Federal Practice—Venue—Pursuant to 28 U.S.C. Section 1391(b), Venue Found Proper Only in District in Which Takeover Statute Promulgated and from Which Statute Enforced. Leroy v. Great Western United Corp

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The judicial resolution of venue disputes, historically a function of statutory interpretation in the United States, significantly affects the presentation and outcome of the litigants' case. Without the certainty of statutory interpretation, practitioners are unable to predict the propriety of their selection of a particular forum and therefore, they risk the multitude of problems that accompany suits in distant fora, mandatory transfers or dismissals. Venue in the federal district courts generally is determined under 28 U.S.C. section 1391 for both diversity and nondiversity actions. The phrase "in which the claim arose," added to subsections (a) and (b) of that statute in 1966, has been the subject of multifarious interpretations by courts and commentators. Until June 26, 1979, however, the United States Supreme Court had refrained from an examination of the meaning of these words.

Leroy v. Great Western United Corp. arose as a result of the activities of Great Western, a Texas-based corporation, which had made a tender offer to shareholders of an Idaho corporation in an attempt to takeover the Idaho business. Great Western complied with all federal regulations concerning the tender offer, but Idaho officials, acting under authority granted by the Idaho takeover statute, effectively precluded the tender offer. A declaratory action was brought in the Northern District of Texas by Great Western, seeking to have the Idaho takeover statute declared unconstitutional in its effects and preempted by federal statute. In response to a motion challenging the propriety

2. See notes 57-60 and accompanying text infra.
3. 28 U.S.C. § 1391 (1976). The pertinent text of the statute is as follows: “(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.” Id. § 1391(b) (emphasis added).
of venue, Great Western argued that for purposes of section 1391(b) the claim arose in Texas since enforcement of the Idaho statute restricted its corporate activities in Dallas. The district court held that Great Western's choice of venue was improper under section 1391(b), but on appeal the Fifth Circuit approved venue in the Texas district. The Supreme Court, however, held that because the locus of certain factors surrounding the enactment and enforcement procedures of the challenged state statute was Idaho, "the District of Idaho [was] the only one in which 'the claim arose' within the meaning of § 1391(b).

Measuring the extent and merit of the Leroy v. Great Western decision requires careful review of the historical framework of venue in the federal courts, the legislative history and congressional intent behind the 1966 amendments, and the trends in interpretation and tests developed by lower federal courts. Analysis from this perspective reveals Leroy v. Great Western as only a superficially vital and conclusive decision; its principal significance arises from its failure to eradicate the uncertainties that have surrounded evocations of venue in the "district . . . in which the claim arose."

I. HISTORY AND BACKGROUND

In its earliest stages of development, venue evolved from its original purpose of merely serving the convenience of the court into a principle valuing convenience to the litigants. In the colonial period, venue was used to ensure a fair trial for the defendant who could otherwise be forced to travel great distances, endure much hardship and incur great expense in presenting his defense far from home, in hostile communities with unfamiliar procedures and customs. These goals of convenience and fairness have continued to be paramount. Competing policies and changes in society, technology, and legal practices, however, have combined to foster a trend toward an increasingly broader choice of fora for the aggrieved plaintiff.

11. See generally Kershen, Vicinage, 29 Okla. L. Rev. 801, 808 (1976) (though dealing with venue in criminal cases, historical principles are analogous).
The Judiciary Act of 1789\textsuperscript{12} allocated suits in federal courts by limiting venue to districts inhabited by the defendant, or in which the defendant could be found. Since the passage of the 1789 Act, Congress has, with one exception,\textsuperscript{13} gradually provided for a more liberal choice of venue. A limited grant of jurisdiction, however, restricted the full exercise of venue choice provided by the 1789 Act. In 1875, however, jurisdiction was expanded, thereby allowing full use of the 1789 venue provisions.\textsuperscript{14} The effect of the statutory change of 1875 was, therefore, to expand the selection of venue. The 1888 restrictions, limiting venue to only the district inhabited by the defendant, were intended to reduce the deluge of cases under the post-Civil War amendments.\textsuperscript{15} Venue was expanded for certain cases by special provisions in the Judicial Code of 1948\textsuperscript{16} and a 1963 addition to section 1391.\textsuperscript{17} This trend toward expanding venue to districts other than the defendant’s residence culminated in the 1966 amendments to section 1391,\textsuperscript{18} the general federal venue statute.

The reasons for restricting choices of venue have changed since 1789. As a result, the policy considerations relied upon by courts in selecting venue also have changed. Because of vastly improved transportation and communication systems and because legal customs have become generally uniform,\textsuperscript{19} the residence of the defendant is no longer the vital consideration.\textsuperscript{20} Current policy considerations include fairness to plaintiffs, convenience of witnesses, availability of physical evidence,\textsuperscript{21} and conservation of judicial resources.

\begin{footnotesize}
\begin{enumerate}
\item 20. See 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3806, at 25 (1976) [hereinafter cited as C. Wright].
\end{enumerate}
\end{footnotesize}
vation of judicial resources, as well as the traditional deference to protecting defendants. The proper method of balancing these policies, however, is far from clear.

The courts' traditional disfavor of plaintiffs' forum shopping demonstrates a judicial tendency to disregard the desires of the plaintiff in selecting the proper forum for trial. This tendency can be contrasted with the espoused purpose of modern venue provisions—the balancing of the conveniences of all the parties, including the plaintiff. The revived focus on convenience of the court itself merely has been superimposed on this contrast by both courts and commentators. Emphases of the newly revived approach include: the need for uniformity in federal question cases, the need for federal courts to hear the multi-defendant federal question cases that otherwise were being forced into state courts by restrictive venue provisions, and the need for the less important concept of venue to cease restricting the exercise of the more important and broader grant of jurisdiction.

