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PULLING VENUE UP BY ITS OWN BOOTSTRAPS: THE RELATIONSHIP AMONG NATIONWIDE SERVICE OF PROCESS, PERSONAL JURISDICTION, AND § 1391(C)

RACHEL M. JANUTIS†

INTRODUCTION

Venue limitations serve to protect a defendant from litigation in an inconvenient or burdensome forum. This is accomplished by ensuring that the forum has some connection to the litigation or the defendant. Despite the general purpose for venue limitations, some courts have interpreted venue provisions in the general federal venue statute, 28 U.S.C. § 1391, and special venue provisions in ERISA, federal antitrust, and federal securities laws to permit nationwide venue in cases involving corporations subject to nationwide service of process. Commentators also have recognized the possibility of nationwide venue in such cases.¹ Specifically, some courts have literally construed language in § 1391(c) defining corporate residence for venue purposes as *any* district in which a corporation is subject to personal jurisdiction. These literalist courts construe § 1391(c) to allow venue when a defendant is subject to personal jurisdiction in the district solely because of a nationwide service of process provision. Since a corporation subject to nationwide service of process is subject to nationwide personal jurisdiction,

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¹ See David D. Siegel, Commentary on 1988 and 1990 Revisions of Section 1391, 28 U.S.C.A. § 1391 (1993); see also Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1611–12 (1992); John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 954 n.432 (1998).

literalist courts conclude that a corporation is subject to nationwide venue.

Bootstrapping venue to jurisdiction in this manner results in no venue constraints independent from jurisdiction in cases where such constraints are most needed to protect the defendant from litigation in an inconvenient forum and to ensure a connection between the forum and the defendant or the litigation. This Article argues that such independent constraints are not only needed but actually provided in the federal venue statute and that these literalist courts have misconstrued § 1391(c)'s definition of corporate residence. Reading the language of § 1391(c) in the context of the overall statute and employing traditional canons of statutory construction provides independent constraints. Further, consideration of the historical context in which § 1391(c) was enacted and historical usage support a reading of § 1391(c) that provides independent constraints.

Part I of this Article discusses the purposes underlying venue limitations and the general venue limitations in the federal system. Part I then illustrates how literalist courts have interpreted § 1391 and special venue provisions to create nationwide venue. Part II argues that courts have misconstrued § 1391(c) by engaging in a literalism devoid of any consideration of context within the statute and that a contextual construction of the venue statute would avoid nationwide venue in cases involving corporate defendants subject to nationwide service of process. Part III then discusses the legislative history surrounding the enactment of § 1391(c) and surveys the historical definition of corporate residence prior to the enactment of § 1391(c) to conclude that the historical usage and context support a contextualist construction of § 1391(c). Part IV concludes by addressing potential objections to such an interpretation.

I. NATIONWIDE VENUE: PULLING VENUE UP BY JURISDICTION'S BOOTSTRAPS

A. *Introduction to Venue*

The civil justice system regards a plaintiff as the "master of its complaint." In part, this means that a plaintiff chooses in which forum to prosecute its claim. In selecting a forum, a

plaintiff may consider a variety of factors. Common considerations include geographic location, pleading and discovery rules, docket speed, judge assignment system, and jury pool. A plaintiff also may consider choice of law rules and the law likely to be applied in a given forum. Indeed, a plaintiff has great flexibility in selecting a forum to maximize its advantage and its opponent's disadvantage based on these and other considerations. For example, a plaintiff may select the forum that will apply the longest statute of limitations. Generally, a plaintiff need only select any forum within broad constitutional limits on the forum's exercise of jurisdiction. A plaintiff's reasons for selecting a forum generally do not affect the propriety of a given forum.²

Venue limitations operate as a constraint on a plaintiff's forum options. Congress imposed venue limitations on the federal courts out of a concern for fairness to the defendant. Indeed, Congress first imposed venue restrictions on federal courts to curb "the abuses engendered by this extensive venue."³ Venue constraints ensure that a defendant does not have to defend in an inconvenient forum.⁴ Venue constraints also ensure efficient allocation of judicial resources and fairness to residents of the forum district and parties interested in the litigation. Venue constraints insist that the forum has some connection to the dispute underlying the litigation or to the defendant. Thus, venue limitations make certain that a court does not have to

² See Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 291 (1996) ("There are no uniform opinions on the acceptability of filing lawsuits in given venues in order to obtain more favorable laws or more favorable juries. But the overwhelming majority of decisions accepts these two types of forum-shopping as legitimate tactical maneuvers.").

³ See 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3802 (2d ed. 1986) (quoting *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942)).

⁴ See *Olberding v. Ill. Cent. R.R.*, 346 U.S. 338, 340 (1953) (stating that Section 1391 "is not a qualification upon the power of the court to adjudicate, but a limitation designed for the convenience of litigants, and, as such, may be waived by them"); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) ("[T]he locality of a law suit . . . though defined by legislation relates to the convenience of litigants and as such is subject to their disposition."); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 316-17 (2001) (arguing that convenience to the defendant is the background principle underlying the law of venue and that courts should interpret the venue statute in light of this principle).

expend limited judicial resources to resolve a dispute with which it has little connection.

Likewise, venue constraints ensure that residents of the district are not forced to bear the cost of unrelated litigation and that interested parties are able to witness proceedings in person.⁵ For example, 28 U.S.C. § 1391, the main source of venue limitations in the federal system, initially restricts venue to a judicial district in which a defendant resides if all defendants reside in the same state⁶ or the district in which a substantial part of the events giving rise to the claim occurred.⁷ Several substantive statutes also provide venue limitations, similarly restricting venue to a district connected to the defendant or the events at issue in the litigation. For example, the Employment Retirement Income Security Act of 1974 (ERISA) provides for venue in a district where the benefits plan at issue is administered, where breach of the duty at issue in the litigation took place, or where a defendant resides or may be found.⁸

B. *Two Hypothetical Cases*

Given the underlying purpose of convenience to the defendant, one might expect venue limitations to prohibit nationwide venue without regard to a defendant's connection to the forum. By blindly adhering to the literal language of § 1391, however, some courts have construed § 1391 to authorize nationwide venue in cases involving corporate defendants subject to nationwide service of process. Literalist courts read § 1391 to authorize venue in judicial districts without regard to the district's connection to the defendant or to the dispute at issue in the litigation. As such, they deviate from the fundamental premise of venue limitations. Literalist courts combine nationwide service of process and § 1391 to authorize nationwide venue in two ways. The following two hypothetical cases illustrate these alternative situations giving rise to nationwide venue.

⁵ Norwood, *supra* note 2, at 317.

⁶ 28 U.S.C. § 1391(b)(1) (2000).

⁷ *Id.* § 1391(b)(2).

⁸ 29 U.S.C. § 1132(e) (2000).

1. Retirement Plan v. Corporation

Consider the hypothetical case of *Retirement Plan v. Corporation*. Corporation is a California corporation with its principal place of business in California. Corporation is sued in a federal district court in Kansas and served with process at its California headquarters. The Kansas lawsuit is filed under ERISA and alleges that Corporation failed to make required contributions to an employee benefits plan. The plan has no connection with Kansas. None of the beneficiaries under the plan reside in Kansas, and the plan is administered by Retirement Plan, which is headquartered in Missouri. The decision not to pay was made at Corporation's headquarters in California and payment was due at Retirement Plan's headquarters in Missouri. Moreover, Corporation does not maintain an office in Kansas nor does it do business within the state. Indeed, the lawsuit bears no connection to Kansas. This lawsuit would appear to raise the fairness and judicial economy concerns underlying venue limitations. Yet, literalist courts would conclude that Corporation has no valid objection to venue in the District of Kansas.

Literalist courts use three provisions to support nationwide venue: the nationwide service of process provision in section 503 of ERISA, Federal Rule of Civil Procedure 4, and § 1391(c). First, literalist courts use section 503 to support nationwide personal jurisdiction over Corporation. Ordinarily, a court like the District of Kansas would not be able to extend its process beyond the borders of the district to reach an out-of-state defendant like Corporation unless Kansas would allow its state courts to reach the defendant.⁹ A state court could not reach an out-of-state defendant unless, at a minimum, the exercise of jurisdiction would conform to the minimum-contacts standard set forth in *International Shoe v. Washington*.¹⁰ Specifically, a state court could not exercise jurisdiction over the defendant unless the defendant maintained minimum contacts with the state and the exercise of jurisdiction over the defendant would be reasonable.¹¹ Because Corporation maintains no contacts with

⁹ FED. R. CIV. P. 4(k)(1)(A).

¹⁰ 326 U.S. 310 (1945).

¹¹ See *id.* at 316; see also *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 108–09, 113 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–78 (1985).

Kansas, the District of Kansas ordinarily would not be able to extend its process to reach Corporation.

Section 503 of ERISA, like several other federal statutes,¹² however, authorizes nationwide service of process in any judicial district in which the "defendant resides or may be found."¹³ Nationwide service of process provisions such as the one contained in ERISA allow a federal district court to extend its process to reach a defendant that resides anywhere in the United States. Thus, in the hypothetical, the District of Kansas could extend its process beyond the boundaries of the district to reach Corporation at its headquarters in California.

Further, Federal Rule of Civil Procedure 4 provides that service pursuant to a federal statute is sufficient to confer jurisdiction over a defendant.¹⁴ Accordingly, service outside of the district pursuant to a nationwide service of process provision is sufficient to confer jurisdiction on a federal court.¹⁵ Thus, in the present hypothetical, service at Corporation's headquarters in California would be proper pursuant to section 503 of ERISA. Because service is proper under ERISA, Rule 4 confers jurisdiction in Kansas. Indeed, because any federal district court could properly serve Corporation in California pursuant to the nationwide service of process provision in ERISA, Corporation would be amenable to jurisdiction in any federal district court.¹⁶ As the hypothetical demonstrates, Corporation or any other corporate defendant would be subject to personal jurisdiction in any district regardless of the defendant's contacts with the district.¹⁷

¹² See, e.g., Commodities Exchange Act, 7 U.S.C. §§ 13a-2, 18 (2000) (authorizing nationwide service of process in actions brought by the Commission or designated state officials); Securities Exchange Act of 1934, 15 U.S.C. § 78aa (2000) ("[P]rocess in [any suit arising under the 1934 Act] may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1965 (2000) ("All process in any [RICO] action . . . may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.").

¹³ 29 U.S.C. § 1132(e)(2) (2000).

¹⁴ FED. R. CIV. P. 4(k)(1).

¹⁵ *Id.* 4(k)(1)(D).

¹⁶ See *Kingsepp v. Wesleyan Univ.*, 763 F. Supp. 22, 24 (S.D.N.Y. 1991) ("In cases where Congress authorizes nationwide federal jurisdiction, as in section 12 of the Clayton Act, the district court's jurisdiction is co-extensive with the boundaries of the United States.").

