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Geoffrey P. Miller
NYU School of Law, geoffrey.miller@nyu.edu

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In Search of the Most Adequate Forum: State Court Personal Jurisdiction

Geoffrey P. Miller

Abstract: To what extent do the rules on state court personal jurisdiction distribute litigation to the forum that can resolve the dispute at the lowest social cost? It turns out that current rules do select the least-cost forum in many cases. However, three problems interfere with the goal of minimizing the costs of dispute resolution: (a) analysis under the Due Process Clause does not account for the full social costs of litigation; (b) federalism-based concerns sometimes allow state courts to adjudicate cases when they are not the most adequate forums; (c) institutional factors limit the Supreme Court’s ability to prevent excessive exercises of state court jurisdiction. The dilemma of achieving forum efficiency within the existing legal and institutional framework helps to explain the confusion that pervades the Supreme Court’s state court personal jurisdiction cases.

Introduction

Litigation is expensive. Party costs include fees of lawyers, paralegals, experts, and other professionals; costs of research; expenses of complying with discovery requests; costs of time spent in consulting with attorneys, traveling, or participating in hearings or trials; and the unquantifiable but real costs of anxiety and risk. Social costs include the expenses of the parties but also involve other items associated with the litigation: costs to jurors, judges, other court personnel, and third parties; costs to the state of managing a court system; and costs of error if the litigation results in incorrect findings of fact or law.

Many of these costs are fixed, in that they will be incurred no matter where the litigation takes place. Others are not fixed. Litigation occurring in a court geographically far removed from the place where an accident occurred, for example, may be more costly for witnesses or parties than litigation near the accident; litigation before a judge who is unfamiliar with the law may carry a higher risk of erroneous rulings as compared with a adjudication by a better-

1 Stuyvesant Comfort Professor of Law, New York University. I thank Oscar Chase, Helen Hershkoff, Sam Issacharoff, Jay Tidmarsh, participants at a faculty workshop at Notre Dame Law School for helpful comments, and Gabriel R. Geada for excellent research assistance.
informed court; litigation in a court plagued by delays may be more costly than litigation in
courts with more expeditious dockets. Because costs vary across tribunals, it is possible – at least
in principle – to identify the tribunal which can resolve the dispute at the least social cost. I refer
to this tribunal as the “most adequate forum.”

All advanced legal systems contain rules for allocating disputes to different tribunals for
resolution. Examples include principles of personal jurisdiction, venue, subject matter
jurisdiction, and discretionary rationales for avoiding or deferring adjudication. Each of these
rules can be evaluated against the benchmark of the most adequate forum. Other things equal, a
forum-allocation rule is to be preferred if it directs litigation to the most adequate forum and
disfavored if it directs litigation to less adequate forums.² I refer to the objective of directing
litigation to the most adequate forum as the goal of “forum adequacy.”

This article considers one important complex of forum-allocation rules – limits on state
court personal jurisdiction – from the perspective of the most adequate forum. Part I examines
applicable law. It demonstrates that existing rules on state court personal jurisdiction do not
reliably direct litigation to the most adequate forum. Part II suggests that much of the doctrinal
confusion in the Supreme Court’s state court personal jurisdiction jurisprudence is due, not to
incompetence or political bickering, but rather to the intractable dilemmas the Court faces in
reconciling the institutional and legal framework with the goal of forum adequacy. I end with a
brief conclusion.

I. Personal Jurisdiction of State Courts

² This paper is limited to the impact of forum selection rules on the direct costs of litigation. Analysis of other
social costs, such as the costs of the forum choice leading to the selection of inefficient law, is outside the scope of
the present study. For discussion of these other costs, see Daniel Klerman, Personal Jurisdiction and Product
Liability, 85 Southern California Law Review 1551 (2012); Dustin E. Buehler, Jurisdictional Incentives, 20 George
State court personal jurisdiction rules align with forum adequacy most of the time, but also display significant deviations from this objective. Forum adequacy is realized when the forum state court exercises jurisdiction when it is the most adequate forum and refrains from exercising jurisdiction when it is not the most adequate forum. Personal jurisdiction rules do not align with forum adequacy if the court exercises jurisdiction when some other forum is more adequate for resolving the controversy or refrains from exercising jurisdiction when it is the most adequate forum.

A high level of alignment between jurisdiction rules and forum adequacy exists when the plaintiff and the defendant agree to litigate in state court, either by signing a contract containing a forum-selection clause or by the defendant not contesting the forum selected by the plaintiff ex post. In such cases the defendant’s consent to the forum confers unquestioned personal jurisdiction. The agreement of the parties also evidences the adequacy of the forum: if both the defendant and the plaintiff are content to litigate their dispute in a particular state court, it is probable that the court so selected is able to resolve the controversy at lowest social cost.3 Because both the rules on personal jurisdiction and the analysis of forum adequacy dictate the same result – the plaintiff’s choice of forum should be respected – these cases are not problematic from the standpoint of the most adequate forum.

As will be demonstrated below,4 a good degree of alignment can also be achieved in cases where the defendant removes the action to federal court. In such cases, if the geographic

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3 Exceptions can be imagined: for example, commercial disputes involving parties from other states or countries are sometimes brought in New York State courts by agreement of the parties, even though the dispute has no contacts or connections with that state. See Geoffrey P. Miller & Theodore Eisenberg, The Market for Contracts, 30 Cardozo Law Review 2073 (2009) (discussing New York law authorizing such suits to be brought in New York courts under specified conditions). In such a case, it may be that a court of some other state or country would be the most adequate to resolve the controversy – although the wish of both parties to opt into a New York forum would suggest the contrary.

4 See notes xx-xx and accompanying text, infra.
location in the state of origin is not convenient, the defendant (or the plaintiff) can move to
transfer the litigation to another federal district court.5 Because the transfer motion will be
decided according to criteria that overlap substantially with the goal of forum adequacy,6 the
process of removal and transfer will often work to distribute adjudication to the most adequate
forum.

The alignment is less precise when the parties do not agree on the forum and removal is
not possible. In such cases the court cannot look to the consent of the defendant as establishing
its jurisdiction because the defendant has not consented. At the same time, if the parties disagree
on the forum, the forum selected by the plaintiff is no longer presumptively the most adequate
forum: the defendant’s objection to the forum suggests that the plaintiff may have selected a less
adequate tribunal – either because the chosen forum represents the lowest-cost option for the
plaintiff or because, even if the chosen forum is not the plaintiff’s lowest-cost option, she selects
the court to impose even larger burdens on the defendant.7 In either of these situations, allowing
the plaintiff control over forum choice would result in a socially inefficient outcome.

Whether in the absence of party consent the rules on personal jurisdiction align with the
principle of forum adequacy depends, therefore, on whether the line drawn by the personal
jurisdiction inquiry (adjudicate/dismiss) coincides with that delimited by the analysis of forum
adequacy (the forum court is/is not the most adequate forum).

It turns out that the rules on state court personal jurisdiction do align with the principle of
forum adequacy, to some degree, even in situations where the parties do not agree on the forum.

Rules governing state court jurisdiction do take considerations of forum adequacy into account,

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5 See notes xx-xx and accompanying text, infra.
6 See notes xx-xx and accompanying text, infra.
7 See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) ("A plaintiff sometimes is under temptation to resort to a
strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to
himself.")
and to a substantial extent. However, the alignment is incomplete. Three principal reasons explain this lack of overlap: (a) the legal tool used in personal jurisdiction analysis (the Due Process Clause of the Fourteenth Amendment) over-weights certain costs of litigation and under-weights others; (b) interests of federalism may require deference to the forum’s jurisdiction in cases when a different forum is more adequate; and (c) institutional limitations allow state courts to manipulate the rules in order to adjudicate cases that would be more efficiently litigated elsewhere.

A. Due Process

Challenges to a state court’s personal jurisdiction typically allege either or both of the following defects: the plaintiff failed comply with a state long-arm statute authorizing service of process on non-residents, or the exercise of jurisdiction, if permitted under the long-arm statute, would violate constitutional norms. In practice, these arguments usually coalesce into a single inquiry. Most states extend their long-arm statutes to the full constitutional limits;\textsuperscript{8} and most interpret the applicable provisions of their own constitutions to be co-extensive with the mandates of the federal constitution.\textsuperscript{9} Ordinarily, therefore, the inquiry into state court personal jurisdiction morphs into an investigation under the Due Process Clause of the Fourteenth Amendment.