Authorities have recently advanced compelling reasons for requiring the defendant to litigate in any district convenient to the plaintiff: the plaintiff is supposedly the aggrieved party and the defendant is presumably the wrongdoer, the plaintiff bears the expenses of initiating the action and carries the burden of going forward, and any federal court should be equally competent to hear the matter. No due process problem should arise if the plaintiff chooses a district in which there is some logical

26. Barrett, supra note 12, at 635.
connection among the claim, the parties, and the forum.\textsuperscript{29} Acceptance of this primary focus on the plaintiff, a nontraditional approach, further clouds the proper interaction of competing policies and represents the result of another extreme shift in the purposes underlying venue.

As the policy considerations have shifted, so have the objectives served by venue. The concept of venue has evolved through three stages: as an instrument for convenience of the court, as a vehicle for protection of the defendant, and as a mechanism for balancing convenience of the court and all parties. The resurgence of concepts that support the convenience of the court and recent emphasis on the needs of the plaintiff have created interactional difficulties. In conjunction with the gradual expansion of the statutory grant of venue, the shifting policies invoked by the courts as guidelines demonstrate that neither a party nor a court solely dictates the place of trial.

II. THE 1966 AMENDMENTS

The most recent and most controversial statutory expansion of venue has been the addition, in the 1966 amendments, of the words “in which the claim arose” to section 1391. Prior to the passage of these amendments, venue was proper in federal question cases under section 1391(b) only in the “district where all the defendants reside[d].”\textsuperscript{30} This rule barred plaintiffs who wished to bring one suit in a federal court when the action involved multiple defendants residing in more than one district. Hence an anomaly, commonly referred to as “venue gap,” was created: the plaintiff often could find the district court with both proper jurisdiction and amenable service of process, but was barred from bringing the suit because venue was not provided in that district under the statute.\textsuperscript{31}

In 1959 the Judicial Conference of the United States lobbied for and obtained expansion of section 1391 to correct the venue gap problem. The changes allowed venue where the injury took place in automobile tort cases. That expansion was eventually repealed, and superseded by the more general grant in the 1966

\textsuperscript{29} Foster, \textit{supra} note 22, at 36-40.


amendments. Commentators believed not only that venue in the
district in which the claim arose resolved the venue gap problem,
but also that venue at that situs was more likely to be fair and
convenient. No authorities have disputed, however, that in en-
acting the 1966 amendments Congress wanted to assure at least
one proper venue, eradicating the venue gap, in all cases.

The crucial puzzle of the amendments results from Congress’
use of the definite article “the” in allowing venue in “the judicial
district . . . in which the claim arose.” Courts and commenta-
tors have disagreed on whether this language precludes the claim
from arising in more than one district. The disagreement is evi-
denced by two divergent lines of decisions in lower federal courts.
Some courts have interpreted the statute to allow venue in any
district in which any part of the claim arose, while other courts
have determined that the statute restricts venue to only the single
district in which a whole claim arose. Congressional history
“affords little guidance,” making reference to “liberaliz[ing] the
venue provisions” and “providing . . . a more convenient
forum . . . for the litigants,” but not indicating the interpreta-
tion Congress intended with its word selection. Extended debate

33. See Foster, Judicial Economy; Fairness and Convenience of Place of Trial: Long-
Arm Jurisdiction in District Courts, 47 F.R.D. 73, 102-03 (1970).
34. See, e.g., Honda Assocs., Inc. v. Nozawa Trading, Inc., 374 F. Supp. 886, 891
(S.D.N.Y. 1974); Wood, supra note 10, at 397.
36. Compare Commercial Lighting Prod., Inc. v. United States Dist. Court, 537 F.2d 1078, 1080 (9th Cir. 1976) (preferring approach allowing more than one state and district); Liberation News Serv. v. Eastland, 426 F.2d 1379, 1382 n.4 (2d Cir. 1970) (Friendly, J., assumes claim arose “perhaps in both” districts); and Transamerica Corp. v. Transfer Planning, Inc., 419 F. Supp. 1261, 1263 (S.D.N.Y. 1976) (using indefinite article, “in a
307, 315 (S.D.N.Y. 1975) (asserting that all districts are to be compared to discern the
one best suited); and Philadelphia Hous. Auth. v. American Radiator & Std. Sanitary
Corp., 291 F. Supp. 252, 260 (E.D. Pa. 1968) (applying similar approach to select the
district most suitable). See generally 1 Moore’s, supra note 35, ¶ 0.142 [5-2] at 1431-
34.
37. 1 Moore’s, supra note 35, ¶ 0.142 [5-2] at 1431-34. Interpretations range
from the district in which any part of the claim arose to the single district in which the
greatest part of the claim arose. Id.
1974).
& Ad. News 3693, 3694 (emphasis added). See Honda Assocs., Inc. v. Nozawa Trading,
generally precedes congressional acts that effect extreme shifts of existing statutory positions. If Congress had intended the broader expansion involved in recognizing more than one situs of the claim simultaneously, then the absence of controversy over enactment of the amendments is indeed curious. Congressional reports reveal, in addition to the absence of debates, a use of the words "minor change" in a reference to the 1966 amendments by their principal proponent in the House. Authorities supporting the expansive interpretation, however, argue that Congress would not intend to take away with restrictive venue provisions that which it gave with liberal grants of jurisdiction. Although venue gap may have been narrowed with the adoption of the 1966 amendments, the uncertainty fostered by the language of the amendments led to new problems for the lower federal courts.

III. TRENDS AND TESTS IN THE COURTS

The lower federal courts have employed numerous tests to determine where the claim arose for purposes of the venue statutes. This multiplicity of tests stems directly from the controversy surrounding Congress' use of the definite articles in the 1966 amendments. The differing tests applied by courts vary in degrees of restrictiveness. Whether a court interprets the 1966 amendments expansively or restrictively, therefore, tends to determine which test will be selected.