¹⁷ For the purpose of this Article, I presume the constitutionality of nationwide

ERISA, like most statutes authorizing nationwide service of process, also provides specific venue options. One might anticipate these provisions would limit the districts in which a suit may be filed. Nevertheless, literalist courts interpret section 503 and § 1391(c) to reach just the opposite conclusion. Section 503 provides, in relevant part, that an action may be brought “where a defendant resides or may be found.”¹⁸ ERISA does not define corporate residence. The general federal venue statute, 28 U.S.C. § 1391, however, does define corporate residence for venue purposes. Section 1391(c) reads that “a corporation shall be deemed to reside in any judicial district in

personal jurisdiction. This is in line with the conclusion reached by most courts. Most courts recognize that due process requires that a defendant maintain minimum contacts only with the United States as a whole rather than with a particular state or judicial district. *See, e.g.,* *Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1257–58 (5th Cir. 1994); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993); *United Elec., Radio & Mach. Workers of America v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992); *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1416 (9th Cir. 1989); *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979). Domestic corporations will always possess minimum contacts with the United States as a whole, and thus constitutionally may be subject to nationwide personal jurisdiction in federal courts. *See Vlasak v. Rapid Collection Sys., Inc.*, 962 F. Supp. 1096, 1099 (N.D. Ill. 1997) (“A defendant ‘has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court’ if he resides or conducts business on American soil.”) (quoting *Fitzsimmons v. Barton*, 589 F.2d 330, 333) (7th Cir. 1979); *United States v. Grewell*, No. 97-0170, 1997 U.S. Dist. Lexis 8957 (E.D. La. June 23, 1997) (same).

A few courts and commentators suggest that due process further protects a defendant from litigation in an inconvenient forum. *See, e.g.,* Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988). Most of these courts and commentators, however, concede that due process does not require a connection between the judicial district and the defendant or the litigation. *See, e.g.,* *Waeltz v. Delta Pilots Ret. Plan*, 301 F.3d 804, 808 n.3 (7th Cir. 2002) (“A district court’s exercise of personal jurisdiction over a defendant is constitutional, notwithstanding a complete lack of contact between the defendant and the forum district, so long as the defendant has sufficient contacts with the United States as a whole.”); *Bd. of Trustees, Sheet Metal Workers’ Nat’l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000) (“[T]his principle is unrelated to any requirement that a defendant have ‘contacts’ with a particular federal judicial district and does not block litigation in easy-to-reach forums.”); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 948 (11th Cir. 1997). Thus, regardless of the scope of constitutional limitations on nationwide personal jurisdiction, due process will not ensure that a district exercising jurisdiction possesses significant contacts with the defendant or the events at issue in the litigation. Yet, such contacts are needed to alleviate more than the financial costs associated with litigation in a geographically distant forum. *See infra* notes 113–18 and accompanying text.

¹⁸ 29 U.S.C. § 1132(e)(2).

which it is subject to personal jurisdiction at the time the action is commenced.”¹⁹ Literalist courts transfer § 1391(c)'s definition of corporate residence to ERISA.²⁰

Thus, in our hypothetical, because personal jurisdiction over Corporation is proper in Kansas, these courts would conclude that venue is proper in Kansas. Indeed, because personal jurisdiction would be proper in any judicial district, literalist courts would conclude that venue would be proper in any district. As one literalist court noted in *McCracken v. Automobile Club of Southern California*,²¹ venue would be proper in any judicial district notwithstanding a corporate defendant's lack of contacts with the district.

2. Plaintiff v. Able Corporation and Better Corporation

Even in the absence of a broad “resides” venue provision, such as the provision in ERISA, literalist courts nonetheless find nationwide venue when a corporate defendant is subject to nationwide service of process. Consider the case of *Plaintiff v. Able Corporation and Better Corporation*. Able is a Kansas corporation. Better is a Missouri corporation. Able is served with process at its headquarters in Kansas in a lawsuit pending in the Western District of Louisiana. Better is served with process at its headquarters in Missouri in the same lawsuit. The lawsuit is filed under the Sherman Act and alleges that Able and Better conspired to exclude Plaintiff from the relevant market and that as part of the conspiracy, Able and Better disseminated false information about Plaintiff to at least one potential customer.

Able and Better allegedly entered into the conspiracy to restrain trade in Kansas. The false statements were made from Better's headquarters in Missouri and Able's headquarters in

¹⁹ 28 U.S.C. § 1391(c) (2000).

²⁰ See, e.g., *McCracken v. Auto. Club of S. Cal. Inc.*, 891 F. Supp. 559, 562 (D. Kan. 1995); see also *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1210 n.3 (10th Cir. 2000) (“[W]e supplement the specific venue statute in § 1132(e)(2) with the more general venue provision applicable in all civil cases found in 28 U.S.C. § 1391(c).”); *Stumpf v. Med. Benefits Adm'rs*, No. 8:99CV185, 2001 WL 1397326, at *2 (D. Neb. March 14, 2001) (finding venue proper because the alleged breach of fiduciary duty occurred in the district but also noting that venue would be proper under ERISA and § 1391(c) because a corporation resides anywhere it is subject to personal jurisdiction).

²¹ See 891 F. Supp. at 563.

Kansas to a potential customer located in California. Neither Able nor Better does business in Louisiana. Likewise, neither maintains an office in Louisiana. In fact, neither Able nor Better has any significant contacts with Louisiana. This lawsuit, like the lawsuit in the previous hypothetical, would appear to raise the fairness and judicial economy concerns underlying venue limitations. Yet, literalist courts would conclude that Able and Better, like the corporation in the previous hypothetical, have no valid objection to venue in the Western District of Louisiana.

Literalist courts use four provisions to support nationwide venue: the nationwide service of process provision in section 12 of the Clayton Act, Federal Rule of Civil Procedure 4, § 1391(b), and § 1391(c).²² First, the Clayton Act, like ERISA, authorizes nationwide service of process. Specifically, section 12 authorizes process in all antitrust cases brought under the Clayton Act against a corporation to “be served in the district of which [the defendant] is an inhabitant, or wherever it may be found.”²³ Thus, process was served properly on Better and Able at their headquarters in Missouri and Kansas. Further, as in the previous hypothetical, proper service in Missouri and Kansas is sufficient to confer personal jurisdiction over Better and Able in Louisiana under Federal Rule of Civil Procedure 4. Indeed, proper service at their headquarters in Missouri and Kansas would be sufficient to confer personal jurisdiction over Better and Able in any federal district court.

Venue is a little bit more complicated. Section 12 of the Clayton Act, like section 503 of ERISA, contains a special venue provision. Section 12, however, does not authorize venue where any defendant resides. Thus, courts cannot simply graft § 1391(c)’s definition of corporate residence onto section 12 to find venue. In the hypothetical case, venue would not be proper under any of the venue alternatives in the Clayton Act.

²² See, e.g., *In re Triton Ltd. Sec. Litig.*, 70 F. Supp. 2d 678, 684–85 (E.D. Tex. 1999) (finding that § 1391(b) and (c) applied to actions brought under the Securities Exchange Act despite special venue provisions in the Securities Exchange Act); *Daniel v. Am. Bd. of Emergency Med.*, 988 F. Supp. 127, 143–45 (W.D.N.Y. 1997) (finding that § 1391(b) and (c) supplement special venue provisions in the Clayton Act); *Icon Indus. Controls Corp. v. Cimetrix, Inc.*, 921 F. Supp. 375, 376 (W.D. La. 1996) (concluding that § 1391(c) applies to special venue provisions in the Clayton Act); *Kingsepp v. Wesleyan Univ.*, 763 F. Supp. 22, 28 (S.D.N.Y. 1991) (same).

²³ 15 U.S.C. § 22 (2000).

Nonetheless, literalist courts would conclude that venue is proper in the hypothetical action.

To reach this conclusion, these courts make two assumptions. First, these courts hold that the special venue provisions in substantive statutes like section 12 are not exclusive. Rather, literalist courts reason that the special venue provisions in the substantive statutes supplement § 1391. Therefore, these courts conclude that venue is proper as long as the action meets either the requirements of the special venue provisions set forth in the substantive statute, here the Clayton Act, or the provisions delineated in § 1391.

Second, literalist courts would conclude that venue is proper under § 1391(b). Section 1391(b) of the general federal venue statute authorizes venue in a "district where any defendant resides, if all defendants reside in the same State."²⁴ Thus, in our hypothetical, venue would be proper if: (1) either Able or Better or both resided in the Western District of Louisiana and (2) if both Able and Better resided in Louisiana. Both Able and Better are corporations. Section 1391(c) provides that a corporation resides in any judicial district in which it is subject to personal jurisdiction.²⁵ Therefore, Able and Better reside in any district in which they are subject to personal jurisdiction. Able and Better are both subject to personal jurisdiction in the Western District of Louisiana via the nationwide service of process provision in the Clayton Act. Accordingly, both Able and Better reside in the Western District of Louisiana and consequently Louisiana. As a result, venue is proper under § 1391(b). Indeed, as another literalist court noted in *Icon Industrial Controls Corp. v. Cimetrix, Inc.*,²⁶ because Able and Better would be subject to personal jurisdiction in any judicial district via the nationwide service of process provision, venue would be proper not just in the Western District of Louisiana but also in every other judicial district in the United States.²⁷

In each hypothetical, the authorization for nationwide venue rests on the courts' expansive interpretations of "subject to personal jurisdiction" in 28 U.S.C. § 1391(c). In both scenarios, literalist courts would interpret the phrase to mean subject to

²⁴ 28 U.S.C. § 1391(b)(1) (2000).

²⁵ *Id.* § 1391(c).

²⁶ 921 F. Supp. at 376, 383.

²⁷ *See id.*

personal jurisdiction by any means by which a federal court may obtain personal jurisdiction over a defendant, including personal jurisdiction acquired by nationwide service of process. These courts allow venue in a district regardless of the defendant's lack of contacts with the district because personal jurisdiction is proper pursuant to nationwide service of process. This is done without consideration of the defendant's contacts with the district or the state in which the district sits.

II. INDEPENDENT CONSTRAINTS ON VENUE FOR CORPORATE DEFENDANTS: PULLING VENUE UP BY ITS OWN BOOTSTRAPS

Nationwide venue without regard for a defendant's contacts seems contrary to the general principle that venue should make sure that a defendant is not forced to litigate in an inconvenient forum. General notions of convenience dictate that the defendant has some connection with the forum. Indeed, one literalist court acknowledged the tension between its holding and this general principle. The court observed that "[t]he result seems to depart from the traditional notion that the district where an action is litigated, if not a district where any defendant resides, should have some connection to the events giving rise to the underlying controversy."²⁸ Likewise, another court sensed dissonance in its holding. The court in *McCracken v. Automobile Club of Southern California, Inc.* noted that its reading of ERISA was "circular," that it "effectively nullifie[d] ERISA's venue provisions with respect to corporate defendants," and that "[t]ypically, such an anomalous result would signal some error in interpretation."²⁹ Nonetheless, these courts seemed driven to reach their results by what they perceived to be the plain meaning of § 1391(c).

Can these general principles of venue be reconciled with the plain language of § 1391(c)? The answer lies in a more thorough examination of the statutory language and the context in which that language is used. Such a contextual reading of § 1391 demonstrates that "subject to personal jurisdiction" in § 1391(c) should be read as shorthand for an *International Shoe* style contact-based analysis. That is, § 1391(c) should be read to mean that a corporation resides in a district only if the

²⁸ *Id.* at 376.

²⁹ 891 F. Supp. 559, 562 (D. Kan. 1995).

corporation would be subject to personal jurisdiction under *International Shoe's* minimum contacts standard. This reading avoids the conflict between general venue principles and § 1391(c) because it makes sure that venue is proper only where a defendant maintains contacts.

Moreover, such a contextual reading better comports with current accounts of textualist statutory construction and fundamental principles of statutory interpretation. As set forth below, an *International Shoe* contextual reading gives meaning to the entirety of § 1391(c), as well as other provisions in § 1391. Likewise, the *International Shoe* contextual reading gives meaning to the entirety of special venue provisions. Finally, an *International Shoe* contextual reading avoids an absurd and circular reading of the nationwide service of process provisions in the special venue statutes.

