A1, A17. That, of course, is precisely what will happen to some additional number of plaintiffs who find themselves confronting forum-selection clauses in consumer form contracts. Congress overruled *Atonio* and several other similar recent decisions in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

317. Defending much of the Court's approach to changing the criminal law, a recent newspaper editorial struck the concern that appears most fundamental and troublesome. "Even if the majority's motives in implementing an anti-crime agenda are the best, the worry is that the court is too easily casting aside its historic role as the staunchest, and often last, protector of the individual against state power." *High*

reverses the long-standing efforts of both Congress and the Court to minimize the impact that those burdens impose on "the fair and orderly administration of the laws."³¹⁸ Restricting the rights of ordinary Americans to obtain relief against established and powerful institutions, *Carnival Cruise* enshrines the social and economic values of a corporatist-statist Court in a time of perceived economic and moral decline. It reflects the Court's inchoate desire to strengthen the nation's economic institutions by allowing American business to operate freely and "efficiently" and its relative unwillingness to provide meaningful remedies for those individuals who fail, for whatever reason, to protect their own interests.

Court's Crime Offensive: In the End Who Will Be Hurt?, L.A. TIMES, Aug. 5, 1991, at B4 (editorial).

Considering several recent decisions that affected minorities, Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals expressed a similar concern about the Court's attitudes. He noted that:

the Court clearly turned away from its historical role as the protector of the civil rights of minorities—those who need its protection the most. Instead, in a remarkable display of that dreaded quality—judicial activism—the Court perceived a need to rewrite our civil rights law and to concentrate its efforts on preserving the privileged status of the white majority.

Stephen Reinhardt, *Civil Rights and the New Federal Judiciary: The Retreat from Fairness*, 14 HARV. J.L. & PUB. POL'Y 143 (1991). Along the same line, Professor David Chang concluded that the Court has been particularly "activist" in limiting "programs that benefit traditional victims of racism" and that, in doing so, it has "ignored principles of federalism" and "ignored the impropriety of judicially-mandated resolutions of political controversies based only on their personal values." David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 844 (1991).

Reviewing the Court's recent use of its powers of judicial review, Guido Calabresi, Dean of Yale Law School, concluded more generally that the Justices have been "willful" in failing to intervene in several areas, including situations where "the burden of the rule [under review] falls on those who cannot protect themselves in legislatures." The decisions of the current Court, he emphasizes, constitute "result-oriented judicial activism." Guido Calabresi, *The Supreme Court 1990 Term—Forward: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 151 (1991).

The pattern seems clear. As Professor George Kannar commented recently:

The advent of the Reagan-Rehnquist Court presents an opportunity for some corrective *perestroika*, as a broader set of constitutional scholars now suddenly experience the same frustrations those concerned with criminal procedure have been facing for almost twenty years—the frustrations of living with a Court pursuing a pre-determined course toward Constitutional retrenchment.

George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1344 (1990).

318. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

V. REPLACING *CARNIVAL CRUISE*: SOME PROPOSED ALTERATIONS IN THE LAW

The Supreme Court has repeatedly recognized the importance of an individual's right to bring suit in a forum near her home. Even its restrictive commerce clause venue doctrine recognized that plaintiff's residence in the forum state prior to the time of injury weighed heavily in favor of her right to sue in the local courts.³¹⁹ When the Court abandoned the doctrine in the thirties, it again emphasized that in determining the propriety of forum choice the plaintiff's place of residence, "even though not controlling, is a fact of high significance."³²⁰ When the Court finally adopted the doctrine of *forum non conveniens* in 1947, it again emphasized the same point. "Where there are only two parties to a dispute," it declared, "there is good reason why it should be tried in the plaintiff's home forum if that has been his choice."³²¹

The same rule should apply, though often it does not, to motions under Section 1404. Because the provision allows judges to transfer rather than dismiss actions, as is done under the doctrine of *forum non conveniens*, the federal courts have considered transfers "less drastic" remedies and, accordingly, give plaintiff's choice of forum somewhat less weight in considering a motion under the former than under the latter.³²² As discussed earlier,³²³ however, the legislative history of Section 1404 suggests strongly that Congress

319. See *State of Missouri ex rel. St. Louis, B. & Mex. R.R. Co. v. Taylor*, 266 U.S. 200, 207 (1924); *Davis v. Farmers Co-Operative Equity Co.*, 262 U.S. 312, 316-17 (1923).