The "weight-of-contacts" test was first considered definitively by a Pennsylvania district court. This test, the most popular, necessitates quantitative and qualitative comparison of each potential forum's contacts with the claim. The weight-of-contacts test has developed in three variations according to courts' interpretation of the restrictiveness required by the statute. Initially, this test precluded venue in all but the single district with the greatest weight of contacts (most-significant-contacts test). The

43. Id. at 260-62. Arguably, the Pennsylvania district court discusses the most-significant-contacts test in dictum; the court's emphases, however, on the conspiratorial meetings among defendants and the need for limiting choices of venue indicate that the court actually applies this test.
same court subsequently indicated in a related case, however, that in order to meet the statutory requirements for proper venue, the contacts between the forum and the claim need only be substantial (substantial-contacts test).44 The many courts applying this variation of the test consider the words of the 1966 amendments in a manner requiring an analysis similar to the minimum contacts, due process and fairness analyses of jurisdiction.45 Under the substantial-contacts test, which tends to provide venue in almost any forum in which jurisdiction is proper,46 the claim could be found to arise in more than one district simultaneously. A liberal modification of the substantial-contacts test is evidenced by recent cases in which it was held that venue was proper in any district where merely "more than miniscule" contacts between claim and situs could be found (more-than-miniscule-contacts test).47 This third variation reflects a court's adoption of the most expansive interpretation of the amendments to section 1391, inherently anticipating that claims arise in more than one district simultaneously.48

The second most widely used test has been the "place of injury" or "impact test."49 Courts invoking this test recognize that the claim originates in the district where the injury occurs or is felt, since the right of action only accrues when the party is injured.50 This test, criticized for being too mechanical and rigid,51 is sometimes paradoxical in its results. A plaintiff most fre-

46. See notes 27 & 41 and accompanying text supra.
48. One criticism of this test is that, in its more expansive forms, it is no different from tests of jurisdiction. In this sense, the weight-of-contacts test amounts to a superfluous exercise.
49. 1 Moore's, supra note 35, ¶ 0.142 [5.-2] at 1434.
frequently will experience injury in the district where he resides, and that district generally will be most convenient for the plaintiff to bring suit. The tendency of the test, which is to allow the selection of the forum at the residence of the plaintiff, aligns the impact test with the most liberal of the purposes of venue—convenience of the plaintiff.\(^{52}\) The tendency of the impact test to mechanically limit the extension under the 1966 amendments to the *one* district in which the plaintiff is injured, however, suggests that the test also is highly restrictive. The results of the impact test, therefore, can be characterized as both liberal and restrictive. Although this paradox between results may be equally indicative of either interpretation, the antinomical quality is not fatal to the effectiveness of the impact test. The courts have not rejected the test because its results fail to fit within consistent categories.

The most important of the other tests used by courts\(^{53}\) has been the “venue by necessity” or “practicality” test. In this analysis, venue is allowed under the “district . . . in which the claim arose” language in any forum vaguely connected with the claim when no other district could have proper venue because the claim engages multiple parties in various districts, or because all substantial contacts occurred in a foreign country.\(^{54}\) This test, essentially a derivative of the weight-of-contacts test, focuses on the need for a forum rather than the propriety of a particular forum. The importance of this test increases as interstate and international commercial ventures increase in number and scope.

All of the less popular tests can fit analytically within the weight-of-contacts schema, and several authorities have recognized this concentricity. The impact and weight-of-contacts tests have frequently been used concurrently.\(^{55}\) Courts and commentators have argued that the place of the injury should be the most heavily weighted contact.\(^{56}\) The practicality test has a different

\(^{52}\) See sources cited at note 28 supra.

\(^{53}\) Other tests include: analogy to doctrines of substantive law, analogy to choice-of-law doctrine, and limitation by long-arm statute only. Many courts, however, apply no recognizable test at all. These approaches have all been widely criticized. See, e.g., 15 C. Wright, *supra* note 18, § 3806 at 28; Wood, *supra* note 10, at 410.


\(^{55}\) *E.g.*, *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 526 (8th Cir. 1973); *Johnson v. Mississippi*, 78 F.R.D. 37 (N.D. Miss. 1977).

focus, but its elements are essentially the same as those of the weight-of-contacts test. Although the variety of tests may be reconciled into one schema, the unresolved problem of interpreting the definite article "the" in the statute creates uncertainty within that schema: are the contacts to be weighed in order to discover the one district in which they are greatest, or merely to eliminate those districts in which the contacts are miniscule and in which venue would be unjustified?

IV. ILLUSORY ANSWERS

The historical trends and competing policies, the indefiniteness of the 1966 amendments, and the wanderings of lower courts searching for a methodology to apply the language of the amendments all demonstrated the need for clarification by the United States Supreme Court. Without a clear definition of the practical meaning of the statute, litigants faced the temporal, financial, and emotional expenses of inconclusive appeals.\(^{57}\) Prior to these amendments, unlucky plaintiffs had even been dismissed for improper venue,\(^{58}\) although transfer is the favored remedy. If the tests chosen allowed venue that was too expansive, due process questions would arise;\(^{59}\) but if the tests chosen were too restrictive, fairness and judicial efficiency would be compromised by excessive transfers and litigation.\(^{60}\) A precise understanding of the statutory language—a definition of the number of districts allowed and a choice of a workable test—used by Congress in the 1966 amendments was necessary.\(^{61}\) *Leroy v. Great Western* offered the Supreme Court an opportunity to provide much needed guidance.

A. The Facts\(^ {62}\)

Great Western United Corporation, a Dallas-based business,

\(^{57}\) See Wood, *supra* note 10, at 399.


\(^{59}\) Foster, *supra* note 22, at 37.

\(^{60}\) Wood, *supra* note 10, at 403; see generally Foster, *supra* note 33, at 105. The theory relied on by defendants was that the more restrictive the tests, the better the chance of transfer, dismissal and dilatory tactics; hence, the rewards for litigating venue become greater and litigation is encouraged.