A. Possible Meanings of "Subject to Personal Jurisdiction"

The relationship between nationwide service of process and nationwide venue balances on the plain meaning of "subject to personal jurisdiction" in the first sentence of § 1391(c). Federal Rule of Civil Procedure 4(k)(1) defines the personal jurisdiction of the federal courts. As such, it provides an obvious starting point to understand the meaning of "subject to personal jurisdiction." Rule 4(k)(1) authorizes a district court to exercise personal jurisdiction over a defendant under either of two main circumstances: (1) where a state court in the state in which the district sits could exercise jurisdiction over the defendant, Rule 4(k)(1)(A), or (2) if service is affected pursuant to a federal statute, Rule 4(k)(1)(D).³⁰

Determination of a defendant's amenability to jurisdiction in the courts of the state in which a federal district court sits—amenability to jurisdiction under circumstance (1) above—turns on an analysis of the defendant's contacts with the state. At a minimum, a state's exercise of jurisdiction must comply with the *International Shoe* standard: a defendant must possess sufficient minimum contacts with a state such that the exercise of jurisdiction over the defendant comports with traditional notions

³⁰ FED. R. CIV. P. 4(k)(1). Rule 4(k)(1) also authorizes jurisdiction in two other limited circumstances: over certain joined defendants located within a certain distance of the district and over defendants in interpleader matters.

of fair play and reasonableness.³¹ Thus, a defendant will be subject to personal jurisdiction in a federal court pursuant to Rule 4(k)(1)(A) only if the defendant possesses sufficient minimum contacts with the state in which the district sits and subjecting the defendant to jurisdiction in the state is fair and reasonable.

In contrast, under hypothetical (2) above, a defendant is subject to personal jurisdiction if service is effected pursuant to a federal statute that authorizes service of process and the defendant is served consistently with the terms of that statute. As both hypothetical cases demonstrate, federal statutes may authorize service of process beyond the borders of the district or the state in which the district sits and confer jurisdiction over a defendant based on such extraterritorial service. Thus, a defendant may be subject to jurisdiction pursuant to Rule 4(k)(1)(D) regardless of the defendant's contacts with the district or the state.

"Subject to personal jurisdiction" in § 1391(c) may refer to amenability to jurisdiction on any of the grounds enumerated in Rule 4, as the literalist courts conclude, or it may refer more narrowly to subject to jurisdiction on only one or a few of these grounds. A contextual examination of § 1391 suggests that "subject to personal jurisdiction" is best construed to apply to defendants subject to personal jurisdiction based on an *International Shoe* contact-based standard only.

B. Plain Meaning in Context

In their haste to find and apply the "plain meaning" of § 1391(c), literalist courts have attempted to discern "the plain meaning of the words used in § 1391(c) divorced from the context in which they are used" in the statute, in turn disregarding traditional canons of statutory construction. In short, courts have failed to engage in what Professor Shapiro has termed a "more sophisticated" form of textualism, "which considers the statutory language not simply in light of dictionary definitions but in the context in which the language is used."³²

³¹ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945); see also *Asahi Metal Indus. Co. v. Super. Ct. of California*, 480 U.S. 102, 108–09, 113 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–78 (1985).

³² David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 923, 933 (1992).

Even the most ardent of the textualists, however, recognize the need to consider the plain meaning of the text in its textual context and to apply that plain meaning only if “established canons of construction” do not dictate a contrary result.³² In fact, textualists defend their position from criticisms of rigidity on the grounds that textualism “does not permit interpreters to ignore context, purpose, rationality, or established notions of justice in the application of statutory text.”³³ Traditional canons of statutory construction confirm this contextual approach. These canons dictate that a court should enforce the plain meaning of a statute, yet not in a vacuum. Rather, it is the plain meaning in the context of the entire statute that controls.³⁴ Traditional principles of statutory construction further instruct that courts should adopt the meaning that will give effect to all provisions in a statute.³⁵ Thus, the literalist courts’ interpretation cannot be defended even under a strict adherence to modern textualism.

Literalist courts ignore the language of § 1391(c) itself. While § 1391(c) initially provides that a corporation resides

³² *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 109–12 (2001) (asserting that modern textualists apply a contextual approach to statutory interpretation, focusing on the context within which a word or phrase is used to discern the “subtleties of usage”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456–64 (2003) (arguing that modern textualists rely on context to discern the nuances of usage); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 191 (1986) (positing that “[n]o text is clear except in terms of a linguistic and cultural environment”).

³³ Manning, *Textualism and the Equity of the Statute*, *supra* note 33, at 106.

³⁴ *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”).

³⁵ *See J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.* 534 U.S. 124, 146 (2001) (Scalia, J., concurring) (noting the “perfectly valid” canon of statutory construction that “statutes must be construed in their entirety, so that the meaning of one provision sheds light upon the meaning of another”); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (internal quotations omitted); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty to give effect, if possible, to every clause and word of a statute. We are thus reluctant to treat statutory terms as surplusage in any setting.”) (internal quotations and citations omitted); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 693–94 (2001) (Scalia, J., dissenting) (“The words of Title III must be read in their context and with a view to their place in the overall statutory scheme.”) (internal quotations omitted).

anywhere it is subject to personal jurisdiction, § 1391(c) also provides that in states containing more than one federal judicial district, the “corporation shall be deemed to reside in any district in that State within which *its contacts would be sufficient* to subject it to personal jurisdiction if that district were a separate State.”³⁶ The section continues, stating that if no district in a multi-district state has sufficient contacts, “the corporation shall be deemed to reside in the district within which it has the most significant contacts.”³⁷ These provisions direct a court to engage in a contact-based venue analysis in multi-district states, examining the contacts between the defendant and the district to determine if venue is proper. As such, these provisions indicate that Congress presumed, implicitly, that personal jurisdiction, which was sufficient to confer venue under § 1391(c), would be based on contacts with the state where the district sits.

Only a construction of § 1391(c) which reads the phrase “subject to personal jurisdiction” in the first sentence to mean subject to *International Shoe* contact-based personal jurisdiction gives effect to these subsequent provisions of § 1391(c). Any other construction establishes personal jurisdiction sufficient to confer venue without regard to a corporation’s contacts with the judicial district or the state where the district sits. If, however, personal jurisdiction sufficient to confer venue was supported by some basis other than contacts with the state in which the district lies, such as nationwide service of process, § 1391(c) would provide no method for determining in which districts within a multi-district state venue would be proper.

Put another way, in bootstrapping venue to jurisdiction pursuant to nationwide service of process, literalist courts implicitly read personal jurisdiction via nationwide service of process to presume that jurisdiction would be proper in all districts within a multi-district state. Courts then assume that because jurisdiction would be proper in all districts within a multi-district state, venue would be proper in all districts within a multi-district state. Courts, in essence, conflate jurisdiction and venue into one analysis. In so doing, they disregard the clear language of § 1391(c). Section 1391(c) does not fuse jurisdiction and venue in multi-district states.³⁸ Instead, in

³⁶ 28 U.S.C. § 1391(c) (2000) (emphasis added).

³⁷ *Id.*

³⁸ See John B. Oakley, *Recent Statutory Changes in the Law of Federal*

determining venue, § 1391(c) directs a court to engage in a two-step analysis. First, a court is to consider whether the defendant is subject to personal jurisdiction in the state where the district sits. Then a court is to consider the defendant's *contacts* with the district itself. A reading resulting in the conclusion that venue is proper in a district without any consideration of the defendant's contacts with the district renders the multi-district state provisions in § 1391(c) meaningless.

C. Section 1391(c) in the Context of the Entire Statutory Scheme

Traditional canons dictate that a court read a statute not only in the context of the particular statutory provision but also in the context of the entire statutory scheme.³⁹ Thus, the canons dictate that a court read "subject to personal jurisdiction" in the context of § 1391 in its entirety and, if possible, adopt a meaning which gives effect to each provision of § 1391. Reading personal jurisdiction to require an *International Shoe*, contact-based analysis is necessary to give meaning to the other portions of the general federal venue statute. For example, the alien venue provision immediately following § 1391(c) states: "An alien may be sued in any district."⁴⁰ Thus, Congress expressly suspended independent constraints on venue and provided for nationwide venue when it drafted this provision.

The literalist reading of § 1391(c) allows for nationwide venue in any district despite the difference in language between the alien venue provision and the corporate venue provision. In contrast, reading the corporate venue statute to require *International Shoe*, contact-based jurisdiction provides an independent constraint on corporate venue. This reading ensures that a corporation will be subject to suit only in those

Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990, 24 U.C. DAVIS L. REV. 735, 771-72 (1991) (asserting that the first sentence of § 1391(c) collapses the concepts of venue and jurisdiction but that the second sentence of § 1391(c) "reimposes a venue requirement when a corporation is sued in a multidistrict state"); see also Oakley, *supra* note 1, at 955 (illustrating that Congress did not repeal the venue requirement and leave corporations to challenge choice of forum on jurisdictional grounds alone).

³⁹ See *supra* note 33 and accompanying text; see also Krzalic v. Republic Title Co., 314 F.3d 875, 880 (7th Cir. 2002) (Posner, J.) ("[I]f the clear language, when read in the context of the statute as a whole . . . points to an unreasonable result, courts do not consider themselves bound by 'plain meaning,' but have recourse to other interpretive tools in an effort to make sense of the statute.") (emphasis added).

⁴⁰ 28 U.S.C. § 1391(d).

districts with which it possesses sufficient minimum contacts. This gives meaning to the difference in language in the corporate venue statute and the alien venue statute.⁴¹

Reading “subject to personal jurisdiction” as incorporating an *International Shoe* contact-based jurisdiction analysis also gives meaning to the special venue provisions in nationwide service of process statutes. For example, ERISA allows venue not only where a defendant resides or may be found but also expressly provides for venue where the benefits plan is administered or where the breach took place.⁴² Applying the literalist courts’ expansive definition of corporate residence to ERISA’s special venue provision renders ERISA’s additional venue provisions a nullity. Under the literalist courts’ reading, a corporation “resides” in any judicial district. Consequently, provisions expressly allowing venue where the plan was administered and where the breach occurred would be redundant.

In contrast, a contextual *International Shoe* reading of § 1391(c) gives meaning to the additional venue options provided for in ERISA. ERISA’s nationwide service-of-process provision ensures that a defendant will be subject to personal jurisdiction in the district in which the plan is administered and the district in which the breach occurred, despite a lack of contacts with the states in which those districts sit. Likewise, these specific venue provisions are necessary to ensure that venue is proper in the district in which the plan is administered and the district in which the breach occurred, even though the defendant does not reside in these districts.

⁴¹ More liberal venue options for cases involving aliens may be justified by the difference in marginal burdens imposed on domestic and foreign defendants. An alien located outside the United States bears a significant burden simply by being forced to defend litigation in the United States. The marginal burden imposed by being forced to defend in one district rather than another is less than the marginal burden on a domestic defendant. Further, for an alien no convenient forum necessarily exists within the United States. In contrast, at least one convenient forum always exists for a domestic corporation. Litigation always will be convenient in the district in which the corporation maintains its headquarters.

⁴² 29 U.S.C. § 1132(e)(2) (2000).

