

# ARTICLE

## TRANSFERRED JUSTICE: AN EMPIRICAL ACCOUNT OF FEDERAL TRANSFERS IN THE WAKE OF *ATLANTIC MARINE*

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### ABSTRACT

This Article presents empirical findings on motions to transfer in the wake of the Supreme Court's decision in *Atlantic Marine Construction Co. Inc. v. United States District Court for the Western District of Texas*. Based on an original dataset of roughly 15,500 federal transfers over three years, it traces the evolving patterns of interdistrict transfers and how doctrinal changes affect the flow of cases between districts.

These patterns suggest both beneficial and troubling aspects of the federal transfer system. On the beneficial side, transfers do important work in regulating and directing the massive flow of prisoners' rights and habeas corpus litigation. Any reform of the federal transfer regime must be mindful of this important function.

On the troubling side, many transfers in a broad range of cases occur very quickly, without hearings, and often on the initiative of the courts rather than the parties. This gives inexperienced and vulnerable plaintiffs little time to challenge the transfer. Also, many transfers benefit corporate defendants and adversely affect individuals whose cases are transferred far away from their chosen forum. Together, the findings of this Article suggest that transfers make litigation more efficient but

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also frequently tilt the litigation playing field in favor of institutional actors at the expense of individuals.

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#### I. INTRODUCTION

There are two narratives about interdistrict transfers. The first narrative emphasizes that transfers might be efficient tools to move cases closer to where parties and witnesses reside and to cure jurisdictional defects on the cheap.<sup>1</sup> For example, transfers

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1. See *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (“[T]he purpose of [interdistrict transfers] is to prevent the waste ‘of time, energy and money’ and ‘to protect litigants, witnesses and the public against unnecessary inconvenience and expense.” (quoting *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26–27 (1959)); *Hoffman v. Blaski*, 363 U.S. 335, 351 (1960) (Frankfurter, J., dissenting) (“Section 1404(a) was devised to avoid needless hardship and even miscarriage of justice by empowering district judges to recognize special circumstances calling for special relief.”); *Norwood v. Kirkpatrick*, 349 U.S. 29, 35 (1955) (Frankfurter, J., dissenting) (“It is often said that the plaintiff may not, by choice of an inconvenient forum, ‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.” (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947))); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 939 (1947) (welcoming transfer reforms as hopefully “go[ing] far to relieve the federal judiciary of self-imposed obstacles to the efficient administration of the law governing place of trial”); David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 445 (1990) (“[W]here the plaintiff has chosen a district arbitrarily or to harass a defendant, the defendant may seek a transfer to a more convenient federal district.”); cf. Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 99 (1965) (“[T]he section has received nearly unanimous praise

grounded in the ex ante consent of the parties might lead to lower litigation costs.<sup>2</sup> This narrative highlights cost-savings and efficiency.<sup>3</sup>

The second narrative stresses that transfers of cases to distant forums can impose significant costs on plaintiffs who have to litigate far from their chosen forum.<sup>4</sup> Such transfers will skew the litigant's bargaining power. It might even make suits unviable. If true, this raises the specter that interdistrict transfers could harm the most vulnerable plaintiffs: individuals, often suing pro se, litigating against large corporations and other well-funded institutional actors, seeking redress in sensitive areas like civil rights violations.

But which of these two narratives captures the empirical workings of interdistrict transfers? A well-established body of literature has explored the normative underpinnings and doctrinal coherence of the federal transfer system.<sup>5</sup> This body of

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from the commentators and the courts in light of its unexceptionable objectives of convenience and justice.”).

2. See, e.g., Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856–60 (2006) (noting that ex ante contract procedure can “increase the incentive bang for the enforcement buck”); see also Eric B. Travers & Peter A. Berg, *Forum-Selection Clauses After Atlantic Marine*, CONSTRUCTION LAW., Summer 2014, at 6, 6 (“Particularly where a company works over broad geographical areas, forum-selection clauses are a way to avoid the drudgery and expense of having to litigate disputes in a large variety of different forums.”).

3. See generally David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 U.C.L.A. L. REV. 605, 607 (2010) (“Conservative courts and commentators, business groups, and the defense bar see contract procedure as an economic necessity.”).

4. See Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (“[A]rbitration and forum selection clauses in contracts of adhesion are sometimes a method for stripping people of their rights.”); Travers & Berg, *supra* note 2, at 6 (“Particularly burdensome forum-selection clauses can make it difficult for an injured party to get its day in court. This often happens when a forum-selection clause requires all disputes to be adjudicated near the larger company’s home office, but hundreds or thousands of miles from where the dispute arose and where the injured party may reside.”); Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 494 n.36 (1956) (“As a delaying tactic it has few equals; as a control of jury trial its significance is unfathomable.”). See generally Horton, *supra* note 3, at 608 (“[L]iberal-minded observers, public interest organizations, and trial lawyers assert that consumers cannot negotiate, do not read, and cannot understand procedural terms.”).

5. Federal courts can transfer civil cases under five statutes. See 28 U.S.C. § 1404 (2012) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”); 28 U.S.C. § 1406 (curing filing in an improper division or district); 28 U.S.C. § 1631 (curing want of jurisdiction); 28 U.S.C. § 2241(d) (authorizing transfer in habeas-corpore cases between district of confinement and the district of conviction); 28 U.S.C. § 1407 (transferring multidistrict litigation proceedings for coordinated or consolidated pretrial proceedings). I will use the term “federal transfer system” to refer to the use of the first four statutes collectively. Tellingly, federal docket sheets typically do not distinguish between the four

literature is now revived by an onslaught of new articles on transfers<sup>6</sup> in the wake of the Supreme Court's 2013 opinion in *Atlantic Marine*.<sup>7</sup>

Yet despite this outpouring of scholarship, we still do not know the most basic empirical facts about interdistrict transfers. How many cases are affected? In what subject areas? Are transfers mostly used against individual litigants, corporate litigants, or government litigants? How long does it typically take for cases to be transferred? How far are they transferred? Is there variation between circuits? And did *Atlantic Marine* change things?

It is difficult to provide a full evaluation of the federal transfer system and of *Atlantic Marine* without having answers to at least some of these empirical questions. Transfers might be innocent procedural vehicles to realize litigation efficiencies completely divorced from affecting the underlying suits. Or transfers might chill litigation by vulnerable plaintiffs and exacerbate litigation advantages to the point where litigation outcomes have little connection to the underlying merits of the suit. Doctrinally, both of these extremes are imaginable. But until we have more empirical answers to how transfers actually work, we will have few resources to assess doctrinal recommendations.

This Article takes initial steps to build toward such answers. It presents empirical findings on interdistrict transfer patterns in the wake of *Atlantic Marine*.<sup>8</sup> The only other empirical study of federal transfers is a well-received, useful, and path-breaking inquiry by Professors Clermont and Eisenberg from 1995.<sup>9</sup> It provided a first account of the effect of transfers on outcomes and

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(they are, however, very clear on multidistrict litigation (MDL) transfers). The data presented in this paper does not include any MDL cases because they raise unique doctrinal and normative questions and concerns.

6. See, e.g., Andrew D. Bradt, *Atlantic Marine and Choice-of-Law Federalism*, 66 HASTINGS L.J. 617 (2015); Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643 (2015); Scott Dodson, *Atlantic Marine and the Future of Party Preference*, 66 HASTINGS L.J. 675 (2015); Robin Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693 (2015); Linda S. Mullenix, *Gaming the System*, 66 HASTINGS L.J. 719 (2015); Stephen E. Sachs, *Five Questions After Atlantic Marine*, 66 HASTINGS L.J. 761 (2015); Bradley Scott Shannon, *Enforcing Forum-Selection Clauses*, 66 HASTINGS L.J. 777 (2015); Adam N. Steinman, *Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795 (2015).

7. *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568 (2013).

8. As such, this Article does not touch upon interdistrict transfers in bankruptcy proceedings, MDL transfers, or transfers in criminal cases.

9. Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995).

reported a significant drop in plaintiffs' win rates after transfers.<sup>10</sup> Because of data limitations,<sup>11</sup> that study, unlike the present one, did not characterize transfer patterns based on sending and receiving courts, the pro se status of litigants, the time from filing a case until transfer, or based on the identity of the litigants.<sup>12</sup>

This Article presents a different and complementary account of transfers. It is designed to inform the doctrinal and normative scholarship that has sprung up in response to *Atlantic Marine*. However, like the Clermont and Eisenberg study, the present Article is unable to analyze denied transfer motions.<sup>13</sup> Instead, this Article is limited to study the universe of actual transfers. It proceeds in three Parts.

Part II introduces an original dataset of roughly 15,500 federal transfers over the course of the last three years. It explains how this data collection approach contributes to evolving normative debates in ways that doctrinal scholarship cannot. Most notably, doctrinal scholarship is focused on cases that produce opinions reported on Westlaw or LexisNexis while the present dataset is built on docket sheets that exist for all federal cases, whether they produce reported opinions or not (most do not).

Part III examines different aspects of current transfer patterns. It shows which types of cases are transferred the most, between which circuits, and how much time it takes to transfer cases. Troublingly, many transfers occur very quickly, giving inexperienced and vulnerable plaintiffs little time and opportunity to combat the transfer. This Part also demonstrates that most transfers are initiated by corporations and adversely affect individuals. The findings of this Part suggest that

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10. *Id.* at 1511 (“The most striking result that our more comprehensive data set yielded is the dramatic drop in plaintiffs’ rate of winning after transfer of venue.”).

11. The study relied on data from the Administrative Office of the United States Courts (“A.O. data”), which is limited in some ways but superior in others. *Id.* at 1512. Most notably, A.O. data includes a massive number of both transfer and non-transfer cases, codes for disposition timing, and disposition method. *Id.* at 1512, 1519–21.

12. The A.O. database does include codes for when the basis of invoking a federal jurisdiction transfer is due to the United States being a plaintiff or defendant. *Id.* at 1523–24; *see also* 28 U.S.C. § 1345–1346 (2012). Also, the data distinguishes between individuals and corporations in diversity cases for fiscal years 1987–1991. Clermont & Eisenberg, *supra* note 9, at 1516. Outside these exceptions however, A.O. data generally makes it difficult to group litigants into more detailed categories.