\(^{62}\) The facts that follow are derived from the Supreme Court and the lower court opinions. 99 S. Ct. 2710 *passim*; 577 F.2d 1256 *passim*; 439 F. Supp. 420 *passim*. 

https://scholarcommons.sc.edu/sclr/vol31/iss3/11
attempted to purchase a significant number of shares in Sunshine Mining and Metal Company, a corporation with most of its assets and activities in Idaho, but with other major interests in New York and Maryland. Great Western complied with all federal disclosure requirements under the Williams Act, which governs corporate tender offers. The Texas corporation also sought favorable preliminary rulings from the Idaho, New York, and Maryland authorities charged with enforcing the respective state takeover statutes. While Maryland and New York officials avoided decisions, the Idaho authorities did review the documents submitted by Great Western, and found that a hearing and additional disclosure was necessary. The Idaho officials then ordered Great Western to suspend its tender offer activities under penalty of a $5,000 fine and three-years imprisonment of its officers. To avoid delay, and to simplify the complexity in meeting the requirements of various states, Great Western filed suit in the Northern District of Texas, its home district, against officials of the three states. As plaintiff in this action, Great Western requested declaratory and injunctive relief and claimed that the various takeover statutes were unconstitutional and preempted by federal law. Since no proceedings had actually taken place in New York or Maryland, the claims against those officials were dismissed for failure to raise justiciable issues. The Idaho officials challenged, among other things, the propriety of venue in the Northern District of Texas.

B. The Lower Court Opinions

The district court refused venue under section 1391(b), apparently basing its decision upon a finding that the impact test

63. 15 U.S.C. §§ 78m(b)-(f), 78n(d)(1) (1976). Amendments to these sections made subsequent to the date Great Western initiated its declaratory action are not noted because Great Western had made all disclosures required of it at the time of its tender offer. Note, however, that some amendments have been made.

64. For elements of the statutes and comparison to the Williams Act, see 577 F.2d at 1263. See also Idaho Code § 30-1501 to -1513 (Cum. Supp. 1979).

65. Neither state felt the conditions were ripe for issuing a ruling since the tender offer was merely pending. Because Sunshine Mining's basic operation was in Idaho, these states chose to wait for the final Idaho ruling. 577 F.2d at 1264.

66. 99 S. Ct. at 2717.

would produce an unmanageable result. Since the restraint of the takeover statute had impact on all the potential offeree shareholders of Sunshine Mining, the plaintiff could have proper venue in any one of many districts with justification equal to that of the Northern District of Texas. This unworkable outcome was avoided by the court, which contended that the language of section 1391(b) recognized only one district in which the claim could arise. The impact test was therefore overridden by the practicality test.

On the question arising from the 1966 amendments, the Court of Appeals for the Fifth Circuit concluded that the district court erred in applying the impact test to the offeree shareholders. The Fifth Circuit reasoned that the situs of the essential effects was Dallas since the restraints injured the offeror corporation, and not the potential sellers, who were not even parties to the suit. Under a venue-by-necessity approach, that court found the Texas district to be the only practical district, since other states with similar regulations could have asserted power over the tender offers and could not justifiably be made parties to the action in Idaho or any other one state.

The conflict between the opinions of the district court and circuit court demonstrates vividly that the facts of *Leroy v. Great Western* provided the Supreme Court with ample opportunity to develop answers to numerous questions surrounding the language "the judicial district . . . in which the claim arose." Both lower courts applied essentially the same tests, but arrived at opposite conclusions. The Supreme Court, at least superficially, answered some of the questions raised by these and other conflicting opinions.

C. The Supreme Court Holdings

The Supreme Court reversed the Fifth Circuit, finding that

68. See notes 49-50 and accompanying text supra.
69. 439 F. Supp. at 433.
70. See note 54 and accompanying text supra.
72. 577 F.2d at 1273 n.5.
73. See note 54 and accompanying text supra.
74. 99 S. Ct. 2710 (1979). The decision was divided six to three. The majority refused the selection of venue under both the provisions of 28 U.S.C. § 1391(b) and § 27 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa (1976). The three dissenting
venue was improper under the general provision of section 1391(b). Justice Stevens in the majority opinion expressly claimed to avoid decision on whether the language of the 1966 amendments allowed venue in more than one district.\textsuperscript{75} The Court held that venue could be proper only in the District of Idaho\textsuperscript{76} for two reasons: under a weight-of-contacts analysis,\textsuperscript{77} the contacts between the claim and the Northern District of Texas fell short of those between the claim and Idaho;\textsuperscript{78} and under a practicality test,\textsuperscript{79} allowing venue in Texas would likewise subject the Idaho officials to suit in the federal districts of at least the forty-eight other states in which Sunshine Mining shareholders resided. The impact test\textsuperscript{80} was seemingly rejected in the opinion.\textsuperscript{81} The Court's decision, however, includes more than mere application of the tests.

The majority opinion asserted that the general venue statute did not authorize the plaintiff to rely on either the economic policy of consolidating suits or the policy of convenience to the aggrieved plaintiff.\textsuperscript{82} These previously acceptable policies apparently were rejected by the Court.\textsuperscript{83} Instead, the majority based its decision on the more traditional policy of protecting the defendant.\textsuperscript{84}

The Court's selection of the more traditional policy consideration indicates the degree of restrictiveness used in interpreting the critical language of section 1391(b). Because the Court chose a policy giving deference exclusively to the convenience of the defendant, a plaintiff now may be allowed only very limited discretion in its choice of a forum. In dictum,\textsuperscript{85} the Court interpreted