D. *Avoiding Absurd Results*

Traditional canons of statutory construction further caution that a court should construe statutes to avoid absurd results.⁴³ An *International Shoe*, contact-based reading of § 1391(c) also is necessary to avoid an absurd reading of the service provisions in nationwide service of process statutes. For example, ERISA provides that an action “may be brought . . . where a defendant resides or may be found, and *process may be served in any other district where a defendant resides or may be found.*”⁴⁴ As the *McCracken* court noted, a reading that defines corporate residence as amenability to jurisdiction on any basis including nationwide service of process would be circular.⁴⁵ A corporation resides in a district because it is subject to personal jurisdiction. A corporation resides in any district pursuant to nationwide service of process as long as it is properly served. To be properly served, the corporation must be served where it resides. This begs the question of where the corporation resides. An *International Shoe* contact-based reading avoids this circular reasoning. A defendant may be served in any district in which it resides. That means a corporation may be served in any district with which it maintains sufficient minimum contacts. Service in such a district is sufficient to confer jurisdiction on any other district court, regardless of the corporation’s lack of contacts with that district. Venue is proper on the basis of corporate residence, either in the district in which service is effectuated or in any other district with which the corporation maintains sufficient minimum contacts.⁴⁶

In sum, tenets of modern textualism and fundamental principles of statutory construction mandate a rejection of the literalist courts’ expansive interpretation of § 1391(c). Instead, a

⁴³ See, e.g., *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 n.4 (2002) (Scalia, J., dissenting) (“A possibility so startling (and unlikely to occur) is well enough precluded by the rule that a statute should not be interpreted to produce absurd results.”).

⁴⁴ 29 U.S.C. § 1132(e)(2) (emphasis added).

⁴⁵ *McCracken v. Auto. Club of S. Cal. Inc.*, 891 F. Supp. 559, 562 (D. Kan. 1995).

⁴⁶ Venue also would be proper in a district that met any of the other venue criteria authorized by a special venue provision or the general venue provisions of § 1391. For example, in an ERISA case, venue would be proper in the district in which the plan was administered or in which the breach occurred, even if the defendant lacked sufficient minimum contacts with the district.

modern textualist construction incorporating fundamental principles of statutory construction embraces a contextual *International Shoe* reading of § 1391(c). Such a reading is necessary to give meaning to the entirety of § 1391 and to the entirety of special venue provisions. Further, the contextual reading avoids absurd results.

III. HISTORY OF § 1391: A HISTORY OF CONTACT-BASED RESIDENCY

Although courts must enforce the plain meaning of a statute, they need not blind themselves to the historical context in which the statute was enacted and the historical usage of terms codified within the statute. Instead, this historical context and usage should guide courts in ascertaining the statute's meaning.⁴⁷ Traditional canons dictate that courts should interpret statutes consistently with prior judicial interpretation of the same concepts unless Congress expressly has indicated that it meant to depart from the prior judicial interpretation.⁴⁸ Further, the Supreme Court has relied on the common law understanding of concepts in construing statutes.⁴⁹ As other

⁴⁷ Manning, *Textualism and the Equity of the Statute*, *supra* note 33, at 108 (noting that modern textualists “do not claim that interpretation can occur ‘within the four corners’ of a statute”). Professor Manning argues that modern textualists decode the shared meaning or common understanding a linguistic community attaches to words and phrases. *Id.* at 108–15. This includes the shared understanding that terms of art acquire in a specialized community such as a legal community. *Id.* at 112; *see also* Krzalic v. Republic Title Co., 314 F.3d 875, 880 (7th Cir. 2002) (“[I]f the clear language, when read in the context of the statute as a whole or of the commercial or other real-world . . . activity that the statute is regulating, points to an unreasonable result, courts do not consider themselves bound by ‘plain meaning,’ but have recourse to other interpretive tools.”). Under this reasoning, consideration of judicial usage is particularly important in the construction of procedural statutes because terms like “personal jurisdiction” used in procedural statutes are terms of art with specialized meaning in the legal community.

⁴⁸ *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 813 (1989) (“When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.”).

⁴⁹ *See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2048–50 (2003) (relying on the Lanham Act’s “common law” origins to hold that the Lanham Act does not protect the author of intangible ideas or concepts embodied in tangible goods); *Branch v. Smith*, 123 S. Ct. 1429, 1439–40 (2003) (relying on the historical context in which a statute governing congressional reapportionment was enacted to choose between two plausible meanings); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 692–703 (2001) (Scalia, J., dissenting) (relying in part on the common law

commentators have suggested, statutory construction informed by historical context and usage of terms with a pre-existing rich judicial interpretation results in a plain meaning of text more easily reconciled with traditional principles underlying a statute. Such a statutory construction makes sure that existing understandings are not changed any more than necessary to implement statutory objectives, thereby preserving expectations.⁵⁰

An examination of the historical usage of corporate residence and the context in which § 1391(c) was enacted supports a contextualist, *International Shoe* construction of § 1391(c) and once again illustrates the importance of statutory construction informed by historical context and usage.⁵¹ In sum, a survey of the judicial landscape leading up to the enactment of § 1391(c) in its current form reveals that venue without regard to a defendant's contacts with a district is inconsistent not only with notions of venue but also with judicial practice. The judicial landscape also reveals a long-standing practice of applying the general federal venue statute to actions arising under statutes containing special venue provisions. Nothing in the legislative history surrounding the enactment of § 1391(c) in its current form suggests that Congress intended to radically alter traditional venue rules for corporations, nor does anything suggest that Congress intended to dispense with the practice of

understanding that public accommodation laws protect customers to conclude that Title III of the ADA protects customers only). See generally Manning, *The Absurdity Doctrine*, *supra* note 33, at 2467–70 (noting that modern textualists rely on background legal conventions to interpret statutes and discussing examples).

⁵⁰ Shapiro, *supra* note 32, at 925, 943–45 (arguing that interpretive guides and canons “that aid in reading statutes against the entire background of existing customs, practices, rights, and obligations . . . emphasize the importance of not changing existing understandings any more than is needed to implement the statutory objective” and that this tendency “to favor continuity” promotes predictability and fair notice).

⁵¹ Commentators have demonstrated this with respect to other statutes. For example, Professor Pfander provides an example of how historical context and usage can guide courts in ascertaining plain meaning. In calling for a “sympathetic textualism” reading of 28 U.S.C. § 1367, Professor Pfander argues that the plain language of § 1367 can be read to codify judicially defined notions of original, ancillary, and pendent jurisdiction. See James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 128–53 (1999); see also Siegel, *supra* note 4, at 366 (arguing that courts should construe the venue statute in light of background principles underlying venue law). Professor Siegel goes so far as to argue that courts may disregard plain meaning if it departs from these background principles.

applying general federal venue provisions to statutes containing special venue provisions. To the contrary, the legislative history seems to indicate that Congress intended to codify traditional venue rules.

A. *Early Attempts to Define Corporate Residence Under § 1391*

The history of the general venue statute can be told in three parts. The Judiciary Act of 1789 placed virtually no limits on venue. Section 11 provided “[t]hat no civil suit in the Circuit or District Court shall be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.”⁵² Thus, the Act allowed for suit not only where a defendant resided but also in any district where a defendant could be served with process, even if the defendant were only temporarily present in the district.

Congress first imposed significant venue restrictions on the federal courts in 1887. Initially, Congress mandated venue restrictions to curb “the abuses engendered by . . . extensive venue” under the 1789 Act.⁵³ In the 1887 Act, Congress limited venue to any district in which the defendant was an inhabitant in federal question cases and any district in which either the plaintiff or the defendant resided in diversity cases.⁵⁴ These initial venue limitations did not differentiate between corporations and individuals. Thus, courts applied the general venue rule to corporations, permitting venue only in the district in which the corporation resided. The venue limitations, however, did not define corporate residency. Accordingly, courts were left to define corporate residency themselves. Originally, courts deemed corporate residency as the state of incorporation.⁵⁵ Further, courts concluded that venue was proper only in the district in which the corporation maintained its principal office.⁵⁶

⁵² *Chaffee v. Hayward*, 61 U.S. 208, 215 (1857); see also *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942).

⁵³ See WRIGHT, MILLER & COOPER, *supra* note 3, § 3802 (quoting *Stonite Products*, 315 U.S. at 563).

⁵⁴ *Id.*

⁵⁵ See *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 176 (1939) (Roberts, J., dissenting) (citing cases); *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 449 (1892).

⁵⁶ See WRIGHT, MILLER & COOPER, *supra* note 3, § 3811.

B. *The Emergence of Interstate Commerce*

As corporations began to conduct activities farther and farther away from their states of incorporation, such stringent venue constraints became unworkable.⁵⁷ Thus, courts expanded the notion of corporate residency. In *Neirbo Co. v. Bethlehem Shipbuilding Corp.*,⁵⁸ the Supreme Court held that a corporation consented to suit, and thus could be sued, in any state in which it had designated an agent for the service of process pursuant to state law, regardless of any venue objection it might otherwise have had. This significantly eased venue restrictions on suits against corporations; although, it did have the seemingly anomalous effect of loosening restrictions when corporations had complied with state law by appointing a registered agent and leaving tighter venue restrictions in place in suits against corporations that had not complied with state law.⁵⁹

Congress reversed this result in 1948 by adding a provision in the federal venue statute directly addressing venue in actions against corporations. The 1948 revision provided: "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."⁶⁰ The "doing business" provision corrected the seemingly inconsistent results of the *Neirbo* rule by ensuring that a corporation operating in a jurisdiction could not evade suit within the jurisdiction by failing to obtain a license. Determining where a corporation was "doing business," however, proved difficult for courts.⁶¹ Indeed, courts interpreted "doing business" three different ways.

Some courts imposed exacting limits on where a corporation was subject to venue. These courts employed a Commerce

⁵⁷ See *id.*

⁵⁸ 308 U.S. 165 (1939).

⁵⁹ See *Maybelline Co. v. Noxell Corp.*, 813 F.2d 901, 905 (8th Cir. 1987) ("[T]he 'Neirbo rule,' led to the anomaly that venue was proper as against corporations that conformed with state law and appointed agents for service of process, but improper as against corporations that had not designated an agent even though state law required them to do so.").

⁶⁰ WRIGHT, MILLER & COOPER, *supra* note 3, § 3811.

⁶¹ See *Maybelline Co.*, 813 F.2d at 903-04 (recognizing split in authority); *Johnson Creative Arts, Inc. v. Wool Masters*, 743 F.2d 947 (1st Cir. 1984) (recognizing authority for the personal jurisdiction standard but adopting the commerce clause standard).

Clause test to determine whether a corporation was doing business in a district. Under this standard, a corporation was doing business, and hence was subject to venue in, the district whenever the corporation engaged in transactions within the district to such an extent and of such a nature that the state in which the district was located could require the corporation to obtain a license to do business.⁶² The courts acknowledged that this standard was more restrictive of venue than any standard based on personal jurisdiction. These courts, however, reasoned that such a restrictive standard was necessary because venue imposed a constraint on forum separate and distinct from jurisdiction.⁶³ Jurisdiction, these courts explained, was about where a case could be heard; venue was about where a case should be heard.⁶⁴ These courts also argued that the context in which doing business was added supported their reading.⁶⁵

On the opposite end of the spectrum, some courts used a specific-jurisdiction test to determine where a corporation was doing business for venue purposes. These courts employed an *International Shoe*, minimum contacts analysis to determine whether a corporation was doing business in a district.⁶⁶ Under

⁶² See, e.g., *Maybelline Co.*, 813 F.2d at 905; *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 721-22 (D.C. Cir. 1986); *Johnson Creative Arts*, 743 F.2d at 955; *Saturn Sys., Inc. v. Saturn Corp.*, 659 F. Supp. 865, 868 (D. Minn. 1987); *Lubrizol Corp. v. Neville Chem. Co.*, 463 F. Supp. 33, 37 (N.D. Ohio 1978).