13. Clermont & Eisenberg, *supra* note 9, at 1512 (noting the available “data do not contain many things one would like to know, such as the occurrence of transfer motions made but denied”).

transfers distort the litigation playing field and tilt it in favor of institutional actors at the expense of individuals.

Part IV traces the impact of *Atlantic Marine* on this state of affairs by examining transfer patterns longitudinally. It finds that *Atlantic Marine* did not modify overall transfer levels but might have started to recalibrate the composition of which entities are affected by transfers.

These findings are limited in scope and will certainly not end normative debates about transfers. However, they inform doctrinal scholarship by emphasizing previously neglected beneficial and potentially troublesome ways in which transfers are currently used.<sup>14</sup> On the upside, transfers seem to do important work in regulating and directing the massive flow of prisoners' rights and habeas-corpus litigation.<sup>15</sup> Any reform of the federal transfer regime must be mindful of this important function. On the flipside, this Article provides transfer critics with new ammunition to challenge lopsided uses of transfers.

## II. DATA AND DATA LIMITATIONS

Transfers are pretrial motions that rarely prompt opinions that are reported on Westlaw, LexisNexis, or the like.<sup>16</sup> This means that doctrinal scholarship focused on such published opinions might work with a biased sample of transfers. Cases that result in published opinions are, almost by definition, exceptional cases because there was something about them (the complexity, the parties' tenacity or know-how, etc.) that prompted the district court judge to write an opinion and for Westlaw or LexisNexis to publish that opinion.<sup>17</sup>

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14. As such, I am trying to take seriously Professor Clermont and Eisenberg's observation that "[c]ritics of transfer of venue tend to overlook its benefits and to overstate its costs." *Id.* at 1530.

15. See *infra* Part III.B (showing that prison conditions and habeas corpus cases comprised the majority of transfer actions from 2012 to 2014).

16. Roughly 5000 non-MDL, non-bankruptcy civil cases are transferred each year, compared with roughly 200 reported opinions on Westlaw. See *infra* Part III.A; see also Clermont & Eisenberg, *supra* note 9, at 1530 ("[V]ery few § 1404(a) transfer motions are contested or difficult enough to be interesting or important."); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 975 n.4 (2008) ("A Westlaw search for 'forum selection clause' in the same sentence as 'motion' and 'dismiss' or 'transfer' in the ALLFEDS database, limited to the year 2006, yielded 168 results. Given that many clause enforcement decisions are not reported, the real number is likely higher.").

17. See generally Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683 (2014) (highlighting the implications of unpublished procedural decisions).

Most transfers are not like that. Most transfers fly under the radar and are never reported. That does not mean that they are unimportant. Transfers might effectively terminate cases by making litigation in a distant forum too expensive for the plaintiff to further pursue an action. Transfer motions are thus good examples of the importance of motion work that is difficult to study comprehensively by only using published opinions.<sup>18</sup>

Similarly, transfers rarely trigger appellate review and appellate opinions. Orders granting or denying a motion to transfer are interlocutory and thus not immediately appealable as a “final decision.”<sup>19</sup> Since most transfer cases are settled, dismissed voluntarily, or dismissed for lack of prosecution, they never result in a final decision and are never appealed.<sup>20</sup> Even when a transfer order becomes appealable, few potential appeals are likely to succeed because the review of the order to transfer is merely for abuse of discretion.<sup>21</sup> This discourages litigants from

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18. Even if the sample was not completely biased, how would we ever know the ways in which it is representative or not?

19. 28 U.S.C. § 1291 (2012); *Liberi v. Taitz*, 425 F. App'x 132, 133 (3d Cir. 2011) (dismissing appeal from an order for lack of appellate jurisdiction because an order of transfer under § 1404(a) is interlocutory and not immediately appealable); *In re Leggett & Platt, Inc.*, 425 F. App'x 903, 903–04 (Fed. Cir. 2011) (finding that an appellate court should only in rare instances reverse a lower court's refusal to transfer); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1322 (Fed. Cir. 2008) (“Interlocutory review of a transfer order under 28 U.S.C. § 1292(b) is unavailable.”); *Seville v. Martinez*, 130 F. App'x 549, 551 (3d Cir. 2005) (“An order transferring venue is not a final or appealable order.”).

20. See *Clermont & Eisenberg*, *supra* note 9, at 1521–22 (finding that most judgments are settled, dismissed voluntarily or dismissed for lack of prosecution). Mandamus or certified appeals are rarely granted. See *United States v. McGarr*, 461 F.2d 1, 5 (7th Cir. 1972) (“[M]andamus is an extraordinary writ to be used only in exceptional circumstances”); Andrew Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1643, 1658–59 (2011) (“[A]ppellate courts typically refuse to accept [certified] appeals . . . [I]n fiscal year 2000, . . . only 2.3% of mandamus petitions succeeded . . .”). Appeals invoking the “collateral order” doctrine are sometimes successful. See, e.g., *Gower v. Lehman*, 799 F.2d 925, 927 (4th Cir. 1986). *But cf. Zani v. Soc. Sec. Admin.*, 323 F. App'x 286, 287 (4th Cir. 2009) (“[Petitioner] seeks to appeal the district court's order transferring his action to the United States District Court for the Northern District of Texas . . . . The order [Petitioner] seeks to appeal is neither a final order nor an appealable interlocutory or collateral order.”).

21. See, e.g., *In re Nissim Corp.*, 316 F. App'x 991, 992 (Fed. Cir. 2008) (“Absent a clear abuse of discretion, an appellate court will not reverse a court's decision to transfer a case . . . . Weighing of the factors for and against transfer involves subtle considerations and is best left to the discretion of the trial judge.” (internal quotations omitted) (first quoting *Brown v. Conn. Gen. Life Ins. Co.*, 934 F.2d 1193, 1197 (11th Cir. 1991); and then quoting *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979)); *In re Denso Corp.*, 263 F. App'x 861, 862 (Fed. Cir. 2008) (“The Sixth Circuit reviews a district court's decision whether to transfer pursuant to section 1404(a) for abuse of discretion. . . . Where a matter is committed to [the trial court's] discretion, it cannot be said that a litigant's right to a particular result is ‘clear and indisputable.’” (internal quotations omitted) (citations omitted)); *D.H. Blair & Co. v. Gottdiener*, 462 F.3d

pursuing appeals even where appeals are available. Also, inexperienced litigants might be confused about the timing of appeals and whether the proper appellate court is the appellate court overseeing the transferee or transferor district court.<sup>22</sup> As such, appellate courts and the Supreme Court regulate transfer doctrine that applies to all transfers based on the highly unusual set of transfer cases that come before it.

The aim of this Article is to provide a portrait of the federal transfer system that avoids such biases and helps courts, commentators, and policymakers to evaluate transfers more holistically. To do so, we must go beyond district court opinions, appellate opinions, or Supreme Court decisions.

The most comprehensive account of transfer activity is contained in federal docket sheets.<sup>23</sup> The docket sheets contain information about each case before federal courts, including the parties, the nature of the suit, all court appearances, and case activity. Docket sheets contain one of the most fine-grained accounts of what actually happens in federal courts.

Using these docket sheets, I collected information on 15,500 successful transfers over the course of the last three years (transfers in the years 2012, 2013, and 2014). This time period covers two years prior to *Atlantic Marine* and one full year since then.

This new dataset provides an unprecedented view of transfers. Its main virtue is that it is fine-grained.<sup>24</sup> For example, the docket sheets allow us to pinpoint transferee and transferor circuits, districts, and even divisions in ways never done before.

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95, 106 (2d Cir. 2006) (“Although venue would also have been proper in Florida, the district court in the S.D.N.Y. did not abuse its discretion by refusing to transfer the case. . . . District courts have broad discretion in making determinations of convenience under Section 1404(a) and notions of convenience and fairness are considered on a case-by-case basis.”).

22. See *Tricome v. eBay, Inc.*, 486 F. App’x 639, 640 (9th Cir. 2012) (holding the court lacks jurisdiction to review the decision to transfer by a district court outside of its circuit to a district court within its circuit); *Thompson v. United States*, 445 F. App’x 878, 881 (7th Cir. 2011) (“We have jurisdiction to review an order from a court within our territorial jurisdiction denying a motion to transfer a suit back to the transferor district. But we do not have jurisdiction to review a transfer order from a court outside of our territorial jurisdiction.”); Mullenix, *supra* note 6, at 724 (“*Atlantic Marine* has left the parties in doctrinal limbo concerning what law, what forum, and the timing of [determining the validity of a forum selection clause].”).

23. Available from a number of places, including PACER and Bloomberg Law. See PUB. ACCESS TO COURT ELECTRONIC RECORDS, <https://www.pacer.gov/> (last visited Apr. 22, 2016); see also BLOOMBERG LAW, <https://www.bloomberglaw.com/dockets> (last visited Apr. 22, 2016).

24. The only other empirical study of transfers that I know of used a larger dataset that was less detailed. See generally Clermont & Eisenberg, *supra* note 9, at 1507, 1512 (using a data-set from the Administrative Office of the United States Courts).



The docket sheets also specify litigant identities in ways that published opinions typically do not. For example, an opinion might identify a defendant as “Gore” without indicating whether this is a corporation, township, or individual. Having more information about the litigants allows us, for the first time, to analyze how different types of entities use transfer motions and differentiate between transfers used primarily by individuals and those primarily used by corporate and government litigants.

The main limitation of using these docket sheets is that they only allow us to study *actual* transfers, rather than the world of all *attempted* transfers. This is because motions to transfer are often grouped with other pretrial motions and courts do not systematically highlight them in the docket sheets. I was unable to develop a filtering device to detect with sufficient confidence transfer motions. Actual transfers, in contrast, are easily detectable because they necessitate a transfer out of a court and a transfer into another court (both significant events that require clerks to physically or electronically move a case file to another court and that always trigger clearly marked docket entries).