320. *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511, 520 (1934).

321. *Koster v. (American) Lumbermen's Mut. Casualty Co.*, 330 U.S. 518, 524 (1947). In a companion case the Court explained that "unless the balance [of convenience] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

322. Under Section 1404 the federal courts hold that plaintiff's choice of forum should be respected unless there are strong reasons why another forum would better serve the interests of convenience and justice. Further, they also hold that the party seeking transfer under Section 1404 carries the burden of making that showing. On the theory that transfer under Section 1404 is a less drastic remedy than dismissal under the doctrine of *forum non conveniens*, however, the federal courts exercise broader discretion under the former and give greater weight to general "economy" factors, including the convenience of witnesses and of the judicial system itself. Accordingly, they give relatively less weight to plaintiff's choice of forum in motions under Section 1404 than they do under *forum non conveniens*. *Norwood v. Kirkpatrick*, 349 U.S. 29, 30-32 (1955). Compare *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) (discussing the proper weight to be accorded to plaintiff's choice of forum in a motion to dismiss on the ground of *forum non conveniens*) with 1A, pt. 2, JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 0.345[5], at 4376 n.23, 4379 n.35 (2d ed. 1991).

323. See *supra* Part III(B).

intended that in deciding transfer motions the courts continue to give heavy weight—most likely the same weight accorded under the doctrine of *forum non conveniens*—to plaintiff's choice of forum when she chooses to sue in the courts of her home state or where the claim arose. First, the legislative history shows that Congress intended the provision as a device to deal with cases brought in forums unconnected with either the plaintiff or the cause of action. Second, the Reviser's notes state that the new provision "was drafted in accordance with the doctrine of *forum non conveniens*."³²⁴ When Congress enacted Section 1404, it was surely aware of the heavy weight that the Court had accorded to plaintiff's choice of forum when it adopted the *forum non conveniens* doctrine the preceding year. Those considerations of legislative history argue strongly that the courts should accord the same heavy weight to plaintiff's choice of forum under Section 1404 as they do under *forum non conveniens*, and, more specifically, that they should unquestionably do so when plaintiff files suit in her home state or in the state where her claim arose. That conclusion is further strengthened by the recognition that, in the context of real-world claims-disputing practices, a transfer under Section 1404 is often no "less drastic" a remedy than a dismissal on *forum non conveniens* grounds.³²⁵ In both instances the result is frequently the same: Plaintiff may still pursue her claim; if she does, she must litigate in a forum that will impose greater costs and inconveniences on her; and in either event she will be more likely to settle and more willing to do so for relatively less money. To the extent that a transfer is the functional equivalent of a dismissal on *forum non conveniens* grounds, the standard under the two should be the same.³²⁶

The fundamental social policy that those rules and the legislative history of Section 1404 embody, and the particularly oppressive

324. H.R. REP. NO. 308, 80th Cong., 1st Sess., app., at 132 (1947).

325. The situation could, of course, be quite different in some cases. If the statute of limitations had run during the time between filing and decision on the venue question, for example, then a *forum non conveniens* dismissal would be "drastic." More broadly, too, transfer allows plaintiff to retain whatever advantages she may have sought from the laws of the forum state. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964). If plaintiff was seeking special advantage from the forum state's laws, transfer would then be a "less drastic" disposition than dismissal.

326. *Forum non conveniens* is not used in the federal courts when the action can appropriately be transferred to another federal judicial district. It is used only when the proper jurisdiction for an action is a foreign country. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The point in the text, of course, is only that in most cases there is little or no *de facto* difference between transfer and dismissal in terms of the litigation future of the dispute.

burdens that geography imposes on ordinary litigants, suggest the desirability of several related changes in the law. First, in the interests of both justice and convenience, and contrary to the holding in *Carnival Cruise*, federal admiralty courts should not enforce forum-selection clauses in consumer form contracts.³²⁷

Second, *The Bremen*'s reasonableness rule should be restricted to commercial cases involving bargaining between relative equals. While expanding the rule beyond the field of international trade may be both desirable and consistent with the decision's rationale, extending its rule to consumer form contracts is not.³²⁸

Third, for the same reasons and contrary to both *Ricoh* and *Carnival Cruise*, the federal courts should not give weight to forum-selection clauses in consumer form contracts in considering the merits of transfer motions under Sections 1404.³²⁹ Section 1404 was not intended to deal with cases brought in a plaintiff's home state or in the district where the claim arose. It was intended to block systematic efforts to exploit the burdens of geography. Giving weight to forum-selection clauses in consumer form contracts conflicts with the intent of Congress on both counts.