⁶³ See, e.g., *Johnson Creative Arts*, 743 F.2d at 951-53 (noting that "[t]he two concepts are independent of each other and must be interpreted with their respective underlying objectives and rationales in mind").

⁶⁴ See, e.g., *id.*

⁶⁵ These courts noted the anomaly of the *Neirbo* rule, which resulted in subjecting law abiding corporations to venue in a district in which they were licensed to do business while allowing corporations which refused to comply with state law by obtaining a license to escape venue in a district even though they were engaged in the same quantum of activity as the law abiding corporations. See, e.g., *id.* at 953. They reasoned that when Congress amended the venue statute to define corporate residence to include any district in which the corporation was doing business, it appeared to be rectifying the anomalies of the *Neirbo* rule. See, e.g., *id.* Because the doing business language appeared to be inserted to put corporations violating state licensing laws on equal footing with those corporations that complied, the courts recognized that a test based on whether or not the corporation was required to obtain a license would be consistent with congressional intent. See, e.g., *id.* at 954.

⁶⁶ See, e.g., *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 825 (10th Cir. 1963); *Cable News Network, Inc. v. Am. Broad. Co.*, 528 F. Supp. 365, 367 (N.D. Ga. 1981); *Galonis v. Nat'l Broad. Co.*, 498 F. Supp. 789, 791 (D.N.H. 1980); see also *Frazier v. Ala. Motor Club, Inc.*, 349 F.2d 456, 459 (5th Cir. 1965) (corporation is doing business when its activities have been not only continuous and systematic but also

this standard, a corporation was doing business in a district sufficient to make venue proper whenever a defendant maintained sufficient minimum contacts with a district such that the corporation could reasonably anticipate being haled into court in the district to defend a lawsuit arising from those contacts.

An example of this approach is *Houston Fearless Corp. v. Teter*,⁶⁷ where the Court of Appeals for the Tenth Circuit employed an *International Shoe* analysis to determine where a corporation was doing business for venue purposes. The court noted that the issues regarding venue and amenability to service were intertwined and concluded that the tests for determining whether a corporation was doing business and whether a corporation was amenable to process were the same.⁶⁸ The court, however, also noted that federal, rather than state law, should control where a corporation was doing business.⁶⁹ Thus, the Tenth Circuit looked to whether a state could constitutionally exercise jurisdiction, rather than whether a state's long-arm statute allowed for the exercise of jurisdiction.⁷⁰ In so doing, the court employed an *International Shoe* analysis.

Finally, in the middle of these two standards, a few courts imposed a general-jurisdiction test.⁷¹ Under this test, a corporation was doing business in a district for venue purposes if it engaged in such systematic and continuous contacts with the forum that it could be said to be doing business within the meaning of the state's long-arm statute. Thus, like the specific jurisdiction approach, this test focused on the defendant's contacts with the forum. This approach, however, required a

give rise to the liability upon which it is sued).

⁶⁷ 318 F.2d 822 (10th Cir. 1963).

⁶⁸ *Id.* at 825.

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *See, e.g., Dai Nippon Printing Co. v. Melrose Publ'g Co.*, 113 F.R.D. 540, 543 (S.D.N.Y. 1986) (stating that if a corporation is "doing business" in New York within the meaning of [the New York long-arm statute], venue in New York is also proper"); *Oral-B Labs., Inc. v. Mi-Lor Corp.*, 611 F. Supp. 460, 462 (S.D.N.Y. 1985) (noting that for venue to be proper a defendant's contacts must satisfy the state general jurisdiction standard); *see also Flowers Indus., Inc. v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 565 F. Supp. 286, 291 (N.D. Ga. 1983) (remarking that doing business for venue purposes requires a greater quantum of activity than that which is necessary to satisfy due process limits on jurisdiction, but a lesser quantum than that which is required to satisfy the Commerce Clause).

greater quantum and quality of contacts before a corporation was doing business in the state.⁷²

None of these courts considered the residency of a corporation under § 1391(c) when the corporation was subject to personal jurisdiction under a nationwide service of process provision. Indeed, no reason existed for such a case to arise. Most statutes providing for nationwide service of process also provided special venue provisions. These venue provisions allowed for venue where a corporate defendant “may be found” or “transacts business” among other places. Regardless of the approach a court took to define “doing business” under § 1391(c), these provisions were thought to provide more liberal venue options. In particular, courts considered the “transacts business” test to allow for broader venue than the doing-business standard.⁷³ Thus, if a corporate defendant were not transacting business for purposes of the special venue statute, it necessarily could not have been doing business in the district for the purpose of the general federal venue statute. Further, if a defendant were transacting business, then venue was deemed proper, and the court had no need to consider whether the corporation was doing business for purposes of the general venue statute.

C. Corporate Venue Under Special Venue Provisions

1. Corporate Residency Under Special Venue Provisions

While courts did not need to consider the residency of a corporate defendant subject to nationwide service of process for

⁷² See *Oral-B Labs, Inc.*, 611 F. Supp. at 462 (rejecting notion that defendant was doing business if it was subject to jurisdiction under the state long-arm statute).

⁷³ See *Gen. Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037, 1041 (S.D.N.Y. 1982) (explaining that the general federal venue provision pertaining to domestic corporations was more difficult to satisfy than the special venue provisions contained in the Clayton Act and noting that “[b]eing ‘found’ in a district is generally equated with ‘doing business’ there, and requires greater contacts than does ‘transacting business’”); *Athletes Foot of Del., Inc. v. Ralph Libonati Co.*, 445 F. Supp. 35, 45 (D. Del. 1977) (finding that “doing business” under §1391(c) requires more activity than “transacting business” under the Clayton Act); see also *Reynolds Metals Co. v. Columbia Gas Sys., Inc.*, 669 F. Supp. 744, 747 (E.D. Va. 1987) (explaining that the “transacts business” language in the Clayton Act enlarges the “found” standard); *Monument Builders of Greater Kansas City, Inc. v. Am. Cemetery Ass’n*, 629 F. Supp. 1002, 1006 (D. Kan. 1986) (holding that “transacting business” under the Clayton Act is given a broader meaning for establishing venue than “found” under § 1391), *rev’d on other grounds*, 891 F.2d 1473 (10th Cir. 1989).

the purposes of § 1391(c), they did consider the residency of corporate defendants subject to nationwide service of process for the purposes of special venue provisions. For example, ERISA provided for venue where any defendant resided. Analogously, courts determined where corporate defendants might be found under special venue provisions. Generally, courts ruled that a corporation resided or might be found wherever it was subject to personal jurisdiction. Courts determined where a corporate defendant was subject to personal jurisdiction, however, independently of any nationwide service of process provision. In other words, courts found that a corporation was subject to personal jurisdiction and, hence, resided or might be found in the district only if the defendant possessed sufficient minimum contacts with the district.⁷⁴

For example, in *Varsic v. United States District Court for the Central District of California*,⁷⁵ the Court of Appeals for the Ninth Circuit concluded that a defendant might be found for purposes of ERISA's special venue provision wherever it was subject to personal jurisdiction. Citing *International Shoe*, the court then considered whether the defendant's contacts with the Central District of California were "sufficient to satisfy the 'minimum contacts' test for personal jurisdiction"⁷⁶ and "whether the exercise of jurisdiction [would] be reasonable."⁷⁷ Because the defendant had purposefully availed itself of the privilege of conducting business within the district and because the exercise of jurisdiction in the district would be reasonable, the court concluded that the defendant was subject to personal jurisdiction in the district and that, consequently, the defendant could be found in the district pursuant to the ERISA special venue provisions.

⁷⁴ See, e.g., *Economu v. Borg Warner Corp.*, No. H-84-1320, 1985 WL 4575, at *1 (D. Conn. Oct. 3, 1985) ("[A] defendant 'may be found', and venue is proper, wherever its contacts with the forum are sufficient for a constitutionally valid exercise of *in personam* jurisdiction."); *Bostic v. Ohio River Co. (Ohio Division) Basic Pension Plan*, 517 F. Supp. 627, 633-34 (S.D. W. Va. 1981) (adopting *Varsic* and applying an *International Shoe* personal jurisdiction analysis to determine whether a defendant was found in the district and, hence, whether venue was proper under the ERISA venue provision).

⁷⁵ 607 F.2d 245, 248 (9th Cir. 1979).

⁷⁶ *Id.* at 248-49.

⁷⁷ See *id.* at 249-50.

Likewise, in *McFarland v. Yegen*,⁷⁸ the District of New Hampshire adopted the *International Shoe* minimum contacts standard for determining where a defendant may be found for the purpose of the ERISA venue provision. The court noted that the “liberal intention of Congress with regard to venue” supported interpreting the word “found” in the ERISA venue provision to mean that a defendant is found anywhere the defendant is subject to personal jurisdiction.⁷⁹ The court, however, also refused to base amenability to jurisdiction for venue purposes on the ERISA nationwide service of process provision. The court reasoned that such a reading would mean that a defendant would be found in every district because the defendant would be subject to personal jurisdiction in every district.⁸⁰ Thus, the court concluded that such a reading would make the ERISA venue provision “superfluous and inconsistent” with the service-of-process provision that permitted service “in any *other* district where a defendant may be found, besides the district in which the action is brought.”⁸¹ Moreover, the court observed that such a reading would be “unfair to the defendants, even considering the liberal intention of Congress.”⁸² Therefore, the court held that a defendant could be found in a district such that venue would be proper “if a defendant had ‘minimum contacts’ with that district, under the standard enunciated in *International Shoe* and progeny.”⁸³

These decisions illustrate that even before Congress amended § 1391(c) to equate corporate residence with amenability to personal jurisdiction for venue purposes, courts had begun to equate venue with amenability to personal jurisdiction. However, courts had also maintained the independence of the two inquiries. They required amenability to jurisdiction for venue purposes to be established independent of any statutory authorization for nationwide jurisdiction. Thus, courts equated venue limits, not with amenability to jurisdiction generally, but with amenability to a specific kind of

⁷⁸ 699 F. Supp. 10, 14 (D. N.H. 1988).

⁷⁹ *Id.* at 13.

⁸⁰ *Id.* at 14.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

jurisdiction—amenability to jurisdiction in the forum based on an *International Shoe*—minimum contacts standard.

2. The Relationship Between the Special Venue Provisions and the General Venue Statute

Courts also had occasion to consider whether provisions in the general federal venue statute applied to cases arising under the Clayton Act, despite the special venue provisions. Specifically, courts have inquired whether the general federal venue statute supplemented the special venue provisions of the Clayton Act. The Clayton Act provided for venue only where a corporate defendant was an inhabitant, was found, or had transacted business. An antitrust plaintiff sometimes sought to sue in the district in which it had felt injury from the defendant's anticompetitive conduct. The plaintiff, however, could not always demonstrate that the defendant had transacted business in that district.⁸⁴ After 1966, the general federal venue statute permitted venue in the district where the claim arose. Relying on this provision, an antitrust plaintiff would argue that venue was proper where it felt the injury because that was the district in which the claim arose.⁸⁵ Courts generally concluded that the general federal venue statute did supplement the special venue provisions.⁸⁶ Courts, however, held that a plaintiff had to

⁸⁴ See, e.g., *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kansas*, 891 F.2d 1473, 1477–78 (10th Cir. 1989); *Grosser v. Commodity Exch., Inc.*, 639 F. Supp. 1293, 1313 (S.D.N.Y. 1986).