Although the constitutional limits on state court personal jurisdiction are sometimes treated as \textit{sui generis}, the analysis is consonant with the approach taken in due process cases


\textsuperscript{9} On convergence of state and federal constitutional standards, see, e.g., \textit{Hyatt Int'l Corp. v. Coco}, 302 F.3d 707, 715 (7th Cir. 2002) (Illinois); \textit{Ex parte McInnis}, 820 So.2d 795, 802 (Ala. 2001) (Alabama); \textit{CSR, Ltd. v. Link}, 925 S.W.2d 591, 594 (Tex.1996) (Texas); \textit{Gallaher v. Elam}, 104 S.W.3d 455, 463 (Tenn. 2003) (Tennessee).
generally. To establish a denial of due process, a party must demonstrate that a state has impermissibly infringed an interest in life, liberty or property. Most of these elements are satisfied in every case where the defendant challenges the state’s right to force him into court. The requirement of state action is met since the summons that commands the defendant to appear in court is issued by a state official. The Court has declared that being summoned into court implicates a liberty interest protected under the Constitution.\(^\text{10}\) The defendant’s challenge to the state court’s jurisdiction alleges an infringement of a constitutionally protected interest: her liberty is impaired when the government forces her to appear and defend against accusations of wrongful conduct (the archaic terminology of being “haled” into court emphasizes the compulsory quality of the action).\(^\text{11}\)

Issue is joined, in these cases, on the question of whether the state’s exercise of jurisdiction over the defendant is constitutionally permissible. Restrictions on liberty are not outlawed altogether; they may be permitted under the Due Process Clause if they further a sufficiently important governmental interest.\(^\text{12}\) Thus, in determining what process is “due”, a court must balance the defendant’s interest in receiving the benefit of a procedural protection, on the one hand, against the state’s interest in not providing the protection, on the other.\(^\text{13}\) This analysis applies in the context of state court personal jurisdiction, except that the issue for

\(^{10}\) See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471 (1985); *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 702-03 n.10 (1982). For skeptical commentary on whether a liberty interest is actually implicated, see, e.g., Jay Conison, *What Does Due Process Have to Do With Jurisdiction?*, 46 Rutgers Law Review 1196-97 (1994) (questioning whether a liberty interest is involved); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 Boston College Law Review 529, 535 (1991) (“the Court has never explained why being subject to jurisdiction is a taking of liberty, at least where the defendant has had notice and a full opportunity to defend”).

\(^{11}\) See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011) (“A state court’s assertion of jurisdiction exposes defendants to the State’s coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause.”)


\(^{13}\) For example, due process generally requires notice and an opportunity to be heard before a state can deprive a person of a property interest; but notice can be dispensed with when the state’s interest in summary seizure is sufficiently important. *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972).
determination is not the amount of process the forum must afford to the defendant before depriving her of a protected interest, but rather whether the state, through its courts, may deprive the defendant of a protected interest at all.\(^\text{14}\) Although the context is different, the relevant analysis is similar: a court must balance the interest of the defendant in not having to answer in the forum against the interest of the forum state in forcing the defendant to answer in its courts.\(^\text{15}\)

**1. Minimum Contacts**

The test for due process limits on state court personal jurisdiction, announced in *International Shoe v. Washington* and elaborated in subsequent cases, provides that a state court may exercise personal jurisdiction only if the party in question has “minimum contacts” with the forum state.\(^\text{16}\) This section first analyzes the minimum contacts test as a form of due process balancing and considers whether the test satisfies the criterion of forum adequacy (deferred until later is a discussion of the second part of the *International Shoe* test, requiring that the exercise of jurisdiction must comport with “traditional notions of fair play and substantial justice”).\(^\text{17}\)

**a. Minimum Contacts as Due Process Balancing**

\(^\text{14}\) Partly for this reason, the issue in personal jurisdiction cases has elements both of procedural and substantive due process. See, e.g., Jay Conison, What Does Due Process Have to Do With Jurisdiction?, 46 Rutgers Law Review 1071 (1994); Stephen B. Burbank, Jurisdiction to Adjudicate: End of the Century or Beginning of the Millenium?, 7 Tulane Journal of International and Comparative Law 111, 113 (1999) (“Due process has both procedural and substantive dimensions... and it is not easy to locate the law of personal jurisdiction exclusively in either.”).

\(^\text{15}\) The balancing required looks principally to the interests of the person whose interest is infringed, on the one hand, and the interest of the government in imposing the restriction, on the other. A classic formulation is found in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976): “Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”)


\(^\text{17}\) See text accompanying notes -- -- infra.
Although the Supreme Court has never fully explained why the minimum contacts test implements the requirements of due process, the answer appears to be the following: the inquiry, which focuses on the relationship between “the defendant, the forum, and the litigation,” balances between the interest of the defendant in avoiding answering in the forum state’s courts and the interest of the forum state in calling the defendant to account there.

Consider a case where the defendant has no contacts with the forum state. Not having involvement with the state, the defendant may be unfamiliar with its laws, its legal system, and its attorneys. The defendant would have little reason to expect to be sued there, and thus may find that her reasonable expectations are upset when she is summoned to answer before the tribunal of a distant state. To the extent her presence is required for the litigation, the defendant is likely to undergo expense, anxiety and expenditure of time that she would prefer to avoid. For these and other reasons a lack of contact with the forum state correlates with a defendant interest in not being required to answer in the state’s courts.

Contrast the foregoing with the situation where a defendant has many contacts with the forum state. Such a defendant will likely be familiar with the state, have at least a general understanding of its laws, have connections that may help her find legal representation, and have reason to expect that she might be sued there. Litigating in the forum state under these conditions is likely to be more convenient than in the situation where the defendant has no connections with the jurisdiction. Substantial contacts with the forum state thus correlate with the defendant having only a weak interest in avoiding the state’s courts.

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The minimum contacts requirement also serves as a proxy for the interest of the forum state. Where the defendant has only slight contacts with the forum state, it can be surmised that the policies of the state will not be significantly frustrated if litigation occurs elsewhere. Where, on the other hand, the defendant has substantial contacts with the forum state, it is more likely that the state’s policies will be frustrated if the state’s courts do not control the adjudication. Considerations analogous to the interest in protecting the defendant’s justifiable expectations also play a role: when a party has only minor contacts with the forum state, the state has little reason to expect that its courts will adjudicate claims against that party; but if the defendant has significant contacts with the forum, then the state may more justifiably expect that the defendant will be subject to suit in that state’s courts. Thus when significant contacts are present, the forum state is likely to have a substantial interest in adjudicating disputes involving the defendant in its own courts; but when substantial contacts are absent the forum state’s interest in adjudicating disputes involving the defendant is more attenuated.

Because the interests of the defendant and those of the forum state move in opposite directions, minimum contacts can be used as a metric for both: as the defendant’s contacts with the forum state increase, the defendant’s interest in avoiding the forum state’s courts diminishes while the state’s interest in its courts adjudicating claims against the defendant increases. For this reason a reviewing court can – in theory at least – identify a tipping point: a level of contacts beyond which the state’s interest in taking jurisdiction over the defendant outweighs the defendant’s interest in avoiding the state’s courts.

Particular rules implementing the minimum contacts idea carry forward the approach of balancing the interests of the forum state and the defendant. Consider specific jurisdiction. When

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the defendant’s contacts with the forum state are closely connected with the transaction or occurrence that gives rise to plaintiff’s grievance, the defendant’s interest in avoiding the forum state’s courts is relatively slight. The defendant can rarely claim surprise at being sued in the forum state when the dispute involves the defendant’s own conduct there. The forum state, meanwhile, has a substantial interest in adjudicating rights and duties that flow from harmful conduct that the defendant has performed in the forum. Hence, in specific jurisdiction situations, the required level of contacts would appear to be lower than in other cases.

Consider general jurisdiction.21 When the defendant’s activities in the forum state are continuous, ongoing and systematic, it is likely that the defendant could reasonably expect to be sued in that state, and also likely that, if sued in a court of that state, the defendant will not experience the forum as inconvenient compared with other tribunals. The forum state, likewise, has a greater interest in subjecting the defendant to its courts when the defendant’s activities are so extensive as to make her effectively “at home” there.22 These considerations are so powerful that the law deems it unnecessary, when such contacts are present, to require that the plaintiff’s grievance be connected with the defendant’s activities in the forum state.

Similar considerations apply in the case of in rem jurisdiction. When a controversy concerns ownership or control of property located in the forum state, it can be inferred that the state has an interest in having its courts resolve the controversy. In the case of real property, these interests are compelling; it is essential that the state be able to provide clear and definitive

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answers to the question of ownership of lands and buildings situated within its borders. Even for chattels or intangible property, the state where the property is located has an interest in adjudicating disputes over ownership or control. Meanwhile the defendant’s claim of right to the property indicates that litigating in the forum state is probably not overly inconvenient: as putative owner, the defendant can be expected to monitor the condition of her property; and she can hardly claim surprise if litigation over property located in the forum state occurs in that state’s courts. The existence of disputed property in the state is thus a proxy for the state’s interest in adjudicating the dispute being sufficiently great as to outweigh the defendant’s interest in avoiding the state’s courts.