Studying all successful and unsuccessful motions to transfer would require a very different research design. Successful transfer motions occur in roughly 2% of all civil federal cases.<sup>25</sup> Assuming, without knowing, that roughly half of all transfer motions succeed, that would mean that transfer motions are made in only 4% of all cases. A study on all attempted transfer motions would thus have to sample civil federal cases, manually pull all motions and perhaps even transcripts (because some transfer motions might be made by oral motion), and zero in on the relatively rare cases that do indeed have transfer motions. Doing this time-consuming work for a thousand cases would yield roughly forty cases where transfers were attempted. Even with abundant research resources, it would be very difficult to build a dataset this way that could provide a detailed portrait of transfer activity. Notice, however, that such an approach would complement the approach of the current Article because it could provide more detailed answers about which transfer statutes are commonly invoked,<sup>26</sup> who moved for the transfer, and how often

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25. See *infra* note 42 and accompanying text.

26. Previous studies similarly struggled to disaggregate transfers under different transfer statutes. See Clermont & Eisenberg, *supra* note 9, at 1528 (“[T]he transfer number and percent include transfers other than those under the relevant transfer provision . . . . Although the A.O.’s instructions to clerks and lawyers limit the relevant transfer code to § 1404(a) transfers, there is no code for other transfers into the district except for multidistrict litigation under 28 U.S.C. § 1407. Thus, transfers under special

forum selection agreements are implicated. I will leave such work for future researchers and focus here on an initial portrait of successful transfers.

### III. AN EMPIRICAL PRIMER ON TRANSFERS

To begin the difficult work of evaluating transfers, we have to characterize transfer patterns first. This Part presents findings on transfers that occurred over the last three years, encompassing the years leading up to *Atlantic Marine* and the transfers during the year following. It shows which types of cases typically are transferred,<sup>27</sup> between which districts,<sup>28</sup> how long it takes from filing to transfer,<sup>29</sup> which types of entities are most affected by transfers,<sup>30</sup> and each of these factors' relevance to pro se litigants.<sup>31</sup> The findings of these Sections suggest that doctrinal scholarship has focused on atypical cases and has neglected both important normative concerns and potential benefits raised by the federal transfer regime.

#### A. Which Type of Cases?

This Section takes a first step towards characterizing transfer patterns. It shows which types of cases are transferred most commonly. This is an important research question because different subject areas raise different normative concerns. For example, antitrust enforcement actions raise broad public policy issues but rarely implicate radical imbalances in litigation resources. In contrast, consumer contract cases often turn on “prelitigation gamesmanship to achieve strategic advantage” that can favor corporations over individuals and exacerbate unequal litigation opportunities.<sup>32</sup>

Similarly, much of the doctrinal literature on transfers has focused on cases with a forum selection clause.<sup>33</sup> This is

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statutes, such as the very different transfers under 28 U.S.C. § 1406(a) to correct improper judicial jurisdiction or venue, appear in the § 1404(a) transfer totals.”).

27. See *infra* Part III.A.

28. See *infra* Part III.B.

29. See *infra* Part III.C.

30. See *infra* Part III.D.

31. See *infra* Parts III.A–D (explaining how the case type, the particular transferor and transferee district, and the amount of time it takes to transfer relates to inexperienced and vulnerable litigants, who are typically pro se).

32. Mullenix, *supra* note 6, at 722.

33. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1105 (2011) (“[I]t is no exaggeration to say that, with little exception, parties presently can largely control jurisdiction by contract.”); Marcus, *The Perils of Contract Procedure*, *supra* note 16, at 975 (“The forum selection clause addresses a key

understandable because numerous high-profile cases emphasized the extent and limits of private choices over the proper forum to resolve disputes.<sup>34</sup> Of course this presumes the existence of a contractual relationship between the litigants. But not all subject matters implicate contracts. Predictably, contractual relations between the litigants are far more common in insurance cases than intentional tort cases. Also, the doctrinal shift in *Atlantic Marine* specifically affects cases with pre-suit forum selection agreements.<sup>35</sup> Because not all subject matters implicate contracts, *Atlantic Marine* predictably will affect some subject areas more than others. But before we can evaluate the normative impact of this doctrinal shift, we first have to determine which cases in which subject areas are actually transferred.

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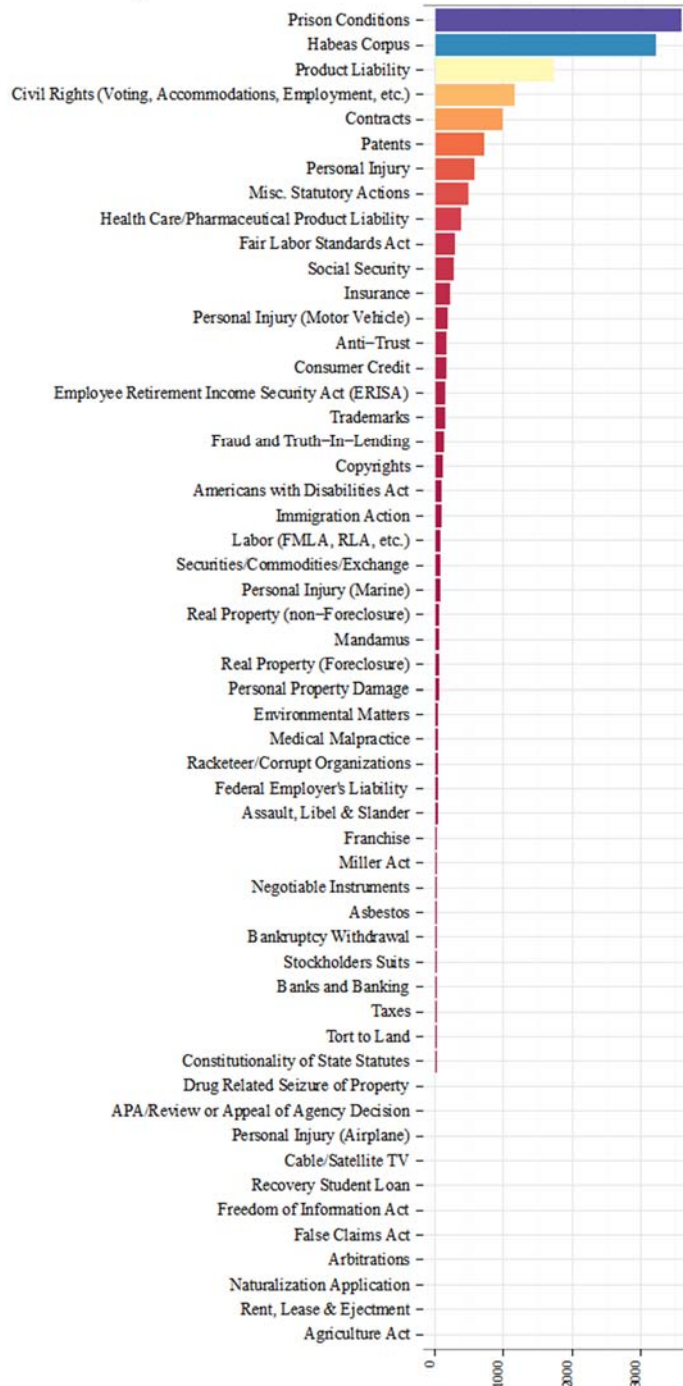
aspect of litigation—the place of suit—and thus is among the most important and pervasive types of contract procedure.”); Mullenix, *supra* note 6, at 723 (noting “the pervasive utilization of such [forum selection clauses] by business entities in consumer transactions”); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1140 (2006) (noting that consent has become “the preferable modality for conflict resolution”); Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 366 (2003) (“Enforcing contract provisions that choose the law that applies to the contract can be efficient because these clauses reduce the uncertainty of vague conflict-of-laws default rules and help contracting parties avoid the application of inefficient mandatory rules.”); Scott & Triantis, *supra* note 2, at 856 (“It is now common for parties to agree to have disputes resolved by arbitration rather than by litigation or by the court of a specified venue.”). *See generally* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1362–67 (2012) (discussing the criticisms and advantages of consumer contracts modifying the rules of dispute resolution); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 595–99 (2007) (discussing the history and limitations of modifying the rules of dispute resolution through contracts); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597–99 (2005) (discussing issues that arise from modifying the rules of dispute resolution through contracts); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431 (1993) (presenting a more in-depth look at the history and theories of modifying the rules of dispute resolution through contracts and the modern court’s approach to enforcing them).

34. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–95 (1991); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–15 (1972).

35. *Travers & Berg, supra* note 2, at 15.

Figure 1 shows the number of transfers by the subject area of the suit. It contains numerous surprises and insights.

Figure 1: Number of Transferred Cases (2012–2014)



Notice that prison conditions and habeas corpus cases encompass the majority of transfers. Together, they account for roughly as many transfers as all other subject areas combined.<sup>36</sup> These types of suits raise unique normative and procedural issues in part because of the unique characteristics of these plaintiffs and the unique procedural posture.<sup>37</sup> Most articles on transfers overlook these types of cases altogether, but this overlooks the important function transfers play in many of these cases.

Prisoners typically litigate pro se and frequently file their prison condition complaints in inappropriate forums.<sup>38</sup> Many prisoners also file frivolous lawsuits in distant forums and transfers to a forum closer to home help the court system supervise such prisoners effectively.<sup>39</sup> The dataset contains examples of prisoners filing simultaneous suits in twenty to thirty federal district courts. These courts frequently transfer such cases to a district familiar with a particular prisoner.

Transfers in this context can make litigation and court administration more efficient without raising overpowering normative concerns.<sup>40</sup> Any reforms or proposed modifications of the current transfer regime must take care not to disturb this function of transfers that arises in a large number of cases.

The most commonly transferred cases after prisoners' rights and habeas corpus cases are (in order): products liability,<sup>41</sup> civil

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36. This represents a striking increase from the roughly 25% of transfers reported for prisoner cases in an earlier study. Clermont & Eisenberg, *supra* note 9, at 1527.