⁸⁵ See, e.g., *Monument Builders*, 891 F.2d at 1478; *Grosser*, 639 F. Supp. at 1313.

⁸⁶ See, e.g., *Monument Builders*, 891 F.2d at 1479 (concluding that venue was proper in a claim under the Clayton Act because the claim arose in the district pursuant to § 1391(b)); *Ballard v. Blue Shield of S. W. Va., Inc.*, 543 F.2d 1075, 1080 (4th Cir. 1976) (finding that special venue provisions in the Clayton Act are not exclusive and that § 1392 venue provisions also apply); *In re Sonnax Indus., Inc.*, 99 B.R. 591, 594–95 (D. Vt. 1989) (deciding that the federal bankruptcy venue provision supplements special venue provisions under the Clayton Act); *Grosser*, 639 F. Supp. at 1313 (“Venue in this district may be authorized under either Section 12 [of the Clayton Act] or under the general federal venue provisions of 28 U.S.C. § 1391(b), since the weight of authority now holds that the provisions of the general venue statute are supplemental to—not superseded by—the special antitrust venue statute.”); *Gen. Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037, 1040 (S.D.N.Y. 1982) (holding that § 1391(d) supplements special venue provisions contained in the Clayton Act); *Caribe Trailer Sys. v. P. R. Mar. Shipping Auth.*, 475 F. Supp. 711, 718 n.20 (D.D.C. 1979) (noting that “[a]lthough there has been some judicial uncertainty whether the general federal venue statute expands special venue provisions, it is now generally recognized that these provisions are available absent

establish proper venue pursuant to either the special venue provisions or the general federal venue statute before it could avail itself of the nationwide service of process provision. Therefore, courts determined venue independently of nationwide service of process.

D. 1988 Revisions to § 1391(c)

In 1988, Congress revised the venue statute, adopting it in its current form. Congress eliminated the corporate specific venue provision contained in the 1948 Act that allowed for venue in a district where a corporation was incorporated, was licensed to do business, or was doing business. Instead, the current venue statute makes a corporation, like any other defendant, subject to venue anywhere it resides, provided that all of the defendants in a multiple defendant action reside in the same state or in any district where a substantial part of the events giving rise to the litigation took place.⁸⁷ This revision suggests that Congress did not intend to suspend independent constraints on venue in cases involving corporate defendants, as § 1391(b) subjects cases involving corporations to the same venue rules that apply to cases involving individual defendants. These rules place constraints on venue independent of jurisdiction.

The statute, like its predecessor, also specifically defines where a corporation resides. Unlike its predecessor, however, § 1391(c) now states, in pertinent part: “[A] defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.”⁸⁸ This revision appears to have been adopted to resolve the split among the courts as to the meaning of “doing business” under the old § 1391(c) and to adopt the broadest interpretation of “doing business” under the old statute—the specific jurisdiction approach. In passing on the revisions, the Committee on the Judiciary specifically noted the problems that existed in determining where a corporation resided under the old statute. The Committee then “concluded that a corporation . . . should be deemed to reside in any judicial district in which it

contrary statutory restrictions”); *Athletes Foot of Del., Inc. v. Ralph Libonati Co.*, 445 F. Supp. 35, 44 (D. Del. 1977) (concluding that § 1391(b) & (c) supplement venue provisions contained in the Clayton Act).

⁸⁷ 28 U.S.C. § 1391(b) (2000).

⁸⁸ *Id.* § 1391(c).

was subject to personal jurisdiction.”⁸⁹ As discussed above, however, even this broad interpretation of doing business employed a contact-based analysis. Courts employing the specific jurisdiction standard considered whether the defendant possessed sufficient minimum contacts with the forum state such that the exercise of jurisdiction would be consistent with due process in determining whether the corporation was “doing business” such that venue would be proper.⁹⁰ These courts never suggested that service alone was sufficient.

Moreover, there is nothing in the legislative history to suggest that Congress intended to dispense with a contact-based venue analysis and to permit venue based on amenability to jurisdiction pursuant to nationwide service of process. Indeed, the only legislative history pertaining to the section affirmatively suggests that Congress envisioned a contact-based venue analysis. The Committee concluded the following:

[A] corporation for venue purposes should be deemed to reside in any judicial district in which it was subject to personal jurisdiction at the time the action was commenced. In multidistrict states in which a corporation is not incorporated or licensed to do business, the venue determination should be made with reference to the particular district in which a corporation is sued. Thus, for example, a corporation that confines its activities to Los Angeles (Central California) should not be required to defend in San Francisco (Northern California) unless, of course, venue lies there for other reasons. This amendment would accomplish this purpose.⁹¹

The Committee’s illustration of the venue provision demonstrates that Congress envisioned a contact-based analysis. The Committee suggests that a corporation that “confines its activities” to a particular district in a state would not be subject to venue in another district in the state. This would be true only if personal jurisdiction for venue purposes were based on minimum contacts with the forum state.

In sum, the historical context in which § 1391(c) was enacted supports an *International Shoe* minimum contacts-based reading of “subject to personal jurisdiction” in § 1391(c). A survey of the judicial landscape prior to the enactment of § 1391(c) in its

⁸⁹ H.R. REP. NO. 100-889, pt. 1, at 70 (1988).

⁹⁰ See *supra* notes 68–72 and accompanying text.

⁹¹ H.R. REP. NO. 100-889, pt. 1, at 70.

current form reveals a long-standing practice of determining corporate residency for venue based on amenability to jurisdiction. That amenability to jurisdiction, however, was limited to jurisdiction based on an *International Shoe* analysis regardless of nationwide service of process. Prior to the enactment of § 1391(c), courts also engaged in a long-standing practice of applying the general federal venue statute to actions arising under statutes containing special venue provisions. Nothing in the legislative history surrounding § 1391(c) suggests that Congress intended to depart from this long-standing practice. Indeed, to the contrary, the historical context in which § 1391(c) was enacted as well as the legislative history indicate that Congress intended to codify this practice by defining corporate residence as any district where a corporation was subject to personal jurisdiction.

Furthermore, the statutory language of § 1391(c) itself supports an *International Shoe* reading of “subject to personal jurisdiction” in § 1391(c). Such a reading gives meaning to the entirety of § 1391(c) and other provisions in § 1391 as well as the special venue provisions. This reading also avoids the absurdities that would result in attempting to apply nationwide service of process provisions.

A contextual *International Shoe* reading reconciles § 1391(c) with the general principle underlying venue—a defendant should not be forced to litigate in an inconvenient forum. Such a reading ensures that a defendant will not have to litigate in a forum unless it possesses sufficient contacts with the district. For example, in our hypothetical cases of *Retirement Plan v. Corporation* and *Plaintiff v. Able Corporation and Better Corporation*, venue would no longer be proper because each of the defendants lacks significant contacts with the district in which the litigation was filed. In *Retirement Plan*, service on Corporation in its California headquarters still would be proper under section 503 of ERISA.⁹² Likewise, because service was proper pursuant to ERISA, Federal Rule of Civil Procedure 4 would confer jurisdiction on the Kansas court.⁹³ Venue would not be proper in Kansas, however, because Corporation does not possess minimum contacts with Kansas.

⁹² See *supra* notes 12–13 and accompanying text.

⁹³ See *supra* notes 14–15 and accompanying text.

Similarly, in *Able and Better*, service on Able and Better at their headquarters in Kansas and Missouri would be proper pursuant to the Clayton Act.⁹⁴ Service would be sufficient to confer jurisdiction on the Louisiana court.⁹⁵ Venue would not be proper in the Western District of Louisiana, however, unless both Able and Better possessed sufficient minimum contacts with Louisiana and either Able or Better maintained sufficient minimum contacts with the Western District of Louisiana.

IV. POSSIBLE OBJECTIONS TO A CONTEXTUALIST CONSTRUCTION

Those who agree that nationwide venue is problematic might suggest that this evil can be avoided by taking steps short of re-interpreting § 1391(c). This section explores these alternatives and explains why they should be rejected.

A. *The Non-Exclusivity of Special Venue Provisions*

One might argue that courts need not depart from the literalist reading of § 1391(c) to avoid nationwide venue. Instead, courts should recognize that special venue provisions operate to the exclusion of the general venue statute, or that nationwide service of process is available only when a plaintiff first satisfies the special venue provisions of the statute authorizing nationwide service of process. Indeed, some courts have adopted such reasoning to avoid nationwide venue.⁹⁶ Applying special venue provisions to the exclusion of the general federal venue statute, however, would not obviate fully the need for courts to construe § 1391(c) in cases involving nationwide service of process. Furthermore, statutory text, precedent, and policy dictate that the general venue provisions such as those in § 1391(c) should apply in cases arising under statutes containing special venue provisions.

⁹⁴ See *supra* note 23 and accompanying text.

⁹⁵ See *supra* note 23 and accompanying text.

⁹⁶ See, e.g., *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350–51 (D.C. Cir. 2000) (finding that the plaintiff must satisfy the special venue provisions of the Clayton Act to avail itself of world-wide service of process); *Mgmt. Insights, Inc. v. CIC Enters.*, 194 F. Supp. 2d 520, 531–32 (N.D. Tex. 2001) (refusing to use § 1391 to supplement the special venue provisions in the Clayton Act); *Sea-Roy Corp. v. Parts R Parts, Inc.*, No. 1:94CV00059, 1995 U.S. Dist. LEXIS 21859, at *18–19 (M.D.N.C. Aug. 15, 1995) (holding that world-wide service of process provisions may be employed only when the defendant is found or transacts business in the district where the action is filed).

Some special venue provisions, such as section 503 of ERISA, allow venue where a defendant resides without defining corporate residence. Thus, courts still may need to define corporate residence for venue purposes in cases arising exclusively under special venue provisions. Literalist courts turn to § 1391(c)'s definition to fill this gap and § 1391(c)'s definition seems a logical choice. As the *McCracken* court noted in applying § 1391(c) to an ERISA action, “[w]ithout a reason to look elsewhere, resort to § 1391(c) for a definition of corporate residence is appropriate.”⁹⁷ Indeed, in *Pure Oil Co. v. Suarez*, the Supreme Court directed the courts to apply § 1391(c)'s definition to special venue provisions.⁹⁸ The Court concluded that, absent contrary statutory restrictions, “the liberalizing purpose underlying [§ 1391(c)]’s enactment and the generality of its language” suggested that it should apply to all venue statutes using residence as a basis for venue.⁹⁹

If special venue provisions do not lay venue where a defendant resides, literalist courts create nationwide venue only by applying general venue provisions such as § 1391(b). Thus, barring the use of § 1391(b) in such cases and requiring plaintiffs to meet the requirements of special venue provisions would preclude nationwide venue. *Suarez* and other precedent, however, support supplementing special venue provisions with § 1391(b). *Suarez* rests on two assumptions: (1) that Congress attempts to liberalize venue by enacting special venue provisions and (2) that applying the general federal venue provisions will further this purpose.¹⁰⁰ Special venue provisions in statutes like ERISA, the Securities Exchange Act, the Securities Act, and the Clayton Act appear to have been enacted to provide for more expansive venue than existed at the time those statutes were enacted. For example, provisions in the Clayton Act allowing for

⁹⁷ *McCracken v. Auto. Club of S. Cal. Inc.*, 891 F. Supp. 559, 562 (D. Kan. 1995).

⁹⁸ 384 U.S. 202, 207 (1966).

⁹⁹ *Id.* at 204–05.