The balance between state and defendant is different when the in-state property enters the picture by way of attachment in an unrelated dispute. In such quasi in rem cases, it cannot be inferred that the presence of property in the state correlates strongly either with a reduced interest of the defendant in avoiding answering in the state’s courts or with an enhanced interest of the state in calling the defendant to account there. These inferences are particularly weak when the property in question is an intangible or readily transportable item that is present in the state by happenstance. In such cases, the existence of property in the state provides little if any enhanced justification for the state exercising jurisdiction over an out-of-state defendant. Again the law tracks this analysis: a mere attachment of intangible property, unrelated to the underlying dispute, provides little if any greater justification for jurisdiction than would be derived from the baseline of minimum contacts.23

Consider the case of transient jurisdiction, where the courts recognize nearly absolute authority to adjudicate claims against persons who have been physically served with process.

while present in the state.\textsuperscript{24} In such cases the fact of in-state service indicates that the defendant has familiarity with that jurisdiction and some reason to be there. Especially after a dispute has arisen, the defendant may suspect that the plaintiff may seek to serve her with process in the forum state. If avoiding the forum is crucial to the defendant, she can seek to conduct whatever business she has in other locations. This strategy is not always possible; sometimes a defendant has a compelling need to visit the forum state. But at least there is a correlation between the defendant’s physical presence and a reduced cost to the defendant of having to litigate in the forum state. By like reasoning, if the defendant is physically present in the forum, it can be inferred that the forum state has an interest in subjecting the defendant to its courts. As in the other cases just discussed – the pure minimum contacts test and its glosses for specific jurisdiction, general jurisdiction and \textit{in rem} jurisdiction – the rule on transient jurisdiction can be understood as reflecting a balancing between the interests of the defendant and the forum state.

\textit{b. Minimum Contacts and Forum Adequacy}

To what extent does the balancing required by due process analysis correlate with forum adequacy? It is apparent that these standards do overlap to a substantial extent. Consider the defendant’s interest in avoiding the forum, one of the principal concerns of due process analysis. This interest can be rephrased as the defendant’s cost of answering in the forum. Because this is an important social cost of resolving a dispute in the forum, due process considerations overlap here with considerations of forum adequacy. Similarly, the state’s interest in adjudicating the dispute can be rephrased as the cost to the forum state of not doing so. This also is an important cost that affects the calculation of the most adequate forum. The factors, moreover, work the same way in the most adequate forum context as they do in the analysis under due process. As the defendant’s contacts with the forum state increase, the costs of dispute resolution in the

forum state diminish (because the defendant’s cost of having to litigate in the forum decreases), while the costs to the forum state of litigation in alternative tribunals rises (because the cost to the forum state of another state adjudicating the defendant’s rights increases).

Thus, to the extent that the interests of the defendant and the forum are the relevant concerns, the analysis of forum adequacy substantially replicates the analysis under the minimum contacts test. However, the analysis of forum adequacy is not limited to the costs to the defendant and the forum state: it considers also the plaintiff’s cost of the litigation occurring elsewhere; the costs to other sovereign entities of the litigation occurring in the forum state; and the costs of witness appearances, presentation of evidence, inconvenience to third parties; and error in the determination of fact or law. These other costs are not specifically considered under the minimum contacts test. \(^{25}\) When additional costs are taken into account, the correlation between minimum contacts and forum adequacy is less exact. \(^{26}\)

The degree of alignment between minimum contacts analysis and forum adequacy depends on the type of personal jurisdiction being asserted. Where the parties are disputing over real property located in the forum state – the case of *in rem* jurisdiction – it is likely that the

\(^{25}\) These costs do, however, overlap to some extent with the minimum contacts analysis: for example, the costs to the plaintiff of having to litigate in another forum tends to overlap with the costs to the forum state of the litigation occurring elsewhere. The presence of overlap, however, does not imply that the interests of the plaintiff are given sufficient weight in the minimum contacts analysis.

\(^{26}\) The failure of minimum contacts analysis to consider the full range of interests is a frequent theme in commentaries that criticize the Supreme Court for failing to give adequate weight to the interests of plaintiffs in their choice of forum. See, e.g., Patrick J. Borchers, *J. McIntyre Machinery, Goodyear*, and the Incoherence of the Minimum Contacts Test, 44 Creighton Law Review 1245, 1246 (2011) (Supreme Court “overlooked the obvious point that fairness to the plaintiff in providing a realistic forum is at least as important as protecting a foreign defendant”); Walter W. Heiser, A “Minimum Interest” Approach to Personal Jurisdiction, 35 Wake Forest Law Review 915, 922-23 (2000) (Supreme Court doctrine “focuses only on the defendant’s conduct and ignores other legitimate interests, such as those of the plaintiff and the forum state”); Russell J. Weintraub, A Map Out of the Personal Jurisdiction Labyrinth, 28 University of California at Davis Law Review 531, 531-32 (1995) (“[D]eference to the convenience of nonresident defendants has frustrated the reasonable interests of plaintiffs and their home states.”); Wendy Collins Perdue, Personal Jurisdiction and the Beetle in the Box, 32 Boston College Law Review 529, 547 (1991); R. Lawrence Dessem, Personal Jurisdiction after Asahi: The Other (International Shoe) Drops, 55 Tennessee Law Review 41, 65 n.136 (1987).
forum will be found to be the most adequate to resolve the dispute even when the full range of social costs is taken into account. Evidence bearing on the nature, location and condition of the property is likely to be located in the forum state; the plaintiff and other persons with an interest in the property are likely to be located or have activities there; and the applicable law is likely to be that of the forum.

In cases involving disputed claims to moveable or intangible property located in the forum, the correlation between minimum contacts analysis and forum adequacy is somewhat less pronounced. Although in such cases the balance of defendant and forum state interests would ordinarily counsel for litigation in the state where the property is located, interests of other parties might lead to the conclusion that the courts of a different forum are able to resolve the dispute at lower social cost. Nevertheless, the presence of the property in the state suggests that a court of the state where the property is located is ordinarily the most adequate forum.

When the dispute is factually connected with the defendant’s contacts in the forum state – the case of specific jurisdiction – the forum state will often be found to be the most adequate forum even when all costs of litigation are taken into account. In such cases it is probable that witnesses or evidence will be located in the forum state. Third parties who will participate in the litigation might also be located there. Because the law chosen – by the forum or other courts – may well be the law of the forum state, the courts of the forum state may be best qualified to interpret ambiguous rules. Other sovereigns, meanwhile, may have a reduced interest in resolving the dispute through their courts if when the controversy concerns the defendant’s activities in the forum state. All of these factors counsel in favor of the plaintiff’s choice of tribunal as the most adequate forum in specific jurisdiction cases.
However, the overlap between specific jurisdiction rules and forum adequacy is less pronounced than in the cases just discussed. Situations could arise where the interests of parties other than the defendant and the forum state tip the balance in favor of some other tribunal as the most adequate forum. Imagine a Pennsylvania company which sells most of its products in Pennsylvania but also conducts marketing activity in parts of Ohio near the Pennsylvania border. A Pennsylvania resident is injured while using the company’s product during a visit to Ohio. Minimum contacts analysis would probably allow the injured party to bring a products liability suit against the manufacturer in Ohio because the defendant has purposefully availed itself of Ohio’s market. Yet on these facts it appears most likely that Pennsylvania, not Ohio, is the state of the most adequate forum: both parties are located in Pennsylvania; key witnesses and evidence regarding the defendant’s manufacturing processes will be in Pennsylvania; evidence bearing on the plaintiff’s medical costs and physical harm will be centered in Pennsylvania; and Pennsylvania may have a stronger interest in adjudicating the controversy in its courts. In circumstances such as this, the rules on specific jurisdiction would allow a state court to exercise jurisdiction even though a court of some other state is the most adequate forum.

Conversely, specific jurisdiction rules may sometimes work to deny a state court the authority to adjudicate a controversy even when it is the most adequate forum. *J. McIntyre Machinery, Ltd. v. Nicastro* provides an example. The plaintiff was injured while operating a metal shearing machine in New Jersey. The machine was manufactured by an English company which sold its products in the United States through an independent distributor located in another state. There was no evidence that the manufacturer had conducted marketing activity in New Jersey or shipped product there. On these facts, a majority of the Justices concluded that the Due Process Clause prohibited New Jersey courts from taking jurisdiction over the foreign defendant.