37. See, e.g., 42 U.S.C. § 1997e(a) (2012) (exhaustion requirement for prisoners' rights suits); see also *Jones v. Bock*, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the [Prison Litigation Reform Act of 1995] . . ."); *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) (noting that under the Prison Litigation Reform Act, "[e]xhaustion is no longer left to the discretion of the district court, but is mandatory").

38. Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 277–85 (2010); Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 821–22 n.7. This might mean that most of these transfers are under § 1406(a) rather than § 1404(a). For a discussion on the statutes for transfers of civil cases in federal courts, see *supra* note 5. Because courts are haphazard about specifying which statute they invoke when transferring cases, the data cannot specify the breakdown between the two.

39. None of this should obscure the important point that many prisoner suits are not frivolous and face often insurmountable uphill battles.

40. See *infra* Part III.B (noting that prisoners' rights and habeas suits are typically transferred within circuit, and often even within districts rather than sent far away).

41. The category of products liability cases excludes pharmaceutical products liability cases, which appear further down the list. The two are sufficiently different (and sizable) to separate. In contrast, civil rights cases encompass voting, accommodations,

rights, contract, patent, and personal-injury cases. Products liability and civil rights cases raise strong practical and normative concerns. Both frequently pit plaintiffs with few litigation resources against better-funded defendants who can exploit transfers to tilt settlement negotiations in their favor. Together, products liability and civil rights cases account for about 1 in 5 transfers.

All of these categories amount to roughly 15,500 transfers in three years (consistently around 5,000 per year). This is a large number, to be sure, but it encompasses only about 2% of all federal cases.<sup>42</sup> Transfers thus remain a rarely used pretrial option, about as rare as trials. Of course this number could be much higher if the doctrine became more transfer friendly. It is tempting to read *Atlantic Marine* in this manner. In it, the Supreme Court encouraged the inclusion of forum-selection clauses in contracts by making enforcement quicker and more predictable. Later Sections will examine the effects of *Atlantic Marine* over the course of the following year. For now, it suffices to point out that its doctrinal shifts cannot affect the many subject areas where there is typically no preexisting contractual relationship between litigants (e.g., prisoners' rights or patents).

### B. *Between Which Districts?*

Understanding the types of cases typically transferred is helpful, but we also need to understand transfer flows. This Section shows transfer patterns between and within different circuits. It contributes to the body of literature by showing that most transfers occur within circuits, rather than across circuits. This is significant because a transfer from the Eastern District of N.Y. to the Southern District of N.Y. imposes smaller litigation costs on plaintiffs than a transfer from New York to California. This Section also demonstrates that different subject areas have different transfer patterns. For example, while prisoners' rights suits are typically transferred within circuit, products liability and patent cases are more often sent to distant circuits.

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employment, and a host of other civil rights categories (some rather small). As with all data categorization, future research might find it useful to aggregate or disaggregate various categories.

42. Again, this is the percentage of actually transferred cases, not cases where there was a motion to transfer. See *Table JCI—U.S. Federal Courts Federal Judicial Caseload Statistics*, U.S. CTS. (Mar. 31, 2014), <http://www.uscourts.gov/statistics/table/jci/federal-judicial-caseload-statistics/2014/03/31> (providing the total number of federal civil cases filed annually for the years 2005, 2010, 2013, and 2014 as between 271,950–303,820).

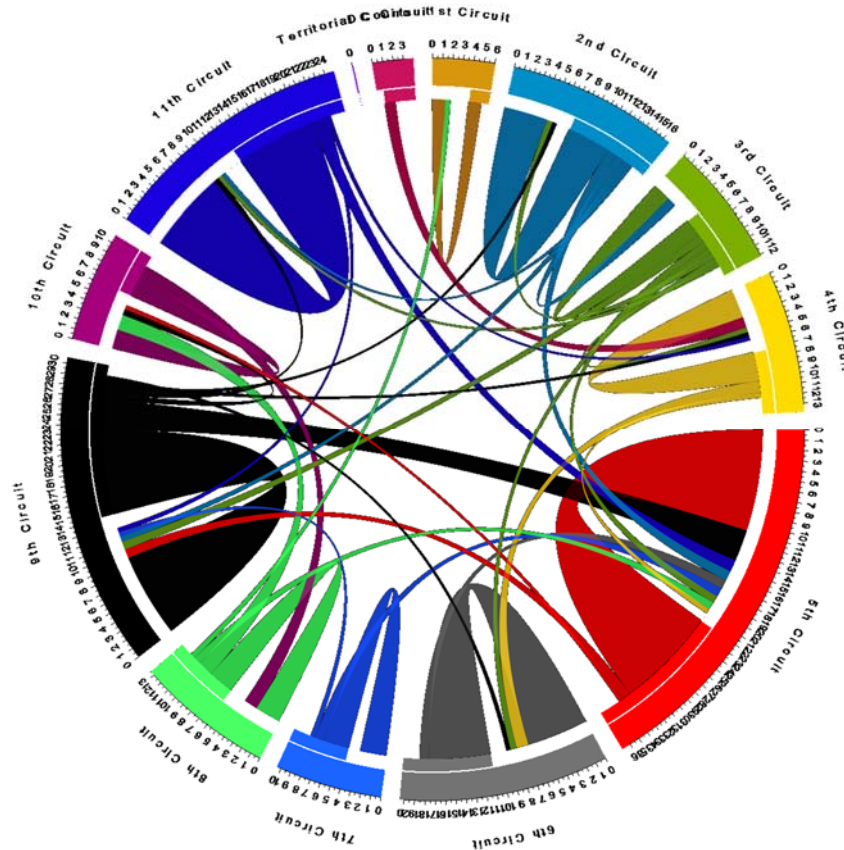
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## TRANSFERRED JUSTICE

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We begin with an overview of all transfers in the years 2012–2014. Figure 2 shows the origin of those transfers and termination points.<sup>43</sup>

Figure 2



Each circuit is represented by a color.<sup>44</sup> Cases originating from that circuit have the same color and are bundled together towards their target circuits. The numbers around the circle add up to 200% (100% for outgoing cases, 100% for incoming cases).<sup>45</sup>

43. An interactive version of this Figure can be found at [www.michalski.ch](http://www.michalski.ch) (last visited Apr. 22, 2016).

44. I grouped the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands into their own category in part because they are physically distant from most other Circuits and because 28 U.S.C. § 1404(d) singles them out for unidirectional treatment (transfers *from* a district court to one of these courts is not permitted).

45. For ease of interpretation, I reduced visual clutter by removing very small connections between circuits (e.g., a thin line connecting the First and Seventh Circuit, who rarely send cases to each other).

This circle, in short, compresses a huge amount of information (15,500 transfers from one district court to another) into a format that allows for interpretation and analysis.

One lesson that becomes immediately apparent in this Figure, but that has escaped scholarly attention, is that most transfers occur within the same circuit (or even the same district). Roughly 55% of all transfers are from one district in a circuit to another district in the same circuit. For example, the Fifth Circuit (represented here in red on the right side) transfers more cases intracircuit than intercircuit as shown by the red band that begins and ends on the red section of the circle. This lessens concerns about choice-of-law forum shopping.<sup>46</sup>

Very few bands across the center of the circle can rival such a high rate of intracircuit transfers. But one exception stands out: the Ninth Circuit (represented in black) sends a significant amount of cases to the Fifth Circuit. To understand this transfer pattern (and detect others), we have to examine transfer patterns by subject area.

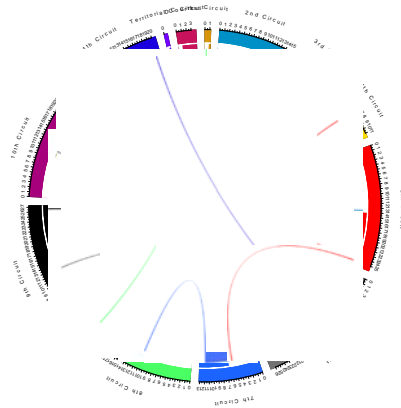
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46. See generally Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984) (discussing the history and concerns of transfers).

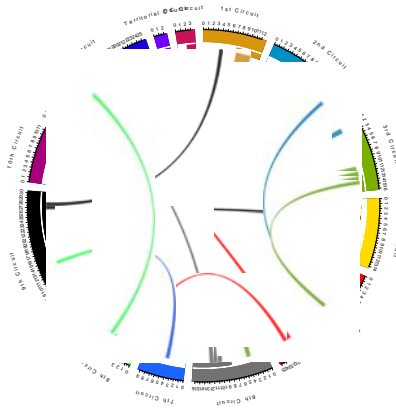


First, compare the transfer patterns for prisoners' rights and habeas cases on the left, with contracts and patents cases on the right.<sup>47</sup>

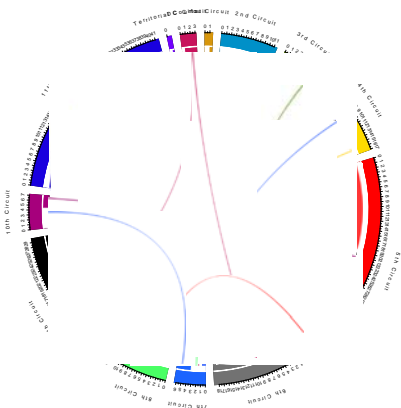
**Figure 3a: Prisoners' Rights**



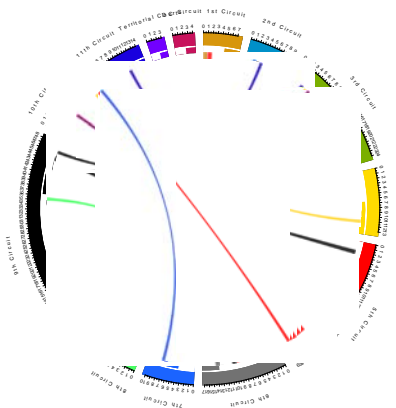
**Figure 3b: Contracts**



**Figure 3c: Habeas Corpus**



**Figure 3d: Patents**



Prisoners' rights and habeas transfers end up in the vast majority of cases in the same circuit where they originated.<sup>48</sup> Contrast this intracircuit transfer pattern with the intercircuit transfer patterns on the right. In both contracts and patent cases, a far greater percentage of cases are transferred between circuits and often distant circuits. These transfer patterns thus

47. For ease of interpretation, I kept the colors of the circuits consistent so that, for example, the Fifth Circuit is always represented in red.