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\textsuperscript{75} See 99 S. Ct. at 2717.
\textsuperscript{76} Id. at 2718-19.
\textsuperscript{77} See note 42 and accompanying text supra.
\textsuperscript{78} 99 S. Ct. at 2718.
\textsuperscript{79} See notes 68-69 and accompanying text supra.
\textsuperscript{80} See notes 49-52 and accompanying text supra.
\textsuperscript{81} 99 S. Ct. at 2718.
\textsuperscript{82} Id. at 2717.
\textsuperscript{83} See id. at 2718. See notes 23-27 and accompanying text supra. These policies are rejected, at least for federal question cases.
\textsuperscript{84} 99 S. Ct. at 2717. But see id. at 2717-18 (Court refers to convenience of litigants).
\textsuperscript{85} Id. at 2718. This interpretation is dictum since the Court prefaces the statement...
the 1966 amendments to mean, in essence: If and only if it is unclear that the claim arose in one specific district, the plaintiff then may choose between districts that are equally plausible in terms of (1) availability of witnesses; (2) accessibility of evidence; and (3) convenience to the defendant.86 These three factors have been widely accepted,87 but the Court undermined its own position by erroneously citing Braden v. 30th Judicial Circuit Court88 to support its emphasis on convenience of the defendant alone. In that case the convenience of both parties was crucial; the Braden court concluded that the alternative districts were no less convenient to either party.89

In Leroy v. Great Western, the Court also concluded that the 1966 amendments did not need to be interpreted to support any broad view of the allowable choices of venue, if a more narrow construction did not re-open the venue gap that the amendments were intended to close.90 That Congress did not intend to give the plaintiff an unfettered choice "is absolutely clear,"91 although most authorities agree that the intent of Congress in the 1966 amendments is at best inconclusive.92 The Supreme Court approached these questions of interpretation as it did the application of test and policy questions, with only the appearance of reaching definitive resolution.

V. EXAMINATION OF THE ILLUSIONS

In its choice and application of tests, in its evaluation of policy, and in its suggested interpretation of the statute, the Court confronted the problems that have been faced by the lower

with the words "in the unusual case" and subsequently concludes that "[t]his case is not, however, unusual." Id.

86. The Court's language is as follows:
   [I]n the unusual case in which it is not clear that the claim arose in only one specific district, a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility—in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but not of the plaintiff)—may be assigned as the locus of the claim.

Id.

87. See note 21 and accompanying text supra.
89. Id. at 494.
90. 99 S. Ct. at 2717.
92. See notes 35-41 and accompanying text supra.
courts, but only superficially calmed the confusion. Analysis reveals that the apparent answers dissolve into additional questions and heighten the previous level of disorder.

A. Selection of the Weight-of-Contacts Test

To apply the words "in which the claim arose," the Court apparently chose one of the weight-of-contacts test variations.\(^{93}\) Although the Court did not expressly label its methodology, the test can be identified by the analysis and language in the opinion. The Court's analysis was based on three critical contacts. The Court first analyzed the actions taken in Idaho. The particular actions examined were those manifested in the enactment and operation of the takeover statute. Secondly, the Court relied on the location in Idaho of relevant evidence and witnesses. Finally, the Court examined the nature of the review of Idaho's statute and concluded that the review would be more properly handled by a federal court in the enacting state.\(^{94}\) These three contacts were balanced against any contacts between the claim and the Texas forum.\(^{95}\) The Court recognized that contacts existed in Texas but stated that they fell "far short of those connecting the claim and the Idaho district."\(^{96}\) From the several districts having contacts with the claim, the Court chose the one, Idaho, which had the greatest weight of contacts. The last sentence of the majority opinion states that "the District of Idaho is the only one in which 'the claim arose.'"\(^{97}\) This language identifies the Court's test as the first variation of the weight-of-contacts test, the most-significant-contacts approach.\(^{98}\)

The Supreme Court's revival of this variation of the weight-of-contacts test was not only contrary to the recent trend of case law,\(^{99}\) but also created two distinct problems which cannot be

\(^{93}\) See notes 42-47 and accompanying text supra.

\(^{94}\) 99 S. Ct. at 2718. The Court states:
Most importantly, it is action that was taken in Idaho by Idaho residents—the enactment of the statute by the legislature, the review of Great Western's filing . . . . [T]he bulk of the relevant evidence and witnesses . . . . is also located in the state [of Idaho]. Less important, but nonetheless relevant, the nature of this action challenging the constitutionality of a state statute makes venue in the District of Idaho appropriate.

\(^{95}\) Id.

\(^{96}\) Id.

\(^{97}\) Id. (emphasis added).

\(^{98}\) See note 42 and accompanying text supra.

\(^{99}\) See notes 44-47 and accompanying text supra.
resolved: the maximization of the mechanical difficulty inherent in any weight-of-contacts test, and the creation of a contradiction between implications of this particular test and other language in the opinion.

Authorities have been perplexed in their efforts to develop, in an acceptable manner, precise weights for contacts\(^1\)\(^0\) that seemingly do not possess relative inherent values,\(^1\)\(^1\) are not derived from closely related fields of law,\(^1\)\(^2\) and do not necessarily fit within established balancing schemes.\(^1\)\(^3\) This perplexity is accentuated by use of the most-significant-contacts variation, because this test requires an exacting discrimination between the different weights of the contacts in order to determine the one proper district. The substantial-contacts and more-than-miniscule variations,\(^1\)\(^4\) tests that are only intended to narrow potential venues to those with a rational relation to the claim, require merely a determination that contacts exist. These tests minimize the balancing problem.

Implicit in the Court's selection of the most-significant-contacts variation is that the words of the 1966 amendments allow venue in only one district. This implication contradicts the Court's statement that it decided the propriety of venue "[w]ithout deciding whether this language [of the amendments] adopts the . . . assumption that a claim may arise in only one district."\(^1\)\(^5\) The Court selected a test that by its nature always will determine that a claim arises in one and only one district, but expressly disavowed that it made a decision about the number of districts in which a claim may arise. A pronouncement that a claim can arise at only one situs would not only be contrary to the weight of authority,\(^1\)\(^6\) but also would fail to admit any realistic view of the nature of claims or the mobility of society. The Court recognized the nonsensical basis of any such

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100. 15 C. Wright, supra note 20, § 3806 at 36.
101. For example, what value should be assigned to the factors of convenience both to defendant and the court, or of accessibility of witnesses and nature of impact? These factors have no common elements to compare.
102. For example, the elements in an analogy to substantive law factors and in a consideration of the nature of impact or convenience to a party are not in the same fields of law, and thus are not readily compared. See notes 53, 55-56 and accompanying text supra.
104. See notes 44 & 47 and accompanying text supra.
105. 99 S. Ct. at 2717.
106. See notes 35-41, 44 & 53 and accompanying text supra.
pronunciation by its reference to the "occasionally fictive assumption that a claim may arise in only one district." The intrinsic contradiction between this recognition and the Court's choice of a test that requires a divining of the one district with the greatest weight of contacts leaves an unresolved dilemma. The problems in the mechanics of the most-significant-contacts test, and in the contradiction created by its use, received no treatment in the opinion. Other problems, however, were referred to, but received inadequate consideration.