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Yet it appears likely that the New Jersey state court was in fact the most adequate forum. The plaintiff, apparently an individual without substantial means, resided in New Jersey. Much of the evidence bearing on liability and damages was located in New Jersey: whether the machine in question was properly maintained; whether the plaintiff operated the equipment in an appropriate fashion; how the accident occurred; what expenses the plaintiff incurred as a result of the accident; and how permanent and how severe the plaintiff’s injuries were. New Jersey had a substantial interest in protecting its citizens against the risk of being injured by dangerous products and in reducing the taxpayer expenses associated with workplace accidents. While there were also arguments in favor of litigation in the United Kingdom – the defendant’s manufacturing facility and corporate headquarters were there, as was evidence on possible design defects or manufacturing failures – it was almost certainly easier for the defendant to answer for the alleged wrongdoing in the courts of New Jersey than it would have been for the plaintiff to pursue a recovery in the United Kingdom. In this case, the law divested the most adequate forum of authority and required that litigation (if any) take place in a less adequate forum.28

The connection between minimum contacts analysis and forum adequacy is even looser in the case of general jurisdiction. The fact that a defendant’s contacts with the forum are so substantial as to warrant subjecting the defendant to the state’s jurisdiction in all cases does not establish that the state’s courts are always the most adequate forums to resolve disputes. If there is no connection between the defendant’s in-state activities and the transaction or occurrence which generated the dispute, it is likely that factors other than the defendant’s contacts with the forum would militate in favor of the selection of a different court. Suppose for example that the

defendant’s contacts with Idaho are so substantial as to warrant that state exercising general
domstion over the defendant, but that the litigation involves an automobile accident that
occurred in Pennsylvania involving an employee of the defendant, a Pennsylvania plaintiff, and
several other Pennsylvania citizens. In such a case a Pennsylvania court would likely be the
most adequate forum even though due process would allow Idaho courts to take cognizance over
the defendant.

A similar disjunction between minimum contacts and forum adequacy can be observed in
the case of Burnham style jurisdiction based on in-state service of process.\textsuperscript{29} While the fact that
the defendant is in a state long enough to receive service of process might have some bearing on
the interests of the defendant and the forum state, it does not necessarily indicate that courts of
the state where service is effected is the most adequate forum. Suppose that the defendant, a
physician living and working in Texas, is served with process while attending a medical
conference in Michigan in a case involving a Texas plaintiff who alleges that the defendant
committed medical practice in Texas. In such a case due process analysis would suggest that the
Michigan courts could take jurisdiction over the defendant even though the courts of Michigan
appear to be more adequate forums.

The upshot of the analysis is that the minimum contacts requirement correlates only
imperfectly with forum adequacy. The test focuses on the costs to the defendant and the forum
state but does not take explicit account of other social costs of litigation. In the cases of in rem
jurisdiction and specific jurisdiction, a consideration of total social costs will generally select the
forum chosen by minimum contacts analysis as the most adequate forum, although the
correlation is not exact. But in the cases of quasi in rem jurisdiction, general jurisdiction and

\textsuperscript{29} Burnham v. Superior Court of California, 495 U.S. 604 (1990).
2. Fair Play/Substantial Justice

The foregoing analysis demonstrates that the requirement of minimum contacts aligns with the goal of forum adequacy, but only to an extent. The existence of contacts between the defendant and the forum state is a good proxy for two relevant costs – the costs to the defendant of having to answer in the forum if the litigation is conducted there, and the costs to the forum state of not calling the defendant to account in its courts if the litigation is conducted elsewhere. But the existence of contacts between defendant and the forum state is not a good proxy for other relevant social costs, such as the costs to plaintiffs, witnesses, third parties, and other states, or the costs of possibly erroneous determinations of fact or law. The requirement of minimum contacts, in short, is a tool which is neither designed for, nor particularly well-adapted to, the task of achieving forum adequacy.

A court wishing to allocate litigation to the most adequate tribunal might therefore seek other justifications which could in appropriate cases authorize the court to override the dictates of minimum contacts analysis taken alone. This is where the second part of the International Shoe test plays a role: the requirement that the exercise of jurisdiction must be consistent with “traditional notions of fair play and substantial justice.”30 This language, although vague, suggests that a court must look beyond the interests of the defendant and forum state which are the focus of the minimum contacts test. “Fair play” and “substantial justice” allude to the interests of the forum state and the defendant, but also to other factors such as the interests of the plaintiff and the value of achieving accurate results. Later decisions indicate that these broader considerations – the so-called “fairness factors” – involve a wide-ranging inquiry into the

adequacy of the forum as compared with other tribunals. These include, but probably are not limited to, the following: the burden on the defendant, the interests of the forum state, the plaintiff’s interest in obtaining relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. Like many lists of factors found in judicial opinions, this iteration of factors is not a model of clarity; but it does seem that all the factors further the goal of directing litigation to the most adequate forum.

Consider first the case where minimum contacts exist but some other tribunal is the most adequate forum. A court applying the fairness factor could, in such a situation, conclude that the Due Process Clause requires that the case be dismissed. The Supreme Court has provided an example: Asahi v. Superior Court. Justice O’Connor’s plurality opinion concluded that both minimum contacts and the fairness factors required dismissal of the litigation; four other Justices disagreed with her conclusion about minimum contacts but agreed that the fairness factors required dismissal. A majority of the Justices thus recognized that the fairness factors could, in appropriate cases, require dismissal of a case even when minimum contacts analysis standing by itself would not.


32 Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113 (1987); World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985) (courts in appropriate cases may evaluate the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.)

Because other cost factors are taken into account, application of the fairness factors improves the alignment between results under the Due Process Clause and the goal of forum adequacy. What is not so clear is how effective this correction will be. It is evident that the fairness factors do not always trump the first-order minimum contacts analysis in situations where an alternative forum is the least-cost tribunal. If the fairness factors always corrected inefficient outcomes, then the minimum contacts analysis would be superfluous: a court could jump directly to the fairness factors without considering minimum contacts at all. Since the Court’s opinions demonstrate that minimum contacts are indeed important, it is evident that the impact of the fairness factors must be limited. These considerations suggest that the fairness factors will not often generate a different result from the one that would be obtained from minimum contacts analysis alone. In Asahi, four Justices agreed with this limited view of the role of the fairness factors, opining that they would divest a state court of jurisdiction otherwise permissible under minimum contacts only in “rare” cases. These Justices suggested that, even after applying the fairness factors, a significant number of cases would remain in the forum even though another tribunal was more adequate.

Consider now the case where minimum contacts do not exist but the original tribunal is the most adequate forum. Here, the fairness factors would correct the result of the minimum

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34 This is in a sense the position once advocated by Justice Brennan, but it has never been endorsed by the Court as a whole and even Justice Brennan eventually backed away from the approach. See Richard D. Freer, Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan, 63 South Carolina Law Review 551 (2012). Echoes of this position can be discerned in Justice Ginsberg’s dissent in the McIntyre Machinery case, which calls for a generalized inquiry into fairness based largely on considerations of litigation convenience. See J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2800-01 (2011) (Ginsburg, J., dissenting).


36 See Austen L. Parrish, Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants, 41 Wake Forest Law Review 1, 23 (2006) (“Although cases will purport to consider all the fairness factors, the lower court decisions often turn on the defendant’s burden of litigating in the United States. Courts are likely to find the exercise of jurisdiction reasonable, unless the defendant and its witnesses have to travel extremely long distances.”); A. Benjamin Spencer, Jurisdiction to Adjudicate: A Revised Analysis, 73 University of Chicago Law Review 617, 623 (2006) (“The burden on defendants is typically given the most weight, with the plaintiffs' interests and state interests receiving a fair degree of consideration as well.”)
contacts test, not by divesting the initial forum of jurisdiction, but rather by allowing the forum to retain cases which it would otherwise not be permitted to adjudicate. The Supreme Court has recognized that the fairness factors can, in appropriate circumstances, work to confer jurisdiction on a state court when minimum contacts alone would not do so.\textsuperscript{37} However, such a use of the factors would be in tension with the “particular notion of defendant-focused fairness” which underlies the Due Process analysis.\textsuperscript{38} Accordingly we can surmise that, if allowed at all, the fairness factors would confer jurisdiction on a court when minimum contacts are otherwise absent only in unusual cases.