48. The most notable exception is prisoners' rights transfers in both directions between the Eighth and Tenth Circuits.

reflect different litigation costs and raise different normative concerns. Defendants in contract and patent cases are able to have their cases transferred to courts distant from where the plaintiff originally filed suit.

Notice also that the circle representing transfers in patent cases tells another story: a significant amount of transfers is *into* the Ninth Circuit (and California districts in particular). Especially noteworthy here is the Fifth Circuit, long renowned as an attractive haven for “patent trolls.”<sup>49</sup> The transfer patterns here complicate this story. Judges in the Fifth Circuit transfer a significant number of cases back to where most commentators seem to think they more properly belong (given the location of witnesses and the defendant’s headquarters, etc.). Of course this does not end the debate. One could still argue that while many cases are transferred out of the Fifth Circuit, it is not enough. Even more aggressively, one could argue it is actually evidence of the audacity of patent trolls who file suits that even Fifth Circuit judges are willing to transfer away. I suspect that no amount of empirical evidence can put this debate to rest. But, at the very least, the evidence here suggests that transfers are indeed an option in patent cases and that numerous circuits make frequent use of them. One way to make this point is to imagine how we would interpret the opposite empirical finding. Imagine, for example, if the transfer patterns had shown no transfers at all out of the Fifth Circuit in patent cases. That would be an important indicator of improper transfer activity.<sup>50</sup> The lack of such a finding is thus of similar importance.

Next, we turn to subject areas that frequently feature vulnerable plaintiffs confronting institutional actors with more litigation resources. These constellations raise vital normative concerns.

Products liability cases and the specialized subset of pharmaceutical products liability cases typically pit individual plaintiffs against corporations. These suits can involve numerous witnesses and experts and require protracted litigation. The situs of such litigation is thus important to the parties. A situs closer to the plaintiff will make it cheaper for the plaintiff to litigate but

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49. See, e.g., Tracie L. Bryant, *The America Invents Act: Slaying Trolls, Limiting Joinder*, 25 HARV. J.L. & TECH. 687, 697 (2012); William Peacock, *Will Venue Decision Make Texas Less Appealing to Patent Trolls?*, FINDLAW: U.S. FIFTH CIRCUIT (Apr. 8, 2014, 3:30 PM), [http://blogs.findlaw.com/fifth\\_circuit/2014/04/will-venue-decision-make-texas-less-appealing-to-patent-trolls.html](http://blogs.findlaw.com/fifth_circuit/2014/04/will-venue-decision-make-texas-less-appealing-to-patent-trolls.html).

50. *But cf.* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 260–63, 270–280 (2016) (highlighting numerous strong indicia of improper denials of transfers out of the Fifth Circuit in patent cases).

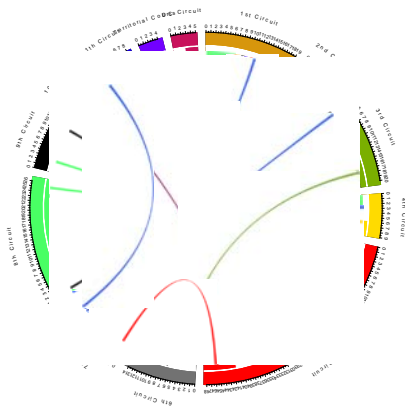
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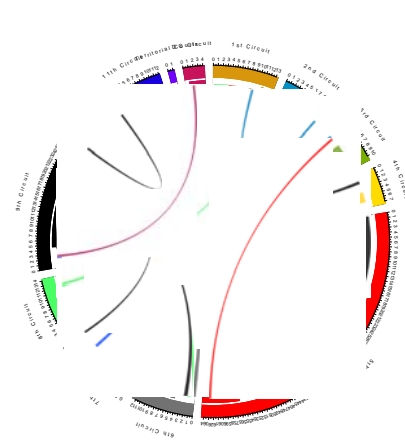
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place more strain on the defendants. A transfer to the defendant's favorite forum reverses this calculation. Because most cases settle long before trial, litigation costs play an important role in settlement negotiations.<sup>51</sup>

**Figure 4a: Pharmaceutical Products Liability**



**Figure 4b: Products Liability**

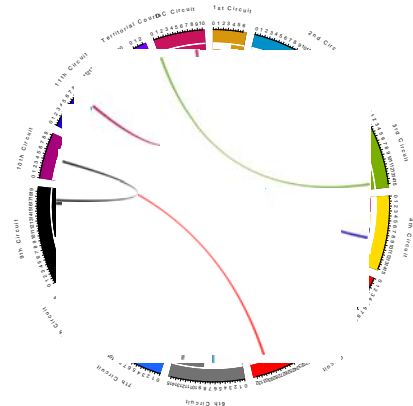


Here, defendants in products liability cases are frequently able to move their case to a forum that is more convenient for them. The most notable aspect of the products liability transfer pattern is that circuits from around the country (and especially the Ninth Circuit) send a large number of cases to the Fifth Circuit. In fact, more than a quarter of all products liability transfers involve the Fifth Circuit as the receiving circuit. This transfer activity outstrips the economic activity within the Fifth Circuit and suggests that defendants in the Fifth Circuit are able to use transfers to move cases from around the country closer to home for litigation. In contrast, relatively few products liability cases are transferred out of the Fifth Circuit.

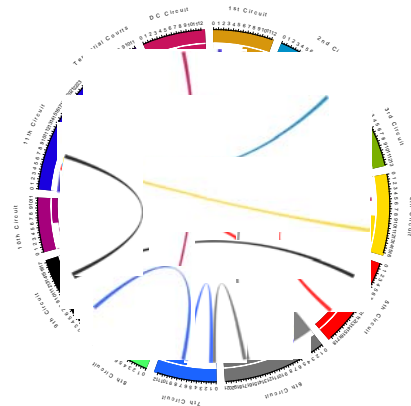
51. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 515–16 (2004).

This picture is very different for civil rights and Americans with Disability Act (ADA) cases. There, transfers tend to be predominantly intracircuit.

**Figure 5a: Civil Rights**



**Figure 5b: ADA**



The relatively low number of cases that are sent to other circuits tend to transfer to circuits nearby. For example, the largest flow of intercircuit civil rights cases is directed from the District Court for the District of Columbia to district courts in the Fourth Circuit. This lessens concerns that transfers deter plaintiffs in these subject areas from pursuing their suit on the merits.

There are also a handful of cases each year where an appellate court, rather than a district court, orders a transfer, but these situations are extremely rare.<sup>52</sup>

### C. How Long Until Transfer?

The previous Section suggests that transfers work differently in different subject areas. One way to evaluate this insight further is to compare the time it takes from initiation of a suit to transfer.<sup>53</sup> Time is a proxy for how far a case progressed

52. See, e.g., *Koehring Co. v. Hyde Const. Co.*, 382 U.S. 362, 364 (1966) (“Although a federal appellate court does not ordinarily itself transfer a case to another district, but remands to the District Court for that purpose, the extraordinary action in this case was taken as a result of extraordinary circumstances.”); *Wilson-Cook Med., Inc. v. Wilson*, 942 F.2d 247, 250 (4th Cir. 1991) (refusing to transfer directly but acknowledging the ability to do so under “extraordinary circumstances”).

53. I measure here only the time from when a complaint was filed to the first transfer. A small number of cases feature multiple transfers. See, e.g., *Alstom Caribe, Inc. v. George P. Reintjes Co.*, 484 F.3d 106, 116 n.5 (1st Cir. 2007) (“While retransfer ordinarily is to be avoided, the intervening five years of litigation have sufficiently altered

before it was transferred. Quick transfers suggest transfers at the pleading stage; later transfers suggest that a case went through some amount of discovery.<sup>54</sup> Because we are interested in the relative burdens that transfers place on plaintiffs and defendants, examining time to transfer is a useful approach.

Typically, plaintiffs desire to stay in their chosen forum. If the case must be transferred, they would prefer that it transfer as late as possible (so as to minimize the expense associated with litigating in a distant forum). Defendants have opposite incentives. Not only would they like to transfer cases to a more favorable location, but also they desire transfers as early as possible so as to minimize the costs they have to bear to defend in the plaintiff's chosen forum.

Time, then, represents a spectrum of costs. Much of the literature on transfers discusses transfers simply as a binary yes/no option. But notice that the transfer statutes do not specify precise times when transfers must occur (say, after the answer has been filed or after the pretrial conference).<sup>55</sup> Some transfers occur very early on in the lifecycle of a case;<sup>56</sup> others only after a significant amount of discovery has taken place.<sup>57</sup> Figure 6 demonstrates this variation:

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matters that comity would not be offended by returning the suit to the original court.” (citations omitted)).