B. The Role of the Impact Test

The essence of the impact test is that the claim should originate in the district in which the injury occurs or is felt. This test has been employed to fulfill two roles. The courts both have invoked the impact test as an alternative to other tests and have utilized the test as one contact to be weighed in applying the weight-of-contacts test. The Court in Leroy v. Great Western equivocally rejected the impact test as an alternative approach and incorrectly applied it as a consideration in its weight-of-contacts analysis.

Immediately after weighing the contacts with Idaho, the Court asserted that it "therefore reject[s] the Court of Appeals' reasoning that the 'claim arose' in Dallas because . . . that is where Idaho's statute had its impact on Great Western." This language is ambiguous; it could be construed fairly as either a repudiation of the impact test as an alternative approach or as merely a repudiation of the circuit court's application of the test to the facts of the case. On this discrepancy the opinion is cryptic, but because the Court's method of analysis generally followed the weight-of-contacts test exclusively, one presumes that the Court intended the rejection of the impact test as an alternative approach. This presumption is reinforced by the location of the Court's discussion of the contacts in Idaho in the paragraph immediately preceding the language rejecting the impact test.

The precise location of this language in the opinion also indicates that the Court indeed considered the impact test to be an element of the weight-of-contacts test. In the sentence following the rejection language, the Court referred to the impact on Great

107. 99 S. Ct. at 2717 (emphasis added).
108. See notes 55-56 and accompanying text supra.
109. 99 S. Ct. at 2718.
Western as "‘contacts’ between the ‘claim’ and the Texas district"\(^{110}\) that fell short of the Idaho contacts. The Court thus recognized that there was impact in Dallas, but rejected its importance.

The Court’s reliance on the third of its enumerated contacts between the claim and Idaho, the nature of a federal case that reviews the validity of a state statute,\(^ {111}\) additionally suggests that the impact test was used by the Court as an element in the weight-of-contacts schema. One undeniable reason for the Court’s concern over the review of a state statute, additionally suggests that the impact test was used by the Court as an element in the weight-of-contacts schema. One undeniable reason for the Court’s concern over the review of a state statute was the impact that an unfair or incorrect review, which struck down the statute, might have on state objectives that the statute was designed to fulfill.\(^ {112}\) This impact of the outcome of the litigation combined with the usual influences of comity and federalism, neither of which were expressly mentioned by the Court, appears to be the only justification for inclusion of the nature of the review action as an element in balancing the contacts. While the Court stressed this value of the impact in Idaho, the correlative value of the impact in Texas was virtually ignored, or at least greatly discounted. A consideration of the impact on Great Western was excluded from the analysis of the significant contacts giving rise to venue in Idaho.\(^ {113}\) The policy position assumed by the Court tends to mechanically preclude any consideration of convenience of the plaintiff\(^ {114}\) from the operation of the weight-of-contacts test. The Court did, however, acknowledge the existence of an impact in Texas and that this impact was a contact.\(^ {115}\) The weight-of-contacts test has, as a necessary object, the fairness of balancing all contacts relevant to the selection of venue.\(^ {116}\) The perfunctory dismissal of the value of the impact in Texas was, therefore, disconsonant with the objectives of the weight-of-contacts schema.

The Court inequitably administered the impact test within the weight-of-contacts analysis by selecting for consideration only those facts which tended to show impact in Idaho. Facts that the Court arbitrarily omitted from its analysis indicated a coinci-

\(^{110}\) Id.
\(^{111}\) See note 94 and accompanying text supra.
\(^{112}\) 99 S. Ct. at 2718.
\(^{113}\) Id.
\(^{114}\) See notes 82-86 and accompanying text supra.
\(^{115}\) See notes 109-10 and accompanying text supra.
\(^{116}\) See notes 42-48 and accompanying text supra.
idence of impact. The impact on Sunshine Mining Corporation in Idaho would have evolved from the potential takeover by Great Western. The potential sales of stock could have resulted in an impact on the shareholders of Sunshine Mining in at least forty-nine states. These two impacts were in addition to those on the State of Idaho and on Great Western. Logically, the only impacts which would have been included in a test determining venue for the trial were those which affected actual litigants in the action, the State of Idaho and Great Western.

The interests of Sunshine Mining and its shareholders could have been only indirectly affected by the outcome of this suit. If the takeover statute were upheld, these interests would have been considered in the administrative hearings required by the statute. Any decision directly affecting Sunshine Mining or its shareholders would have been made at that administrative level, not at the level at which Leroy v. Great Western was brought. The Court obviously could not determine the results of the Idaho hearings. If the Court had held, however, that the Idaho statute was unconstitutional or preempted, Sunshine Mining and its shareholders still would have received the protection of the federal statute. The potential for success of the offer made pursuant to the federal disclosure requirements could not be predicted accurately from the facts before the Court. Concern with the impact of Leroy v. Great Western on Sunshine Mining or its shareholders in deciding the venue dispute, therefore, could be only speculative and thus improper. Eliminating from consideration the impact on these nonparties, the resulting question arises: whether the impact that should have been considered was the present impact of the allegedly wrongful action on Great Western\textsuperscript{117}—the application of an unconstitutional or preempted statute to the plaintiff; or whether the impact that should have been considered was the future impact of the litigation on the State of Idaho\textsuperscript{118}—the voiding of a state statute.