The limited role of the fairness factors can be understood as reflecting their uncomfortable position within the framework of due process analysis. Unlike the interests implicated by minimum contacts (the convenience of the defendant and the interest of the forum state), which are the same as those analyzed in traditional due process cases, the fairness factors have a weaker grounding in due process values. It is true that modern due process doctrine includes a relatively free-form weighing of various policy concerns and is not limited to the interests of the defendant and the forum state.\textsuperscript{39} Nevertheless some of the fairness factors fit uncomfortably within a due process framework. Why, for example, does due process require the court to evaluate the interests of other states in adjudicating the controversy? The interests of sister states does not seem relevant to an inquiry focusing on the infringement of individual

\textsuperscript{37} \textit{Burger King Corp. v. Rudzewicz}, 471 U.S. 462, 477 (1985) (fairness factors “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”)

\textsuperscript{38} \textit{J. McIntyre Machinery, Ltd. v. Nicastro}, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring in the result).

rights. It is for this reason that the Court adds in the fairness factors as a sort of an afterthought: they correct the seasoning of a dish already composed under minimum contacts.\footnote{See \textit{World-Wide Volkswagen Corp. v. Woodson}, 444 U.S. 286, 292 (1980) (burden on a defendant is “always a primary concern” of the due process analysis.)}

The upshot is that while the fairness factors are correctives which help align the due process analysis with the goal of forum adequacy, they can play this role only to an extent. Even with the fairness factors in play, \textit{International Shoe} and subsequent cases sometimes allow a state court to exercise jurisdiction over defendants in cases where they are not the most adequate forums, and sometimes prohibit state courts from exercising jurisdiction in cases where they are the most adequate forums.

\textbf{B. Federalism}

A second reason for misalignment between the requirement of minimum contacts/fair play and substantial justice and the goal of forum adequacy has to do with principles of federalism. Here, as in the previous discussion of minimum contacts, the Supreme Court applies a basic principle which permits substantial deviations from the principle of the most adequate forum, and then offers a possible corrective that mitigates but does not eliminate the problem.

\textit{1. Vertical Federalism}

Enshrined in American constitutionalism is the principle that the states retain sovereign authority even while participating in a national government whose law, where it applies, is the supreme law of the land.\footnote{See U.S. Constitution Amendment X. See also \textit{New York v. United States}, 505 U.S. 144, 157 (1992) (federalism is part of “the framework set forth in the Constitution”); H. Jefferson Powell & Benjamin J. Priester, \textit{Convenient Shorthand: The Supreme Court and the Language of State Sovereignty}, 71 University of Colorado Law Review 645 (2000).} This bedrock principle requires that, in general, the federal government should not interfere with the sovereign activities of state governments without good reason. Constitutional law, accordingly, does not authorize the federal government to
micromanage state authority, commandeer state officials to carry out federal programs, or preempt state programs absent a clear expression of congressional intent. State actions are generally afforded a presumption of constitutionality and are upheld against constitutional challenge unless they intrude impermissibly on fundamental rights, interfere with a compelling federal interest, or are so irrational as to be impossible to justify under any plausible set of facts.

Few activities of government are more fundamental to sovereignty than the power of a state to resolve disputes through its courts. When another sovereign – in this case the federal government – declares that a state may not exercise judicial authority, the result is consequential for the relations between the states and federal government. Federal law, accordingly, is deferential to state court procedures. In federal habeas corpus review of state court criminal convictions, for example, the Supreme Court has long recognized that defendants must meet a high burden to overcome procedural defaults committed during the state litigation. The Antiterrorism and Effective Death Penalty Act, likewise, requires federal courts to defer to state court procedures in the course of habeas corpus challenges to criminal convictions. Principles of deference also apply in settings where federal courts refrain from or defer rulings in cases involving state court proceedings: the supplemental jurisdiction statute, which allows

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42 *New York v. United States*, 505 U.S. 144, 162 (1992) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”).
44 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[T]he historic police powers of the States [are] not to be superseded ... unless that was the clear and manifest purpose of Congress.”)
49 See *Bell v. Cone*, 543 U.S. 447, 455 (2005) (AEDPA dictates a highly deferential standard for evaluating state-court rulings which “demands the state court decisions be given the benefit of the doubt.”)
federal district courts to turn away state law claims;50 the *Rooker-Feldman* doctrine, which bars federal courts from exercising appellate review over state court judgments;51 *Pullman* abstention, which requires federal courts to defer resolving unsettled questions of state law;52 *Burford* abstention, under which federal courts may dismiss cases in which a federal adjudication could interfere with a complex regulatory scheme;53 and *Younger* abstention, under which federal courts dismiss actions seeking to enjoin state criminal proceedings.54

Some commentators see the Supreme Court’s decisions on personal jurisdiction as reversing this pattern of deference and discarding the presumption of constitutionality ordinarily attributed to exercises of state authority.55 But this is an error. As demonstrated above,56 the minimum contacts analysis incorporates a concern for the interest of the forum state and balances that concern against the interest of the defendant in avoiding answering in the forum state’s courts. The *International Shoe* standard does not demand a precise weighing of the interests of the forum state and the interests of the defendant; all that is required is that the state must not impose too great a burden.57 This demand of federalism is coded in the *International Shoe* test itself, which insists only that there be “minimum” contacts between the defendant and the forum

50 See 12 U.S.C. § 1367(c).
55 John Vail, Six Questions in Light of *J. McIntyre Machinery, Ltd. v. Nicastro*, 63 South Carolina Law Review 517, 519 (2012); Russell J. Weintraub, Commentary on the Conflict of Laws § 6.2 (6th ed. 2010), § 4.8A(1)(D), at 191; id. § 4.8A(1)(E), at 195 (“It is a disgrace that we have made what should be a matter of interstate venue a constitutional issue and then have micromanaged state-court jurisdiction to adjudicate so that this threshold issue is one of the most litigated.”); Paul R. Dubinsky, Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism In American Procedural Law, 44 Stanford Journal of International Law 301, 322 n.113 (2008).
56 See notes xx-xx and accompanying text, infra.
57 Some, such as Justice Brennan, would go even further in deferring to state interests. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299-300 (1980) (Brennan, J., dissenting) (“The Court’s opinions focus tightly on the existence of contacts between the forum and the defendant. In so doing, they accord too little weight to the strength of the forum State’s interest in the case and fail to explore whether there would be any actual inconvenience to the defendant.”)
state. “Minimum” in this context means both that the required contacts need only exceed a certain threshold, and also that the threshold is not demanding.58

The demands of deference to state procedural determinations – including the determination of who may be forced to answer before the state’s courts – create another source of tension between the minimum contacts/fair play and substantial justice test, on the one hand, and the value of forum adequacy, on the other. Unlike the due process approach, the inquiry into forum adequacy carries no deference to a state’s decisions; it looks impartially across states and asks which of the potentially available forums can adjudicate the dispute at lowest social cost. The requirement of deference to state procedures, on the other hand, creates a zone in which a forum may exercise jurisdiction over an out-of-state defendant even though the court of some other state is capable of resolving the dispute at lower social cost.59

2. Horizontal Federalism

The application of federalism principles thus generates an initial result which is not well aligned with the goal of directing litigation to the most adequate forum: several states can satisfy the due process requirements even though only one state court can be the most adequate forum. We saw that when faced with a similar dilemma in the context of the minimum contacts test, the Court supplies a corrective in the form of fairness factors. The Court utilizes an analogous strategy in the case of the inefficiencies that flow from federalism-based deference. The parallel to “fair play and substantial justice” is the concept that state courts may not exercise their sovereign power to adjudicate disputes in such a way as to interfere unduly with the authority of other states to exercise a similar power.

58 Where the defendant purposefully directs activities at the forum, for example, only “compelling” evidence of unreasonableness defeats state court jurisdiction. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).
Despite occasional derision from commentators who find the whole notion antithetical to due process, the idea of a sovereignty-based limitation on state court jurisdiction is consistent with constitutional norms. In enforcing legal rights, the Supreme Court inevitably and properly takes account of structural features of constitutional design. One of these structural features is the federalism-based principle of deference to state legal processes just discussed. Another is what Alan Erbson calls “horizontal federalism:” the notion that in performing their official responsibilities, federal agencies and federal courts can legitimately take account of the need for reasonable coordination and mutual respect among the states. Sovereignty-based considerations in state court personal jurisdiction cases are simply special applications to a particular context of horizontal federalism principles familiar in many other settings.

References to state sovereignty in the Supreme Court’s personal jurisdiction opinions can be understood in these terms. A principal justification of the “power theory” of Pennoyer v.

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63 Indeed, there is no doubt that such considerations do inform due process analysis in a variety of contexts. See Allan Erbsen, Horizontal Federalism, 93 Minnesota Law Review 493, 503 (2008) (“Some individual rights and liberties that constrain state power -- often framed in terms of due process and equality . . . fit within horizontal federalism.”)

64 See Garrick B. Pursley, Defeasible Federalism, 63 Alabama Law Review 801 (2012) (discussing cases where federalism concerns influence constitutional doctrine without being the object of constitutional doctrine).