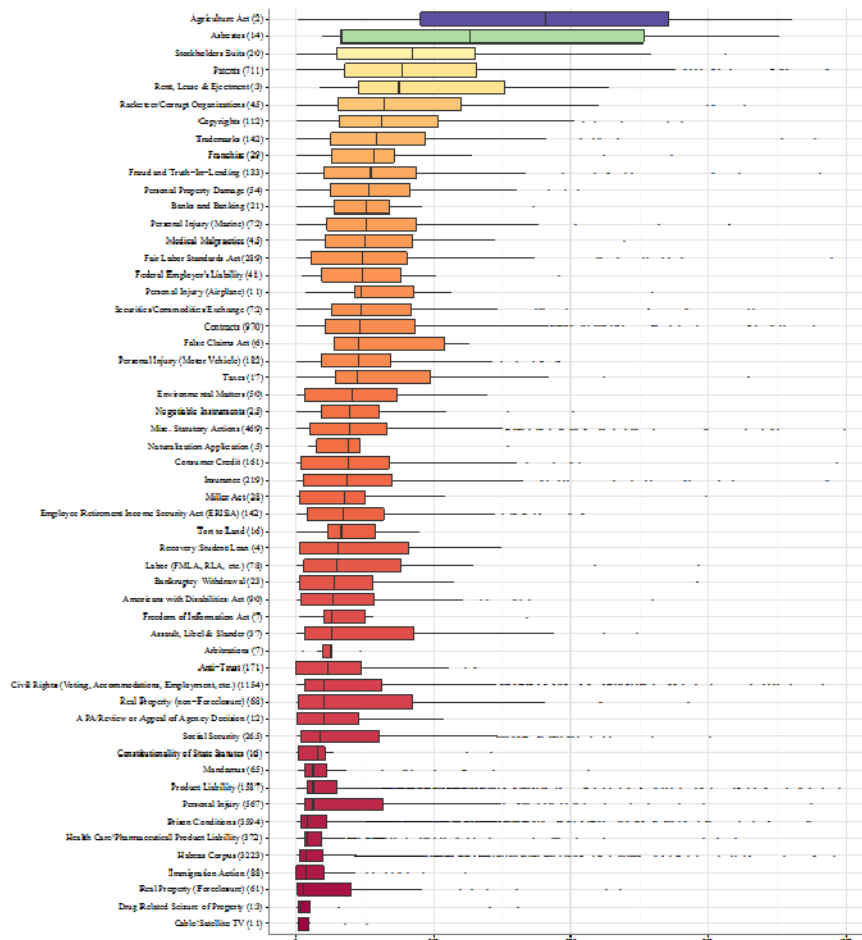
54. “A civil action is commenced by filing a complaint with the court.” FED. R. CIV. P. 3. There might be significant variation depending upon the point in time when the defendant becomes aware of the suit and responds. Similarly, the pleading phase might take more or less time. This variation makes it difficult to describe with particularity how far a case developed before it was transferred.

55. *See, e.g.*, 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3844, at 63 (4th ed. 2013) (“Section 1404(a) sets no limit on the time when a motion to transfer may be made.”). However, mandating the enforcement of restrictive forum-selection clauses under Rule 12(b)(6) might change that. *See* Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party at 14, *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 134 S. Ct. 568 (2013) (No. 12-929).

56. *See, e.g.*, *Liberty Nat'l. Life Ins. Co. v. Suntrust Bank*, 2012 WL 3849615, at \*3 (N.D. Ala. 2012) (finding transfer proper prior to service on all defendants); *Nautilus Ins. Co. v. A. Moore Const. & Roofing, Inc.*, 2010 WL 2985929, at \*1 n.3 (D. Minn. 2010) (“[W]hile no proof of service on [the Defendants] appears in the docket, the Court may transfer this action before all Defendants have been served.”); *Hanover Ins. Co. v. Paint City Contractors, Inc.*, 299 F. Supp. 2d 554, 556 n.1 (E.D. Va. 2004) (“[T]wo defendants] have not been served. This lack of service is no impediment to the current motion to transfer venue. Service of process on all named defendants is not a prerequisite to the court's power to transfer.”).

57. *See, e.g.*, *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991) (finding § 1404(a) transfer proper even after a judgment has been entered); *Travelers Indem. Co. v. E.F. Corp.*, 1997 WL 135819, at \*9 (E.D. Pa. 1997) (“[A] motion [to transfer pursuant to § 1404(a)] is proper even after the jury has failed to agree at a trial of a case or even after final judgment when modification of a decree is necessary.”).

Figure 6: Median Days from Filing to Transfer



Each subject matter has its own boxplot that captures the median days from the initiation of the suit to transfer.<sup>58</sup> Subject matters are sorted by these median days, with the highest on top and the lowest at the bottom. The size of each box is determined by the distribution of days to transfer within each subject matter. The box spans the first quartile to third quartile (also called the interquartile range). Outliers are marked with black dots. The parentheses after each subject matter indicate the number of transfers in a given category. This Figure, in short, provides a quick and intuitive way to capture a huge amount of information

58. The median is a better measure of “typicality” here than the mean (average) because it is less susceptible to extreme outliers. For example, a case that transfers after seven years of discovery could move the mean significantly in a category that has few other cases, but might not move the median far.

on transfers.<sup>59</sup> These boxplots reveal variation and conformity. Most transfers take place well within one year from the initiation of the lawsuit. Many transfers occur very early in the life cycle of a case. Many types of suits are typically transferred within mere days from the initiation of the lawsuit. In fact, the early timing of transfers before defendants are typically served<sup>60</sup> suggests that these transfers occur on the initiative of the courts rather than the parties<sup>61</sup> and without a hearing.<sup>62</sup> This raises doubts that parties have sufficient opportunity to argue in favor of or against transfers, present affidavits, or conduct limited discovery on this point.<sup>63</sup> It also raises doubts that courts have sufficient information to make findings and to explain what factors were considered and how they were balanced.<sup>64</sup>

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59. See *supra* Part III.A.

60. Compare FED. R. CIV. P. 4(m) (2015) (indicating the current time limit for service on defendants of 90 days, which may be extended for good cause), with FED. R. CIV. P. 4(m) (2014) (indicating a time limit for service of 120 days, which was applicable during the period studied, extendable for good cause).

61. See, e.g., *Union Elec. Co. v. Energy Ins. Mut.*, 689 F.3d 968, 972 (8th Cir. 2012) (“There is authority supporting the district court’s ability to sua sponte transfer a case under § 1404(a).”). The docket sheets typically do not indicate who initiated the transfer.

62. See 15 WRIGHT ET AL., *supra* note 55, § 3844, at 69–70 (“A hearing is not necessarily required, but is the better practice if the evidence and arguments for and against transfer have raised any doubts. Several appellate courts have suggested that it is desirable for the district court to make findings specifically relating the evidence upon which it relies to the factors stated in Section 1404(a), although there is no formal requirement that this be done.”).

63. See, e.g., *Nalls v. Coleman Low Fed. Inst.*, 440 F. App’x 704, 706 (11th Cir. 2011) (“A district court may sua sponte transfer a civil action to any other district where it might have been brought if doing so will be convenient for the parties and witnesses and serve the interest of justice. . . . Before proceeding, the court should provide the parties with notice and an opportunity to be heard.”); *Moore v. Rohm & Haas Co.*, 446 F.3d 643, 647 (6th Cir. 2006) (“[A] court considering sua sponte transfer of [a] case ‘should make that possibility known to the parties so that they may present their views about the transfer.’” (quoting 15 WRIGHT ET AL., *supra* note 55, § 3844, at 2847–48)); *Liberi v. Taitz*, No. 09-1898, 2010 WL 2270853, at \*2 (E.D. Pa. June 3, 2010) (noting the importance that “each party to the litigation was on notice and was afforded an opportunity to be heard on the issue”).

64. Cf. *In re United States*, 273 F.3d 380, 387 (3d Cir. 2001) (explaining that transfer orders need not be lengthy “as long as there is a sufficient explanation of the factors considered, the weight accorded them, and the balancing performed”); *In re Pope*, 580 F.2d 620, 623 (D.C. Cir. 1978) (“A statement of reasons is always highly desirable. Not only does it facilitate appellate review, but more importantly, it helps to insure that the District Court considers carefully the arguments for and against transfer. While a statement of reasons is not an invariable requirement, it is essential when the basis for transfer cannot be inferred from the record with reasonable certainty.”). *But cf.* *Westinghouse Elec. Corp. v. Weigel*, 426 F.2d 1356, 1358 (9th Cir. 1970) (“We agree with petitioner that such a statement is always desirable and in some instances may be essential. In this case, however, the grounds upon which the district court granted the motion may be inferred with reasonable certainty from the record as a whole.”).

Some courts, seemingly, place efficiency arguments over participatory rights when transferring cases. These types of transfers are difficult to detect when looking at published opinions only, because many transfers never result in an opinion or order that is published on Westlaw, LexisNexis, or the like.<sup>65</sup>

Other types of cases tend to take significantly longer to transfer. Patent, trademark, copyright, and stockholder suits cases are often transferred after around six months.<sup>66</sup> This variation suggests that the transfer of suits with high monetary value and typically more experienced litigants (like corporate plaintiffs in patent suits) function very differently than transfers in cases that typically involve lower monetary stakes and less experienced litigants (like individuals in social security litigation).

#### *D. By and Against Which Type of Litigants?*

The previous Sections explored different transfers in relation to different subject matters in the underlying suits. This Section turns to the question of who initiates transfers and who is affected by transfers. This turns our attention from the nature of the suit to the nature of the litigants. This focus is warranted because different types of plaintiffs raise different normative concerns. For example, a transfer rarely will deter government plaintiffs from pursuing a suit on the merits. Similarly, many corporations have institutional resources and access to legal counsel that makes them less vulnerable to the potential downsides of transfers.<sup>67</sup>

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65. For exceptions, see *Braswell v. Chowdhury*, No. 4:08ev204-WS, 2008 WL 2439651, at \*1 (N.D. Fla. 2008) (“A court . . . should not dismiss an improperly filed case for lack of venue without giving the parties an opportunity to respond. The *Lipofsky* court did not place the same limitations on the court’s ability to transfer a case to the appropriate forum . . . . There is no need for a hearing on this transfer.” (citations omitted)); *Echols v. Morpho Detection, Inc.*, No. C12-1581 CW, 2013 WL 1832642, at \*2 (N.D. Cal. 2013) (transferring the action based on “interests of fairness and convenience”); *Davis v. U.S. Bank, N.A.*, No. 3:12-CV-2756-L, 2012 WL 9334546, at \*1 (N.D. Tex. 2012) (“Before the court is Plaintiff’s Complaint . . . . After reviewing Plaintiff’s Complaint, the court determines *sua sponte* that this case should be and is hereby transferred to the Fort Worth Division of the Northern District of Texas.”).

66. Late transfers can raise their own practical and normative concerns. For example, transferring a case late in its life cycle will force upon the transferee court the transferor’s decisions from a district that might have very different local rules and conventions. However, transfers around six months suggests that few such rulings have taken place given the typical pace of cases in federal courts.