Distinctions between the application of present and future impacts dictated that the only practicable, fair impact for consideration by the Court was the present impact of the allegedly wrongful action on the plaintiff. The then present impact of the actions of the defendants on the plaintiff was one that could have been accurately measured at the time venue was properly liti-

\textsuperscript{117} See generally Wood, supra note 10, at 408-09.
\textsuperscript{118} Id.
gated, before a decision on the merits. In contrast, the outcome of the litigation would have had a future impact only if the defendants were found to have acted wrongfully in the promulgation or enforcement of the statute. Thus, the future impact could have been analyzed only in retrospect, after the trial was completed. This distinction between the times for accurately measuring impacts demonstrates that the application of future impacts is impractical. The application of future impacts is also unfair because there would be an absence of impact from the outcome of litigation on a defendant prevailing on the merits. Hence, only wrongdoers, defendants losing on the merits, could argue a future impact of the litigation to justify venue. To thus give deference to the interests of wrongdoers while ignoring the interests of innocent parties, the plaintiff in the same case or prevailing defendants in other cases, is a use of the impact test obviously dissonant with fairness.

The distinction between present and future impacts becomes insignificant, however, if the Court was merely pursuing a policy of convenience to the defendant, for then the impact on Great Western was irrelevant. If the Court indeed followed a policy of choosing a place "‘which may be convenient to the litigants’—i.e., both of them," then the impact on the plaintiff becomes a contact of great weight and the distinction between present and future impacts takes on added significance. Pursuant to the conclusion derived from these distinctions, the value of the impact on Idaho would have been excluded from, or at least discounted in any weighing of contacts. The impact of the wrongful action on Great Western alone would have been considered. Therefore, Great Western’s chances of obtaining venue in the Northern District of Texas would have been greatly enhanced.

The Court’s failure to define more precisely its actual bases

119. See generally Barrett, supra note 12, at 612. See also 99 S. Ct. at 2716.

120. This argument is particularly forceful in Leroy v. Great Western, because plaintiff prevailed on the merits at the district court level. The takeover statute was held invalid. See note 67 and accompanying text supra.

121. 99 S. Ct. at 2718.


123. See notes 55-56 and accompanying text supra.

124. Great Western also took actions in Texas (initiation of the tender offer) and would have to supply corporate records as evidence and officers as witnesses. In addition, the nature of the impact on a Texas business arguably could be better assessed in a Texas district court.
of decision regarding the use or rejection of the impact test, as well as its reasoning in support of that decision, increases the previous uncertainty about the status of the tests. Litigants could find ample support in the opinion for either correctly and incorrectly utilizing or rejecting the impact test. The lower courts, therefore, have guidelines that are more confusing than before the 

**Leroy v. Great Western** decision.

### C. A Fact-Tailored Approach

The Court's emphasis on the nature of the review of a state statute may suggest that deference should be given to any unique contacts in a particular case. This deference given to certain peculiar contacts, for example the special relationship of state objectives and state statutes, indicates that the weight-of-contacts test should always be tailored to the facts and substantive law of the case. This expression of the weight-of-contacts test might present problems in establishing clear precedent and predictability for litigants choosing a place for trial in a range of case types that includes antitrust,125 civil rights,126 labor,127 contracts and products liability,128 as well as securities cases like **Leroy v. Great Western.**129

A fact-tailored approach would indeed assist courts in overcoming many of the analytical problems that arise from attempts to weigh seemingly unrelated contacts in a suitable manner.130 The Supreme Court's unclear choice of tests and apparent misuse of the nature of the action as an impact in the weight-of-contacts schema are not cured by this derivative explanation. Rather these deficiencies in the opinion undermine the usefulness of any fact-tailored approach. Because the facts did not justify the deference

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128. *E.g.*, Far-Mar-Co. v. Schultz Cattle Co., 71 F.R.D. 225 (W.D. Okla. 1976). The "district . . . in which the claim arose" language also was added to subsection (a) of § 1391, governing venue in diversity actions. Since any area of the law can be the subject of a diversity action, the import of the controversies surrounding these words is virtually unlimited in scope. See Wood, *supra* note 10, at 407-10.


130. See notes 100-03 and accompanying text *supra*. 

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granted by the Court to the peculiar contacts of Leroy v. Great Western,131 lower courts and future litigants cannot be certain how the test should be tailored.

D. Confusion in Policy and Interpretation

The confusion is only increased by the Court's perfunctory dismissal of the policy bases that support venue in the Texas district.132 Many convincing policies relied on prior to Leroy v. Great Western were rejected by the Court. The most significant of these disapproved policies is convenience to the court. Courts employing this convenience policy have emphasized: the judicial and statutory trends toward expanding venue so it will not constrict broader jurisdictional grants;133 the economy of consolidating suits in one action when possible;134 and the recognition that restricted venue will force plaintiffs in federal question actions, similar to Leroy v. Great Western, to retreat to state courts where venue options are broader.135 Not only was the policy of convenience to the court seemingly disapproved by the Supreme Court in Leroy v. Great Western, but the discussion of the reasons for this rejection raises doubts about its continued validity in deciding venue questions. The Court gave two reasons for rejecting the policy of convenience that would "be served by consolidating the three claims":136 (1) no justiciable claims remained against the officials of New York and Maryland, and (2) the venue statute did not authorize the plaintiff to rely on the convenience of consolidation. No question of consolidation was actually presented since the sole remaining defendants were in Idaho. The Court could have justifiably rejected this version of convenience by its absence alone. The second reason provided by the opinion is ambiguous. The Court did not demonstrate whether it objected to the plaintiff's reliance on the policy or whether it objected to the statute's authorization of the policy. If the Court intended that plaintiffs could not invoke the convenience of consolidation to justify venue, then in the future this consideration will be raised in multi-defendant cases only sua sponte from the bench. Rarely

131. See notes 117-19 and accompanying text supra.
132. See notes 82-86 and accompanying text supra.
133. See note 27 and accompanying text supra.
134. See note 22 and accompanying text supra.
135. Barrett, supra note 12, at 635.
136. 99 S. Ct. at 2717.
would any of the several defendants choose to make this assertion of policy, since it would tend to alleviate the impediments and hardship to the plaintiff's prosecution of several trials.\textsuperscript{137} If the Court intended that this convenience consideration was not authorized by the statute, then the entire concept of the advantage of unified suits is discredited or severely limited. The convenience of consolidation, however, was not expressly repudiated, especially as that concept had been applied to convenience of the courts. The uncertainty emanating from the diversity of policies announced by authorities construing section 1391 and other venue statutes, therefore, has been increased. Instead of relying on the particular facts of this case and avoiding the uncertainty, the Court went beyond that which was necessary and thereby added to the confusion.