Neff was that jurisdiction so limited would control the propensity of state courts to expand their authority into domains properly reserved for the courts of other states.66 Although Justice Stone’s opinion in International Shoe squelched the power notion of jurisdiction, it did not reject the more general idea of respecting horizontal federalism.67 On the contrary, the result of the International Shoe case, bringing the administration of a state’s unemployment insurance system more fully under the jurisdiction of the state’s courts, was in furtherance rather than in derogation of interstate sovereignty. On the facts of the case, involving a Delaware-chartered company with its principal place of business in St. Louis, a contrary result would have left it to the courts of Missouri or Delaware to enforce Washington’s statutory scheme.

Later cases make it clear that concerns about horizontal sovereignty continue to inform the analysis of due process limitations on state court jurisdiction. In Hanson v. Denckla, an early post-International Shoe case, the Court observed that restrictions on personal jurisdiction “are a consequence of territorial limitations on the power of the respective States.”68 World-Wide Volkswagen v. Woodson echoed this view, stating that the notion of minimum contacts “acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”69 Likewise, in J. McIntyre Machinery Ltd. v. Nicastro,70 Justice Kennedy’s plurality opinion warned that “if another State were to

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67 See Friedrich K. Juenger, A Shoe Unfit for Globetrotting, 28 University of California at Davis Law Review 1027, 1031 (1995) (“though International Shoe no longer required some magic act within the forum as a prerequisite for the sovereign’s acquisition of jurisdiction, Chief Justice Stone’s opinion did not eschew the notion of territorial sovereignty.”)
assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”

In context, these statements do not imply that the Due Process Clause is itself a protection of interstate sovereignty; rather, they reference the fact that considerations of interstate federalism properly inform how the Court goes about protecting individual due process rights. Justice White, the author of *World-Wide Volkswagen*, clarified the distinction in the *Bauxites* case decided just a few years later: “It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States. . . . The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.” In enforcing due process limits on state court personal jurisdiction, in other words, it is appropriate for the Court to take account of fundamental values of the structural constitution.

Although the concerns of horizontal federalism embodied in the foregoing opinions are not explicitly based on considerations of forum adequacy, they have implications for that topic. We have seen that principles of vertical federalism – the deference federal courts pay to state sovereign interests when enforcing due process limits on state court jurisdiction – tend to generate inefficient forum allocation decisions because the plaintiff’s chosen forum may not be the tribunal which can adjudicate the dispute at the lowest social cost. The sovereignty strand of *Hanson v. Denckla* and later cases partially corrects this misalignment. When a state court’s exercise of jurisdiction is so aggressive as to raise questions about horizontal federalism, it can

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71 Id. at 2789.
be inferred that the forum state may not be the most adequate forum. The interests of other states are likely to be strong enough to tilt the balance of costs in favor of some other court being the tribunal which can resolve the controversy at the lowest social cost.

C. Institutional Factors

I now turn to a third problem that leads to an imperfect alignment between existing law and the criterion of the most adequate forum: institutional limitations on the role of the Supreme Court. The pattern is similar to that already observed: the background rules align imperfectly with the principle of the most adequate forum; and the Supreme Court employs corrective measures which partially rectify the problem.

1. Limitations of Supreme Court Review

Although the legal principle involved – the Due Process Clause – is a creature of federal law, the due process limits on state court jurisdiction are enforced by state courts. The problem with this enforcement pattern is that state courts are being asked to police themselves. Certainly state court judges consider the interests of out-of-state defendants who are brought before them under authority of a long-arm statute. There is no crisis of noncompliance with Supreme Court precedents in this area. Yet state court sensitivity to defendant interests will sometimes be tempered by other concerns. State judges may consider themselves best suited to interpret and enforce important state policies, and therefore may favor their own jurisdiction over litigation in other tribunals. Some state judges may be tempted to interpret their jurisdiction broadly in order to enhance their power or prestige. And it is a natural response, in the event of conflict, to favor one’s own citizens over outsiders, even if the bias is unconscious.73

73 Consider in this regard the pretentious and overweening tone of the New Jersey Supreme Court’s opinion reversed by the Supreme Court in McIntyre: “we discard outmoded constructs of jurisdiction in product-liability cases, and embrace a modality that will provide legal relief to our citizens harmed by the products of a foreign
The evidence suggests that state courts do sometimes adopt an expensive interpretation of their authority. For example, they often interpret conflict-of-laws principles to select the law of their own state to govern disputes that come before them. Similar parochial tendencies are evidenced in the personal jurisdiction area. State courts have long displayed a propensity to interpret their long-arm statutes generously, extending their jurisdiction to the fullest extent permitted by the federal constitution. The structure of pleading rules in such cases also favors the interests of the plaintiff who has selected the forum: typically, on motion to dismiss for lack of personal jurisdiction, the court is required to accept all uncontroverted allegations in the complaint, and where the plaintiff’s complaint and the defendant’s affidavits conflict, the court construes all reasonable inferences in favor of the plaintiff. It is, accordingly, not difficult to find instances in which state courts exercise jurisdiction over parties with few connections to the forum state.

77 Ex parte Alamo Title Co., --- So.3d ----, 2013 WL 1032857 (Ala. 2013).
78 See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (North Carolina state court asserted jurisdiction over subsidiaries of a United States tire manufacturer, including subsidiaries based in Luxembourg, Turkey and France, in a case where North Carolina residents were killed in a bus accident that occurred in France); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (Texas courts took jurisdiction over a Colombian corporation which had engaged in few contacts with Texas, in a case arising out of an accident that occurred in Peru); Rush v. Savchuk, 444 U.S. 320 (1980) (Minnesota courts used the local presence of defendant’s automobile insurer as a basis for asserting civil jurisdiction over a defendant who had no contacts with the state); Hageseth v. Superior Court, 59 Cal. Rptr. 3d 385, 388 (Cal. App. 2007) (California courts held to have jurisdiction to prosecute defendant even though he never directly communicated with anyone in California); Mary Twitchell, Why We Keep Doing Business with Doing-Business Jurisdiction, 2001 University of Chicago Legal Forum 171, 201 (highlighting risk of state abuse of general jurisdiction powers).
The only institution capable of policing against the tendency of state courts to exercise such “exorbitant jurisdiction”\textsuperscript{79} is the United States Supreme Court. Lower federal courts cannot do the job. There is no federal habeas corpus procedure under which federal district courts can intervene to protect defendants in state court civil cases, and no route of appeal to federal district or circuit courts from state court rulings on jurisdictional matters. The Supreme Court of the United States, on the other hand, can take up any case in which a state allegedly infringes a person’s constitutional rights.\textsuperscript{80} Thus the Supreme Court, in theory, could act as a policeman to control exorbitant exercises of state court jurisdiction. The problem is the Supreme Court can decide only a tiny fraction of the cases that might come before it.\textsuperscript{81} The Court simply has no capacity to supervise the ordinary business of jurisdictional disputes that arise in state courts. In consequence, state courts, as a practical matter, have substantial discretion to ignore, nullify or minimize the impact of Supreme Court precedents.\textsuperscript{82}

The practical ability of state courts to evade the constitutional limits on their jurisdiction has consequences for forum efficiency. In rare cases, the effect could be to enhance efficiency. For example, the state court in \textit{McIntyre v. Nicastro} was arguably the most adequate forum even though a majority of the Supreme Court found that it could not constitutionally exercise jurisdiction. In a subsequent case, a similarly situated state court which evaded the rule that might be derived from the Supreme Court’s opinion in that case would arguably enhance the

\textsuperscript{79} See Kevin M. Clermont & John R. B. Palmer, Exorbitant Jurisdiction, 58 Maine Law Review 474, 482-503 (2006) (discussing tendency of courts to interpret the scope of their authority broadly in cases with international dimensions).

\textsuperscript{80} 28 U.S.C. § 1257.

\textsuperscript{81} See Jay Timarsh, Pound’s Century, and Ours, 81 Notre Dame Law Review 513, 557 n. 187 (2006) (Supreme Court grants review in about one percent of the cases in its discretionary docket). The two recent state court jurisdiction cases – Nicastro and Goodyear – were the Court’s first venture into the area in twenty-one years.

efficiency of forum selection. In most cases, however, state court evasions of Supreme Court precedent would detract from forum efficiency because the court that asserts jurisdiction would not be the most efficient forum. Thus, while the exact implications of state court evasion of Supreme Court precedent are ambiguous, it is clear that overall this phenomenon would reduce the efficiency of dispute resolution.