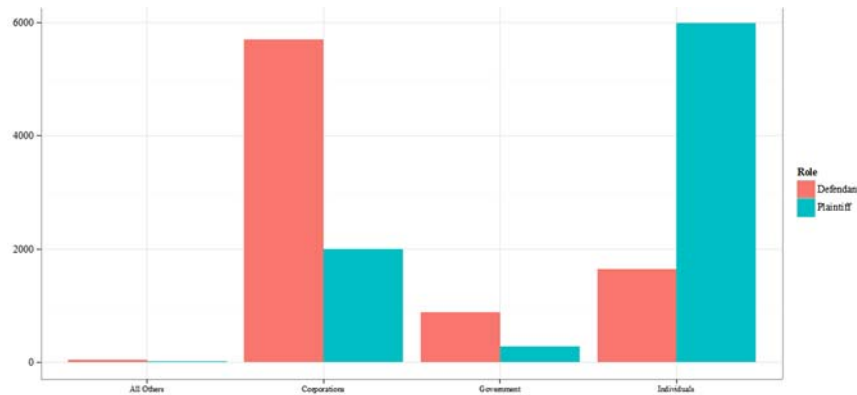
67. The match is far from perfect. There are, of course, individuals with abundant litigation resources and experience, just as there are corporations without litigation resources and experience.



As such, this Section deals with a different question than the one typically discussed in cases and scholarship. They ask which litigants in which roles (plaintiff, defendant, third-party defendant, courts, etc.) make motions for transfers, while I ask which types of litigants (corporations, government, labor unions, etc.) transfer.<sup>68</sup>

Figure 7 compares transfers by entity types. It shows which entities typically initiate transfers (in grey) and which entities typically are on the receiving end of transfers that move cases outside their chosen forum (in black).<sup>69</sup>

**Figure 7: Number of Transferred Case by Litigant Role and Type (2012–2014)  
Excluding all prisoner rights and habeas corpus cases**



This Figure shows that corporate defendants initiate most nonprisoner transfers and that most transfers affect individual plaintiffs.<sup>70</sup> Prisoners' rights suits and habeas corpus cases are

68. See, e.g., *In re Volkswagen AG*, 371 F.3d 201, 204 (5th Cir. 2004) (“[E]ither a defendant or a plaintiff can move for change of venue under § 1404(a) and . . . the same treatment and consideration should be given to the motion for transfer regardless of who the movant of that motion may be.”); *Kivitz v. Phx. Gen. & Health Servs., Inc.*, 51 F. App’x 348, 350 (2d Cir. 2002) (noting a nonparty lacks the standing to seek a change of venue); *Sundstrand Corp. v. Am. Brake Shoe Co.*, 315 F.2d 273, 276 (7th Cir. 1963) (informing that a motion to transfer under § 1404(a) can only be made in the transferor court).

69. This assumes that plaintiffs typically do not make motions for transfers because they choose the forum in the first place. Undoubtedly there will be exceptions to this general rule. See, e.g., 15 WRIGHT ET AL., *supra* note 55, § 3844, at 51 (“The motion to transfer under Section 1404(a) usually is made by a defendant.” (emphasis added)); David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 444 n.4 (1990) (“The vast majority of motions to transfer are brought by defendants.”).

70. The “Government” category includes the United States proper, U.S. agencies, as well as state and municipal litigants. The “All Others” category includes everything not captured in the categories: “corporations,” “government,” and “individuals”—like Native American Tribes, labor unions, non-profit organizations, universities, etc.

excluded here because, predictably, they usually are initiated by government defendants (prisons/jails) and affect individuals (prisoners).<sup>71</sup>

This confirms the worry that transfers could target precisely the kind of litigants that are ill equipped to deal with the consequences of having to litigate a case in a distant forum. Institutional actors typically initiate transfers at the expense of individual litigants.

One way to develop this observation further is to hone in on the pro se status of individual litigants.<sup>72</sup> Counting prisoners' rights and habeas cases, roughly 56% of all transfers affected pro se plaintiffs. Not counting prisoners' rights and habeas cases that number is roughly 18%. In short, plaintiffs proceeding pro se are affected by transfers in a significant percentage of cases.

These findings are significant because transfer statutes essentially shift the balance of litigation and bargaining powers between plaintiffs and defendants. Jurisdiction and venue provisions favor the plaintiff's choice of forum.<sup>73</sup> The plaintiff thereby gets to choose the applicable choice-of-law provisions, jury pool, crowded or not crowded docket, and proximity to parties and witnesses. Transfer statutes and the forum non conveniens doctrine do just the opposite. They are tools defendants have to protect against inconvenient and unwelcoming forums. Every modification of transfer and venue law reshapes this balance between plaintiffs and defendants.<sup>74</sup> One side wins, the other loses. It is thus paramount that courts, commentators, and policymakers know whom they are helping and whom they are hindering.<sup>75</sup>

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71. One exception might be prisoners housed in private prisons.

72. Corporations, no matter how poor or close to bankruptcy, are typically not allowed to proceed pro se. *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985).

73. See 15 WRIGHT ET AL., *supra* note 55, § 3848, at 167 ("Over the years the federal courts have developed a bewildering variety of verbal formulations to describe the weight to be accorded the plaintiff's initial choice of forum in transfer motions."); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) ("[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards dismissal and trial in the alternative forum."); *In re Horseshoe Entm't*, 337 F.3d 429, 434 (5th Cir. 2003) (stating the plaintiff's choice of forum is a factor to be considered, but "is neither conclusive nor determinative").

74. See *Kitch*, *supra* note 1, at 137 ("[T]he congressional policy of the venue provision to favor the plaintiff is in irreconcilable conflict with the congressional policy incorporated in the transfer section to protect the defendant against an inconvenient forum.").

75. See generally *Mullenix*, *supra* note 6, at 723 ("[T]he Court's forum-selection clause jurisprudence . . . consistently fails to distinguish among parties to litigation, applying the same principles to cases involving uninformed consumers as to sophisticated business entities.").

IV. THE AFTERMATH OF *ATLANTIC MARINE*

Part III provided a static description of federal transfers and highlighted blind spots in the doctrinal literature. This body of literature has recently been revived in the wake of the Supreme Court's decision in *Atlantic Marine*. Predictably, the normative evaluations and doctrinal elucidations in this body of literature must take a stance on whether *Atlantic Marine* changed things or not. If things remain unchanged, was this a missed opportunity? Or if things changed, is that cause for celebration or lamentation? Thus far, there have been no systematic attempts to probe this empirical question. This Part takes some tentative steps towards evaluating the empirical effects of *Atlantic Marine* by examining transfer patterns longitudinally.

A. *Changes, Clarifications, and Ratifications*

*Atlantic Marine* was decided in December of 2013. It clarified the effect of private forum-selection clauses where parties agreed pre-suit to litigate only in a particular domestic forum.

The Court emphasized three aspects of venue doctrine. First, private forum-selection clauses do not make a proper venue improper. Venue is governed by 28 U.S.C. § 1391 and specifies a number of categories that determine where a civil action may be initiated. The Court held that private forum-selection agreements do not affect these categories and, therefore, cannot render a proper forum improper.<sup>76</sup> As such, forum-selection clauses cannot be enforced through a motion to dismiss for improper venue under the Federal Rules of Civil Procedure 12(b)(3) or using 28 U.S.C. § 1406(a).

Second, the Court held that forum-selection clauses must instead be enforced through use of 28 U.S.C. § 1404(a).<sup>77</sup> It authorizes courts to transfer cases “to any other district or division where it might have been brought or to any district or division to which all parties have consented.”<sup>78</sup> To do so, courts must balance “the convenience of parties and witnesses” and “the

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76. *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 577 (2013) (“Whether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories of cases listed in § 1391(b).”).

77. *Id.* at 579 (“Although a forum-selection clause does not render venue in a court ‘wrong’ or ‘improper’ within the meaning of § 1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under § 1404(a).”).

78. 28 U.S.C. § 1404(a) (2012).

interest of justice.”<sup>79</sup> The Court emphasized that courts applying § 1404(a) must give forum-selection clauses “controlling weight in all but the most exceptional cases.”<sup>80</sup> Restrictive forum-selection clauses will thus be enforced under § 1404(a) except where unusually strong public interest factors counsel against such a transfer.<sup>81</sup>

Third, the Court created an exception to the usual choice-of-law principles in such cases. Normally, courts on the receiving end of a 1404 transfer apply the law of the transferor court.<sup>82</sup> But district courts receiving a case as a result of a 1404(a) transfer that is based on a restrictive forum-selection clause must now apply their own law instead of the law of the transferor court.<sup>83</sup>

A vibrant doctrinal literature is in the process of evaluating these changes and assessing their normative desirability.<sup>84</sup> However, it is difficult to do so without having a better grasp on whether the Supreme Court’s decision really was a “change” in the law on transfers and private restrictive forum-selection clauses, a “clarification,” or merely a “ratification” of what was already largely happening in the lower courts. A temporal look at transfer patterns helps to elucidate this question and to assess some of the impact *Atlantic Marine* might have had.

### B. Week-by-Week

A first step to characterize transfer patterns across time and the potential impact of *Atlantic Marine* is to measure whether more cases were transferred after the Supreme Court’s decision. Figure 8 plots the number of transfers across all circuits week-by-week (blue line on top) and the Fifth Circuit (red line at

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79. *Id.*

80. *Atlantic Marine*, 134 S. Ct. at 579.

81. *Id.* at 581 (“[T]he plaintiff’s choice of forum merits no weight. . . . [A] court evaluating a defendant’s § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties’ private interests.”).