¹⁰⁰ *Suarez* involved application of § 1391(c) to the special venue provisions in the Jones Act. In *Suarez*, the Court reasoned that rather than containing statutory restrictions contrary to the broad definition of corporate residence in § 1391(c), the purpose and language of the Jones Act supported a broad definition. The Court noted that the Jones Act was intended to provide more expansive corporate venue than existed at the time it was enacted and that nothing in the legislative history indicated that the drafters of the Jones Act intended to use the word “‘residence’ as anything more than a referent to more general doctrines of venue rules.” *Id.* at 205.

venue in a district where the defendant corporation "transacts business" provided more liberal venue than § 1391(c), which at the time the venue provisions in the Clayton Act were enacted, permitted venue in a district in which the corporation was "doing business."¹⁰¹

Furthermore, courts that have applied the general provisions of § 1391(b) to cases arising under statutes containing special venue provisions have used the federal venue statute to expand upon venue options otherwise available under special venue provisions.¹⁰² Thus, applying general provisions of § 1391(b) to cases arising under statutes containing special venue provisions seems to be a logical extension of *Suarez*. In fact, lower courts have relied on *Suarez* to supplement special venue provisions with other portions of § 1391.¹⁰³ Moreover, applying § 1391 and special venue provisions as complementary provisions is consistent with the Supreme Court's treatment of other procedural statutes. For instance, the Court and lower federal courts have maintained that special removal procedures in substantive statutes supplement rather than supplant the general removal statute.¹⁰⁴

Nothing in the language of § 1391 prohibits applying the section to cases brought under statutes with special venue provisions. Section 1391(b) provides that:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State,

¹⁰¹ See *supra* note 74 and accompanying text.

¹⁰² See *supra* notes 85–87 and accompanying text.

¹⁰³ See, e.g., *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1409 (9th Cir. 1989) (noting that the general alien venue provision contained in § 1391(d) supplemented special venue provisions in the Clayton Act); *Paper Sys. Inc. v. Mitsubishi Corp.*, 967 F. Supp. 364, 367 (E.D. Wis. 1997) (same); *Caribe Trailer Sys., Inc. v. P. R. Mar. Shipping Auth.*, 475 F. Supp. 711, 718 n.20 (D.D.C. 1979) ("Although there has been some judicial uncertainty whether the general federal venue statute expands special venue provisions, it is now generally recognized that these provisions are available absent contrary statutory restrictions.").

¹⁰⁴ See, e.g., *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995) (stating that provisions in the general removal statute governing remand for untimeliness and prohibiting appeal of remand orders apply to bankruptcy cases despite special bankruptcy removal provisions); *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 125 (2d Cir. 2003) (stating that provisions in the general removal statute prohibiting appeal of remand orders apply to cases removed under the Securities Litigation Uniform Standards Act).

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.¹⁰⁵

This language of § 1391(b) not only authorizes venue in certain districts, it also limits venue to those districts authorized in § 1391(b). Section 1391(b) provides that a federal question case may “be brought *only* in” the districts enumerated in § 1391(b).¹⁰⁶ The statute recognizes that federal substantive law may place different limits on venue. It states that a federal question action “may, *except as otherwise provided by law*, be brought only in” the districts enumerated in § 1391(b).¹⁰⁷ When read in connection with the “only” limitation on venue, however, this exception for other federal law should be read to expand venue beyond the limits of § 1391(b) rather than to preclude venue in the districts authorized by § 1391(b). In other words, § 1391(b) provides that ordinarily a federal question case may be brought only in the districts enumerated in the section. Where federal law provides otherwise, on the other hand, a federal question case may be brought in additional districts. Thus, the language of § 1391 supports the position taken by courts that special venue provisions supplement rather than supplant § 1391.

Finally, applying § 1391 as a supplement to special venue provisions best effectuates congressional intent to promote broad forum availability in nationwide service of process cases. Congress authorizes nationwide service of process in statutes like the Clayton Act and the securities laws to ensure that district courts with a significant connection to the litigation may serve defendants and, hence, exercise jurisdiction over an action. For example, in RICO claims and antitrust claims general service rules often worked to preclude jurisdiction where the harmful effects of the conduct were felt. Thus, Congress inserted

¹⁰⁵ 28 U.S.C. § 1391(b) (2000). Section 1391(b) applies to actions arising under federal statutes authorizing nationwide service of process. It applies to “a civil action wherein jurisdiction is not founded solely on diversity.” A federal court necessarily will have jurisdiction in any action arising under a federal statute pursuant to § 1331 “federal question” jurisdiction. See 28 U.S.C. § 1331. Thus, in any action arising under a federal statute authorizing nationwide service of process, jurisdiction will not be founded solely on diversity.

¹⁰⁶ § 1391(b) (emphasis added).

¹⁰⁷ *Id.* (emphasis added).

nationwide service of process provisions, allowing plaintiffs to effectuate service in the district where they were injured.¹⁰⁸ Likewise, Congress provided for nationwide service of process in ERISA actions to "remove a possible procedural obstacle to having all proper parties before the court."¹⁰⁹ Special venue rules, however, do not always allow for venue in these fora. For example, special venue provisions in the Clayton Act sometimes do not reach districts in which the plaintiff feels the harmful effects of a defendant's anticompetitive conduct.¹¹⁰ Supplementing special venue provisions helps to ensure that districts such as these, with a significant connection to the lawsuit, may entertain the suit. Thus, supplementing helps further the purposes behind nationwide service of process.

B. Section 1404(a)'s Inability to Protect the Corporate Defendant

Alternatively, one might argue that, while nationwide venue may theoretically be problematic, the burden it imposes on a corporation is not great and that the availability of transfer under 28 U.S.C. § 1404(a) can alleviate any burden that might exist.¹¹¹ Such arguments disregard the significant costs that forum choice can impose. Regardless of whether the defendant is a corporation or an individual, forum choice imposes institutional costs on the court, residents of the district, and interested non-parties. When a case is resolved in a district with no connection to that case, limited judicial resources are diverted from cases involving forum residents or arising out of events that took place in the district. Likewise, interested parties may be precluded from witnessing the proceedings in a distant forum regardless of whether the defendant is a corporation or an individual.¹¹²

If raised, a § 1404(a) transfer may alleviate some of these burdens. A court may transfer the action, however, only upon

¹⁰⁸ See *United States v. Nat'l City Lines*, 334 U.S. 573, 581 (1948) (stating that Congress adopted the Clayton Act "to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust policy").

¹⁰⁹ *Varsic v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 607 F.2d 245, 247-48 (9th Cir. 1979) (noting the "liberal intent of Congress" and quoting H.R. REP. NO. 93-533, at 17 (1973)).

¹¹⁰ See *supra* notes 85-87 and accompanying text.

¹¹¹ See 28 U.S.C. § 1404(a).

¹¹² *Norwood*, *supra* note 2, at 317.

the motion of a party. Thus, institutional concerns will be protected only if the burdens on an individual party are sufficient to prompt the party to seek relief. Accordingly, institutional concerns suggest a need for independent venue constraints in cases involving corporate defendants.

Moreover, corporate defendants, like individual defendants, may incur significant costs as a result of forum choice. Defendants incur financial costs when forced to defend a lawsuit away from home. One such cost to defendants is that to retain local counsel in the district in which the lawsuit proceeds. Likewise, defendants incur travel costs to transport themselves and evidence to the district.¹¹³ For corporations, this might take the form of travel costs so that representatives may travel to the district when necessary for court appearances. Nothing about corporations makes them inherently better able to absorb these costs than individuals.¹¹⁴ Individuals may be considerably wealthy, while small corporations may have limited financial resources.¹¹⁵

Further, arguments that minimize the burdens on corporations as a result of nationwide venue disregard the non-monetary costs of forum choice. As Professors Clermont and Eisenberg have argued, forum choice influences outcome.¹¹⁶

¹¹³ While defendants are not required to appear in civil proceedings, a prudent defendant may want to witness proceedings in person rather than learn of proceedings through reports from counsel. Further, a corporate defendant may have to produce representatives to testify in support of its position.

¹¹⁴ See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1516 (1995) (noting that "in some case categories, plaintiffs may not be little and defendants may not be big" and that "the casting of the aggrieved in the role of plaintiff or defendant may be rather arbitrary").

¹¹⁵ Indeed, small corporations have been subject to suit under ERISA for failure to make required contributions to benefit plans. See, e.g., *Boilermaker-Blacksmith Nat'l Pension Fund v. Tank Maint. & Tech., Inc.*, No. 96-2161-JWL, 1997 WL 458411, at *1 (D. Kan. July 18, 1997). In *Tank Maintenance*, a national multi-employer pension fund sued a small, closely-held corporation for failure to make required fringe benefit contributions. Although the corporation was incorporated in and operating out of New Jersey, the pension fund sued in the District of Kansas. The court granted the pension fund's motion for summary judgment as uncontested even though the corporation attempted to file a pro se motion for an extension of time to respond to the summary judgment motion. In the pro se motion, the corporation argued that its counsel had withdrawn and that it was financially unable to retain new counsel.

¹¹⁶ Clermont & Eisenberg, *supra* note 115, at 1508; see also Kevin M. Clermont & Theodore Eisenberg, *Simplifying the Choice of Forum: A Reply*, 75 WASH. U. L.Q.

Professors Clermont and Eisenberg posit that this may be so, at least in part, because plaintiffs engage in forum shopping when selecting a venue. For example, a plaintiff may select a particularly inconvenient forum in the hope of improving the settlement value of its case, or a forum with a comparatively slow or quick docket so as to suit its perceived settlement needs. Likewise, a plaintiff may select what it perceives to be a more plaintiff-friendly forum.¹¹⁷

Additionally, a plaintiff may select a forum to obtain more favorable law. Nationwide service of process provisions arise in federal claims that are generally resolved by federal law. Some statutes, however, may require reference to, or incorporation of, state law. For example, courts reference state law in determining the statute of limitations for certain ERISA claims.¹¹⁸ Many courts apply the forum's statute of limitations

1551, 1551 (1997) ("We have three things to think about here, as the real estate agents say—location, location, location.' . . . The results to date strongly suggest that forum really matters."); Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373, 385 ("Even where the formal legal rules are unaffected by the forum choice, other forum characteristics can put plaintiffs at a significant advantage; the availability and sympathy of juries, discovery, and contingent fees all vary significantly from state to state.").

¹¹⁷ Consider, for example, the plaintiffs' choice of forum in *In re Triton Ltd. Securities Litigation*, 70 F. Supp. 2d 678 (E.D. Tex. 1999). The plaintiffs opted to pursue their claims in the Eastern District of Texas even though none of the plaintiffs resided within the district and the bulk of corporate witnesses and documents appeared to be only 180 miles away in the Northern District of Texas. Filing their claims in a district 180 miles away would not seem to impose a great burden on the plaintiffs, especially given that none of the plaintiffs resided in the Eastern District. *Id.* at 689; see also *Waeltz v. Delta Pilots Ret. Plan*, 301 F.3d 804, 806 (7th Cir. 2002) (indicating that plaintiffs sued in the Southern District of Illinois even though neither plaintiff received benefits while residing there and only 2 out of the 2740 retired pilots receiving benefits under the plan resided in the district.). Professor Norwood characterizes Madison and St. Clair Counties, which sit in the Southern District of Illinois, as "nationally known for pro-plaintiff verdicts and very large damage awards." Norwood, *supra* note 2, at 278.