2. Mitigation Techniques

The Court uses two techniques to mitigate its weaknesses as an enforcer of constitutional limits on state court jurisdiction: rule-based requirements and doctrines empowering defendants to avoid state court jurisdiction by unilateral action.

a. Rule-based Requirements

*International Shoe* envisaged a discretionary approach to state court personal jurisdiction.\(^8^3\) Later cases continue, from time to time, to emphasize the fact-specific nature of the inquiry.\(^8^4\) Yet, especially in more recent years, one detects in the cases an attraction for rule-based doctrines that rely on objective determinants of jurisdiction.\(^8^5\) Examples include the rule of general jurisdiction, which allows a state court to exercise jurisdiction over all matters involving a defendant who has behaved in such a way as to make her “at home” in the forum state, the rule on specific jurisdiction which subjects the defendant to the jurisdiction of courts in a state in which the defendant has engaged in some purposive act connected with the dispute; and

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\(^8^3\) See Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe’s Half-Buried Legacy*, 28 University of California Davis Law Review 561, 580 (1995) (“the [International Shoe] Court’s ultimate test for jurisdiction was not so much the ‘minimum contacts’ concept that has dominated our analysis since, but, rather, the broader principle of ‘fair play and substantial justice.’”)

\(^8^4\) See Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination under International Shoe*, 28 University of California at Davis Law Review 769, 834 (1995) (Supreme Court has “eschewed the opportunity to create definitive rules” and “mandated case-by-case, fact-specific inquiry”).

the rule on transient jurisdiction, which recognizes a state’s power to adjudicate cases involving
out-of-state defendants who have been personally served with process in the forum state. These
rules function, in part, to provide notice to the parties about where jurisdiction will and will not
be permitted, thus reducing the incidence of collateral disputes over jurisdiction and also
equipping potential defendants with the ability to structure their primary conduct with knowledge
as to its implications for litigation risk. But objectively ascertainable rules also have the quality
that they better control the judicial discretion of state judges. Even though a state judge might
still manipulate results through fact-finding, an objective standard reduces the ambit of
discretion. If, for example, the rule on specific jurisdiction is that the defendant must have
purposefully availed itself of the forum state, a state court wishing to exercise personal
jurisdiction will need to point to facts supporting an inference of such intentional behavior. In a
purely discretionary regime, in contrast, a state court would not need to offer such specific
support for its conclusion that jurisdiction is appropriate. Because rules impose greater
constraints, they make it difficult for a state court to manipulate its decisions in order to
manufacture jurisdiction where none exists.

In addition to enhancing state court compliance with the Supreme Court’s approach, rule-
based doctrines can help improve the efficiency of forum allocation. By constraining state court
discretion, rule-based doctrines reduce the tendency of state courts to exercise jurisdiction over
cases that would more efficiently be litigated elsewhere. Thus the use of rule-based doctrine to

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86 See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (jurisdiction rules provide “fair warning” to
defendants as to where they are likely to be sued); World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980)
(purposeful availment test provides “clear notice” to defendants about where they will be subject to suit); McGee
87 For discussion of the use of rules to control lower court discretion, see Jonathan Remy Nash, On the Efficient
Deployment of Rules and Standards to Define Federal Jurisdiction, 65 Vanderbilt Law Review 509 (2012); Tonja
Jacobi & Emerson H. Tiller, Legal Doctrine and Political Control, 23 Journal of Law, Economics and Organization
police state court jurisdiction mitigates, to some extent, the inefficiency inherent in the institutional limitations on the Supreme Court’s role. Rule-based doctrines, however, can only manage these inefficiencies to some extent. Because of the inherently fact-specific nature of the due process analysis, the rules, even if expressed in objective terms, can reduce but cannot eliminate the risk of state court noncompliance. Even with objective rules in place, a state court intent on expanding its jurisdiction can often find ways to do so without triggering Supreme Court review. The problem of exorbitant jurisdiction is mitigated but not solved.

Rules, moreover, do not always work to reduce inefficient forum allocations even when faithfully observed. In some cases, in fact, rules exacerbate the problem. Consider the “purposeful availment” test of specific jurisdiction. As Justices Breyer and Alito observed in their Nicastro concurrence, a strict application of the purposeful availment test can generate errors on either side.\(^8\) In some cases the test would subject a defendant to the jurisdiction of a less adequate court (for example, when the defendant knowingly introduces one and only one product in the stream of commerce hoping it would be sold in the forum state). In other cases, the defendant might not deliberately avail itself of the forum, but still might engage in activities (for example, world-wide product distribution through the Internet) which, although short of the level qualifying for general jurisdiction, nevertheless establish the state court as the most adequate tribunal.\(^9\) In each of these situations, the purposeful availment test results in inefficient forum allocation decisions.

Consider also general jurisdiction. Because general jurisdiction is not tied to a transaction or occurrence in the forum state which gives rise to the dispute, the doctrine encourages forum shopping by plaintiffs seeking to obtain favorable law or to impose

\(^8\) Nicastro, 131 S. Ct. at 2793 (Breyer and Alito, concurring).
\(^9\) Nicastro, 131 S. Ct. at 2793 (Breyer and Alito, concurring).
inconvenience on their adversary. It was probably for these reasons that the Supreme Court’s most recent foray into the topic of general jurisdiction endorsed a limited concept under which an out-of-state defendant could be sued for any reason in the forum state only if it was “essentially at home” there. Even so, cases can be imagined in which the defendant is “at home” in the forum state but nevertheless the courts of some other jurisdiction can resolve the controversy at lower social cost. Suppose, for example, that a defendant with its principal place of business in Minnesota manufactures a product which causes harm in the United Kingdom to an English citizen. Most of the evidence is located in the UK and UK substantive law will apply to the litigation wherever it is filed. The plaintiff, however, sues in Minnesota because she hopes to take advantage of the benefits of broad discovery and jury trial which are available in Minnesota but not in the United Kingdom. In such a case, the courts of the United Kingdom may be the most adequate forums but the rule on general jurisdiction will allow the litigation to be conducted in Minnesota (although the Minnesota court might reject the case on *forum non conveniens* grounds).

Consider also the rule of transient jurisdiction. Although in general, as we have seen, the defendant’s physical presence in the forum state might be a proxy for the relevant due process balancing of interests of plaintiff and defendant, in specific cases the proxy might be grossly off base. The result could be severe harm to the defendant which makes the forum state a less-than-

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90 See Walter W. Heiser, Toward Reasonable Limitations on the Exercise of General Jurisdiction, 41 San Diego Law Review 1035, 1036-37 (2004) (“general jurisdiction may permit a plaintiff to engage in unfettered forum shopping designed to capture the most favorable substantive law or statute of limitations, or both”); Mary Twitchell, The Myth of General Jurisdiction, 101 Harvard Law Review 610, 671 (1988) (“if general jurisdiction is permitted to extend beyond the defendant’s home base, plaintiffs may forum-shop among the various states where general jurisdiction is available, looking for the most favorable choice-of-law rule.”); Charles W. “Rocky” Rhodes, Clarifying General Jurisdiction, 34 Seton Hall L. Rev. 807, 823 n.87 (2004) (criticizing the idea that individuals should be subject to general jurisdiction based on continuous and systematic business activities).
92 See notes xx-xx and accompanying text, infra.
adequate tribunal in which to resolve the controversy. If the rule on transient jurisdiction is
truly hard-and-fast – if state courts can take jurisdiction over transient defendants served with
process in the state, without any other contact with the litigation – the result will be to increase
rather than decrease the inefficiency of forum allocation.

The upshot of this analysis is that although objective, rule-based doctrines can to some
extent mitigate the inefficiency inherent in the institutional limitations to the Supreme Court’s
role, the mitigation will be only partial and, in some cases, the strategy of using rules rather than
discretion will increase rather than decrease the inefficiency inherent in the process.

**b. Defendant Control**

Another feature which mitigates the problem of limited Supreme Court capability is the
fact that personal jurisdiction law purports to confer on the defendant the unilateral power to
avoid being sued in a particular jurisdiction. Take the “purposeful availment” standard. In theory
at least, this test allows the defendant to avoid being brought before a state’s courts. All the
defendant needs to do is to avoid intentional contact with the forum state. Or consider transient
jurisdiction. To avoid being brought into state court on this theory, the defendant merely needs

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94 See Henry S. Noyes, The Persistent Problem of Purposeful Availment, 45 Connecticut Law Review 41 (2012) (arguing that the purposeful availment requirement should be applied in such a manner that an economic actor can structure its conduct so as to avoid subjecting itself to jurisdiction in a disfavored forum).