Additional policy confusion\textsuperscript{138} exudes from conflicting statements in the opinion, reflecting indecision about which parties' convenience was to be evaluated. The opinion cited protection of the defendant as the purpose of venue\textsuperscript{139} and listed "the convenience of the defendant (but not of the plaintiff)"\textsuperscript{140} as one of the vital elements in its interpretation of the venue statute. The Court also favorably referred to language in a Senate report authorizing venue in a "'place which may be more convenient to the litigants'" and then indicated that the cited language meant "both of them."\textsuperscript{141} The Court curiously cited with approval these two inconsistent policies.

The confusion of policy objectives combined with the ineffectual choice and use of tests renders the Court's suggested "broadest interpretation of the language of § 1391(b)"\textsuperscript{142} inconsequential. In this proposed interpretation, the Court excluded the policies of convenience to the courts or plaintiffs, a questionable and unreliable approach.\textsuperscript{143} The Court instead provided the plaintiff a choice only between districts with "equal plausibility" in terms of (1) availability of witnesses, (2) accessibility of evidence,

\textsuperscript{137} Obviously, defendants generally would not wish to aid a plaintiff in bringing the suit. Defendants would instead make tactical decisions with a goal of spreading out plaintiff's resources, thereby forcing the plaintiff to drop one or more of the suits.

\textsuperscript{138} See notes 121-22 and accompanying text supra.

\textsuperscript{139} 99 S. Ct. at 2717.

\textsuperscript{140} Id. at 2718 (emphasis in original).


\textsuperscript{142} Id. at 2718.

\textsuperscript{143} See notes 21-29 and accompanying text supra.
and (3) convenience of the defendant.\textsuperscript{144} Since the defendant's place of residence is almost always more convenient, the choice of venue will be as restricted in practice now as it was by the 1888 changes in the statute — to the residence of the defendant only.\textsuperscript{145} The plaintiff's choice only arises after a court first determines that the claim does not clearly originate in a single district. The uncertainty of tests, therefore, causes the interpretation to become inoperative, because without a certain analytical system the prerequisite determination of whether the "claim arose in only one specific district"\textsuperscript{146} cannot be established. The Court's broadest interpretation, therefore, besides being mere dictum,\textsuperscript{147} is unreliable and unworkable as precedent when viewed from the perspective of the deficiencies in choice of policy and methodology in the remainder of the opinion.

VI. Conclusion

In terms of the general history and background policies, the legislative intent, and the methodology of previous cases, the trends toward expanded choice of venue were seemingly halted by the \textit{Leroy v. Great Western} decision. The superficial answers supplied by the Court were addressed to the questions that had been raised by the lower courts and commentators since the 1966 amendments to section 1391(b). Upon scrutiny, however, those answers decompose and meld into the most pervasive of recent trends, the continually increasing confusion about the meaning of the words "district . . . in which the claim arose." Rather than resolving any of the uncertainties that have arisen from the words, \textit{Leroy v. Great Western} added to them principally by its inconclusive selection of venue tests and its perfunctory discussion of policy considerations. The Court committed three crucial errors in its analysis: (1) selection of the most perplexing variation of the weight-of-contacts test, the most-significant-contacts variation; (2) an impractical and unfair use of the impact test; and (3) a statement in dictum of an ill-conceived interpretation of the crucial language. These errors were aggravated by the Court's omission of an adequate pronouncement concerning the number of districts in which a claim may arise for purposes of the

\textsuperscript{144} 99 S. Ct. at 2718. See note 86 and accompanying text \textit{supra}.
\textsuperscript{145} See notes 10-18 and accompanying text \textit{supra}.
\textsuperscript{146} 99 S. Ct. at 2718.
\textsuperscript{147} See note 85 \textit{supra}.
statute and by the Court's mechanical repudiation of previously acceptable policy positions.

Although the Court appeared to choose a test and define policy, that appearance is not supported by substance. The practitioner should be cautious about relying on the superficialities of this opinion as a final judicial resolution of venue disputes arising out of section 1391(b). In those courts relying on the illusory answers of Leroy v. Great Western, litigants should expect that results of future evocations of the "district . . . in which the claim arose" language will justifiably and necessarily follow recent patterns of confusion. The Supreme Court should soon have opportunity to refine its position.148

G. Marcus Knight

148. The American Law Institute has proposed a legislative correction as an alternative to the courts' currently futile attempts to make sense of the words of the 1966 amendments. The ALI proposal classifies some of the variables and gives plaintiffs a viable choice of forums. Under this scheme, plaintiffs may bring suit:
   (1) in a district where a substantial part of the events or omissions giving rise to the claim occurred, or where a substantial part of property that is the subject of the action is situated, or (2) where any defendant resides, if all defendants reside in the same state, or (3) where any defendant may be found, if there is no district within the United States that would be a proper forum under (1) or (2).

ALI Study of the Division of Jurisdiction Between State and Federal Courts, Commentary—Federal Question, Section 1314, Subsection (a), at 217 (1969). A legislative correction may indeed be the solution and the confusion after Leroy v. Great Western may be the strongest lobbying tool to use in Congress.