¹¹⁸ While ERISA provides for nine different causes of action, it expressly provides a statute of limitations for only one of the nine claims—breach of fiduciary duty claims. See *Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Ret. Income Trust*, 134 F. Supp. 2d 189, 193, 205 (D. Mass. 2001). Federal courts borrow state statutes of limitations for analogous state claims to determine the statutes of limitations for the remaining claims. See, e.g., *Syed v. Hercules Inc.*, 214 F.3d 155, 159–61 (3d Cir. 2000) (applying Delaware state statute of limitations for actions to recover wages to claim under ERISA to recover benefits); *Mattson v. Farrell Distrib. Corp.*, 163 F. Supp. 2d 411, 415–18 (D. Vt. 2001) (applying Vermont state statute of limitations for claims for economic losses to ERISA and COBRA claim for notice); *Laurenzano*, 134 F. Supp. 2d at 206 (applying Massachusetts state statute of limitations for contract actions to claim under ERISA to recalculate benefits); *Bd. of*

even if the forum's law would not govern the substance of the claim.¹¹⁹ Thus, a plaintiff may select the forum with the most advantageous statute of limitations. In sum, corporate defendants, like individual defendants, suffer real burdens as a result of forum choice. Restrictions on venue operate to restrict opportunities for forum shopping and, thus, alleviate some of these burdens.

One might acknowledge these potential burdens but nonetheless contend that transfer under § 1404(a) will protect corporate defendants from these harms. Section 1404(a) allows for transfer from the district in which the plaintiff brought the action to any other district in which the plaintiff may have brought the action originally “[f]or the convenience of parties and witnesses, in the interest of justice.”¹²⁰ The availability of transfer under § 1404(a) may somewhat constrain the opportunities for forum shopping. A § 1404(a) transfer, however, fails to protect the defendant from the burdens imposed by forum selection in several respects. First, § 1404(a) transfers are not granted as of right, but rather are discretionary. Discretionary transfers result in inconsistent outcomes.¹²¹ Further, the

Trustees v. D'Elia Erectors, Inc., 17 F. Supp. 2d 511, 513–14 (E.D. Va. 1998) (applying Virginia state statute of limitations to action under ERISA for contributions).

Prior to the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), federal courts also adopted state statutes of limitations as the applicable limitations periods in private actions under § 10(b) of the Securities Exchange Act. See *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1124 (7th Cir. 1993).

¹¹⁹ In *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988), the Supreme Court upheld the application of the Kansas statute of limitations to claims by out-of-state plaintiffs even though the Court previously had held that Kansas could not apply its substantive contract law to claims by the same out-of-state plaintiffs. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (holding that applying Kansas law to all claims at issue would be unconstitutionally arbitrary and unfair).

¹²⁰ 28 U.S.C. § 1404(a) (2000).

¹²¹ For example, a review of caselaw by Professor Steinberg revealed that courts reached different outcomes in cases involving similar fact patterns. See David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 WASH. U. L.Q. 1479, 1503 (1997); see also Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 131–32 (1965) (noting that courts find the “‘interest of justice’ and the ‘convenience of parties and witnesses’” standards “difficult to deal with” and that the number of judicial decisions with respect to these standards “do not add to their clarity”); Siegel, *supra* note 4, at 343–44 (arguing that § 1404(a) is insufficient to protect defendants from an error in the venue statute because “[d]ifferent . . . judges might exercise their discretion differently”).

defendant bears the burden of establishing that the balance of convenience and justice warrants transfer. Thus, § 1404(a) effectively creates a presumption in favor of the plaintiff's choice of forum. A defendant sued in a forum lacking a substantial connection with either the defendant or the dispute ideally should be able to meet this burden. Courts, however, have not always reached this result.¹²²

Indeed, the same courts that have found nationwide venue in cases involving corporate defendants have also refused to transfer despite the defendant's acknowledged lack of contacts with the district. While these courts purport to show less deference to a plaintiff's choice of forum when the plaintiff has no connection with the forum or the events giving rise to the dispute occurred outside the forum, the outcomes of these cases indicate otherwise.¹²³ For example, in *Triton Securities Litigation*, the court denied the defendants' request for a § 1404(a) transfer even though the plaintiffs had no connection with the original forum.¹²⁴ The court discounted the burden to both the defendants and potentially the plaintiffs caused by the fact that most of the key witnesses resided in the proposed transferee forum rather than the original forum.¹²⁵ Likewise, it discounted the fact that most of the documents were located in the proposed transferee forum.¹²⁶ The court reasoned that the plaintiffs' choice of forum was a factor weighing against transfer.¹²⁷ Indeed, the plaintiffs' choice of forum seems to have been the *only* factor.

¹²² Norwood, *supra* note 2, at 320 ("Moreover, although many federal courts say that a plaintiff's forum choice deserves *less* deference when there is an 'absence of any material connection or significant contact between the forum state and the events allegedly underlying the claim,' few courts *act* accordingly.") (emphasis added).

¹²³ See, e.g., *In re Triton Ltd. Sec. Litig.*, 70 F. Supp. 2d 678, 689 (E.D. Tex. 1999) ("[E]ven though the Plaintiffs' choice of forum gets lessened deference, it is still at least a factor which should be considered in a convenience transfer analysis."); *Icon Indus. Controls Corp. v. Cimetrix, Inc.*, 921 F. Supp. 375, 383-84 (W.D. La. 1996) (noting that deference to the plaintiff's choice of forum is "lessened when the operative facts of the dispute occur outside plaintiff's chosen forum" but also that the defendants must "prove that the balance is *strongly* in favor of the [proposed transferee] forum as more convenient").

¹²⁴ *Triton Ltd. Sec. Litig.*, 70 F. Supp. 2d at 689-91.

¹²⁵ *Id.* at 689-90.

¹²⁶ *Id.* at 690.

¹²⁷ *Id.* at 691.

Similarly, in *Icon Industrial Controls*, the court denied a motion to transfer to a district in which a substantial number of the witnesses to be called in the action resided, even though only three witnesses resided in the original forum and the forum lacked any other connection with the dispute.¹²⁸ The court concluded that the defendants had not met their burden of showing that the balance of the convenience favored transfer. This was determined despite the fact that a substantial number of witnesses resided in the proposed forum, because other witnesses resided outside of the proposed forum. The court noted that no single forum, including the proposed forum, would be convenient for all the witnesses.¹²⁹ In so doing, the court misconstrued the § 1404(a) inquiry, requiring the defendants to show not just that their proposed forum was more convenient than the plaintiffs' proposed forum but also that it was the most convenient forum.

Denials of § 1404(a) transfer motions such as these are well insulated from appellate review. A defendant may seek immediate review via a writ of mandamus or interlocutory review pursuant to § 1292(b) only. Circuit courts rarely grant writs of mandamus.¹³⁰ Further, because § 1404(a) transfers are a matter of discretion, even if appellate review is granted, the orders are subject to limited appellate scrutiny and are rarely reversed.¹³¹ In general, appellate courts will reverse a denial of a transfer motion only if the court fails to apply the statutory criteria.¹³² In contrast, the approach advocated here—a limitation on venue—cannot be ignored by courts. If venue is improper, a court must either dismiss the action or transfer it to a district in which venue would be proper. Denial of a motion to

¹²⁸ *Icon Industrial Controls*, 921 F. Supp. at 384–85.

¹²⁹ *Id.* at 384.

¹³⁰ See *SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 176 (2d Cir. 2000) (noting that the Fifth Circuit rarely grants mandamus review of transfer orders). The Second Circuit “has also been markedly reluctant to grant the writ.” *Id.* at 176 n.5.

¹³¹ See WRIGHT, MILLER & COOPER, *supra* note 3, § 3855, at 473–74; see also Kitch, *supra* note 122, at 117 (“[T]he requirements of the harmless error statute would make it unlikely that any appellate court would reverse because of an erroneous transfer order.”).

¹³² See, e.g., *Hustler Magazine v. United States Dist. Ct.*, 790 F.2d 69, 72 (10th Cir. 1986) (McKay, J., concurring) (“If the trial court indicates it has considered these factors, mandamus should not lie to correct an error in the district court’s judgment.”).

dismiss or transfer on the grounds of improper venue is subject to only limited interlocutory review. When review is granted, however, such denials are subject to greater appellate scrutiny. While an appellate court will defer to a district court's interpretation of disputed facts, it reviews *de novo* a district court's interpretation of the venue statute.¹³³

Transfer under § 1404(a) is inadequate to protect a corporate defendant for a second reason. Even where transfer is granted, it may not reduce the risk of forum shopping to obtain more favorable law because the transferee court may be required to apply the law that the transferor forum would have applied.¹³⁴ Generally, courts agree that when a federal court hears a case decided under federal law, it makes an independent interpretation of federal law and need not apply the binding precedent of a transferor forum.¹³⁵

The Supreme Court, however, has mandated that in cases decided under state law, the transferee forum must apply the law of the transferor forum.¹³⁶ Relying on this reasoning, a few courts have held that when federal law incorporates state law, a federal transferee court should apply the law of the state in which the transferor court sits rather than the law of the state in which it sits. Most notably, in *In re United Mine Workers of America Employee Benefit Plans Litigation*, the District Court for the District of Columbia held that, in the multidistrict ERISA litigation consolidated before it, the statute of limitations applicable in the transferor fora rather than the statute of limitations of the transferee forum applied.¹³⁷ Thus, the burden on a corporate defendant imposed by unfavorable law would remain even if transfer were granted. In sum, neither § 1404(a) transfers nor exclusive application of special venue provisions cure the ills created by nationwide venue.

¹³³ See *Waeltz v. Delta Pilots Ret. Plan*, 301 F.3d 804, 806–07 (7th Cir. 2002).

¹³⁴ See *Norwood*, *supra* note 2, at 319 (noting that “[b]ecause of current interpretations of transfer statutes, however, merely transferring more cases under § 1404(a) will probably not resolve this Article’s law-shopping concerns”).

¹³⁵ See, e.g., *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1175–76 (D.C. Cir. 1987); see also *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126 (7th Cir. 1993) (agreeing with *Korean Air Lines*).

¹³⁶ *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

¹³⁷ 854 F. Supp. 914, 921–22 (D.D.C. 1994); see also *Eckstein*, 8 F.3d at 1127 (holding that “[w]hen the law of the United States is geographically non-uniform, a transferee court should use the rule of the transferor forum in order to implement the central conclusion of *Van Dusen* and *Ferens*”).

CONCLUSION

Blind adherence to statutory text read in isolation may produce results that conflict with our fundamental notions regarding certain legal principles, as well as longstanding judicial practice and apparent congressional intent. Section 1391(c), which defines corporate residence as any district in which a corporation is “subject to personal jurisdiction” for venue purposes, demonstrates this potential.¹³⁸ When considered in light of federal statutes authorizing nationwide service of process, its seemingly plain language produces anomalous results. Taken at face value, its plain language appears to provide for nationwide venue when a corporation is subject to nationwide personal jurisdiction as a result of a nationwide service of process statute. Such a result, however, seems to conflict with traditional notions on venue and congressional intent embodied in particularized venue provisions in both the general federal venue statutes and special venue provisions contained in nationwide service of process statutes.

A more refined textualist approach that reads the text in the context of the entire venue statute and related provisions and is informed by the historical context in which § 1391(c) was enacted reveals, instead, that § 1391(c) lays corporate residence in districts in which a corporation is subject to personal jurisdiction independent of nationwide service of process. This example underscores how using historical context to guide courts in construing statutes that codify concepts rich with judicial pedigree can result in a fuller statutory interpretation that better comports with congressional intent.

¹³⁸ 28 U.S.C. § 1391(c) (2000).