95 See Burger King Corp v. Rudzewicz, 471 U.S. 462, 479-80 (1985) (purposeful availment requirement ensures that a defendant will not be subjected to state court jurisdiction solely as a result of “random,” “fortuitous,” or “attenuated” contacts . . . or of the “unilateral activity of another party or third person”).
to refrain from traveling to the forum state. Again the defendant can control her susceptibility to suit by actions which are in her unilateral power to control. General jurisdiction provides another example: as long as the defendant stops short of acting “at home” in the forum state, she will not be subject to suit there on a general jurisdiction theory.

These defendant-empowering doctrines mitigate the risk that courts of a given state will exercise exorbitant jurisdiction. Although the Supreme Court cannot, as a practical matter, monitor and correct all inaccurate state court rulings on personal jurisdiction, the Court can delegate this function to defendants who have both the ability and the incentive to take action. The defendant can prevent states from exceeding their authority simply by refraining from conduct which would subject her to suit in the forum state.

For the same reason, defendant-empowering doctrines ameliorate the disjunction between the result of legal doctrine and the dictates of the most adequate forum. A defendant who limits her dealings in a given state – thereby avoiding the risk of being compelled to answer in the state’s courts – may also serve the goal of forum adequacy by directing litigation away from a less adequate forum. In such cases a plaintiff must file her action in a more adequate tribunal.

Defendant-empowering doctrines, however, are only partially successful at correcting for the disjunction between law and forum adequacy. In some cases, a defendant simply cannot avoid traveling to the forum state and thereby rendering herself subject to process there. *Burnham* provides an example. The defendant, a divorcing father, visited California on to visit his children who were under the custody of their mother. It could well have been harmful to the children, as well as inordinately painful for the father, if he refrained from visiting his children in

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96 See Allan R. Stein, Frontiers of Jurisdiction: From Isolation to Connectedness, 2001 University of Chicago Legal Forum 373, 375 (2001) (“Because . . . a defendant is subject to state authority when she is within the state territory, she can control her amenability to jurisdiction by staying away.”)

order to avoid being sued in an inconvenient forum. Thus defendant-empowering doctrines do not preclude all state attempts to exercise jurisdiction in cases where they are not the most adequate forum.

Beyond this, defendant-empowering doctrines can exacerbate the forum-allocation problem in some cases. The problem is that when the means of empowerment is objective, defendants can wind up with too much power. An objective mechanism for avoiding jurisdiction that is solely in the discretion of the defendant can create excessive opportunities for manipulative forum avoidance. This was the issue that motivated the Court to decide *International Shoe*. Arguably the defendant in that case had deliberately structured its distribution system so as to avoid having to respond in the courts of states where it sold its goods, with the consequence that, had the defendant succeeded in its strategy, litigation over Washington’s unemployment insurance scheme would have been allocated to a less-than-adequate forum. The problem has not gone away. Justice Ginsburg’s dissenting opinion in *Nicastro* essentially took the defendant to task on this very point: although she did not directly accuse the defendant of structuring its distribution system to avoid state court jurisdiction, she did suggest, not too subtly, that this type of manipulation might have occurred. Strategic behavior of this sort skews forum-allocation decisions by distributing cases to less adequate

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100 *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780, 2797 (2011) (Ginsburg, J., dissenting) (“A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?”).
tribunals.\textsuperscript{101} The upshot, again, is that the technique used to mitigate the disjunction between existing legal institutions and practices and forum adequacy is only partially effective, and may in some circumstances exacerbate rather than ameliorate the problem.

\textit{II. Assessment}

It is nearly an article of faith among commentators that the Supreme Court’s performance in the personal jurisdiction area leaves much to be desired.\textsuperscript{102} Doctrines shift like quicksand; the Court seems to be unable to muster a majority opinion on fundamental questions; and sometimes the result of a much-anticipated opinion is only greater confusion. A natural question, if one accepts this critique, is why the Court’s performance in state court personal jurisdiction cases is so deficient. Commentators offer no consensus on the reason for the shortcomings. Some commentators blame conservative Justices for sabotaging the desirable framework of \textit{International Shoe} in order to serve personal political agendas; but ideological divisions are present in many areas in which the Court’s jurisprudence does not seem to manifest the same level of inadequacy.\textsuperscript{103} Some commentators suggest that the problem is more judicial

\textsuperscript{101} Manipulative forum avoidance strategies by defendants can also distort processes of product distribution in the marketplace, a potential cost which is outside the scope of this paper.


incompetence than malfeasance. Professor Juenger sees the problem as grounded in the inherent tension between concepts of jurisdiction based on territory and notions based on fairness. Professor McMunigal points to the Court’s propensity to add new factors into the mix of considerations which the trial courts must address. Professor Borchers argues that the root cause of the problem is that the Supreme Court lacks a clear rationale for imposing limits on state court jurisdiction.

The analysis of forum adequacy presented earlier in this article provides a different explanation for the Court’s performance. The key shortcomings noted in the Court’s opinions are found, not in the basic approach of minimum contacts and deference to state procedures, but in the mitigation factors: the fairness factors under *International Shoe*, the idea of horizontal federalism espoused in *Hanson v. Denckla* and other cases; the use of rule-based doctrines for specific jurisdictional situations; and the apparent preference for rules that empower defendant to undertake unilateral actions to avoid the forum. When we see that the locus of difficulty lies in the mitigation factors, it becomes possible to identify a cause of the Court’s difficulties in this area.

As a custodian for the nation’s legal system, the Court has a responsibility to encourage efficiency in litigation, including the allocation of cases to the most adequate tribunal. Only the Supreme Court, among all bodies of government, has the necessary perspective and impartiality.

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to perform this task. Yet the Court faces problems in achieving the goal of efficient forum allocation. Its tool for implementing forum-efficiency principles at the state court level is the Due Process Clause of the Fourteenth Amendment, a law designed for other purposes. The Due Process Clause focuses attention on only some of the factors that bear on forum adequacy, thus potentially distorting the process of forum allocation; and it operates within the framework of a federal system in which the national government necessarily and appropriately displays a degree of deference to state judicial processes. The Supreme Court, meanwhile, lacks the institutional capacity to monitor state court litigation to ensure that the goal of forum adequacy is being served or to intervene to correct things when that goal is not being met.

Faced with a nearly intractable dilemma of achieving forum adequacy consistent with these constraints, the Court employs mitigation measures. Troubled that conventional due process balancing gives too much weight to the interests of the defendant and the forum state and too little weight to other costs, the Court crafts a list of fairness factors that can trump analysis under minimum contacts alone. Concerned that excessive deference to state court proceedings might impair important values of interstate federalism, the Court cites to a need to respect the sovereignty of sister state courts. Wishing to prevent aggressive state courts from extending their jurisdiction in inappropriate ways, the Court crafts a doctrine of purposeful availment which is capable of manipulation by defendants who can, by avoiding direct contacts with the forum state, avoid having to answer in courts which appear, all things considered, to be the most adequate tribunals to resolve the dispute. Unable to intervene in more than a tiny fraction of cases, the Court provides guidance in the form of general rules even though the limits on personal jurisdiction might be more accurately analyzed with a case-by-case, standard-based approach. These features of the Supreme Court’s state court jurisdiction jurisprudence reflect attempts to
achieve a compromise between forum adequacy, on the one hand, and institutional and legal limitations which interfere with the realization of that goal, on the other.

Because these measures are compromises, they go only part way to rectify the weaknesses in the Court’s doctrinal and institutional capacities. They do not fully achieve the goal of forum adequacy, although without them the situation would be worse. And because they are compromises, they represent deviations from the form of due process jurisprudence that some commentators would desire. They are messy, incomplete, and confusing. In context, however, the Court’s use of these mitigation factors is arguably justifiable because they serve a worthwhile goal: allocating litigation, so far as possible given institutional constraints, to the tribunals which, all things considered, can resolve the dispute at lowest overall social cost. The analysis of the most adequate forum thus provides a partial defense to criticisms commonly lodged against the Court’s performance in this area.

**Conclusion**

This article has considered the legal regulation of personal jurisdiction from the perspective of the most adequate forum. In the case of state courts, it turns out that existing law assigns disputes to the most adequate forum only in some cases. Three problems interfere with the goal of distributing disputes in state court so as to minimize the costs of dispute resolution: analysis under the Due Process Clause does not account for the full social costs of litigation; federalism-based concerns sometimes allow state courts to adjudicate cases when they are not the most adequate forums; and institutional constraints interfere with the Supreme Court’s ability to prevent excessive exercises of state court jurisdiction. These problems are partially corrected by mitigation strategies: the fairness factors of *International Shoe*, principles of horizontal federalism, and objective tests and defendant-empowering doctrines. Notwithstanding these
mitigation techniques, however, the rules on state court personal jurisdiction align only imperfectly with the goal of forum adequacy. The dilemma of achieving forum efficiency in state court cases helps to explain the confusion that pervades the Supreme Court’s opinions in this area.