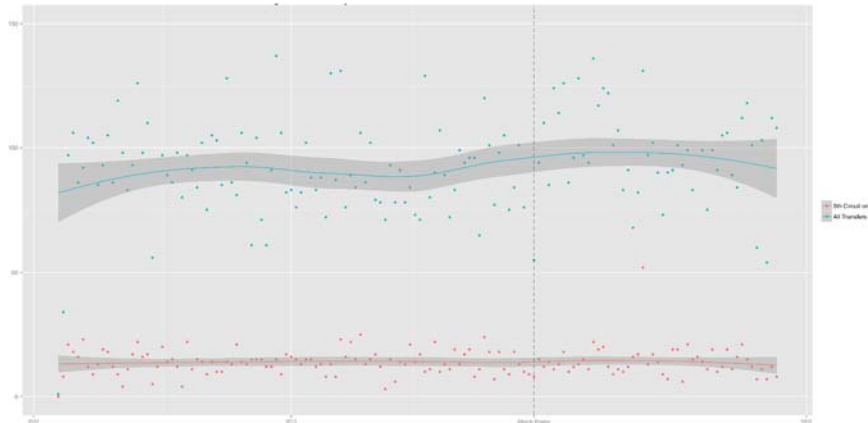
82. *See, e.g.,* *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990) (“[F]ollowing a transfer under § 1404(a) initiated by a defendant, the transferee court must follow the choice-of-law rules that prevailed in the transferor court. We now decide that, when a plaintiff moves for the transfer, the same rule applies.”); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (“[W]here the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms.”).

83. *Atlantic Marine*, 134 S. Ct. at 583.

84. *See supra* note 6.

the bottom). Each dot represents the number of transfers that occurred within a given week. The covered time span includes the two years before the Supreme Court's decision and the year since then. The vertical dotted line marks the week in which *Atlantic Marine* was decided.<sup>85</sup>

Figure 8: Weekly Overall Transfer Numbers and 5th Circuit Transfers



The line remains fairly flat throughout.<sup>86</sup> Most relevant for the purpose at hand, we do not observe a drastic swing right before or after *Atlantic Marine*. Litigants and courts anticipating the Court's decision seemingly did not change their behavior in drastic ways. Similarly, there was no clear increase in transfers in the months after *Atlantic Marine*.

This is true for the overall number of transfers as well as the transfers out of the Fifth Circuit. *Atlantic Marine* dealt with a case arising from that Circuit, and the Supreme Court specifically corrected that Circuit's interpretation of transfer and restrictive forum-selection clause doctrine.<sup>87</sup> This is the most likely place to see an empirically observable effect of *Atlantic Marine*. But the data does not show significant movement in the Fifth Circuit.<sup>88</sup>

85. *Atlantic Marine*, 134 S. Ct. at 568.

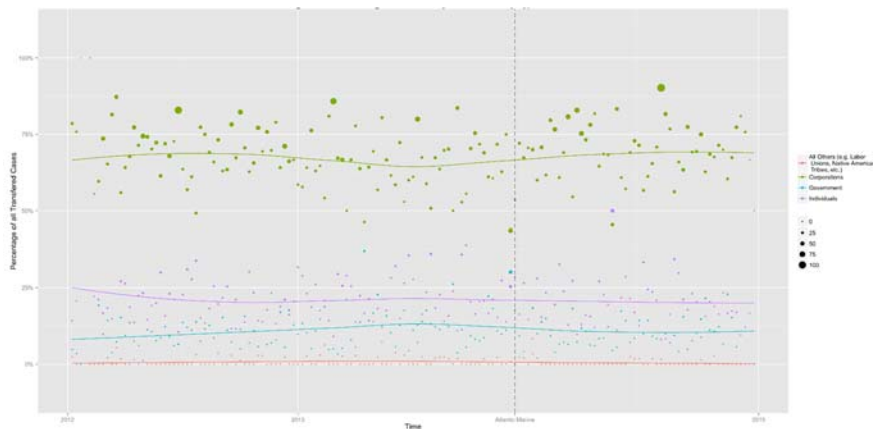
86. Because filing patterns might be seasonal and because transfer motions are tied to filings, there will likely be some seasonality in the observed pattern. More data across a longer time span would be required to test for this.

87. *Atlantic Marine*, 134 S. Ct. at 581.

88. This might be due to local litigation culture, litigants not taking the lessons of *Atlantic Marine* to heart, courts being slow in changing established practices, or that it will take much longer for companies to incorporate restrictive forum-selection clauses in their contracts and enforce them in the years to come.

Another way we can probe whether the doctrinal moves in *Atlantic Marine* translated to changes on the ground is to measure the types of entities that initiated transfers and were affected by transfers. This follows our approach in Part II.D, but instead of examining this question statically we will take the same measure week after week. This allows us to test whether *Atlantic Marine* affected the composition of litigant entities that used and were affected by transfers. Figure 9 shows the percentage of transfers initiated by different types of defendants week after week. The percentages exclude all prisoners' rights and habeas cases.

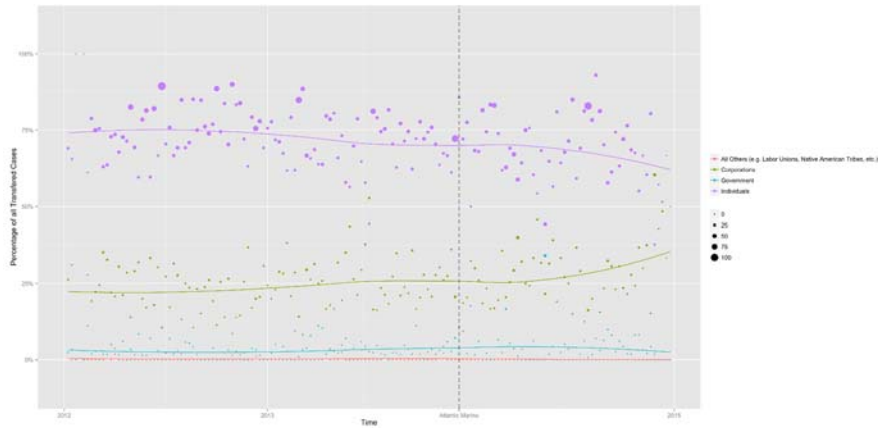
Figure 9: Percentage of Transfers by Defendant Entity Type



The Figure makes clear, again, that corporations are primarily responsible for initiating transfers, followed by individuals, government litigants, and finally the residual category of all other types of defendants. New in this Figure is the observation that this composition is remarkably consistent across time. After all, litigants in any given case typically care very little about who else might be transferring cases in any given week. They simply evaluate what would be the best move in their individual case. Yet despite these independent decisions that have no relation to each other, we still observe a consistent macro-pattern of transfers. This pattern, again, seemingly is not affected by the Court's decision in *Atlantic Marine*.

Figure 10 does for plaintiffs what Figure 9 did for defendants (again excluding all prisoners' rights and habeas cases). It shows the week-by-week percentages of the type of plaintiffs that had their case transferred away from their chosen forum.

Figure 10: Percentage of Transfers by Plaintiff Entity Type



The Figure confirms the findings in Part II.D that most transfers affect individuals, followed by corporations, then government litigants, and finally the residual category of all others.

But here there is movement in the wake of *Atlantic Marine*. There is an uptick in the number of transfers that affect *corporate* plaintiffs and a corresponding downtick of the number of transfers that affect individual plaintiffs (the two are linked because all measures are percentages). This suggests that defendants being sued by corporations took note of *Atlantic Marine* and were able to transfer more cases to a forum more convenient for them. The effect is not immediate because it takes some time to file and argue the motion.<sup>89</sup> The parties most affected were, as in the *Atlantic Marine* case itself, corporate defendants who are sued by corporate plaintiffs.<sup>90</sup> This does not put to rest all normative concerns about the empirical impact of *Atlantic Marine*, but it dulls its immediate edge.

Together, the Figures in this Part suggest that *Atlantic Marine* had some empirically observable effects, though they were not drastic. However, it will take more time, data, and analysis to ascertain the full empirical effects of *Atlantic Marine* as more courts adjust their transfer evaluations, more litigants notice the power of transfers, and more businesses incorporate restrictive forum-selection clauses into their contracts for

89. See *supra* Part III.C (discussing how the length of time to transfer varies depending upon the type of suit). Figure 10 plots when transfers were accomplished, not initiated. This is the case because of data limitations. The docket sheets have clear entries for accomplished transfers but ambiguous or no entries for transfer motions.

90. *Atlantic Marine*, 134 S. Ct. at 575.

eventual enforcement in the years to come. Together, these adjustments by various actors could reshape transfer patterns eventually—though one year after *Atlantic Marine* that has not happened yet. Whatever effect *Atlantic Marine* might have had is either delayed or smaller than feared.

## V. CONCLUSION

The federal transfer statutes<sup>91</sup> are framed in trans-substantive<sup>92</sup> and trans-personal terms.<sup>93</sup> The doctrine, seemingly, applies equally to all types of suits by all types of litigants. *Atlantic Marine*, similarly, does not distinguish between restrictive forum-selection clauses among corporations or where individuals are participants.<sup>94</sup>

Despite this claim to uniformity, this Article makes clear that transfers function differently in different subject areas and between different types of litigants.

Scholars, courts, and policymakers must be attentive to these differences and work to articulate transfer standards that protect vulnerable litigants in sensitive subject areas while ascertaining efficient outcomes for everybody else.

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91. All with the exception of the habeas-corpus transfer statute. See 28 U.S.C. § 2241(d) (2012) (applying only to persons in custody).

92. See Stephen B. Burbank, *Pleading and the Dilemma of "General Rules"*, 2009 WIS. L. REV. 535, 541–43; David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 375–77 (2010); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1194 (2013) (“Trans-substantivity is one of the most fundamental principles of doctrinal design for modern civil procedure.”); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 45–46 (1994).

93. See generally Roger Michalski, *Trans-Personal Procedures*, 47 CONN. L. REV. 321, 326 (2014) (discussing the “strong, yet unexamined, norm embedded in federal and state procedural regimes to treat all entity types equally.”).

94. See generally Mullenix, *supra* note 6, at 723 (“[T]he Court’s forum-selection clause jurisprudence . . . consistently fails to distinguish among parties to litigation, applying the same principles to cases involving uninformed consumers as to sophisticated business entities.”).