Fourth, in the interest of eliminating intrastate forum shopping and promoting the equitable administration of justice, and contrary to the Court's holding in *Ricoh*, the validity and enforceability of forum-selection clauses should be controlled in federal diversity actions by the law of the appropriate state.³³⁰ Indeed, as we have seen, relying on Section 1404 as a justification for giving weight to a forum-selection clause in such cases is dubious in the extreme.

Finally, to the extent that the Court seeks to conserve judicial and litigant resources by minimizing pretrial motions regarding venue and jurisdiction, there are other and better ways to proceed. Eliminating the uncertain but beguiling lure of a highly fact-specific "fundamental fairness" scrutiny in favor of a broader and more easily applied general rule would be a substantial help. Perhaps the easiest and most effective approach would simply be to construe the

327. Standard adhesion contract analysis justifies this result. See, e.g., Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); Kirby, *supra* note 1, at 902-06.

328. For a thoughtful general defense of forum-selection clauses, see Leandra Lederman, Note, *Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422 (1991).

329. *Ricoh* involved a commercial agreement, not a consumer form contract.

330. The dissenting opinion of Justice Scalia in *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 33-41 (1988) states the appropriate considerations.

"interest of justice" requirement in Section 1404³³¹ to mean that in cases involving consumer form contracts no transfer may be made if plaintiff has filed suit in the district where the injury occurred.³³² This construction would dispense with the need for burdensome "fundamental fairness" challenges and eliminate large numbers of transfer motions, and it would also abolish the incentive defendants now have to remove actions that are brought in states where the local courts do not enforce forum-selection clauses.

CONCLUSION

The United States is currently enduring a period of relatively intense self-doubt and introspection. Increasing numbers of people, perhaps a large majority, seem to agree that major changes are necessary, though few seem to agree on what the changes should be. In *Carnival Cruise* the Court reveals its sympathy for those who advocate a relatively untrammelled market approach to our national problems. Whatever the merits of such an approach in economic theory or commercial practice, it seems sadly out of place as an ideal for the nation's system of civil justice. As a valuable commodity, justice has always had a price. Seldom, if ever, however, have we sought to push that price upwards as a matter of national policy and to do so for the express purpose of driving Americans out of the market for justice.

Forum-selection clauses create an egregious disproportionality.³³³ Highly technical, apparently inconsequential, and rarely noticed or understood, they suddenly become—at a crucial and perhaps devastating time for the individuals and families involved—a substantial obstacle to suit and a powerful force pressing them to abandon their claims or to discount them substantially. The law should not sanction market failures that lead to such radical dispro-

331. This proposal does not apply to transfer motions made pursuant to § 1406 which allows such motions and transfers in actions brought in an improper venue.

332. Where plaintiff brought suit in her home state, the case would be transferred only if "convenience" factors overcame the heavy presumption in favor of plaintiff's choice that the Court discussed with respect to *forum non conveniens* in *Koster v. (American) Lumbermen's Mut. Casualty Co.*, 330 U.S. 518, 524 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). This would require a modification of current law. See, e.g., *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

333. The value consumers receive in exchange for accepting the forum-selection clause is, in theory, a discount on the purchase price. On the level of individual savings, even assuming consumers actually receive the theoretically full discount, the amount each saves will be insignificant. In the event that the passenger needs to bring a suit, he or she may be severely disadvantaged in the effort, and the severity of the disadvantage may be wholly disproportionate to the minimal savings on the ticket.

portionalities and compromise the essential integrity of the nation's system of civil justice.³³⁴

334. In the preceding Term, in *Burnham v. Superior Court*, 495 U.S. 604 (1990), Justice Scalia called attention to the inherent unfairness of such disproportionate trade-offs. There, he rejected the concurrence's argument that acceptance by a nonresident of the protections and benefits of California's health, safety, and transportation systems during a short visit to the state was a fair or reasonable basis on which to subject him to personal jurisdiction in the California courts on a claim unrelated to that visit. "We daresay," Justice Scalia declared emphatically in the plurality opinion, "a contractual exchange swapping those benefits for that power would not survive the 'unconscionability' provision of the Uniform Commercial Code." *Id.* at 623.

